Exploring the Discursive Construction of the Drug Court Participant in Appellate Cases

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CONTENTS

SUMMARY

This thesis examines the intersection between the therapeutic context of treatment in a drug court program and subsequent formal legal sentencing and appeal process. During treatment, drug courts operate within a less formal and less adversarial context and adopt language and concepts consistent with the therapeutic goal of treating drug dependence. In contrast, sentencing and appeal occurs within a more formalised legal adversarial setting. This suggests fundamental differences in social practice between treatment in a drug court and sentencing and appeal. During treatment, much information is generated to assist the drug court team to monitor compliance with program requirements and assess progress towards recovery. This thesis seeks to understand how this information is considered later in formal legal contexts. By focussing on discourse in appeal decisions which feature former participants from the Drug Court of South Australia, the research explores how the courts discursively represent former drug court participants using different sources of information provided for the appeal process. This includes, but is not limited to, information about an appellant's progress or non-progress whilst participating in the program. The research design is qualitative and uses case study and critical discourse analysis to locate and analyse discourse in these legal texts. An overview of literature finds some research which explores the discursive construction of drug court participants during program participation. There is research which considers treatment and legal discourses that arise in drug court programs. A large body of research exists which focusses on how criminal courts discursively construct the defendant/appellant. There is little research seeking to understand the ways discourse about program participation is later recontextualised in formal legal contexts.

DECLARATION

I certify that this thesis does not incorporate without acknowledgment any material previously submitted for a degree or diploma in any university; and that to the best of my knowledge and belief it does not contain any material previously published or written by another person except where due reference is made in the text.

Signed.....

Date.....7/4/17.....

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I dedicate this thesis to my late brother Richard who I know would be proud.

1. INTRODUCTION / LITERATURE REVIEW

This thesis investigates how drug court participants are discursively constructed in the space between therapy and law by analysing discourse in judicial decisions in which participants (or prosecution) from the South Australian drug court (SA drug court) appealed their sentences. These decisions include discourse about program participation from the treatment phases of the program. This chapter commences with discussion of the nature of discourse as conceptualised in this thesis, followed by an overview of drug court practice, from acceptance into the program, through the treatment phases of the program, to sentencing and later appeal in a higher court.

Much therapeutic and legal discourse identified in existing research can be characterised as normative and compliance discourse because the focus remains on compliance or non-compliance with program requirements. In contrast to existing research, this thesis defines compliance discourse broadly as discourse about program requirements and does not distinguish that discourse based on therapeutic or legal intent. This thesis identifies how discourse reflecting the normative goal of drug courts, to promote recovery from drug dependence by addressing deviant behaviours and attitudes and by encouraging participant investment the program, was considered by later courts. This thesis shows how, and theorises why, compliance discourse created with normative intent in the drug court is used in subsequent legal contexts to discursively construct the participant/appellant.

I WHAT IS DISCOURSE?

In this thesis, discourse is conceptualised as social interaction shaped by social practices, social structures and social events.[1] Speaking and writing are social actions capable of shaping and representing reality.[2] Discourses are different ways of representing the world from different

[1] See, eg, Linda A Wood and Rolf O Kroger, *Doing Discourse Analysis: Methods for Studying Action in Talk and Text* (Sage Publications, USA, 2000), 4; Norman Fairclough, *Analysing Discourse: Textual Analysis for social research* (Routledge, London and New York, 2003), 25, 206.

[2] See, eg, Fairclough, above n 1, 25; Mary Lacity and Marius Janson, 'Understanding Qualitative Data: A Framework of Text Analysis Methods' (1994) 11 *Journal of Management Information Systems* 137, 147.

perspectives, relations, positions, identities and relationships.[3] The discourse of different social actors plays a role in the 'constitution of identities'[4] and social agents 'are in some sense the effects of discourse'.[5] Consensus about the meaning of discourse can be found amongst people who 'share the same cultural and socio-political perspective'.[6] Accordingly, discourse from the treatment phases of the program can be considered socially constructed with consensus about the meaning of that discourse found amongst the people who create the discourse. Similarly, legal discourse and the meaning attached to that discourse is created by the people involved in legal processes. Legal discourse has been described as 'self or auto-referential, the internal discourse or monologue of a metaphysics'.[7] Fairclough observed that social events such as court proceedings are 'causally shaped by (networks of) social practices' which influence how people act and interact.[8] That fundamental assumption is consistent with the aim of this thesis to explore the discursive construction of the appellant, taking into account fundamental differences in social practices and discourses which occur during treatment in a drug court and in subsequent formal legal contexts. This thesis does not seek to analyse the formal legal reasoning of appellate decisions, but rather seeks to develop a more nuanced understanding of the ways the courts use discourse and information to construct representations of the participant/appellant.

Discourses (otherwise known as discursive formations) are evident in *archives* of different layers of interrelated texts, "texts" meaning people, events and writing.[9] Discourses are located within particular fields of knowledge and consist of *statements* signifying what can be said, written and

3 Fairclough, above n 1, 124.
4 Ibid 206.
5 Ibid 209.
6 Klaus Krippendorff, *Content Analysis: An Introduction to Its Methodology* (Sage, London, 1980), 22. See also Mick Finn, Martin Elliott-White and Mike Walton 'Chapter 8: The Analysis of Qualitative Data — Content Analysis and Semiological Analysis', in *Tourism and Leisure Research Methods — Data Collection, Analysis, and Interpretation* (Pearson Longman, Harlow, 2000) 160.
7 Wood and Kroger, above n 1, 82.
8 Fairclough, above n 1, 25.
9 Michel Foucault, *Archaeology of Knowledge* (Routledge, London and New York, 1972), 142-8. See also Martin D Schwartz and David O Friedrichs, 'Postmodern Thought and Criminological Discontent: New Metaphors for Understanding Violence' (1994) 32 *Criminology* 221, 225 ft 7.

thought in particular moments in time.[10] Statements function within discourse to bring about a certain effect, a certain "truth" through the things that have actually been said or written within a particular field of knowledge.[11] Statements perform the function of enabling, and also constraining, what can be known and imagined at a point in time.[12]

Discourse is an instrument of power located at the centre of all social practice.[13] Discourse is about knowledge and it is through knowledge that power in its discursive form is exercised.[14] Discourses create 'the objects of which they speak' and inform 'meanings, subjects and subjectivities'.[15] The discursive formation of objects, subjects and meaning shape and constrain social practice and influence the 'relations, identities and institutions' within social practice.[16] Institutions and disciplines exercise power through the authority of scientific "truths" which sustains the power to name, divide, describe and explain "what is" through knowledge discourse.[17] This view of discourse sheds light on the relationship between 'bodies of knowledge' (institutions and disciplines) 'and forms of social control' (disciplinary practices).[18] This thesis investigates how the drug dependent offender is constructed discursively as an object of knowledge through institutional relations and normative understandings as a drug court participant and as an appellant. In this thesis, the term "normalisation" focuses on how norms constructed through knowledge discourse and disciplinary practices are applied to drug court participants.

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10 Foucault, above n 9; Alex McHoul and Wendy Grace, *A Foucault Primer: Discourse, power and the subject* (Melbourne University Press, Victoria, 1993), 33, 37.

11 Foucault, above n 9, 142-3.

12 Foucault, above n 9, 143; McHoul and Grace, above n 10, 31, 34, 37; Jan Wright, 'Disciplining the body: power, knowledge and subjectivity in a physical education lesson' in Alison Lee and Cate Poynton (eds), *Culture and Text / Discourse and Methodology in Social Research and Cultural Practices* (Allen and Unwin, NSW, 2000) 152, 154-5; Mark Bevir, 'How Narratives Explain' in Dvora Yanow and Peregrine Schwartz-Shea (eds), *Interpretation and Method: Empirical Research Methods and the Interpretive Turn* (M E Sharpe, New York, 2006) 281. See also Julie Novkov, 'Legal Archaeology' (2011) 64 *Political Research Quarterly* 348, 348-61.

13 Michel Foucault, *The History of Sexuality Volume 1: An Introduction* (Robert Hurley trans, Pantheon Books, New York, 1978): According to Foucault, the use of power to manage populations 'is tolerable only on condition that it mask a substantial part of itself. Its success is proportional to its ability to hide its own mechanisms', at 86; Norman Fairclough, *Discourse and Social Change* (Polity Press, Cambridge, 1992), 50.

14 Josue V Harari (ed), *Textual Strategies: Perspectives in Post-Structuralist Criticism* (Methuen & Co Ltd, London, 1979), 43; McHoul and Grace, above n 10, 21.

15 Foucault, above n 9, 42 as cited in Wright above n 12.

16 Fairclough, above n 13, 63-4.

17 McHoul and Grace, above n 10, 23.

18 Ibid 26.

In this thesis, data analysis focusses on the sources of information the appeal courts rely on to build or frame discoursal images or "representations" or "constructions" of the participant/appellant subject. The words "represent", "representation", "construct" and "construction" are used to indicate this process.

II THE DRUG COURT OF SOUTH AUSTRALIA

This thesis is positioned within the South Australian criminal justice system, with particular focus on appeals arising from sentencing decisions made by the SA drug court and other courts that sentenced drug court participants. As a federal system, each state and territory in Australia has its own legal system with distinct criminal laws, court powers, court practice and procedure, and court hierarchies. As such, this research is specific to Australia, and particularly specific to South Australia. In South Australia, the Magistrates Court is the lowest court in the state court hierarchy and it has power to hear and determine summary and some indictable offences.[19] The SA drug court operates from the Adelaide Magistrates Court and a magistrate presides over drug court proceedings. This drug court is a post-plea court. Participants initially enter guilty pleas to offences but the sentencing process is delayed until program completion. Once program participation has ended, the participant is usually sentenced by the drug court magistrate who takes into account progress made towards rehabilitation during the program.

Conviction and/or sentence can be appealed to the Supreme Court. This court has the power to hear and determine serious indictable matters, and hears appeals from the Magistrates Court, the District Court as well as decisions made by single judges in the Supreme Court.[20] Most appeals from the Magistrates Court are heard by a single judge of the Supreme Court.[21] The Full Court of Criminal Appeal consisting of three judges hears appeals from the District and Supreme Courts.[22] During the

19 *Magistrates Court Act 1991* (SA) s 9.
20 *Supreme Court Act 1935* (SA) s 17.
21 *Magistrates Court Act 1991* (SA) s 42.
22 *District Court Act 1991* (SA) s 43; *Supreme Court Act 1935* (SA) ss 48, 50.

appeal process, legal counsel present their argument orally before the judge. Counsel submissions are supported through documentation listing relevant case law and affidavits outlining the submissions made by the prosecutor and defence counsel during the original sentencing process. These affidavits may include attachments ie the Information and/or Complaint and allegations outlining the basic facts of each offence and the appellant's criminal history. In addition, the Magistrates Court file and the drug court file are brought to the appeal court. These files contain information ie the original sentencing remarks, court orders, drug court progress reports and final report, psychiatric and psychological reports.

The SA drug court provides a twelve month program for treatment of drug dependence before conviction and sentence.[23] The program targets medium to hard end offenders who are facing a term of imprisonment of twelve months or more for a wide range of drug *related* crimes.[24] To be eligible for consideration for this program there must be a connection between the offence(s) and the offender's drug dependence,[25] and the applicant must enter guilty pleas to the more significant offences and most of the offences before the court(s).[26] The requirement for guilty pleas is on the basis that drug courts are treatment courts and not a forum for contesting charges.[27] Sentencing is

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23 See Courts Administration Authority of South Australia, *Drug Court* <http://www.courts.sa.gov.au/OurCourts/MagistratesCourt/InterventionPrograms/Pages/Drug-Court.aspx> for the programs eligibility criteria (last viewed 13 May 2016).

24 Elissa Corlett, Grace Skrzypiec and Nicole Hunter, *Offending Profiles of SA Drug Court Pilot Program 'completers'* (Office of Crime Statistics and Research, 2004), 5: To be eligible for the program the offences would "probably" attract a term of imprisonment; Grace Skrzypiec, *The South Australian Drug Court: A profile of participants during its first thirty eight months of operation* (Office of Crime Statistics and Research, 2006), 3: During the first three years of operation applicants needed to be facing a "probable" term of imprisonment; Andrew Cannon, 'Therapeutic Jurisprudence in the Magistrates Court: Some Issues of Practice and Principle' in Greg Reinhardt and Andrew Cannon AM (eds), *Transforming Legal Processes in Court and Beyond* (Australian Institute of Judicial Administration Incorporated, 2007) 129, 132: Applicants 'are only selected if they face an immediate term of imprisonment'; Emma Ziersch and Jayne Marshall, *The South Australian Drug Court: a recidivism study* (Office of Crime Statistics and Research, 2012), 7: Applicants must be 'charged with an offence related to their drug use' for which they are *"likely"* to be imprisoned [emphasis added]. See generally Arie Freiberg, 'Drug Courts: Sentencing responses to drug use and drug-related crime' (2002) 27(6) *Alternative Law Journal* 282, 283 which confirms Australian drug courts target hard end offenders; Toni Makkai, *Drug Courts: Issues and Prospects* (Trends and Issues in Crime and Criminal Justice No 95, Australian Institute of Criminology, 1998), 4 which recommends Australian drug courts focus on high end recidivist offenders; Australian Institute of Criminology, *Drug Courts: reducing drug related crime* (AICrime Reduction Matters No 24, 2004) which states 'Australian programs are primarily aimed at offenders with a long history of property offending and are used as a final option before incarceration'.

25 See, eg, Skrzypiec, above n 24, 3; Ziersch and Marshall, above n 24, 7; Freiberg, above n 24, 283.

26 Ziersch and Marshall, above n 24, 7.

27 Freiberg, above n 24, 283.

deferred to allow participants to undertake treatment for drug dependence through a highly structured court supervised program.[28]

The program combines judicial supervision with bail conditions such as home detention and curfews, urine testing and treatment for drug dependence.[29] During program participation, the court adopts therapeutic language and concepts consistent with addressing drug dependence with the focus on 'the provision of treatment rather than the imposition of blame and punishment' for offending behaviour.[30] The defendant is accountable to the court and treatment providers for their participation in treatment and for their recovery from drug dependence.[31] There is a system of escalating sanctions for breaching program conditions and rewards for program compliance.[32] Program participation can end in different ways, such as successful completion and graduation, completion of time in the program with not enough progress to merit graduation, and program termination due to non-compliance with program requirements or non-responsiveness to treatment.[33]

The sentencing process is a legal process. The sentencing court must take into consideration numerous factors when determining an appropriate penalty. These factors are based on statute and common law.[34] The establishment of drug courts has not affected these sentencing principles.[35]

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28 *Criminal Law (Sentencing) Act 1988* (SA) s 19B provides for deferral of sentence for rehabilitation.

29 See <http://www.courts.sa.gov.au/OurCourts/MagistratesCourt/InterventionPrograms/Pages/Drug-Court.aspx> (last viewed 8 March 2016).

30 Richard C Boldt, 'The Adversary System and Attorney Role in the Drug Treatment Court Movement' in James L Nolan Jr (ed), *Drug Courts in Theory and in Practice* (Aldine De Gruyter, 2002) 115, 117.

31 See, eg, Susan Meld Shell, 'Drug Treatment Courts: A Traditional Perspective' in Nolan, above n 30, 173, 180; Sara Steen, 'West Coast Drug Courts: Getting Offenders Morally Involved in the Criminal Justice Process' in Nolan, above n 30, 51, 54; Boldt, above n 30, 133.

32 See, eg, Skrzypiec, above n 24, 3.

33 *Bail Act 1985* (SA) s 21B(6): Allows for assessment by the program manager that the 'failure to comply (of itself or in connection with other matters) suggests that the person is unwilling to participate in the … program as directed' and for the court to determine whether the non-compliance constitutes a breach of the bail agreement. This section provides for the process of program termination for non-compliance or non-responsiveness to treatment. See also Grace Skrzypiec, *The South Australian Drug Court: An Analysis of Participant Retention Rates* (Office of Crime Statistics and Research, 2006), 19: The common reasons for termination included program non-compliance, bail breaches, re-offending, drug use, warrants, imprisonment, referrals to the mental impairment court and failure to appear at court hearings.

34 See, eg, *Criminal Law (Sentencing) Act 1988* (SA) s 10 for factors a sentencing court must take into consideration when determining sentence.

35 *R v Tran* [2000] SASC 431, [1], [29]-[30], [40].

Participants who successfully graduate generally receive suspended sentences of imprisonment.[36] Participants who do not successfully complete and graduate may be sentenced to actual imprisonment as well as other penalties. Prosecution and the defendant have a right to appeal the sentence imposed by the drug court to the Supreme Court. Drug court participants who believe their sentence is too harsh ('manifestly excessive') are able to appeal that sentence. Likewise, prosecution can appeal sentences they regard as too lenient ('manifestly inadequate'). In each case, appeals are to a single judge sitting in the Supreme Court.[37]

A Sentencing Practice in Australian Drug Courts

Warner and Kramer observe:

> The movement to connect drug treatment to sentencing has been explicitly set in some jurisdictions through the establishment of drug courts, whereas in other jurisdictions it has been developed as a sentencing option, either as a condition of probation or as an intermediate punishment.[38]

Many drug courts convict and sentence participants to undertake the program as a sentencing option. Literature on sentencing in drug courts from Australia describes the process of treatment during the program as if it were part of the actual sentencing process rather than distinguishing between program participation and sentencing.[39] For example, the sentencing process in drug courts has been described 'as an opportunity to manage change in the offender'[40] and participation in treatment as a sentencing option. The information generated during this "sentencing" process, which includes regular reports documenting participant progress during the program, is considered 'material placed before the court during sentencing procedures'.[41] Professor Freiberg argues that a 'major difference between drug courts and the normal sentencing courts is the ability of the drug court to vary or adjust the sentence

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36 See especially Cannon, above n 24, 132. See also *Criminal Law (Sentencing) Act 1988* (SA) s 10(5): a defendant's participation in an intervention program and their achievements in the program is a relevant sentencing consideration.

37 *Magistrates Court Act 1991* (SA) s 42.

38 Tara Warner and John Kramer, 'Closing the revolving door?' (2009) 36(1) *Criminal Justice and Behavior* 89, 91. See also Douglas Longshore et al, 'Drug Courts: A Conceptual Framework' (2001) 31 *Journal of Drug Issues* 7, 13-4; Arthur Lurigio, 'Drug Treatment Availability and Effectiveness: Studies of the General and Criminal Justice Populations' (2000) 27(4) *Criminal Justice and Behavior* 495, 508.

39 See, eg, Cannon, above n 24, 129; Freiberg, above n 24, 284-5; Michael King, *Solution-Focused Judging Bench Book* (Australasian Institute of Judicial Administration, 2009), 18; Roger Dive, *Sentencing Drug Offenders* (Paper presented to the Sentencing Principles, Perspectives and Possibilities Conference, Canberra, 10-12 February 2006).

40 Dive, above n 39, 1.

41 Cannon, above n 24, 130.

whilst it is in operation in response to the offender's progress on the treatment program'.[42] This observation refers to drug courts that sentence before program participation. The concept of treatment as a sentencing option applies to drug courts where defendants are sentenced before participation but does not apply to programs which sentence after program completion.[43] In South Australia, participants enter guilty pleas but are not convicted and sentenced by the drug court until program completion. This thesis distinguishes between program participation and the sentencing process. The data consists of 36 appeal decisions where appellants were sentenced by the drug court or by a different court following program completion. In these decisions, appellants were re-sentenced by the appeal court, or the original sentence was upheld. This research strategy enables understanding how program information is used by other courts during sentencing and appeal.

There are important differences in social practice between less adversarial court hearings during treatment on a program and later more formal adversarial legal contexts such as sentencing and appeal. This is evident in the appeal decisions, which focus on the legal issues raised for appeal and apply the relevant law to the facts of the case. On the other hand, the discourse evident in drug courts during the treatment process is not about legal issues, but rather focusses on the participant and is therapeutic in nature. There is an absence of research seeking to understand how treatment information and drug court responses to participant progress or non-progress during the program is later conceptualised in formal adversarial legal contexts. This thesis addresses that gap.

III LITERATURE ABOUT DRUG COURT SOCIAL PRACTICE

This thesis investigates fundamental differences in social practice between program participation and formal legal contexts such as sentencing and appeal. This builds on literature about the less adversarial approach evident in drug courts during treatment in the program. This section starts with an overview of literature about the informal and non-adversarial context in which the treatment stages of drug courts occur. This can be compared to later formal and more fully adversarial contexts of sentencing

42 Freiberg, above n 24, 284.
43 Cannon, above n 24, 132.

and appeal which occurs in South Australia when the program ends. It is important to acknowledge that drug courts vary from jurisdiction to jurisdiction because of the different 'historical, cultural, and legal' contexts in which they are formed.[44] According to Nolan, drug courts have '… a very different form when transplanted from one location to another'.[45] Drug court research has been conducted in many different jurisdictions using different methodologies to discourse analysis. Nevertheless, this section includes literature describing non-adversarial process in drug courts and research from other jurisdictions which investigates differences in social practice between treatment and legal drug court team members. None of these studies are discussed as examples of discourse analysis per se, but rather to explore existing research findings into drug court social practice.

A Non-Adversarial Court Process

Therapeutic jurisprudence is considered the 'jurisprudential foundation' of the drug court movement,[46] being consistent with the ways drug courts address drug dependence and recidivism through less adversarial court procedure and treatment programs.[47] Therapeutic jurisprudence demands attention be paid to the impact of the law on the psychological or emotional well-being of those who come into contact with the law, that impact potentially being therapeutic or anti-therapeutic.[48] The less adversarial approach evident in drug courts is based on a belief that the traditional more adversarial structure of court systems conflicts with the therapeutic aim of drug courts to address drug dependence and reduce drug related crime.[49] Nolan observes that therapeutic jurisprudence is the foundation of Australian (and Canadian) problem solving courts, including drug courts.[50]

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44 Nolan, above n 30, xii.

45 Ibid.

46 Peggy Fulton Hora, William G Schma and John T A Rosenthal, 'Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America' (1999) 74 *Notre Dame Law Review* 439, 440.

47 Ibid 453.

48 David Wexler, 'Therapeutic Jurisprudence and its Application to Criminal Justice Research and Development' (2010) 7 *Irish Probation Journal* 94, 95 citing David B Wexler and Bruce J Winick (eds), *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Carolina Academic Press, 1996).

49 Hora, Schma and Rosenthal, above n 46, 454, 467-8.

50 James L Nolan Jr, *Legal Accents, Legal Borrowing: The International Problem-Solving Court Movement* (Princeton University Press, 2009), 79-81.

Much literature describes the collaborative and multi-disciplinary team approach adopted by drug courts.[51] The drug court team consists of the drug court judge (or magistrate),[52] treatment team members (ie counsellors, therapists and case managers) and other legal team members (ie lawyers and correctional services officers)[53] who share their expertise in a non-adversarial decision-making environment. Less adversarial and more collaborative practice is a benchmark for all drug courts.[54] Team members are encouraged to focus on problem solving rather than engage in conflict.[55] During the program, the drug court team create and share therapeutic discourse, concepts and information about the progress or non-progress of participants and develop strategies to encourage compliance with program requirements through rewards and sanctions. This entails collaborative sharing of multi-disciplinary knowledges as well as sharing 'information of opinion and fact about the person and their performance'.[56] Baker observes that despite guidelines for drug courts advocating collaborative team work and decision-making,[57] and critics raising a broad range of concerns about this process,[58] very little research exists into how decisions are actually reached in drug courts.[59] Indeed, drug courts have

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51 See generally, Greg Berman and John Feinblatt, 'Problem Solving Courts: A Brief Primer' (2001) 23(2) *Law & Policy* 125; Peggy Fulton Hora, 'The Synergy Between Therapeutic Jurisprudence and Drug Treatment Courts' in Greg Reinhardt and Andrew Cannon (eds), *Transforming Legal Processes in Court and Beyond* (Australian Institute of Judicial Administration Incorporated, 2007) 155; Boldt, above n 30, 115 on the role of defence counsel within the context of a non-adversarial court system; Julia Foster, 'The Drug Court: A Police Perspective' in Greg Reinhardt and Andrew Cannon (eds), *Transforming Legal Processes in Court and Beyond* (Australian Institute of Judicial Administration Incorporated, 2007) 107 on the role of the prosecutor in a non-adversarial court system; Cannon, above n 24, 129 discussing the drug court team.

52 The Magistrates Court of South Australia has jurisdiction over the SA drug court and magistrates preside in that court. In broad terms, magistrates have jurisdiction to hear and determine minor criminal cases and conduct preliminary hearings for more serious criminal cases before arraignment in the District or Supreme Court. In other drug court jurisdictions such as in New South Wales, the drug court is presided over by judges. That court has the criminal jurisdiction of both a District and Local Court: *Drug Court Act 1998* (NSW) pt 3, div 2, s 24.

53 Freiberg, above n 24, 285.

54 Office of Justice Programs, *Defining Drug Courts: The Key Components* (US Department of Justice, 1997): In particular, see Key Component Two: 'Using a non-adversarial approach, prosecution and defence counsel promote public safety while protecting participants' due process rights', Key Component Six: 'A coordinated strategy governs drug court responses to participants' compliance' and Key Component Seven: 'Ongoing judicial interaction with each drug court participant is essential'. These key components incorporate the non-adversarial team approach to addressing drug dependence.

55 Cannon, above n 24, 131.

56 Ibid 129.

57 Kimberly M Baker, 'Decision Making in a Hybrid Organization: A Case Study of a Southwestern Drug Court Treatment Program' (2013) 38(1) *Law and Social Inquiry* 27, 28 citing Office of Justice Programs, above n 54.

58 See, eg, Baker, above n 57, 29-31.

59 Ibid 27-8.

been provided with little practical guidance as to how decision-making should occur within a team environment.[60]

Research seeking to investigate the cross-disciplinary collaborative decision-making that occurs inside drug courts and its impact on defendants provides insight into non-adversarial court practice and the interactions between therapy and law found to occur in some drug courts. This research (outlined below) is relevant to this thesis which investigates the ways decision-making in drug courts becomes recontextualised in the legal context of appeal decisions.

B The Drug Court Subject

This section includes discussion about how this thesis contributes towards existing research which highlights how participants are constructed as particular types of subjects and the consequences of that construction. This thesis builds on existing research by showing how normative and compliance discourse from the drug court was recontextualised into the appeal decisions to construct the participant/appellant as responsibilised for program non-compliance. This subsequently informed assessments about rehabilitation and risk of future drug use and offending, and contributed towards the appeal outcome.

Baker conducted a case study into the decision-making process evident in an anonymous drug court located in southwestern United States.[61] In this post-sentence program, participants plead guilty to offences before commencing the program but the sentencing process is delayed until program completion.[62] Participants who complete the program have their record expunged of the offence, however, participants who fail the program have their case returned to the criminal list to be sentenced.[63] In contrast to literature describing non-adversarial process and collaborative team work,

60 Ibid.
61 Ibid 34 ft 3. Details of drug court staff was kept anonymous.
62 Ibid 34.
63 Ibid.

Baker observed an organisational structure which was 'hierarchical rather than collaborative'.[64] In particular, Baker observes:

> While the idea of a "team" helps us to think about the drug court staff working together to coordinate their actions, this metaphor does not capture key dynamics revealed in this analysis, including the hierarchical structure of the court as a legal entity in which the judge has the final authority to make decisions, and the efforts of clients to negotiate their treatment and sanctions in the programs.[65]

Baker found no mechanism for clients and case managers to appeal the final decision of the judge[66] and suggests that adversarial process should not be completely eliminated from drug court procedure.[67]

Baker's research focussed on the decision-making and organisational structure of one drug court. As such, the findings are not necessarily generalisable across drug courts. Nevertheless this research suggests there may be variation from the ideal of the non-adversarial collaborative process in other drug courts. The observation by Baker that a drug court can be viewed "as a legal entity" with the "judge the final decision-maker" suggests that drug courts should be conceptualised as both a legal entity and a therapeutic entity when seeking to understand how those courts discursively construct the drug court participant. This thesis considers the drug court as a legal and a therapeutic entity which assists to explain why drug court discourse appears to resonate with how the appeal courts construct representations of the participant/appellant.

Baker investigated how the 'two distinct institutional logics for defining and responding to drug use and addiction: medicalization and criminalization'[68] were rationalised and navigated.[69] Baker recognised the wider historical and political context in which discourses about drug dependence, treatment, crime and punishment occur.[70] From a broad medical perspective, drug dependence is a

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64 Ibid.
65 Ibid 50.
66 Ibid 52.
67 Ibid citing Timothy Casey, 'When Good Intentions Are Not Enough: Problem Solving Courts and the Impending Crisis of Legitimacy' (2004) 57(4) *SMU Law Review* 1459.
68 Ibid 31.
69 Ibid 31-4.
70 Ibid 32.

treatable medical condition. Patients are diagnosed and treatment is tailored to meet individual treatment needs, including the level of commitment to achieving recovery held by that individual.[71] On the other hand, from a broad criminal justice perspective, drug dependence can be considered as the use of illicit substances which is a criminal offence. Illicit drug use impacts on the community particularly when "drug addicts" commit crimes to fund their dependence.[72] Both treatment and punishment focus on the individual offender with 'the criminal law component focusse[d] on matters of individual responsibility and blame, the treatment component defin[ing] the problem as one of individual pathology and personal recovery'.[73] Both logics for treatment and punishment seek 'to transform addicts into healthy, responsible citizens'.[74] In describing a drug court as a hybrid organisation, Baker observes:

> In the drug court, professionals from mental health and criminal justice backgrounds work together on a daily basis and all officials are expected to embrace both the therapeutic and coercive aspects of the court. As a result, decision makers in the drug court operate with a dual focus on medical and criminal definitions of addiction, on improving the well-being of the individual and the community, and on accomplishing the tasks of giving treatment and enforcing the law. In essence, drug court staff members are expected to uphold the inconsistent meanings, goals, and processes of two opposing institutions.[75]

In relation to treatment and punishment, Baker observed that disagreements occurred between the judge and case managers 'because the two parties held different beliefs over the role of punishment in treatment'[76] with case managers considering 'punishment … a therapeutic tool if it was used correctly'.[77] The judge, on the other hand, considered punishment as part of the 'program because it was a criminal justice program'.[78] Accordingly, sanctions were considered to be "court sanctions" by the judge rather than "treatment sanctions".[79] Baker found case managers advocating for more severe sanctions including removal from the program when dealing with difficult

71 Ibid 31.
72 Ibid.
73 Ibid 33 quoting Richard C Boldt, 'Rehabilitative Punishment and the Drug Treatment Court Movement' (1998) 76 *Washington University Law Quarterly* 1205, 1218.
74 Ibid 33.
75 Ibid.
76 Ibid 43.
77 Ibid.
78 Ibid 45.
79 Ibid.

participants, whereas the judge would want to give the participant 'one more shot at therapy'.[80] Furthermore, Baker observed:

> While the cases of successful and failing clients fall along professional lines where case managers supervise therapy and the judge dismisses failures, the at-risk cases appear counterintuitive. For at-risk clients, the case managers speak of the need for more punitive interventions by the court (e.g., jail time, community service, fines, etc.), while the judge advocates for more therapeutic interventions (e.g., twelve-step meetings, counseling [sic] sessions, and in-patient treatment).[81]

Similarly, Lyons conducted a qualitative critical ethnographical study into the impact of the non-adversarial model on drug court participants.[82] The research focused on the Ottawa drug court over a 25 month period.[83] This is a post-sentence program and participants are required to plead guilty to all outstanding charges before commencing the program.[84] If they leave the program or the program is terminated, they are sentenced for those offences.[85] Lyons made observational field notes of interactions during court hearings, informal conversations and interviews,[86] and conducted a text discourse analysis of court policy documents.[87] Analysis was conducted through the lens of critical ethnography which 'moves beyond descriptions of the social world and calls on the ethnographer to be political'[88] to explore the impact of the non-adversarial model on drug court participants.[89] Subsequently, Lyons used the data collected for that study to explore how the court constructed participants as individuals who were simultaneously treatable and punishable addicted subjects requiring therapeutic intervention through the imposition of judicial sanctions.[90] Lyons observes,

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80 Ibid 43.

81 Ibid.

82 Tara Lyons, 'Judges as therapists and therapists as judges: the collision of judicial and therapeutic roles in drug treatment courts' (2013) 16(4) *Contemporary Justice Review* 412, 414.

83 Ibid.

84 Ibid 413.

85 Ibid.

86 Ibid 414-5: These notes were transcribed and subjected to qualitative data analysis using NVivo software to develop emerging themes and codes.

87 Ibid.

88 Ibid 414.

89 Ibid.

90 Tara Lyons, 'Simultaneously treatable and punishable: Implications of the production of addicted subjects in a drug treatment court' (2014) 22(4) *Addiction Research and Theory* 286, 290-1: Lyons considers the creation of subjects through Foucault's dual definition of the subject. The subject is 'subject to someone else by control and dependence and tied to his own identity by a conscience or self-knowledge', at 288 quoting Michel Foucault, 'The subject and power' (1982) 8 *Critical Inquiry* 777, 781. These meanings, according to Foucault, 'suggest a form of power which subjugates and makes subject to', at 781.

from assessment for the program onwards, participants are continuously evaluated to determine whether or not they remain treatable, with those determined untreatable receiving criminal sanctions including removal from the program.[91]

Lyons observes that when an 'addicted subject … is constructed as simultaneously treatable and punishable by judicial sanctions' the result is application of 'a wider range of punishment and interventions in individuals' lives and behaviors'[92] including criminal sanctions for non-criminal behaviour.[93] Furthermore, Lyons found the court constructed a universal definition of the genderless addicted subject which did not take into account gender specific treatment needs.[94] This approach to treatment led to assessments about non-responsiveness to treatment and contributed towards lower completion rates for women.[95] This research demonstrates the importance of understanding how drug courts construct versions of the participant subject because of the potential implications and consequences that may arise. Of relevance to this thesis, Lyons observes:

> … subjects in the ODTC [Ottawa Drug Treatment Court] are also constituted within historical, cultural and political contexts and there are consequences to the production of subjects. How subjects are constructed in DTCs [drug treatment courts] and within treatment programs is overlooked in the literature and this work is an example of the importance of examining how subjects are produced within specialized courts.[96]

Baker (discussed above) similarly found the drug court team categorising participants as either successful, at-risk of failing or failing.[97] Baker also found consistent patterns in decision-making based on these categories with '[s]uccessful participants receiving therapy and failing participants receiving punishment'.[98] This research identifying discourses about treatment and punishment by Baker and Lyons suggest other drug courts are similarly engaging in ongoing discourse about whether or not participants are treatable or untreatable subjects. Discourse analysis of the appeal decisions in

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91 Lyons, 'Simultaneously treatable', above n 90, 289.
92 Ibid 290.
93 Ibid 290-1.
94 Ibid 288.
95 Ibid 288-9, 291.
96 Ibid 291.
97 Baker, above n 57, 37.
98 Ibid.

this thesis located similar themes in the courts' construction of the participant/appellant as failing to demonstrate internal transformation and being at risk of future relapse into drug use and related offending.

According to Baker the research (discussed below) conducted by Paik, Burns and Payrot, and Makinhem and Higgens 'suggest that drug court staff members are making decisions based on their general assessment of the client as succeeding or failing in the program and as people capable or not capable of recovery'.[99] In research on decision-making, Paik conducted a qualitative ethnographic study in a juvenile drug court located in southern California, United States[100] to explore how staff reactions and interpretations of drug test results can shape the meaning and consequences of those results.[101] This is a "post-dispositional" court which deals with difficult youth offenders who have breached probation and now require a higher level of supervision.[102] Those youth who successfully complete the program may have their probation ended, charges dismissed and fees waived. Those participants who are rearrested or found to be non-compliant are referred back to the mainstream Youth Court.[103] Paik took field notes of court sessions and interviews with staff and applied grounded theory to identify, code and analyse emerging themes.[104] Paik found drug court staff interpreting the results of positive or negative drug tests based on assessments of 'overall performance in other key areas, such as school, home and, drug treatment'.[105] They were more likely to question the validity of positive drug tests and to regard them as false positives in situations where the participant was assessed as doing well in the program.[106]

Similarly, Mackinem and Higgins conducted qualitative research into how drug court staff deal with participants who test positive to urine tests in three southwestern drug courts in the United

99 Ibid 29.
100 Leslie Paik, 'Organizational Interpretations of Drug Test Results' (2006) 40(4) *Law and Social Review* 931, 938.
101 Ibid 936.
102 Ibid 939.
103 Ibid 940.
104 Ibid 937.
105 Ibid 943.
106 Ibid.

States.[107] In two courts, defendants were required to sign an admission of guilt before commencing the program. If they failed the program they faced further legal action.[108] In the third court, defendants were either referred as a diversion away from the criminal courts and no admission of guilt was required, or they were ordered into the program as a condition of probation.[109] Mackinem and Higgins made field notes of court observations and conducted interviews with drug court staff. They applied grounded theory to understand the themes that emerged from the data.[110] Mackinem and Higgins found drug court staff constructing participants who admitted drug use as truthful and those who denied drug use as liars.[111] They found drug court staff creating "moral identities" through construction of truths and lies based on participant responses to positive drug tests.[112] These moral constructions suggested worthiness (or not) for continuing treatment and informed assessments about progress or non-progress in the program.[113] Mackinem and Higgins observe, 'judgement as to whether clients are telling the truth or lying … is one occasion of many when the staff creates moral identities for its clients and for those applying to be clients'.[114]

In a qualitative ethnographical study, Burns and Peyrot investigated interaction between drug court judges and participants and how those interactions served 'to construct' the participant as a 'responsible … changed, "recovering" person', or as a person requiring punishment in the form of a sanction.[115] Burns and Peyrot observed court appearances of participants in three anonymous drug courts located in California.[116] Most participants entered the program without entering guilty pleas and upon successful completion (graduation) had their drug offences dismissed.[117] They attended 75

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107 Mitchell B Mackinem and Paul Higgins, 'Tell me about the test: The Construction of Truth and Lies in Drug Court (2007) 36(3) *Journal of Contemporary Ethnography* 223, 223.
108 Ibid 228.
109 Ibid.
110 Ibid 229 citing Barney G Glaser and Anselm L Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine Publishing Company, 1967).
111 Mackinem and Higgins, above n 107, 235-9, 244.
112 Ibid 244-5.
113 Ibid 245.
114 Ibid 244.
115 Stacy Lee Burns and Mark Peyrot, 'Tough Love: Nurturing and Coercing Responsibility and Recovery in California Drug Courts' (2003) 50(3) *Social Problems* 416, 418.
116 Ibid 420.
117 Ibid 432.

hearings and the research included field note observations of exchanges between the judge and participant.[118] Burns and Peyrot also conducted semi-structured interviews with judges,[119] informal interviews with prosecution and defence,[120] and analysed television interviews and media accounts.[121] They found drug courts 'engaged in the business of constructing defendants as salvageable and rehabilitating, or as irremediably deficient selves'[122] to determine worthiness for treatment and whether participants were 'succeeding according to the court's terms'.[123] They observed participants being encouraged by judges to characterise themselves as "drug addicts".[124] To do so was considered a demonstration of insight into their own addiction, or alternatively, as denial when participants refused to acknowledge their own addiction.[125] Acknowledgement of drug dependence was considered a step towards taking responsibility for recovery, whereas denial was considered a symptom of drug dependence.[126]

Burns and Peyrot identified competing discourse between participants and judges whilst constructing versions of the participant as either 'that of a person who can benefit from his mistakes, move forward and take responsibility, or someone who is essentially unchanged, a manipulative addict who lacks self-control and the personal motivation for recovery'.[127] Similar forms of discourse about the treatable and punishable subject (outlined in the research above) was located in the appeal decisions with the appeal court translating deviant behaviour into deviant attitudes such as dishonesty or lack of motivation to change. These translations then informed judgements about lack of internal transformation. Furthermore, similar characterisations such as "drug addict" were located in the appeal decisions. These characterisations supported assessments of risk of future relapse.

118 Ibid 420-1.
119 Ibid 421.
120 Ibid.
121 Ibid.
122 Burns and Peyrot, above n 115, 417, 433.
123 Ibid 433.
124 Ibid 424.
125 Ibid.
126 Ibid.
127 Ibid 425-6.

Burns and Peyrot observe that in order to manage the progress of participants towards recovery, much individualised information about participants was accumulated and provided to the judges.[128] This information was used during court hearings to make it clear to the participant that the judge knows '*every*thing I can know about you in order to try and see if I can help you'.[129] Detailed information about participants empowered judges 'to show … [participants] that they are known and will be held accountable by the court'.[130] In addition to the accumulation and use of information in drug courts, Burns and Peyrot observed ongoing assessments of suitability to remain in the program based on levels of program compliance or non-compliance which were 'contingently negotiated in court interchanges'.[131] Progression through program stages was not always linear, with participants moving backwards and forwards through the stages (backwards as a sanction).[132] These observations by Burns and Peyrot are similar to those of Baker who also found the behaviour of participants being intensively observed, scrutinised and documented.[133] Those participants assessed as doing well in the program were rewarded, and those assessed as not progressing were punished.[134]

C Knowledge Exchanges and Translations between Therapy and Law

This section outlines research into knowledge exchanges and translations which occur across therapeutic and legal disciplines during the treatment stages of drug courts. Existing research explores the space between treatment and law in the context of the treatment and legal roles adopted by members of drug court teams supervising and monitoring participant progress. Research conducted by Moore, Lyons, Bull and Wolf (discussed below) confirm unique exchanges of knowledges, rationalities and translations occur between therapy and law during the treatment phase.[135] This is

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128 Ibid 419.
129 Ibid quoted from an extract of interview with a drug court judge (emphasis in original).
130 Ibid.
131 Ibid 426.
132 Ibid 422.
133 Baker, above n 57, 37-52.
134 Ibid 37.
135 Dawn Moore, 'Translating Justice and Therapy: The Drug Treatment Court Networks' (2007) 47 *British Journal of Criminology* 42; Lyons, 'Judges as therapists', above n 82, 412: Lyons acknowledges the methodology and some of the data for her PhD was borrowed from previous work conducted in the Ottawa drug treatment court by Dr Dawn Moore; Lyons, 'Simultaneously treatable', above n 90: In this article Lyons acknowledges the methodology and some data was borrowed from previous work conducted by Dr Dawn Moore in the Ottawa drug treatment court; Melissa Bull, *Just Treatment: Testing the Limits of Therapeutic Jurisprudence* (Paper presented

important to this thesis, which seeks to locate similar knowledge exchanges and translations through a discourse analysis of appeal decisions.

Moore investigated knowledge exchanges and translations that occur between the disciplines of therapy and law during court hearings in two Canadian drug courts located in Toronto and Vancouver,[136] based on courtroom observations and interviews across a three year period.[137] In both courts the sentence is delayed until program completion with clients assessed as being of high risk required to enter guilty pleas before commencing the program.[138] Participants who successfully complete the program are guaranteed a non-custodial sentence.[139] Drawing on the work of Latour on Actor-Network and Rose on psy knowledges,[140] Moore develops a 'descriptive map' of the knowledge exchanges evident in courtroom observations.[141] In doing so, Moore considers how court actors translate and justify their decisions so that legal actions serve therapeutic purposes and therapeutic actions justify legal decisions.[142] She found a mixing of disciplines which created an environment where 'therapeutic knowledge cohabits with legal knowledge', the result being a blurring between the 'disciplinary barriers erected around epistemologies'.[143] For example, the treatment team participated in 'knowledge exchanges and translations', which included the use of 'legal knowledges and participat[ion] in legal actions'.[144] This meant the legal 'notion of punishment' (ie issuing a warrant for a person's arrest) was 'translated into the therapeutic goal of motivation' by the treatment team.[145]

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at the 3rd International Conference on Therapeutic Jurisprudence, Perth, 7-9 June 2006); Elaine M Wolf, 'Systematic Constraints on the Implementation of a Northeastern Drug Court' in Nolan, above n 30, 27.

136 Moore, above n 135, 47-8.

137 Ibid 44.

138 Ibid 47.

139 Ibid.

140 Ibid 44 citing Bruno Latour, *Science in Action* (Harvard University Press, 1987); Nikolas Rose, *Powers of Freedom: Reframing Political Thought* (Cambridge University Press, 1998).

141 Ibid 45.

142 Ibid 48-51.

143 Ibid 46.

144 Ibid 50.

145 Ibid.

Moore concluded that knowledge exchanges and 'translation … [were] designed into the unique structure of the DTC's [Drug Treatment Courts] ... [as] shared knowledge'.[146] This finding is consistent with wider literature about non-adversarial court procedures and the functions of the treatment and legal team in drug courts. In particular, Moore found:

> … therapeutic discourse about ... levels of motivation ... not about ... status as law breaker, but rather about ... level of commitment to change ... Just as therapeutic actions and knowledges need not be altered in order to be marshalled by legal actors, punitiveness can translate into therapeutic practice without need of removing itself from even the most literal place of punishment — a prison.[147]

Similar to Moore, Lyons (discussed in detail above) located knowledge exchanges about therapy to justify punishment. Lyons observed the judge operating as a key therapeutic actor as well as treatment counsellors empowered to and engaged in punitive legal decision-making. In particular, treatment counsellors had power to enforce program compliance by requesting criminal sanctions such as revocation of bail for non-compliance.[148] Lyons observes, '[t]reatment counsellors play a powerful role … one that focusses far more on punishment than in non-DTC treatment programs'.[149] In addition, Lyons observes the language of therapy serves to conceal 'the fact that those who fail to conform are punished'.[150]

Bull also conducted research into knowledge exchanges between treatment and law in drug courts. Bull conducted a discourse analysis of transcripts from drug court hearings[151] to explore how court procedures, substantive rules and the roles played by legal actors produced therapeutic and anti-therapeutic consequences for participants.[152] Bull identified and tracked the progress of 16

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146 Ibid 51.

147 Ibid.

148 Lyons, 'Judges as therapists', above n 82, 420.

149 Ibid 422.

150 Ibid.

151 Melissa Bull, above n 135, 6: The court hearings included: bail hearings, assessment and eligibility hearings, progress reviews, termination arguments and graduation hearings.

152 Ibid 1. This is based on therapeutic jurisprudence which considers the impact of the law on the psychological or physical well-being of those who come into contact with the law, that impact potentially being therapeutic or anti-therapeutic. See, eg, Hora, Schma and Rosenthal, above n 46, 442, 454; David B Wexler, *From Theory to Practice and Back Again in Therapeutic Jurisprudence: Now Comes the Hard Part* (Arizona Legal Studies Discussion Paper No 10-12, University of Arizona, 2010), 2; David B Wexler, 'Two Decades of Therapeutic Jurisprudence' (2008) 24 *Touro Law Review* 17, 22.

participants through drug court transcripts and court observations in the Parramatta drug court in New South Wales and the Beenleigh, Southport and Ipswich drug courts located in South East Queensland, Australia.[153] All of these courts operate as pre-sentence courts. Participants are required to enter guilty pleas and initially receive suspended sentences to allow for participation in the program. The initial sentence is reviewed by the court upon program completion or termination.[154] Bull identified themes and trends in the 'rationalities and knowledges expressed' during the court hearings[155] which were then analysed and discussed through the lens of theories by Garland, Foucault, Rose, and Rose and Miller on governmentality and governmental power.[156] Bull observes, drug courts operate through a 'range of institutions, experts and systems of thought' which combined adopt 'liberal practices of government'.[157] The common goal of these expert knowledges is the creation of 'individuals who do not need to be governed by others but will govern themselves, master themselves, care for themselves'.[158] Bull concludes, drug courts are not just about monitoring and compliance.[159] Rather, drug courts can be viewed as 'a space of freedom for participants who would normally be in prison'.[160]

In contrast, Wolf conducted an evaluation into the 'situated determinants of recovery' in the Northeastern Drug Court, United States[161] which 'dismisses or reduces … charges in exchange for clients' compliance with court requirements'.[162] Wolf observed court sessions and team meetings over a two year period[163] to compile a court evaluation to consider how 'the organization of treatment, social service, and criminal justice systems presents systematic contradictions that impose constraints

153 Bull, above n 135, 5.
154 See, eg, <http://www.drugcourt.justice.nsw.gov.au/> (last viewed 4/10/17); <http://www.courts.qld.gov.au /courts/drug-court> (last viewed 4/10/17); Jason Payne, *Final report on the North Queensland Drug Court* (Australian Institute of Criminology, 2005), 27.
155 Bull, above n 135, 6.
156 Ibid 4-5, 18.
157 Ibid 18.
158 Ibid quoting Nikolas Rose, 'Governing 'advanced' liberal democracies' in Andrew Barry, Thomas Osborne and Nikolos Rose (eds), *Foucault and Political Reason: Liberalism, Neoliberalism and Rationalities of Government,* (UCL Press, 1996), 45.
159 Bull, above n 135, 4-5, 18.
160 Ibid 18.
161 Wolf, above n 50, 32.
162 Ibid 27.
163 Ibid 32-3.

upon the court's ability to function in a way that is consistent with its design and its purpose'.[164] The notes from interviews and field observations were transcribed and imported into a qualitative data analysis software package which facilitated the coding in relation to 'structural barriers to the court's implementation'.[165] Wolf found treatment providers focus on addiction recovery from a public health perspective whereas prosecution focus on public safety and defence counsel focus on the protection of client rights.[166] These fundamental differences in how treatment and legal systems define goals indicate competing moral and philosophical ideologies.[167] According to Wolf, '[t]hese fundamental differences affect the ways in which staff go about their work, defend their turf, assess the behaviour of the court's clients, and view the purposes and responsibilities of the court'.[168] The contradictions between treatment and legal social practice affected that court's ability to function due to '[i]ssues of turf, of expertise, of financial incentives, of ideology, of culture, of purpose'.[169]

The research conducted by Moore, Lyons, Bull and Wolf are different to this thesis because they focus on interactions between therapeutic and legal team members arising during program participation. In these instances, legal discourse was used to achieve therapeutic goals and vice versa. These types of discoursal interactions, however, are relevant to this thesis but in the context of sentencing and appeal, to the extent similar discourse from the drug court may be recontextualised into the appeal decision. This thesis expands on these findings by exploring how discourses about program participation are recontextualised in those legal contexts. In particular, the discoursal interactions identified in existing research are mostly normative and focus on compliance or non-compliance with program requirements. Information about program compliance is used in drug courts to justify decision-making about progress towards and deviance away from the norms and goals of the program. This thesis builds on existing research by identifying similar discourse in the appeal

164 Ibid 28.
165 Ibid 33.
166 Ibid.
167 Ibid.
168 Ibid.
169 Ibid 45.

decisions and in understanding how this discourse is used to justify punishment during sentencing and appeal processes.

The research outlined above is in the context of treatment during the program. Existing research examining the treatment and legal discourses that occur in drug courts divides that discourse according to the different institutional knowledges and roles of treatment and legal team members. Treatment discourse in that context is characterised as having therapeutic intent and/or is discourse from treatment team members. In this thesis, treatment discourse is conceptualised literally as internal progress towards recovery from drug dependence facilitated through counselling and other forms of therapy. This thesis builds on existing research by looking at how discourse about the drug court participant subject is recontextualised in legal contexts. Information about drug court participants collected through surveillance in the drug court with the intention of monitoring progress and addressing deviant behaviour was used to justify in part the sentencing and appeal decisions. Discourse about program compliance and non-compliance was located in many of the appeal decisions. This partly informed the appeal outcome through assessments about program compliance, risk of future drug use and re-offending, and prospects of rehabilitation.

D Discursive Construction of Progress and Non-progress

This section includes research identifying how drug court teams define participant progress and non-progress and the elusiveness of defining these concepts. This is relevant to this thesis because assessments about progress and non-progress were revisited in later legal contexts. This is followed by a brief overview of literature about drug courts generally. This establishes a paucity of research examining movement of discourse from during the program into more formal legal contexts.

Baker found drug court staff and the judge were often in consensus on who was succeeding and who was failing in the program. However, there was a third group of participants where it was not clear if they were progressing or failing the program. This led to disagreement about whether or not to punish through criminal sanctions. One explanation for this posited by Baker was uncertainty about

the nature of drug dependence and recovery, described by Baker as 'an x-factor'[170] or the 'mysterious' and 'elusiveness of addiction'.[171] According to Baker:

> This inability to predict when addicts would be able to follow through on recovery made the task of treating addiction challenging and sometimes seemingly impossible … understanding this ambivalent relationship with addiction treatment is fundamental to understanding how the drug court staff makes decisions regarding the most challenging clients.[172]

An overview of literature suggests that defining progress towards recovery remains an elusive concept for drug courts.[173] This is important for this thesis because determination of progress or non-progress is later considered during sentencing and appeal. Relapse into drug use, breaches of program requirements and some re-offending while in the program are tolerated to a degree within the therapeutic context of treatment.[174] This is particularly evident in research which analyses the progress and non-progress of drug court participants. For example, Taxman and Bouffard conducted a retrospective analysis of the progress of 2,357 former drug court participants from four drug courts.[175] They found during the program: 64 per cent of graduates tested positive at least once;[176] 60 per cent of graduates completed at least 75 per cent of required drug tests;[177] 62 per cent of graduates

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170 Baker, above n 57, 39.

171 Ibid 40.

172 Ibid.

173 See, eg, Dive, above n 39, 3-4; Freiberg, above n 24, 285; Adele Harrell, 'Judging Drug Courts: Balancing the Evidence' (2003) 2(2) *Criminology and Public Policy* 207; Gill McIvor et al, *Establishing Drug Courts in Scotland: Early Experiences of the Pilot Drug Courts in Glasgow and Fife* (Scottish Executive Social Research, Crime and Criminal Justice Research Programme, Research Findings No 71, 2003); Makkai, above n 24, 4-5; Douglas B Marlowe et al, 'Matching Judicial Supervision to Clients' Risk Status in Drug Court' (2009) 52(1) *Crime & Delinquency* 52, 60-1, 70-3; National Association of Criminal Defense Lawyers, *America's Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform* (National Association of Criminal Defense Lawyers, 2009); Skrzypiec, above n 33; Karen Freeman, *New South Wales Drug Court Evaluation: Health, Well-being and Participant Satisfaction* (NSW Bureau of Crime Statistics and Research, 2002) 35-40; Dale K Sechrest and David Shicor, 'Determinants of Graduation from a Day Treatment Drug Court in California: A Preliminary Study' (2001) 31(1) *Journal of Drug Issues* 129; Stephanie Taplin, *The New South Wales Drug Court Evaluation: A Process Evaluation* (NSW Bureau of Crime Statistics and Research, 2002); Elaine Wolf and Corey Colyer, 'Everyday Hassles: Barriers to Recovery in Drug Court' (2001) 31(1) *Journal of Drug Issues* 233.

174 See, eg, Office of Justice Programs, above n 54, 13: Key Component Six recognises that whilst public safety and abstinence from drug use are the ultimate goal, it would be rare for a participant to immediately cease drug use. Relapses are also expected following periods of sustained abstinence from drug use. This key component also calls for coordinated strategies for non-compliant behaviour; Hora, Schma and Rosenthal, above n 46; Cannon, above n 24; Wolf and Colyer, above n 173.

175 Faye S Taxman and Jeffrey A Bouffard, 'Treatment as Part of Drug Court' (2005) 42(1) *Journal of Offender Rehabilitation* 23, 28.

176 Ibid 35.

177 Ibid 35, 44.

attended at least 75 per cent of their treatment sessions;[178] 53 per cent spent more time in the program than the planned duration, having to repeat program phases due to program non-compliance;[179] and 14 per cent of graduates were arrested.[180] In relation to program compliance, Taxman and Bouffard conclude, '[t]aken together, nearly all drug court participants were not in compliance with treatment or testing requirements during the 12-month program period'.[181] Whilst this research suggests tolerance for degrees of program non-compliance, the findings also suggest high termination rates for non-compliance. In this study 67 per cent of participants were terminated from programs for non-compliance. Similarly, Lyons observes Canadian drug courts have graduation rates between 6 – 36 per cent and the majority of participants do not complete the program.[182] Research on the SA drug court indicates the most common reason for program termination is non-compliance (ie failing to attend urine testing or counselling, breaching bail and not following the directions of case managers) and participants in that study 'were not necessarily terminated for drug use or offending'.[183]

Taxman and Bouffard suggest research is needed into the decision-making process in drug courts that affect termination and graduation rates because these decisions affect the integrity of whether the court is serving the overall goal of advancing offender progress towards abstinence and self-management of addiction.[184] This is relevant to this thesis *only* because discourse reflecting the decision-making process during treatment about progress and non-progress is later revisited during the sentencing and appeal process. Whilst this thesis is not about termination or graduation rates or the decision-making process during treatment, it does provide insight into some of the non-compliance issues raised during treatment. Similar findings of non-compliance were located in the appeal decisions.

178 Ibid.
179 Ibid 35-6, 45.
180 Ibid 36.
181 Ibid 35, 45.
182 Lyons, 'Simultaneously treatable', above n 90, 287.
183 Skrzypiec, above n 24, 20.
184 Taxman and Bouffard, above n 175, 36.

Determining progress in treatment is complex. Drug courts cannot address an individual's drug dependence and criminal behaviour in isolation.[185] The key to successful treatment is addressing co-occurring problems which negatively impact a participant's ability to comply with program requirements and which affects success in the program.[186] This means that, aside from abstinence from drug use and not offending, there is a large range of expectations placed on participants which complicate assessments of progress or non-progress towards recovery. Tiger analysed documents from drug court advocacy organisations, government departments and research agencies about the expansion of drug courts.[187] The aim was to explore the 'theories drug court advocates use to legitimate their activities and how they articulate a role for the courts in solving the complex problem of addiction'.[188] Tiger applied the works of Garland on punishment to analyse 'the "discursive tropes" that constitutes "the institutionalized culture of control"' evident in the discourse.[189] Tiger found that moral and medical considerations often merged to form the therapeutic goals of drug courts.[190] These therapeutic goals span issues such as abstinence from drug use, gaining employment and improving personal relationships. According to Tiger, as these therapeutic goals expand so does the 'scope of activities the court monitors'.[191] The expansion of monitoring is then justified through the 'prevailing theories of addiction and recovery'.[192]

This expanded role of drug courts was observed by Wolf (discussed above) in a case study of drug court hearings and the statements made in court about one drug court participant over a two year period.[193] The field notes of the court observations over that period focussed on the discursive

185 Wolf and Colyer, above n 173; Mary P Brewster, 'An Evaluation of the Chester County (PA) Drug Court Program' (2001) 31(1) *Journal of Drug Issues* 177, 184.

186 Kevin Burke, 'Just What Made Drug Courts Successful' (2010) 36(1) *New England Journal on Criminal and Civil Confinement* 39, 43-4; Wolf and Colyer, above n 173; Dive, above n 39, 1. See also Shannon M Carey, Michael W Finigan and Kimberly Pukstas, *Exploring the Key Components of Drug Courts: A Comparative Study of 18 Adult Drug Courts on Practices, Outcomes and Costs (*NPC Research, 2008), 34; Makkai, above n 24, 1.

187 Rebecca Tiger, 'Drug Courts and the Logic of Coerced Treatment' (2011) 26(1) *Sociological Forum* 169, 173.

188 Ibid.

189 Ibid.

190 Ibid 174.

191 Ibid 179.

192 Ibid.

193 Wolf, above n 50, 40-4.

interactions that occurred between the judge and the participant.[194] In addition, Wolf conducted interviews with drug court staff and observed team meetings.[195] Wolf found earlier achievements and progress such as regularly attending treatment, abstinence from drugs and not offending were 'eclipsed in the minds of … treatment providers and the judge' when other issues of non-compliance occurred such as not paying the fees for treatment.[196] This thesis furthers research by Tiger and Wolf by considering how similar behaviours indicative of progress or non-progress are later considered by a different court. Findings of compliance discourse related to wider lifestyle issues were located in the appeal decisions. In some findings, the participant/appellant had been complicit in the non-compliance, and in others, non-compliance had been beyond the participant/appellant's control. In both instances the participant/appellant was represented as responsibilised by the appeal court for that non-compliant behaviour.

IV RESEARCH IN FORMAL LEGAL CONTEXTS

This section reviews research into how courts construct discursive representations of the legal subject. Whilst none of this research is particular to drug court participants, it does demonstrate the value of research into how courts construct discursive versions of events, representations of the defendant/appellant and the potential consequences of particular kinds of representations. By conceptualising the drug court as a legal and therapeutic entity, this thesis is able to theorise why normative discourse from the drug court appears more consistent with legal institutional practices and knowledges than is currently recognised in existing research.

Much research explores discourse in appeal decisions and other legal contexts. Novkov[197] argues that appeal decisions provide important data for research because appeal discourse reveals how judges 'construct coherent narratives that support particular outcomes in legally cognizable

194 Ibid.
195 Ibid.
196 Ibid 46.
197 Novkov, above n 12.

terms' and the significant legal questions considered.[198] Furthermore, discourse analysis of legal texts shows the kinds of cases being appealed, the issues raised and the discursive construction of contested issues as they take place in adversarial contexts.[199] The following are examples of research conducted through discourse analysis of legal texts: Pether and Threadgold,[200] and Schiavi[201] conducted discourse analysis of appeal decisions; MacMartin and Wood,[202] Bohours and Daly,[203] Weisman,[204] and Phoenix[205] conducted discourse analysis of sentencing decisions; Gurevich[206] analysed trial transcripts.

A Appeal Decisions

Pether and Threadgold conducted a feminist discourse analysis of a single appeal decision and the judgements of other courts cited in that decision.[207] They found the appeal judgements were highly intertextualised with 'repeated, discursively constituted sets of statements and attitudes' revealing the 'ideological underpinnings of the judgement' as well as the 'habitus and investments of the judge'.[208] They found examples in the intertextual chain of legal reasoning where the judgements changed legal meanings to reflect contemporary social values about gendered relationships, thus affecting the 'lived realities' of some people.[209] This research is different to this thesis because it focusses on how judges

198 Ibid 351.

199 Ibid.

200 Penny Pether and Terry Threadgold, 'Chapter 8: Feminist methodologies in discourse analysis: sex, property equity' in Alison Lee and Cate Poynton (eds), *Culture and Text / Discourse and Methodology in social research and cultural practices* (Allen and Unwin, 2000) 132.

201 Petrina Schiavi, 'Chapter 9: The Construction of Truth in Legal Decision-making' in Anne Wagner and Le Cheng (eds), *Exploring Courtroom Discourse: The Language of Power and Control* (Ashgate Publishing Company, 2011) 193.

202 Clare MacMartin and Linda Wood, 'Sexual Motives and Sentencing: Judicial Discourse in Cases of Child Sexual Abuse' (2005) 24 *Journal of Language and Social Psychology* 139.

203 Brigitte Bouhours and Kathleen Daly, 'Youth sex offenders in Court: An analysis of judicial sentencing remarks' (2007) 9(4) *Punishment and Society* 371.

204 Richard Weisman, 'Being and Doing: the Judicial Use of Remorse to Construct Character and Community' (2009) 18(1) *Social and Legal Studies* 47.

205 Jo Phoenix, 'Pre-sentence reports, magisterial discourse and agency in the Youth Courts in England and Wales' (2010) 12(3) *Punishment and Society* 348, 349.

206 Liena Gurevich, 'Patriarchy? Paternalism? Motherhood Discourses in Trials of Crimes against Children' (2008) 51 *Sociological Perspectives* 515.

207 Pether and Threadgold, above n 200, 132: This was the NSW appeal decision in equity *Brown v Brown* (1993) 31 NSWLR 582. Pether and Threadgold found the decision was 'contextualised by a series of Australian judicial decisions which fall in the period 1982-92' relating to family relationship breakdowns and in particular to de facto relationships, at 137.

208 Pether and Threadgold, above n 200, 138.

209 Ibid.

intertextualised other judgements in the course of their decision-making. Nevertheless that research shows that discourse analysis can penetrate the complexity of appeal judgements and reveal how appeal judgements 'perform the tensions between tradition and change characteristic of the law as social process',[210] which is relevant to this thesis because drug courts introduced new ideas and concepts consistent with addressing drug dependence and related offending into the criminal jurisdiction. Whilst existing research (outlined above) establishes differences (and exchanges) in therapeutic and legal social practice in drug courts, no research expands these findings by exploring how such discourses are considered by other courts. In particular, this thesis demonstrates how the drug court participant/appellant can be conceptualised as a legal subject.

Schiavi studied 20 published case reports of judgements in the Family Court of Australia from 1976 – 1995 which included allegations of domestic violence.[211] Schiavi explored narratives of domestic violence using theoretical approaches drawn from ethnomethodology and sociological analysis of motivational accounts and narratives in discourse to investigate how judges construct the "truth" in legal decision-making. Similar to Pether and Threadgold, Schiavi found the judgements revealed how the judges constructed facts which combined with the authority of the law became the truth and thus 'the definitive legal reality of the litigants'.[212] The research conducted by Pether and Threadgold, and Schiavi shows how discourse analysis can penetrate the complexity of appeal judgements, how judges intertextualise other judgements, the effect of judgements on the parties and how the courts can change legal meanings to reflect contemporary social values. This is relevant to this thesis considering drug courts introduced different social practices and knowledges consistent with treating drug dependence into the court system.

210 Ibid 151.
211 Schiavi, above n 201, 194.
212 Ibid.

B Sentencing Decisions

MacMartin and Wood[213] conducted a discourse analysis of 74 Canadian judicial sentencing decisions from 1993 – 1997 in which offenders had sexually abused children and adolescents.[214] They applied the theories of discursive social psychology to analyse the judges' explanations for the offences and the implications for mitigation and aggravation in sentencing.[215] The study looked for the attributions given by judicial officers to explain the sexual offences and explored how those attributions were then used to highlight the seriousness of the offences.[216] MacMartin and Wood observe, '[t]hese studies stress the constitutive role of discourse in legal activities and the ways in which language constructs versions of reality, the rhetorical consequences of which may have serious implications for social justice'.[217]

Bouhours and Daly[218] conducted an analysis of sentencing discourses in 55 sexual offence cases in the South Australian Youth Court from 1995 – 2001.[219] They investigated how the judges' characterised the offending and justified the sentence. The study explored the judges' aims and orientations in sentencing and how they reconciled the competing interests of offenders and victims within the sentencing framework. They found variation in the judges' justifications for particular sentences relating to adolescent sex offenders, however, these justifications 'were consistently patterned by victims' ages, offence contexts and the youths previous offending'.[220] These categories aligned with particular types of constructions about the offender and the offence: the 'potential sex offender' whose offending 'may escalate in seriousness', 'the experimenter' whose offending 'is likely to disappear' as they mature, and those offenders 'viewed as dangerous because of their violent

213 MacMartin and Wood, above n 202.
214 Ibid 142.
215 Ibid.
216 Ibid.
217 Ibid 141.
218 Bouhours and Daly, above n 203.
219 Ibid 376: The research was conducted as part of the Sexual Assault Archival Study (SAAS). The SAAS explored restorative justice in youth sexual violence cases. The original data for the SAAS consisted of 385 cases, namely '226 court cases, 118 conference cases, and 41 caution cases', at 376. Bouhours and Daly found many of the relevant magistrates sentencing remarks were 'not formally documented or readily available' which reduced the current study to 55 judicial sentencing remarks. The researchers also accessed police apprehension reports, criminal histories and the Certificate of Record from the court.
220 Ibid 386.

or persistent offending, but the danger lay in their general antisocial attitude rather than sex offending'.[221] This study is particularly relevant to this thesis which investigates how legal decision-makers justify and explain their sentence with particular focus on whether or not information about program participation informs the courts' construction of the participant/appellant.

Weisman[222] investigated 178 Canadian judgements from 2002 – 2004 where remorse figured 'prominently in the judgement or would be more fully elaborated upon' in order 'to elicit as fully as possible the criteria used in judicial discourse to characterize an offender as remorseful or without remorse'.[223] Weisman observes:

> At one level, the most obvious contingency is the gravity of the offense — those offenses that are accorded longer sentences are also the same offenses for which there is more contestation as well as expanded expectations. But the thrust of this analysis is to suggest that juridical speech does not merely respond to what are more serious offenses by adding more conditions for claims of remorse to be validated.[224]

Weisman observes 'that juridical discourse constitutes not only when remorse should be demonstrated but how it should be demonstrated'.[225] Furthermore, this discourse demonstrates how '[t]hrough the prospect of mercy and moral accreditation but also the concealed threat of violence, judicial discourse shapes the content of remorse in a way that reflects the context in which it is produced'.[226]

Phoenix researched the influence of wider social policy and institutional changes towards 'risk-assessment, risk thinking and risk governance' in youth justice on sentencing in a youth court.[227] Similar to drug courts, youth courts operate less formally than adult courts.[228] There is also direct interaction between the magistrate and youth as occurs in drug courts. Phoenix conducted semi-

221 Ibid.
222 Weisman, above n 204.
223 Ibid 50.
224 Ibid 65.
225 Ibid.
226 Ibid.
227 Phoenix, above n 205, 349.
228 Ibid 388.

structured interviews with magistrates from a youth court located in the United Kingdom.[229] Phoenix found the magistrates engaged directly with youth during the sentencing process in order 'to assess the 'real' young person' against other sources of information such as pre-sentence reports.[230] In addition, Phoenix identified magisterial discourse about having limited sentencing options.[231] Despite sentencing constraints, the magistrates 'operated within an interpretive frame that allowed them to bring to bear other (ie non-actuarial, non-risk) knowledge … in their decision making processes — and ultimately their sentences'.[232] This interpretive framework included their own assessments of the 'real' young person as well as their own privileged knowledges and experiences, particularly 'in knowing young people (and young offenders) … thereby construct[ing] narratives about how young people should or should not act in any given situation'.[233]

The research by MacMartin and Wood, Bouhours and Daly, Weisman and Phoenix shows that research on sentencing discourse can clarify how defendants are constructed discursively within the sentencing framework. This is relevant to this thesis as the predominant source of information about program compliance evident in the appeal decisions are the original sentencing remarks, not other sources of information from the drug court. Existing research also suggests discourse analysis of legal texts can provide insight into the discursive construction of drug court participants as legal subjects and the implications of those constructions for the participant.

C Trial Transcripts

The following study is different to this thesis because it is an analysis of trial transcripts, however, it demonstrates how a broad range of theoretical perspectives can be applied to analyse legal texts. Gurevich conducted a discourse analysis of the transcripts from two trials of women accused of murdering their children to analyse the discourses constructed through the legal strategies of

229 Ibid 349.
230 Ibid 358.
231 Ibid 355-6, 362.
232 Ibid 362.
233 Ibid.

prosecution and defence.[234] Gurevich considered discourse through the lens of the works of Durkheim, Erikson and Foucault and concluded both trials were 'expressions of societal needs for cohesion and boundary-making' as well as 'potent forms of "governmentality" and "normalization"'.[235] Gurevich found the court constructing the defendant discursively and observes, '… legal stories are discursive attempts to produce compelling versions of reality, and they include not only creative reconstruction and interpretation of the evidence and the context of the offense but also active construction of the defendant's character and identity'.[236] This research shows how discourse analysis of legal texts is able to explore the discursive construction of the defendant as a legal subject.

The research outlined above was positioned in legal contexts and sought to answer different questions to this thesis. Nevertheless, that research reveals common themes which are relevant. These themes include: the role of the appeal court in constructing discursive versions of the truth including how courts construct representations of the defendant/appellant consistent with legal principles; the effect of judgements on the legal and lived realities of parties; and how courts respond to social and cultural change. This thesis contributes to this research by exploring further how courts construct the legal subject with interest in how the courts use information about program participation.

The studies outlined above come from a range of disciplines and are framed by different methodological and theoretical perspectives. They show how a broad theoretical approach to discourse analysis of legal texts can provide insight into how appeal judgements reflect the law as social process.[237] Such analysis can explore 'how movements seize upon legal discourse to frame and constrain their own goals and argumentative strategies'.[238] As Novkov states:

> Attending to these dynamics permits direct focus on the pivotal role of discourse in linking social and cultural agendas for change to the legal process, whether individual legal actors are seeking to facilitate or thwart change. It also allows the researcher to consider struggles over strategy within or between

234 Gurevich, above n 206, 516.
235 Ibid.
236 Ibid 518.
237 Pether and Threadgold, above n 200, 151.
238 Novkov, above n 12, 358-9.

> organizations sharing reformist goals and to map out how these struggles shaped later articulations of movement goals and principles that the movement then translated to the public sphere.[239]

Understanding the role of law as social process is relevant to this thesis because existing research is built upon an assumption that there are fundamental philosophical differences between the social practice and institutional knowledges shared in drug courts and in more formal legal contexts. Drug courts introduced new concepts for the treatment of drug dependence into the criminal court system. Existing research into how courts construct discursive representations of the legal subject suggests potential for considering how the courts in other legal contexts accept or reject drug court practice and knowledge. This thesis demonstrates how, and theorises why, discourse about program participation is used to partly inform the sentencing and appeal process and explores how the drug court participant/appellant becomes the responsibilised legal subject.

V WIDER LITERATURE AND CONTEXT

There is much literature and research covering areas such as the theoretical and historical foundations of drug court programs,[240] practice and procedure,[241] evaluation reports[242] and effective methods to evaluate program success.[243] This is practice orientated and particular to the treatment phases of

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239 Ibid 359.

240 See especially Hora, Schma and Rosenthal, above n 46, 439-527 on the development of the drug court movement in the United States. See also Makkai, above n 24; Freiberg, above n 24; Australian Institute of Criminology, above n 24: These outline the development of drug court programs in Australia.

241 See, eg, Carey, Finigan and Pukstas, above n 186 to assess consistency in practice between programs; Dive, above n 39 which highlights some features from the NSW drug court. See also National Association of Drug Court Professionals, *Defining Drug Courts: The Key Components* (Drug Courts Program Office, 1997, 2004); Cannon, above n 24, 129 which refers to the SA program; John S Goldkamp, Michael D White and Jennifer B Robinson, 'Do Drug Courts Work? Getting Inside the Drug Court Black Box' (2001) 31(1) *Journal of Drug Issues* 27; Morris B Hoffman, 'The Denver Drug Court and its Unintended Consequences' in Nolan, above n 30, 67.

242 See, eg, Corlett, Skrzypiec and Hunter, above n 24; Ziersch and Marshall, above n 24; Skrzypiec, above n 24; Skrzypiec, above n 33: These are the evaluation reports from the SA drug court. See also Steven Belenko, 'Research on Drug Courts: A Critical Review 2001 Update' (The National Center on Addiction and Substance Abuse, 2001) which provides a critical review of some drug court evaluations; Berman and Feinblatt, above n 51, 132-3; Makkai, above n 24, 5-7; Centre for Health Economics Research and Evaluation, *The Costs of NSW Drug Court* (Bureau of Crime Statistics and Research, 2008); Department of the Attorney-General, *A review of the Perth Drug Court* (Department of the Attorney-General, 2006); Bronwyn Lind, Don Weatherburn and Shuling Chen, *New South Wales Drug Court Evaluation: Cost Effectiveness* (NSW Bureau of Crime Statistics and Research, 2002); Cassia Spohn et al, 'Drug Courts and Recidivism: The Results of an Evaluation Using Two Comparison Groups and Multiple Indicators of Recidivism' (2001) 31(1) *Journal of Drug Issues* 149.

243 See, eg, Office of Crime Statistics and Research, *Common Performance Measures for the Evaluation of Specialist Court Programs: Discussion Paper* (Attorney-General's Department, 2010); Berman and Feinblatt, above n 51, 132-3; Belenko, above n 242; Goldkamp, White and Robinson, above n 241; Jeffrey Tauber, *Drug Courts: A Research Agenda* (National Drug Court Institute, 1999).

programs. Whilst this literature is not directly relevant to this thesis, it is important for illustrating the local and wider contexts in which the discourse in appeal decisions may arise and for providing support for the assertions made about that discourse in this thesis. This is discussed in detail in the methodology chapter.

VI SUMMARY: CONTRIBUTION TO RESEARCH

Drug court literature is predominately about drug court procedure and outcomes rather than the direct experiences of individual drug court participants.[244] There is research providing insight into the experiences of drug court participants during the program (through surveys and interviews). Some of these insights are included in the analysis/discussion sections of this thesis to illustrate the context in which these types of discourse occur. Quinn observes that the experiences of defendants who fail drug courts is often overlooked in literature[245] and it is those experiences which are often 'missing from the conversation'.[246] The appeal decisions considered in this thesis include discourse about participants who did not successfully complete the program. This thesis does not focus on the direct experiences of drug court participants, but rather the discursive construction of the participant during subsequent legal process. This thesis contributes to a gap in literature by exploring how the experiences of such defendants are constructed within the appeal decision.

This chapter outlines research showing how drug court team members implicitly construct participants as particular types of subjects. As well as the paucity of research tracking similar representations about participants from treatment in the program into other legal contexts. This thesis investigates how the participant/appellant is constructed discursively through information about program participation from a drug court (and other types of information) in sentencing and appeal processes. There appears to be no research investigating the role of treatment discourse and

244 Evaluation reports, for example, focus on measures of *program* success such as cost effectiveness and outcome measures such as program retention, recidivism and relapse rates.

245 Mae C Quinn, 'The Modern Problem-Solving Court Movement: Domination of Discourse and Untold Stories of Criminal Justice Reform' (2009) 31 *Washington University Journal of Law & Policy* 57, 65.

246 Ibid 69.

information in the sentencing process in drug courts or later on appeal. There is a paucity of research on how traditional courts view treatment discourse and information arising from drug courts. How issues such as program compliance, relapse into drug use and re-offending are viewed when considered within the sentencing process or how these concepts are filtered and transformed to fit the legal concepts of sentencing and appeal has not been explored in literature. This thesis addresses that gap by contemplating the drug court as a court, a legal entity, which constructs normative and compliance discourse in line with assessments of rehabilitation and risk. This discourse resonates with later legal decision-making such as sentencing and appeal process which also constructs normative discourse to inform assessments about rehabilitation and risk to justify sentencing and appeal court outcomes.

Drug court research primarily focusses on the treatment phases of programs. This is evident in the research outlined in this chapter which sought insights into drug court decision-making and social practices, and which identified trends and themes (ie treatment and punishment, therapy and law) in the ways progress or non-progress in the program is defined by drug court social actors. This chapter also provides examples of research using discourse analysis located in both drug court and more formal legal contexts.

This thesis addresses a gap in existing literature and provides a significant contribution to existing research because, in contrast to existing research, this thesis reveals how information generated about participants by the drug court is later used by different courts to construct representations of the participant/appellant and the consequences of these discursive constructions.

2. METHODOLOGY

I RESEARCH QUESTIONS AND ANALYSIS OVERVIEW

A Research Aims

This research analyses discourse about former drug court participants to determine how information about program participation is later used in appeal decisions by exploring how the appeal court constructs discursively the participant/appellant throughout the appeal decision.[247] This research examines discourse in decisions in which participants were originally sentenced, by the drug court or another court, after program completion and the defendant/participant or prosecution subsequently appealed the sentence.[248] The research seeks how the appeal courts use information about drug court participation (and other sources of information) to construct representations of the participant/appellant consistent with sentencing and appeal. The research identifies the sources of information the courts rely upon to construct representations of the appellant and the sources of information considered more persuasive and to what effect. This allows investigation of the extent to which the appeal court appropriates, accepts, rejects or excludes aspects of other social practices.

B Research Questions

The following research questions provide a conceptual framework for data analysis and discussion:

- *What types of discourse from the drug court are evident in the appeal decisions?*
- *How does discourse from the drug court (and discourses from other sources) function in the appeal decisions?*
- *How does normative discourse about compliance and risk contribute towards narratives about rehabilitation and risk in the appeal decisions?*

The research questions evolved when it became apparent during the case analysis that the appeal court was engaging in and relying upon some discourses from the drug court but none of that discourse

247 This involves analysing and discussing any categories, themes and patterns evident in how the appeal court constructs the participant/appellant. See generally Valerie J Janesick, 'Chapter 12: The Dance of Qualitative Research Design' in Norman K Denzin and Yvonne S Lincoln (eds), *Handbook of Qualitative Research* (Sage Publications, Thousand Oaks, 1994) 209, 215.

248 Where prosecution appeals the sentence, the drug court participant is the respondent.

suggested therapeutic or treatment discourse.[249] Initial analysis found the appeal court constructing the participant/appellant discursively using discourse about compliance with drug court program requirements and assessments about risk in many of the appeal decisions. The development of the research questions is consistent with Stake who argues '[t]oo much emphasis on original research questions and contexts can distract researchers from recognizing new issues when they emerge'.[250] The research questions allow exploration of the discursive construction of the participant/appellant which is consistent with the aim of this research.

The research questions enable exploration of the binding concepts of compliance, rehabilitation and risk that hold the cases together. Whilst initial discourse analysis focusses on each appeal decision, it is ultimately the group of appeal decisions this research seeks to understand. This requires consideration of the similarity and differences in themes and issues located across the decisions.[251] Answering the research questions requires exploration of the nature of discourse as well as more specific normative discourses of compliance, rehabilitation and risk. In this thesis, data analysis and discussion involves conceptualising emerging themes and issues through the lens of theoretical perspectives to identify and theorise former drug court participants' place between treatment on the drug court program and later formal legal contexts. This is achieved by focusing on how power is used to enforce and normalise certain types of behaviour through discourse about surveillance, coercion, control, punishment and risk.

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249 The original research questions were: To what extent and to what effect does the appeal court take into account therapeutic discourse, concepts and information? To what extent and to what effect does the appeal court take into consideration assessments of progress, success and failure on the drug court program? Is the appeal courts assessment of progress, success or failure consistent with the therapeutic application of those concepts in the drug court? These initial research questions provided the project with initial purpose and a framework within which to conduct the study. However, lack of therapeutic/treatment discourse in the appeal decisions meant the original research questions were not able to address the research aims. Refining the research questions became necessary as issues emerged then faded, whilst other issues continued to develop in complexity during analysis.

250 Robert E Stake, *Multiple Case Study Analysis* (Guilford Press, 2006), 13.

251 Ibid 6.

II RESEARCH DESIGN

This is a qualitative study which uses discourse analysis to identify and analyse the appeal decisions. Qualitative research methods operate from an ontological assumption 'that reality is constructed by individuals interacting with their social worlds'.[252] Qualitative research enables insight into '… *the meaning people have constructed*'[253] about their world as well as the 'multiple realities ... constructed socially by individuals'.[254] The acceptance that there is no single truth or reality is both an ontological position about the nature of the world as well as an epistemological position about the status of knowledge.[255] This viewpoint is consistent with the meaning of discourse underpinning this thesis. Accordingly, qualitative research methods best suit this research project which is based on 'insight, discovery, and interpretation rather than hypothesis testing'.[256]

The research design is a multi-staged study which applies critical discourse analysis to appeal decisions. This is an interpretive research design which seeks to develop deep understanding of a process or experience through observation and intuitive understanding.[257] This produces a 'rich, "thick" description of the phenomenon under study' and 'include[s] as many variables as possible in order to portray their interaction'.[258] The research design is intended to enable inductive, theory generating research.[259] According to Denzin and Lincoln, qualitative research provides insight into phenomena through "emergent construction"[260] which 'changes and takes new forms as different tools, methods, and techniques are added to the puzzle'.[261] Case studies enable investigation of

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252 Sharan B Merriam, *Qualitative Research and Case Study Applications in Education* (Jossey-Bass Publishers, San Francisco, 1998), 6.

253 Ibid (emphasis in original).

254 Ibid 4.

255 Stephanie Taylor, 'Locating and Conducting Discourse Analytic Research' in Margaret Wetherell, Stephanie Taylor and Simeon J Yates (eds), *Discourse as Data: A Guide for Analysis* (Sage Publications, London, 2001) 5, 12.

256 Sharan B Merriam, *Qualitative Research: A Guide to Design and Implementation* (Jossey-Bass, San Francisco, 2nd ed, 2009), 42.

257 Merriam, above n 252, 7.

258 Merriam, above n 256, 43.

259 Merriam, above n 252, 4; Merriam, above n 256, 39.

260 Norman K Denzin and Yvonna S Lincoln (eds), *Handbook of Qualitative Research* (Sage Publications, California, 1994), 2 citing Deena Weinstein and Michael A Weinstein, 'George Simmel: Sociological flaneur bricoleur' (1991) 8(3) *Theory, Culture and Society* 151, 161.

261 Denzin and Lincoln, above n 260, 2.

complex social entities with numerous variables important to understanding the activities evident in the unit of analysis under investigation.[262] In addition, case studies shed light on complex or problematic relationships,[263] as well as ordinary experiences, and the operation of disciplines of knowledge.[264] These qualities make case study research and critical discourse analysis ideal for achieving the interpretive aims of this research.

A Case Study Research

Analysis of the discourse is multi-staged. First, discourse analysis of individual cases uses linguistic methods for interpreting text from critical discourse analysis and second, discourse analysis considers, among others, compliance and risk discourse. The first step in case study research is to define the "case" or unit of analysis to be studied. A unit of analysis is an enclosed entity such as a person, an institution or a program[265] within which the issue to be studied can be conceptually fenced in by boundaries.[266] A case has an inside and an outside;[267] there is an edge which defines that which will and which will not be studied.[268] The unit of analysis is 'a choice of object [or what is] to be studied',[269] not the *topic* of investigation.[270] In this research, appeal court decisions are the units of analysis. Identifying the unit of analysis is considered:

> … fundamental to qualitative case study. It is an epistemological reason. Qualitative understanding of cases requires experiencing the activity of the case as it occurs in its contexts and in its particular situation. The situation is expected to shape the activity, as well as the experiencing and the interpretation of the activity. In choosing a case, we almost always choose to study its situation.[271]

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262 Merriam, above n 256, 50.
263 Stake, above n 250, 10.
264 Ibid.
265 Ibid 1-2; Merriam, above n 256, 40-3.
266 Ibid 40.
267 Stake, above n 250, 3.
268 Merriam, above n 256, 41.
269 Robert E Stake, 'Case Studies' in Denzin and Lincoln above n 260, 236. See also Merriam, above n 256, 40; Stake, above n 250, 6: Stake names the object, phenomenon or condition to be studied — the quintain — (pronounced 'kwin'ton') at 6.
270 Merriam, above n 256, 41.
271 Stake, above n 250, 2.

B Why Discourse Analysis?

This research seeks to understand how the appeal court constructs discursive versions of the participant/appellant. Whilst this research is focussed on understanding discourse in appeal decisions, the importance of this research lies in understanding that discourse as a location where the fundamental philosophical differences underlying decision-making that occurs in the drug court during program participation intersects with the more formal legal contexts of sentence and appeal. Drug courts are guided by therapeutic principles and focus on treatment and recovery from drug dependence. Sentencing and appeal courts, on the other hand, are bound by strict legal principles and court process. This research does not seek to use legal method to understand the legal reasoning of the appeal decision, but rather, to develop a deeper understanding of how information about the drug court participant is used in the appeal decision.

Public documents or records such as appeal decisions form 'the ongoing, continuing records of a society'.[272] They are a 'product of the context in which they were produced and therefore grounded in the real world'.[273] Appeal decisions are 'texts … written with particular readerships in mind, and are orientated to (and anticipate) particular sorts or reception and responses' which makes them inherently interactive.[274] This creates potential for a text to incorporate and recontextualise 'different perspectives, objectives, interests and so forth'.[275] Discourse analysis of texts can demonstrate how social actors within a social practice represent their own social practice as well as represent and incorporate other social practices.[276] Discourse analysis is therefore ideal for this research because this method assists to identify and analyse discourse in the appeal decisions arising from other sources, as well as investigate the appeal decisions themselves.

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272 Merriam, above n 252, 113.

273 Ibid 126-7.

274 Norman Fairclough, 'The Discourse of New Labour: Critical Discourse Analysis' in Margaret Wetherell, Stephanie Taylor and Simeon J Yates (eds), *Discourse as Data: A Guide for Analysis* (Sage Publications, London, 2001) 229, 239-40.

275 Fairclough, above n 1, 48. See also Valentin Nikolaevich Volosinov, *Marxism and the Philosophy of Language* (Ladislav Matejka and I R Titunik trans, Seminar Press, New York and London, 1973).

276 Fairclough, above n 1, 206.

C Sample Selection

1 Appeal decisions

This research requires a purposive sample of decisions in which a sentence imposed on a participant from a drug court was appealed. This sample 'derives from the researcher targeting a particular group, in the full knowledge that it does not represent the wider population; it simply represents itself'.[277] Purposive sampling suits the research aims which seek to locate and explore discursive data representing interplay between discourse arising from program participation and later legal contexts. This is consistent with Taylor who observes that purposive sampling for sources of discourse is justifiable where 'language use reflects the knowledge or skills shared by members of the same culture'.[278] The appeal decisions in the sample are bound together through a common characteristic, they are all appeals challenging the sentence imposed on a former drug court participant and these appeals come from the same criminal jurisdiction.

Another sampling selection criterion requires that the appeal decisions come from a single drug court jurisdiction. There are a number of drug courts in Australia. These drug courts were developed separately, are empowered and operate through different legislative provisions, and have adopted different methods of court practice and procedure. This was confirmed by a search on the Australasian Legal Information Institute website (AustLii)[279] for legislation governing Australian drug courts at the beginning of the research project. For example, the SA drug court sentences participants at the end of the program and operates mainly through South Australian bail and sentencing legislation.[280] In contrast, the NSW drug court sentences participants before program participation with participation ordered as part of the sentencing penalty. This court operates through specific drug court legislation.[281] Because each drug court is distinctive, the sample of cases must derive from a population of appeal decisions featuring drug court participants from one drug court jurisdiction.

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277 Louis Cohen, Lawrence Manion and Keith Morrison, *Research Methods in Education* (Routledge, 6th ed, 2007), 113.

278 Taylor, above n 255, 25.

279 See <http://www.austlii.edu.au>.

280 *Bail Act 1985* (SA); *Criminal Law (Sentencing) Act 1988* (SA).

281 *Drug Court Act 1998* (NSW).

In 2010 a database search for a sample of appeal decisions from any Australian drug court was conducted using AustLii. This publically available on-line database provides access to Australian case law and legislation. All case law database portals for each State, Territory and the Commonwealth were searched using the Boolean terms: "drug court", "drug rehabilitation", "drug diversion" and "drug intervention". The search located cases from courts across Australia. Table One below shows the results from the Boolean terms for each State and Territory.

TABLE ONE: The total number of results from the Boolean terms for each State and Territory.[282]

Search Words	**ACT**	**NSW**	**NT**	**Qld**	**SA**	**Tas**	**Vic**	**WA**	**Cth**
Drug Court	4	134	2	8	26	0	2	10	20
Drug Rehabilitation	0	247	11	62	40	1	70	34	179
Drug Intervention	0	3	1	1	1	0	4	0	1
Drug Diversion	0	1	0	6	3	1	1	0	0
Total	4	385	14	77	70	2	77	44	200

Every case was recorded on an excel sheet which detailed the search date, Boolean term, case name, State/Territory, court or tribunal, and the category[283] of each case. Not all cases related to drug court participants or drug courts. To eliminate these cases, every case was examined to determine whether or not the appellant had been a drug court participant or the case referred to a drug court. These results were recorded on the excel sheet along with a brief notation about the case.

The database search indicated the most likely population of cases for the sample were from South Australia or New South Wales. In 2010 there were 32 cases from the South Australian Supreme and District Court jurisdictions and 141 cases from New South Wales which related to drug court participants or a drug court. The sample was drawn from *all* of the appeal decisions related to the SA

282 This data combines instances where different Boolean search terms located the same case. Duplicates were counted twice.

283 For example, whether the case was an appeal, a sentence, a judicial review or a tribunal decision.

drug court for the following reasons: 1) There is a paucity of research considering discourse from drug courts that sentence after program completion; 2) The smaller sample is more manageable for the time available to complete the research; 3) The researcher has experience as a legal practitioner representing clients in that drug court which may contribute towards understanding the discourse from that court.

The cases located during the preliminary search were re-examined to confirm whether they referred to a SA drug court participant or the South Australian program. This process identified a number of decisions from different jurisdictions other than appeal decisions such as sentencing in higher courts and tribunal decisions. Further searches to update the sample were conducted in 2012, 2013 and 2015. Table Two below lists the South Australian cases for this research project. This includes the jurisdiction of the original sentence (drug court or not) and appeal as well as the status of the participant as having just completed the program or having completed the program previously. The decisions are listed in three columns according to whether the participant/appellant is a drug court participant sentenced following program completion, participated in the program previously, or the decision does not relate specifically to a participant/appellant who completed the program but includes discourse about the drug court program and/or related sentencing principles. This third column lists decisions which do not relate directly to a former drug court participant but do potentially include discourse about the South Australian program. A summary of each decision, including personal /background information about each appellant is located in Appendix Two.

TABLE TWO: Decisions which feature SA drug court participants or the program

Court in which appeal was heard / Court from which appeal was taken	Drug Court Participant (just completed)	Previous Drug Court Participant	Discussion of drug court program / sentencing principles / unresolved offences in other courts / applying for the program
Supreme Court – Magistrates Appeal – Sentence imposed in drug court	Chandler / Ryan / Andreasen / B, WR / Reed / Kells / Richards / Robson / Lawrie (1) / Ashton / Bieg / Parsons / Monterola / Hughes / Van Boxtel / Roberts	-	-
Supreme Court – Magistrates Appeal [284] – sentence imposed in Magistrates Court but not drug court	-	Habra / Ketoglou /Field / Lawrie (2)	Norman / H, T / Madden / Gasmier
Supreme Court, Court of Criminal Appeal [285] – sentence imposed in District Court	Place	Proom / Caplikas	Tran / Becker / Waugh / Thompson / Patzel / Pennington
Supreme Court – Civil Judicial Review	Crockford	-	-
District Court – Rulings	-	Pumpa	Lawrence
Administrative Appeals Tribunal – migration / deportation	-	Narayan / Whiston / "SAAC" / Pull / "BHFC" **EXCLUDED[286]	-
SAMPLE TOTAL = 36	18	7	11

After excluding the AAT cases, as explained below, there are 36 cases in the sample:

- 16 cases are Magistrates Appeal decisions from the Supreme Court of South Australia directly arising from a sentence imposed by the drug court after program completion.
- 17 cases are appeals arising from criminal courts not the drug court where former participants were later sentenced.
- Two cases are rulings from the District Court, and

284 Appeals on conviction and/or sentence from the Magistrates Court are heard in the Supreme Court by a single justice.

285 Appeals on conviction and/or sentence from the District Court are decided by the Full Court which comprises three justices.

286 These AAT cases are excluded from the sample because they do not relate to the criminal jurisdiction. They are not included in the sample total in the table.

- One case is a civil administrative review from a decision to terminate program participation. This was included because it related directly to practice and procedure in the drug court.

All 36 cases in the sample include information about drug court participation or the drug court program and were subjected to the data collection process of discourse analysis as outlined in Part III below.

2 Administrative Appeals Tribunal Decisions

Excluded from the sample are five cases heard in the Administrative Appeals Tribunal in relation to deportation because those hearings occurred outside the criminal jurisdiction and are not connected with drug court practice and procedure.

3 Sentencing Remarks

Consideration was given to whether or not the Magistrates Court sentencing remarks related to each appeal decision could be included. Sentencing remarks held on Magistrates Court files can be inspected or copied by members of the public.[287] Sentencing remarks are recorded in the drug court but may not necessarily be transcribed. The release of sentencing remarks required the approval of each Magistrate which was not readily available. Acquiring copies of those remarks would be costly so they were not included.

4 Supreme Court Appeal and Magistrates Court files

Consideration was given as to whether counsel transcripts and other documents located in the Supreme Court files for the appeal decisions should be included.[288] One Supreme Court file was accessed and counsel transcripts of submissions made on appeal were viewed. The court file contained other documents such as affidavits from prosecution and defence counsel attending the original sentencing process and attachments. Progress reports and the final drug court report were located on the Magistrates Court file and not available to the public. As some of the appeal decisions

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287 *Magistrates Court Act 1991* (SA) s 51(10)(e).

288 In accordance with the *Supreme Court Act 1935* (SA) s 131, most information in these files including Counsel Transcripts is open to the public unless the files are suppressed.

in the sample had court files which were suppressed and access to this source of information was costly and time consuming, a decision was made to not include them.

5 Case Summaries

Each appeal decision in the sample was carefully examined and an outline/summary was recorded into an excel document. These summaries included basic information such as:

- Case name
- Jurisdiction
- Judicial officers presiding
- Court hearing dates
- Court file numbers
- Jurisdiction of original sentence
- Offences for which original sentence imposed
- Penalty imposed
- Result of appeal
- Dates/length of time participated on the drug court program
- Timelines outlining when offences were committed, acceptance into the program, events which occurred during the program, end of program participation and subsequent legal events
- Researcher notes for research project
- Whether or not the appeal decision was cited in journal articles

The case summaries were provided to the research supervisors for feedback. This process provided an opportunity to become familiar with "the whole case" rather than focus on information about program participation. In addition to the case summaries, a case analysis was conducted on one appeal decision randomly selected from the sample.[289] Although this analysis did not directly address the research questions, it was an important first step in developing the discourse analysis used in the research.

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289 *Police v B, WR* [2005] SASC 163.

III THE PROCESS OF DATA COLLECTION

The following outlines how methods from critical discourse analysis (CDA) were used for data collection and analysis. Data collection and analysis has been a continuous process during conduct of this research with analysis being conducted alongside data collection.

A Critical Discourse Analysis

The method used to construct a 'corpus of discourse samples'[290] and undertake initial analysis of that discourse was guided by linguistic methods from CDA. This stage of analysis involved methods to enhance familiarity with the appeal decisions in a holistic manner, to identify discourse samples for the data set, to locate themes and patterns, and to refine the research questions. The linguistic methods were able to reveal how the appeal court: 1) Represented the actions of the participant/appellant as activated and/or passivated; 2) Included or excluded sources of information in constructing the participant/appellant; and 3) Recontextualised information into the authorial voice of the appeal decision. Linguistic analysis of the appeal decisions also ensured the research was grounded in the discourse located in those decisions as a strategy for reliability and validity.

B The Pilot Study

A pilot study was conducted to assess the viability of these methods to gather data able to address the research aims and questions. *R v Place*[291] (*Place*) was randomly selected from the case sample. In this decision, the appellant Mr Place (first name not included in the decision) (male) age 42 has a good employment history and no significant history of offending. He has one son, 15 years of age. Following the breakdown of his marriage, Mr Place used amphetamines heavily and committed

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290 Fairclough, above n 13, 226. See also Alan McKee, *Textual Analysis: A Beginner's Guide* (Sage Publications, 2003), 75: According to McKee, we do not need to analyse 'every element of every text', instead, 'you need to pick out the bits of text that, based on your knowledge of the culture within which it's circulated, appear to you to be relevant to the question you're studying', at 75.

291 [2002] SASC 101. This is a Court of Criminal Appeal decision arising from a sentence imposed in the District Court on 12 September 2001. The appellant, Mr Place participated on the drug court program from October 2000 until May 2001 (a period of less than 6 months on a 12 month program). After Mr Place ceased participating in the program, he was arraigned to appear in the District Court for sentence. The offences before the District Court for sentence were: six counts of armed robbery committed between 11 – 27 July 2000 and four counts of failing to comply with a bail agreement. Mr Place had an insignificant criminal history until these charges. In the District Court he was sentenced to a head sentence of 11 years and 6 months imprisonment. A non-parole period was not mentioned in the appeal decision. Mr Place was re-sentenced by the appeal court to a head sentence of 11 years and 6 months imprisonment with a non-parole period of 6 years commencing on 12 September 2001.

armed robberies to fund his amphetamine dependence. The following outlines the linguistic methods adopted from CDA and provides examples of the findings and initial analysis from the pilot study. This includes an explanation as to why each method suited the research project.

1 Activated and Passivated

Analysis of text for activation and passivation can reveal how the appeal court represents the appellant. Social actors can be represented as activated or passivated in texts. As a participant, the social actor is represented in a clause as an Actor + Process + Affected (within a circumstance).[292] When 'social actors are mainly activated, their capacity for agentive action, for making things happen, for controlling others and so forth is accentuated'.[293] When social actors 'are mainly passivated, what is accentuated is their subjection to processes, them being affected by the actions of others …'.[294] Some findings of activation and passivation are underlined below.

In *Place* most paragraphs which include information about Mr Place (the participant/appellant in this decision) realise Mr Place as a Participant represented often as solely contributing towards a process and the consequential effect of that process. For example, Mr Place is represented discursively as activated and responsibilised by the appeal court for his offending and the consequences of that offending. The findings include: 'You used all of your money to purchase amphetamine and then turned to robbery';[295] and 'For each robbery you used the gun, and your victims were aware that you were armed'.[296] On the other hand, the appeal court represents Mr Place as passivated in relation to court processes. The findings include: his bail is revoked, his counsellor is changed, imprisonment is believed to be inevitable, it was agreed he would leave the program, he is committed to sentence and he is placed on home detention bail.

292 Fairclough, above n 1, 142.
293 Ibid 150.
294 Ibid.
295 *R v Place* [2002] SASC 101, [94] (direct quote from sentencing remarks).
296 Ibid [94] (emphasis added and direct quote from sentencing remarks).

Action represented in discourse defines relations with others and includes consideration of 'action on others', and power.[297] Analysis for activation and passivation in *Place* reveals the court constructing the appellant discursively as an offender, or as a drug court participant or as the appellant. The construction of Mr Place discursively as responsibilised as an offender and as a drug court participant as well as instances of representations of passivation in relation to court process was then explored through theoretical perspectives drawn from other disciplines.

2 Inclusion and Exclusion

Texts can be analysed by determining what events (or parts of events) are included in the representation of the event and by determining what events (or parts of events) are excluded. When considering the parts of events that are included, it is important to consider which elements of the event 'are given the greatest prominence or salience'.[298] Analysis for inclusion and exclusion is useful to assess the sources of information included or excluded by the appeal court when constructing representations of the appellant. An example of exclusion (marked "^") in relation to program participation is 'you substantially reduced your drug habit, notwithstanding some breaches^ which saw your home detention bail revoked'.[299] This statement raises a number of issues worthy of exploration. Details of Mr Place's "breaches" are excluded, which could have included a wide range of situations such as failure to attend counselling, breaching bail by returning home late, failure to attend urine testing, relapse into drug use and so forth.

An overview of the appeal decision suggests the court relied upon the original sentencing remarks as a main source of information in constructing the appellant. There is a large amount of information potentially available to the original sentencing court and to the appeal court about the progress of the appellant while in the program excluded or not mentioned such as a final progress report, progress reports, reports from counsellors and other rehabilitative services, psychological reports, psychiatric reports and affidavits from prosecution and defence counsel present during the

297 Fairclough, above n 1, 26-8.
298 Ibid 136.
299 *R v Place* [2002] SASC 101, [97] (direct quote from sentencing remarks).

original sentencing process (see discussion of court files above). Analysis for inclusion and exclusion reveals the predominant legal concepts considered by the court as well as the sources of information referred to by the court. This method reveals themes evident in the text worthy of discussion and theoretical exploration.

3 Recontextualisation, Dialogicality and Intertextuality

When social actors adopt ideas from other practices, they recontextualise those other practices. Recontextualisation is the 'relationship between different (networks of) social practices' and 'a matter of how elements of one social practice are appropriated by, relocated in the context of, another'.[300] Recontextualisation is consistent with Bakhtin's view that language and texts are dialogical ie texts set up 'relations between different 'voices''.[301] Accordingly, when a text reports the 'speech or writing or thought of another', the effect is to bring different texts and different voices into dialogue. The relation between the authorial voice of the appeal court and other voices and 'the extent to which these voices are represented and responded to, or conversely excluded and suppressed' are measurable.[302] Intertextuality is a method for this type of analysis.

Analysis of text for intertextuality logically followed on from analysis of text for inclusion and exclusion which locates the sources of information relied upon in the appeal decision. Intertextuality is a method which can track the recontextualisation of the content of texts as they move 'from one context to another' and can capture 'particular transformations consequent upon how the material that is moved, [and] recontextualised, figures within that new context'.[303] Intertextuality involves asking

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300 Fairclough, above n 1, 222.

301 Ibid 214. See, eg, Fairclough, above n 13; Mikhail Bakhtin, *The Dialogic Imagination: Four Essays by M M Bakhtin* (Caryl Emerson and Michael Holquist trans, University of Texas Press, Austin, 1981); Mikhail Bakhtin, 'The Problem of Speech Genres' in *Speech Genres Imagination and Other Late Essays* (University of Texas Press, Austin, 1986) 60-7; Mikhail Bakhtin, 'The Problem of the Text in Linguistics, Philology and the Human Sciences: An Experiment in Philosophical Analysis' in *Speech Genres and Other Late Essays* (University of Texas Press, Austin, 1986) 103-28; Michael Holquist, *Dialogism: Bakhtin and his Works* (Routledge, London, 1990); Michael Gardiner, *The Dialogics of Critique: M.M. Bakhtin and the Theory of Ideology* (Routledge, London, 1992); Tzvetan Todorov, *Mikhail Bakhtin: The Dialogical Principle* (Wlad Godzich trans, Manchester University Press, 1984).

302 Fairclough, above n 1, 214. See also Fairclough, above n 13; Bakhtin, 'The Dialogic Imagination: Four Essays', above n 301, 291-3, 352, 358, 424-5, 433; Bakhtin, 'The Problem of Speech Genres', above n 301, 60-7; Bakhtin, 'The Problem of the Text in Linguistics, Philology and the Human Sciences', above n 301, 103; Holquist, above n 301; Gardiner, above n 301.

303 Fairclough, above n 1, 51.

'which texts and voices are included, which are excluded, and what significant absences are there?'[304] This is done by finding the ways other voices and texts are reported in the text,[305] and may include consideration of how other texts and voices are reported and attributed to the source within the text.[306] Intertextuality involves 'the presence of actual elements of other texts within a text' through direct and attributed quotation as well as 'less obvious ways of incorporating elements of other texts' such as summarising what has been said or written elsewhere in the form of direct or indirect speech.[307]

Intertextual analysis of *Place* found very limited evidence of recontextualisation and dialogicality between texts except for where parts of the original sentencing remarks are included in the appeal decision as stand-alone quotations, then restated or recontextualised into the authorial voice of the appeal judgement. For example, in relation to drug use, the original sentencing judge in the sentencing remarks states 'you substantially reduced your drug habit'[308] and 'you are now drug free'.[309] The appeal court recontextualises these statements to 'significantly reducing his drug habit to the point where he might be said to be drug free'.[310] There is a subtle difference between these statements. Analysis of text for recontextualisation is a useful tool for this research as it reveals whether, how and to what extent the appeal court uses and responds to information from other sources.

C Recording the Data and the Initial Analysis

Following the pilot study, six other appeal decisions were similarly analysed and a detailed paper produced outlining the linguistic analysis and discussion of the issues evident in each case. These papers were between 3,000 – 6,000 words and were provided to the research supervisors for feedback.[311] Due to time constraints, not all the appeal decisions were analysed in this way. The

304 Ibid 47.
305 Ibid 49. See also Geoffrey Leech and Mick Short, *Style in Fiction: A Linguistic Introduction to English Fictional Prose* (Pearson Longman, London, 1981).
306 Ibid 49.
307 Ibid 40.
308 *R v Place* [2002] SASC 101, [97].
309 Ibid [98].
310 Ibid.
311 The cases which were analysed and a detailed paper produced were: *R v Place* [2002] SASC 101; *Ashton v Police* [2008] SASC 174; *Chandler v Police* [2002] SASC 130; *Habra v Police* [2004] SASC 430; *Monterola v Police* [2009] SASC 42; *Parsons v Police* [2008] SASC 339; *Hughes v Police* [2012] SASC 183.

remainder of the decisions in the sample contained less discourse about program participation. These were examined and notations of the linguistic analysis and issues were written directly onto copies of the decisions. As data collection and analysis has been ongoing throughout this project, the more detailed analysis of issues was written directly into the body of the thesis rather than in a separate paper for each case.

In addition to the papers and case notations, a table was produced summarising the linguistic analysis of the appeal decisions. This table was a useful guide and thinking tool for identifying issues and patterns in the data. Some examples of inclusion and exclusion are provided in Table Three in Appendix One.

During the initial data collection and analysis stage, it became clear each appeal decision had issues particular to itself, its own stories to tell about the appellant and its own problems and relationships.[312] It also became clear that there were issues that appeared in common across some appeal decisions.

D Emerging Themes and Issues

The research design enabled the researcher to consider what issues questions would bring out concerns? Which ones might become a dominant theme for the whole study? Which issues sought out compelling uniqueness? And which issues helped to better understand the group of cases?[313] The linguistic methods from CDA drew out and revealed elements of discourse from which further analysis and discussion could follow based on the categories, themes and patterns located in each appeal decision as well as across appeal decisions.

312 Stake, above n 250, 11.
313 Ibid.

IV APPROACHES TO DATA ANALYSIS

A Interactional Analysis, Discourse and Power

The analytical framework is based on interactional analysis. Interactive analysis can include linguistic, interdiscursive and social interaction analysis of text.[314] In addition, text analysis involves analysing textual works for representing, relating, identifying and valuing.[315] CDA is influenced by Mikhail Bakhtin who claims that 'linguistic signs ... are the material of ideology, and that all language use is ideological'.[316] CDA is also influenced by the works of Michel Foucault on discourses as 'systems of knowledge … that inform the social and governmental 'technologies' which constitute power in modern society'.[317] CDA is considered 'critical in the sense that it aims to show non-obvious ways in which language is involved in social relations of power and domination, and in ideology'.[318] CDA is interdisciplinary because '[it] opens a dialogue between disciplines concerned with linguistic and semiotic analysis (including discourse analysis), and disciplines concerned with theorizing and researching social processes and social change'.[319] These methods provide a useful tool to describe and analyse the relationship between discourse, power, ideology and social practice.[320] This involves a further review of literature about discourse and power as well as the operation of drug court programs during the treatment phases of the program. The chapters in this thesis which provide analysis and discussion commence with an outline of the theoretical position from which the data is considered.

B Secondary Sources and Context

In this thesis, secondary sources including research and literature about drug courts is cited alongside analysis and discussion of the data. The role of secondary sources is to illustrate the context in which such discourses occur and to provide evidence to support and challenge the researcher's assertions.[321]

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314 Fairclough, above n 274, 240.
315 Ibid 241.
316 Ibid 233.
317 Ibid.
318 Ibid 229.
319 Ibid 230.
320 Fairclough, above n 1, 205.
321 Taylor, above n 255, 26.

Secondary sources provide a means to cross-check the accuracy of interpretation 'of both the language and meaning of discourses'.[322] Furthermore, from a Foucauldian perspective, analysis and description involves situating discourse within its local and wider social, political and historical contexts. This is consistent with Stake who argues '[t]he case's activities are expected to be influenced by contexts, so contexts need to be studied and described, whether or not evidence of influence is found'.[323] Furthermore, Stake observes:

> Each case to be studied is a complex entity located in its own situation. It has special contexts or backgrounds. Historical context is almost always of interest, but so are cultural and physical contexts. Others that are often of interest are the social, economic, political, ethical, and aesthetic contexts. The program or phenomenon operates in many different situations. One purpose of a multicase study is to illuminate some of these many contexts, especially the problematic ones.[324]

To achieve this aim, the discourse evident in the appeal decisions is presented within a narrative about the local and wider context in which such discourse occurs. Stake describes this process as follows:

> People simultaneously experience many things. In qualitative case study, a researcher has certain possible influences in mind — but, sweeping widely, the researcher lets his or her mind and eye scan a large number of happenings, variables and contexts. He or she examines different activity in different settings, looking for "correspondence". Correspondence means patterns of covariation. It is correlation. It means that things are happening together. When we experience repetitious correspondence, we usually think we understand some of the "interactivity" of the case — that is, some ways in which the activity of the case interacts with its contexts.[325]

McKee argues that other texts can assist to 'contextualise and help make sense' of the discourse under analysis. In this way, other texts provide 'contextual evidence'[326] which demonstrate to the reader that a particular interpretation is reasonable.[327] Furthermore, according to McKee:

> That evidence consists of other texts that make it clear that other people might have made such an interpretation — that you haven't imposed a reading on a text where nobody else would see it. Doing textual analysis means making an educated guess at some of the most likely interpretations that might be made of a text.[328]

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322 Jean Carabine, 'Unmarried Motherhood 1830-1990: A Genealogical Analysis' in Margaret Wetherell, Stephanie Taylor and Simeon J Yates (eds), *Discourse as Data: A Guide for Analysis* (Sage Publications, 2001) 267, 292.

323 Stake, above n 250, 27. See also McKee, above n 290, 92: According to McKee: 'When you come to make your educated guess about the likely interpretations of a text, bear in mind: context; context; context', at 92.

324 Stake, above n 250, 12.

325 Ibid 28.

326 McKee, above n 290, 28.

327 Ibid 70.

328 Ibid.

V JUSTIFYING CLAIMS IN QUALITATIVE RESEARCH

A Reliability and Validity

In qualitative research, theory is developed by 'the researcher [who] is the primary instrument of data collection and analysis' with the researcher becoming 'responsive to the context' of the data.[329] This epistemological position understands knowledge to be 'personal, subjective and unique' and this accordingly 'imposes on researchers an involvement with their subjects'.[330] According to Stake:

> Both report writers and report readers have to deal with *ill-structured* knowledge. The quintain, contexts, narratives, and understandings are nuanced, internally contradictory, time-bound, and defying easy conceptualization.[331]

The limitations of case study research become evident through considerations of reliability and validity.[332] These limitations include 'lack of representativeness ... lack of rigour in the collection, construction and analysis ... and bias through the subjectivity of the researcher'.[333] The data in this research was limited to that evident in the appeal decisions. Documents are a stable and objective source of discourse because they are non-reactive and not affected by the research. They have stability because 'the presence of the investigator does not alter what is being studied'.[334] The appeal decisions are publically available and accessible through AustLii.

In qualitative research, '[o]bjective reality can never be captured'.[335] The validity of research is related to the credibility of the description and explanation[336] as well as the development of themes and categories. Accordingly, the assumptions presented in this research project need to be coherent, persuasive and demonstrate rigour through systematic investigation of the data in multiple stages.[337] The data was repeatedly revisited and analysed in multiple stages and different theoretical lenses

329 Merriam, above n 252, 7; Merriam, above n 256, 39.
330 Cohen, Manion and Morrison, above n 277, 7.
331 Stake, above n 250, 35.
332 Merriam, above n 256, 52.
333 Ibid.
334 Merriam, above n 252, 126.
335 Denzin and Lincoln, above n 260, 2.
336 Janesick, above n 247, 216.
337 Stephanie Taylor, 'Evaluating and Applying Discourse Analytic Research' in Margaret Wetherell, Stephanie Taylor and Simeon J Yates (eds), *Discourse as Data: A Guide for Analysis* (Sage Publications, 2001) 311, 320.

applied. Furthermore, case studies have inbuilt checks and balances to ensure validity and accuracy of the findings. This was described as follows:

> By looking at a range of similar and contrasting cases, we can understand a single-case finding, grounding it by specifying *how* and *where* and, if possible, *why* it carries on as it does. We can strengthen the precision, the validity, and the stability of the findings.[338]

Discourse analysis can be considered systematic because 'it encourages analysts to develop multiple explanations before they argue for one'.[339] Similarly, in relation to validity, Stake observes that '[t]he author needs to repeat key assertions in several ways. He or she needs to give illustrations. He or she will leave some of the work for the readers to do, but should give them the makings of understanding'.[340]

In qualitative research, some researchers use the terms "some" or "many" to describe relationships across cases, other researchers use numbers to express relationships across cases. This is not quantitative research per se, but rather a tool to clarify the strength of an assertion. During write up of this thesis it was decided that where the data was discussed across cases, the number of cases indicating that specific issue would be stated.

B Triangulation and Crystallization

One of the tests for validity and reliability is triangulation. According to Stake:

> We researchers want our descriptions to be accurate. We know that our perceptions are subject to different interpretations — which is all the more reason for wanting to record those perceptions with precision. We know that what appears real to one person will not seem real to another; we want these multiple realities to be recognized. It is the process by which we mean to keep misunderstandings to a minimum. Triangulation is mostly a process of repetitious data gathering and critical review of what is being said.[341]

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338 Matthew B Miles and A Michael Huberman, *Qualitative Data Analysis: An Expanded Sourcebook* (Sage Publications, California, 2nd ed, 1994), 29 (emphasis in original). See also Merriam, above n 256, 49-50: Merriam asserts, '[t]he more cases included in a study, and the greater the variation across cases, the more compelling an interpretation is likely to be', at 50.

339 Johnstone, above n 232, 271.

340 Stake, above n 250, 35.

341 Ibid 34.

Denzin identifies four ways that triangulation can be achieved: data triangulation, investigator triangulation, theory triangulation and methodological triangulation. A limitation of this research project is an inability to confirm triangulation through varied sources of data because the only source of data is the appeal decisions. In addition, the research design does not provide for investigator triangulation. As this thesis is supervised and feedback on data collection and analysis was provided by supervisors, it may be reasonable to argue that feedback contributed towards triangulation. The supervisory role could be considered consistent with Stakes observation:

> Getting another person to watch and hear is routine, especially a person from another point of view … Some understandings will converge, whereas others will break into separate perceptions, leaving both to be reported with lower confidence that the meaning has been reached.[342]

Similarly, Merriam observes that triangulation can also be considered the development of 'plausible explanations' rather than 'a technological solution for ensuring validity'.[343] This research project adopts a number of theoretical perspectives to analyse the data and the research design includes multiple stages.

According to Richardson, postmodernist texts do not attempt to triangulate, but rather, they attempt to crystalize.[344] Crystallization occurs through acceptance that there can be no single truth. Crystallization provides 'a deepened, complex, thoroughly partial understanding of the topic' with '[w]hat we see depend[ing] upon our angle of repose'.[345] This process is evident in mixed genre postmodernist texts which incorporate research findings alongside quotations from a wide variety of other sources such as literature (including poetry and fiction) and theory.[346] Whilst this thesis does not incorporate poetry and fiction, it does draw on a wide range of secondary sources to position the discourse in context. This approach is consistent with crystallization 'which combines symmetry and

342 Ibid 35.
343 Merriam, above n 252, 204.
344 Laurel Richardson, 'Writing: a Method of Inquiry' in Norman K Denzin and Yvonna S Lincoln (eds), *Handbook of Qualitative Research* (Sage Publications, 1994) 516, 522.
345 Ibid.
346 Ibid 522-3.

substance with an infinite variety of shapes, substances, transmutations, multidimensionalities, and angles of approach'.[347]

C External Validity (Generalisability)

This research commenced with a purposive sample of documents. The sample selection was not made with an intention to represent the population as a whole but rather to represent a specific category from the population.[348] The sample derives from the population of *all* South Australian appeal decisions in which drug court participants or the drug court feature. The aim of this research is to capture discourses in moments in time that are situational and specific. Whilst this may be considered a limitation, much can nevertheless be learned from a case study project. As Merriam argues:

> … case researchers … pass along to readers some of their personal meanings of events and relationships — and fail to pass along others. They know that the reader, too will add and subtract, invent and shape — reconstructing the knowledge in ways that leave it — more likely to be personally useful.[349]

Similarly, Erickson observes:

> The task of the analyst is to uncover the different layers of universality and particularity that are confronted in the specific case at hand — what is broadly universal, what generalizes to other similar situations, what is unique to the given instance. This can only be done, interpretive researchers maintain, by attending to the details of the concrete case at hand. Thus the primary concern of interpretive research is particularizability, rather than generalizability.[350]

D Researcher Bias, Assumptions and Reflexivity

A limitation of 'qualitative research is that the researcher is the primary instrument of data collection and analysis'.[351] The gathering and analysis of data is instinctual and subjective which means the research project is continuously at risk of researcher bias.[352] Credible research openly acknowledges

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347 Ibid 522.

348 Taylor, above n 255, 24-5.

349 Merriam, above n 256, 51.

350 Frederick Erickson, 'Qualitative Methods in Research on Teaching' in Merlin C Wittrock (ed), *Handbook on Research on Teaching* (Macmillan, London, 3rd ed, 1986) 119, 130. See also Merriam, above n 256, 51: Merriam observes, 'since the general lies in the particular, what we learn in a particular case can be transferred to similar situations. It is the reader, not the researcher, who determines what can apply to his or her context', at 51.

351 Merriam, above n 252, 7; Merriam, above n 256, 39.

352 Merriam, above n 256, 52.

the qualifications and experience of the researcher and also maintains checks and balances for the process of description and interpretation.[353]

> It is important to remember that you come to discourse analysis as a member of the culture, as a speaker-hearer and writer-reader of the language. This raises some dangers, but it also means that you can draw on your own knowledge … the critical feature is not how you come up with patterns, interpretations, and so forth, but how you justify your identification of patterns, how you ground your interpretations.[354]

From a post-structuralist perspective, '[k]nowing the Self and knowing "about" the subject are intertwined, partial, historical, local knowledges'.[355] Accordingly, it is important for researcher/writers 'to understand themselves reflexively as persons writing from particular positions at specific times'.[356] It is through reflexivity that writing becomes 'validated as a method of knowing'.[357]

The researcher is a legal practitioner who represented clients in the SA drug court for many years. During that time I watched drug court participants benefit greatly from participating in the program with improvements in physical, emotional and psychological health, stronger family relationships (including gaining access to children), gaining employment, paying off debts, gaining stable housing and commencing some form of study. Many participants, however, failed the program. Some of those participants nevertheless made significant positive changes in lifestyle. At the time this research commenced, I was no longer in legal practice but wished to develop my interest in drug courts. One phenomenon from previous experience worthy of research was how drug court participation was subsequently viewed in more formal legal contexts. This interest is based on my experience assisting clients through the appeal process which was more formal and legalistic in comparison with program participation. Interpretation of the data is influenced by my engagement with theory as a scholar as well as insider knowledge[358] of the local South Australian context in which

353 Janesick, above n 247, 212, 216.
354 Wood and Kroger, above n 1, 95.
355 Richardson, above n 344, 518.
356 Ibid.
357 Ibid.
358 Taylor, above n 337, 321.

the discourse in the appeal decisions occurred. This includes drug court practice and procedure in relation to the treatment phases of the SA drug court program and the legal principles underlying sentencing and appeal decisions in the South Australian criminal jurisdiction. This insider knowledge assisted to identify secondary sources to support and challenge assertions made about the discourse in the appeal decisions.

There are risks involved with the researcher being familiar with the drug court and the appellants. The first is inadvertently breaching client confidentiality during analysis and discussion, the second is the risk of a perception of bias that the researcher has selected or analysed the data in particular ways not consistent with valid research methods. These issues are addressed through the research design which ensures analysis of the discourse remains grounded in, and limited to, that evident in the appeal decisions.

E Ethical Issues

An enquiry was made with the Social and Behavioural Research Ethics Committee (SBREC) regarding ethics approval. Of concern was the researcher's employment with the Legal Services Commission of South Australia from 2001 – 2010 as a legal practitioner. Some appellants are former clients and others were represented in the drug court on instructions from other solicitors. In response, SBREC concluded ethics approval is not required for this research because 'the research will draw on information contained in publically available court documents' and as such 'contains low if any risk as it relates to the SBREC'.[359] In relation to using appeal decisions connected to former clients, the opinion of the SBREC was 'the information (including the parties) contained in the documents lost its confidentiality (or legal privilege) upon being filed in the court and made public'.[360] Finally, SBREC concluded:

> … the research is based on the text in publically available documents and not information neither acquired from representing clients nor acquired in the role with the Legal Services Commission. Although it is not anticipated to be substantial, there may be a conflict of interest given that the researcher will be drawing on data that the researcher herself has been involved in generating through representations. However, as noted

359 Email from Andrea Fiegert to Danielle Misell, 24 October 2012, <human.researchethics@flinders.edu.au>.
360 Ibid.

> in the correspondence, the research involves some type of discourse analysis, putatively not incorporating any confidential or privileged information acquired through legal representation.[361]

F Further Limitations

In addition to the limitations outlined above, this research is limited to analysis and discussion of discourse evident in the appeal decisions. These documents were not generated for research purposes and are therefore 'incomplete from a research perspective' because they are unable to 'afford a continuity of unfolding events in the kind of detail that the theorist requires'.[362] Subsequently, the research is limited by the researcher not knowing what other materials were before the sentencing and appeal court which are not mentioned in the appeal judgement.

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361 Ibid.

362 Merriam, above n 252, 124 quoting Barney G Glaser and Anselm L Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (AldineTransaction, New Brunswick and London, 1967), 182.

VI SUMMARY: RESEARCH METHODS

<table>
<tr><td colspan="3">RESEARCH AIM (p 38)</td></tr>
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<tr><td colspan="3">RESEARCH QUESTIONS (pp 38-9)</td></tr>
<tr><td colspan="3">• What types of discourse from the drug court are evident in the appeal decisions?
• How does discourse from the drug court (and discourses from other sources) function in the appeal decisions?
• How does normative discourse about compliance and risk contribute towards narratives about rehabilitation and risk in the appeal decisions?</td></tr>
<tr><td colspan="3">The Process of Data Collection and Initial Analysis (pp 49-54)
METHOD : CRITICAL DISCOURSE ANALYSIS
(Interactive analysis – linguistic, interdiscursive)
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• To draw out or reveal elements of discourse from which further analysis and discussion can follow</td></tr>
<tr><td rowspan="3">METHOD -
CASE STUDY
ANALYSIS (pp 49-54)

Understand each case – what themes arise in this case? How do these themes relate to the other cases?</td><td>ACTIVATED/PASSIVATED
Reveals how the court represents the appellant</td><td>These constructions involve reference to and characterisation of the behaviour of the appellant based on information from outside sources such as sentencing remarks and information from the drug court.</td></tr>
<tr><td>INCLUSION/EXCLUSION
Reveals what information about the appellant is included or excluded</td><td>Reveals the predominant legal concepts and sources of information referred to by the court and the possibility of information excluded by the court.</td></tr>
<tr><td>RECONTEXTUALISATION, DIALOGICALITY AND INTERTEXTUALITY
Reveals the degree to which information from other sources (social practices) are recontextualised into the authorial voice of the appeal decision</td><td>Reveals whether, how and to what extent the appeal court uses and responds to information from other sources.</td></tr>
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METHOD : CRITICAL DISCOURSE ANALYSIS
(Interactive analysis –discourse, power and social relations)
• To analyse and discuss the discourse drawing upon theoretical approaches to discourse analysis
• To analyse and discuss any categories, themes and patterns evident in the discourse
• To theorise the space between therapy and law</td></tr>
<tr><td>METHOD -
CASE STUDY ANALYSIS (pp 41, 54)
What common and different themes emerge in the cases?</td><td colspan="2">SIGNIFICANCE / EFFECT
The dominant themes located in the appeal cases were normative/compliance discourse, internal transformation, rehabilitation and risk.
These themes provided a conceptual framework to theorise the effect of that discourse on the appellant.</td></tr>
</table>

3. DISCIPLINARY POWER AND NORMALISATION

> The goal, often reiterated by Sylvia, the men's program's enthusiastic director, was to join the mainstream, to become 'Joe taxpayer'. 'When we go to the bowling alley,' Sylvia insisted, 'and people see you with your baggy pants, prison tattoos, and do-rags, they get worried. Your average Joe,' she continued, 'is a taxpayer. He's a contributing member of society. That's what you guys should be striving to be.[363]

This chapter draws on the works of Foucault about disciplinary power, deviance and the normalisation of attitudes and behaviours attributed to the "law-abiding citizen" such as Joe taxpayer in the quote above. Analysis of the appeal decisions from this perspective found discourse consistent with the drug court using legal coercion to encourage drug dependent offenders into the program, the first step towards transformation, and during the program to monitor and promote participant investment in the normative goals of the program. Based on this information, appellants were represented discursively as responsibilised for their wide ranging deviant attitudes, behaviours and lifestyle choices (including drug use) before and during the program. Failure to demonstrate participant investment in the normative goals of the program through deviance was considered by the original sentencing and appeal courts as failure to demonstrate transformation into the law-abiding citizen. In this thesis, "normalisation" focuses on how socially constructed norms are identified and applied to drug court participants through assessments of their conduct as deviant.

After an introductory discussion on the nature of normative discourse and disciplinary power, this chapter identifies normative discourse about lifestyle changes in the appeal decisions. This is followed by discussion of the discourse in the appeal decisions consistent with legal coercion to get drug dependent offenders *into* treatment and *during* treatment to promote participant investment in the normative goals of the program.

I THE DRUG DEPENDENT OFFENDER: AN OBJECT OF KNOWLEDGE

This thesis explores how the appeal court constructs discursive representations of appellants as an object of knowledge based on different sources of information. Discourse represents the world by

363 Teresa Gowan and Sarah Whetstone, 'Making the criminal addict: Subjectivity and social control in a strong-arm rehab' (2012) 14(1) *Punishment and Society* 69, 80.

'constituting and constructing the world in meaning'.[364] It is through discourse that 'official knowledges … work as instruments of 'normalisation', continually attempting to manoeuvre populations into 'correct' and 'functional' forms of thinking and acting'.[365] Norms are standards of behaviour socially constructed according to the rules, knowledge and practices of a particular social group. For example, social groups such as "the family", "the work situation" and "the religious community" are normative and susceptible to deviation.[366] The power to define norms (and deviance) cuts across multiple sites, knowledges and understandings.

Foucault demonstrated how discourse on "psychopathology" in the 19th century constituted *madness* as an object of knowledge.[367] Mental illness was defined through 'all that was said in all the statements that named it, divided it up, described it, explained it …'.[368] Similarly, *delinquency* was defined as an object of knowledge through complex institutional relations and normative understandings including: medical modes of decision-making, knowledge about psychological characteristics and definitions of pathological behaviour;[369] penal understandings about criminal behaviour, methods of police enforcement and modes of legal decision-making including judicial understandings about criminal responsibility;[370] and through relations forged between the authority of medical institutions and the authority of the courts.[371] Defining the source and authority of norms (and deviance) involves complex understandings about the relationship between the knowledge and practice of social institutions[372] such as the medical and legal professions, the differences in how such

364 Fairclough, above n 13, 63-4.
365 McHoul and Grace, above n 10, 17.
366 Foucault, above n 9, 45.
367 Foucault, above n 9, 35-6. See also Fairclough, above n 13, 41.
368 Ibid.
369 Foucault, above n 9, 48.
370 Ibid.
371 Ibid.
372 Ibid 46, 49: The process of understanding the relationship between the knowledge and practices of institutions is termed "defining the authorities of delimitation".

institutions define an object of knowledge[373] as well as how that object of knowledge is 'divided, contrasted, related, regrouped, [and] classified'[374] within and across institutions.

The drug court imposes behavioural normative standards on drug court participants based on therapeutic institutional understandings of treatment for drug dependence. Drug court participants are closely monitored and that information facilitates the therapeutic intent of drug courts which is to monitor recovery from drug dependence. This information reflects the normative standards of behaviour required by the drug court which is assessed through deviance from the norm. From a treatment perspective, there is an expectation that participants will initially struggle with program requirements and experience relapses into drug use. The appeal court may later apply a different normative standard to such deviant behaviour including behaviour which is illegal.

Knowledge expressed through discourse must be understood within its historical, social, cultural and political context because knowledge is historically variable but also overlaps and intersects as it alters across time.[375] This thesis is limited to understanding the discourse evident in appeal decisions and to understanding how information from the drug court is selected and used by the appeal court. However, it is important to also understand the contexts in which such discourse arises in drug courts and the institutional knowledges and practices underlying that discourse because the appeal court may be using information created with a therapeutic intention to achieve a different normative goal to that of the drug court. Accordingly, discourses from the appeal decisions are presented alongside examples from literature reflecting the local context of the SA drug court and the wider context of drug court programs to show the possible therapeutic intent of some discourse located in the appeal decisions. Furthermore, reference to secondary sources provides contextual

373 Ibid 45, 49: The difference in how an object of knowledge is defined by institutions is about "locating the surfaces of emergence".

374 Ibid 46, 49: This analytical process is about locating "the grids of specification", the different systems and ways an object of knowledge has been conceptualised.

375 Foucault, above n 9, 35; Fairclough, above n 13, 41; McHoul and Grace, above n 10, 29, 31, 38; Novkov, above n 12, 348-61.

evidence to demonstrate to the reader that the interpretation of the data is reasonable and reliable. This strategy is discussed further in the Methodology Chapter (see pp 55-6).

II NORMALISATION AND THE LAW-ABIDING CITIZEN

In this thesis, "normative power" is considered the power to make normative constructs and judgements. Normative power can be considered a form of disciplinary power such as when coercion is used to normalise deviant behaviours and attitudes. In Foucauldian terms, normalisation is inherently disciplinary with the norms imposed being 'conformity, obedience, and behaviour control'.[376] Disciplinary power involves detailed observation or surveillance and the individualisation of those people subject to it.[377] It is through individualisation that the individual becomes 'the proper object and unit of analysis'.[378] Disciplinary power is about individuality because differences need to be sought, identified and then normalised.[379] Surveillance is considered further in Chapter Four. Discourse analysis seeking representation of appellants as activated (suggesting responsibilisation) or as passivated (suggesting subjection to the action of others) reveals normative discourse covering deviant attitudes and behaviour aside from drug dependence, as outlined below.

A Normalisation of Lifestyle

At the time of the appeal, *Chandler v Police*[380] (*Chandler*) Michelle Lea Chandler was 37 years of age and her 16 year old son was in the care of her mother. Michelle had spent most of the past 10 years in custody for dishonesty offences committed to support her heroin dependence. Prior to her program participation, Michelle was released from custody and gained employment which led to a partnership in a hotel. When that business failed leaving her in debt, Michelle relapsed into heroin

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376 David Garland, *Punishment and Modern Society: A Study in Social Theory* (The University of Chicago Press, Chicago, 1990), 169 discussing Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Routledge, London, 1977): Garland clarifies that Foucault in later works 'did much to extend and develop this vision of power, emphasizing its capacity to induce pleasure, discourse, action, and subjectivity', at 169. See also Foucault, above n 13, 85: According to Foucault, '[a]ll the modes of domination, submission, and subjugation are ultimately reduced to an effect of obedience', at 85.

377 David Garland, 'The Criminal and His Science: A Critical Account of the Formation of Criminology at the End of the Nineteenth Century' (1985) 25 *British Journal of Criminology* 109, 115-6; Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (Pluto Press, London, 1998), 21.

378 Garland, above n 377, 122.

379 McHoul and Grace, above n 10, 72.

380 [2002] SASC 130.

use and re-offended. Following four months in custody, she was released to participate in the drug court program, where she remained for eight months. The appeal court recontextualised a drug court report and a psychological report outlining her "dysfunctional behaviour" and inability to achieve "an independent lifestyle" while in the program.[381] The appeal court constructs representations of Michelle as activated (and therefore responsible) for her lack of progress in the program. Michelle is described as 'struggling with an independent lifestyle'[382] while in the program. The psychological report attributed 'the appellant's dysfunctional behaviour as being caused by financial stresses and unsettled living arrangements'.[383] After her release into the program, Michelle encountered a number of financial and relationship problems ie 'outstanding rental from her Housing Trust unit, overdue utilities accounts with threatened disconnections, [and] drug debts …'.[384] In addition, Michelle was dealing with '… the breakdown of a personal relationship of about 18 months standing and a problem in her relationship with her mother which made access to her son difficult'.[385] The drug court report outlines how the 'needs of the appellant'[386] were not met by her case manager who 'at the time of supervising the appellant … was supervising a large quantity of clients and due to the demands of the large client group could not adequately address the needs of the appellant'.[387] The report also describes how '[t]he case manager became aware within a few weeks of the appellant's release into the program that she was struggling with an independent lifestyle'.[388]

Both reports outline financial and relationship problems. These problems, and the fact Michelle had spent much of the previous 10 years in custody,[389] suggest she had little positive support in the community. This was compounded by a case manager who 'could not adequately address the needs of the appellant' due to her case load.[390] Michelle's failure in the program was characterised by the

381 Ibid [14].
382 Ibid (emphasis added).
383 Ibid.
384 Ibid [11].
385 Ibid.
386 Ibid [14].
387 Ibid.
388 Ibid.
389 Ibid [9].
390 Ibid [14].

appeal court through multiple issues aside from drug dependence. Information about Michelle's need for support in a wide range of areas while in the program and the inability of the case worker to assist, was relevant to the drug court when monitoring Michelle during the program because drug courts need to identify and address lifestyle issues which affect program compliance and progress towards recovery.[391] That same information is now used by the appeal court, filtered into a different context, to construct Michelle's lack of progress towards recovery based on issues aside from drug use or offending behaviour, to inform and justify the appeal outcome. In three appeal decisions, including *Chandler* (outlined further below) the court represented appellants as responsible for addressing wider changes in their lifestyle and for not making progress in the program.

B Responsibilisation and Individualisation

In *Chandler*[392] the appeal court used information from a psychological report and the drug court to responsibilise Michelle discursively for not making progress in the program. The appeal court considers the drug court report and the psychological report as both indicating 'the appellant had a commitment to change of attitude and lifestyle but had never been successful in achieving that goal'.[393] Furthermore, Michelle is represented as activated for her failure to complete the program through submissions of defence counsel at the appeal hearing who refers to 'the appellant's failure to complete the Drug Court program'[394] and 'the reasons for the appellant's failure to comply'.[395] The appeal court concludes: '[t]he appellant to date has failed to take advantage of opportunities made available to her to assist in her rehabilitation'.[396]

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391 See, eg, Caroline S Cooper, *Drug Courts – Just the Beginning: Getting Other Areas of Public Policy in Sync* (Justice Programs Office, Washington DC, 2006), 2-3. See also Dive, above n 39, 1; Burke, above n 186, 42; Susan Eley et al, *The Glasgow Drug Court in Action: The First Six Months* (Scottish Executive Social Research, Scotland, 2002), 31; Regan Gibson, 'Review: Rebecca Tiger, Judging Addicts: Drug Courts and Coercion in the Justice System, New York University Press (2013)', *The American Criminal Law Review* (online), 28 January 2013 <http://www.americancriminallawreview.com/aclr-online/review-rebecca-tiger-judging-addicts-drug-courts-and-coercion-justice-system-new-york-university-press-2013/> (last viewed 16 May 2015); Tiger, above n 187, 179.

392 *Chandler v Police* [2002] SASC 130.

393 Ibid [15].

394 Ibid [16].

395 Ibid.

396 Ibid [18].

Michelle is represented as passivated in having rehabilitation and other resources made available to her, but activated in the way she is described as having "exhausted" those resources. The findings include statements such as 'a letter written by the appellant setting out her personal circumstances and the rehabilitation and resources that were available to her',[397] 'it is evident from her remarks that [the sentencing magistrate] … considered that at the time of sentencing the appellant had exhausted the considerable resources which had to date been made available to her to assist in her rehabilitation'.[398] The appeal court concludes '[t]he appellant to date has failed to take advantage of opportunities made available to her to assist in her rehabilitation although is it regrettable that there were not greater support systems in place to assist her with the various problems she faced when released from gaol'.[399] In this appeal decision, Michelle is represented discursively as subject to the actions of others in the availability of support services, yet responsibilised for creating a situation where no more resources were available for her assistance.

In two further appeal decisions, appellants were similarly responsibilised discursively for not seeking support when difficulties arose during the program. In *Police v B, WR*[400] (*B, WR*) the appellant Mr B (name suppressed) is a 47 year old man with a long history of offending. He is the father of two children with whom he maintains regular contact. Mr B was due to successfully complete the program, but re-offended. The sentencing magistrate accepted those offences were committed to raise money to pay a drug debt in circumstances where Mr B and his family were threatened by a drug dealer.[401] During the sentencing process, prosecution argued the offences were committed whilst Mr B 'was receiving substantial support and assistance' and 'had various avenues for assistance'.[402] Similar to Michelle, Mr B is represented as passivated in "receiving" support and yet activated for not seeking further assistance when threatened by a drug dealer. Similar responsibilisation for not

397 Ibid [13].
398 Ibid [16].
399 Ibid [18].
400 [2005] SASC 163.
401 Ibid [13].
402 Ibid [20].

seeking assistance was evident in *Reed v Police*[403] (*Reed*) where the appellant Michael Reed is represented as activated for failing to 'engage the support services when he encountered difficulties' on two occasions following relapses into drug use.[404]

> … the appellant appears to have relapsed into amphetamine use and eventually withdrew himself from the programme. I further note that the appellant also failed to engage the support services when he encountered difficulties^ whilst on the programme. He was remanded into custody for detoxification and on his release he relapsed after two more reviews. He again failed to seek the assistance of the Drug Court staff and instead provided them with an altered medical certificate to excuse his non-attendance. He then voluntarily withdrew from the programme.[405]

Michael demonstrated insight into a vulnerability to relapse and further offending by voluntarily withdrawing from the program, however, the appeal court considers '... that must be put into a context in which he had earlier failed to take full advantage of the help that was available to him'.[406]

These findings demonstrate how normalisation places responsibility upon individuals for adjustments to their deviant behaviours and attitudes in the appeal decisions. Failure to make the most of available support services is a "fault" indicating an inability to adjust to an independent lifestyle. In turn, an inability to adjust to an independent lifestyle suggests lack of internal transformation towards becoming a law-abiding citizen. Similarly, failure to confide in staff when threatened by a drug dealer becomes demonstration of lack of trust, honesty or commitment to the program. It is through the identification of deviance or "fault" that the process of normalisation of an individual's behaviours and attitudes into those expected of the "law-abiding citizen" takes place. This is consistent with Tiger who argues the aim of drug courts 'is not sobriety', but rather 'to create a sober, law-abiding citizen'.[407] By deviating from the norm of the law-abiding citizen during the program, Michelle, Mr B and Michael failed to demonstrate transformation to the appeal court.

403 [2007] SASC 26.
404 Ibid [28].
405 Ibid.
406 Ibid [31].
407 Gibson, above n 391; Tiger, above n 187, 179.

C Norms Defined Through Deviance

Representation of deviant behaviour and attitudes in the appeal decisions demonstrates the relationship between surveillance, disciplinary power and normative process. According to Foucault, '[t]he 'norm' is also implicit in surveillance in that it provides the criteria that the gaze invokes ... and deviance involves infraction of the norm'.[408] The discourses evident in *Chandler, B, WR* and *Reed* demonstrates how states of mind or attitudes such as "honesty", "trust" and "commitment" are inferred from behavioural signs and judgements about deviance.

Similar inferences about dishonest states of mind based on previous behaviour were evident in two further appeal decisions. Eamon Patrick William Ryan, the appellant in *Ryan v Police*[409] (*Ryan*) is a 50 year old man with a history of drug dependence including heroin and a long offending history related to that drug use. Eamon participated in the drug court program for a short period until his participation was terminated for drug use. He tested positive for methamphetamine on a number of occasions but denied drug use.[410] The sentencing remarks (restated)[411] suggest Eamon 'was substituting someone else's urine for [his] urine tests'.[412] Further information is excluded and the allegation does not appear to have been confirmed.

> Although he made some progress,^ as was observed by the sentencing magistrate, when one looks overall at his performance in the Drug Court program, it was not promising. He tested positive for methylamphetamine on more than one occasion, although maintaining a denial of the use of the substance. There is a suggestion^ also that he was substituting someone else's urine for urine tests.[413]

Eamon wrote a letter to the sentencing magistrate apologising for offending and further denied drug use while in the program.[414] Continual denial of drug use was characterised by the sentencing magistrate (directly quoted) as:

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408 Hunt and Wickham, above n 377, 49-50.

409 [2003] SASC 108.

410 Ibid [9].

411 See Fairclough, above n 1, 40: Intertextuality is the presence of other texts within a text. The other text may be indirectly restated or directly quoted within the text. This is discussed in the Methodology Chapter in the pilot study. Analysis of text for intertextuality can show how and to what extent information from other sources is recontextualised into the authorial voice of the appeal decision.

412 Ibid [9].

413 Ibid.

414 Ibid [10].

> Your dishonest behaviour during that period of involvement in the program was of concern^ and does colour any positive outcomes.^ It also makes it very difficult for me to accept as genuine the pleas that you make to me in your letter.[415]

Eamon was responsibilised for testing positive for drug use, denial of drug use and for substituting urine. Similarly, in *Richards v Police*[416] (*Richards*) Walter John Richard's plea for another chance is characterised as "hollow" and "not genuine" in the sentencing remarks (restated) in the appeal decision.[417]

> He observed that the appellant had been given choices^ in the past to deal with his addiction but had not taken them up. His latest opportunity came with his acceptance into the Drug Court program. He failed by his own conduct to take advantage of that. The appellant's plea before the Magistrate to be given another chance rang rather hollow. The Magistrate was justifiably not convinced about the genuineness of that plea.[418]

In the quote above, the appeal court responsibilises Walter discursively for failing to make the most of opportunities to address his drug dependence. Walter had removed the home detention monitoring device and absconded.[419]

These appeal decisions show how:

> [b]y both medicalizing and moralizing the problem(s), judges are less interested in particular actions and more so in what the actions reveal about the selves under consideration. Because selves are at stake, surveillance takes a different form and expands to a new depth; judges look beyond, behind, and beneath surface appearances to see if defendants are worthy of "treatment" in drug court and if they are succeeding according to the court's terms. Drug court judges try to determine if they are dealing with persons who can be repaired and restored, or with irremediably deficient selves.[420]

Characterisation of behaviour and attitudes as deviant in the appeal decisions illustrate the observations of Foucault on disciplinary power,[421] whereby 'knowledge gained on the basis of disciplinary power is formulated according to 'norms of behaviour''.[422] Norms focus on behaviours characterised as faults such as lateness or untidiness and attitudes such as disobedience or

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415 Ibid [11].
416 [2007] SASC 368.
417 Ibid [25].
418 Ibid.
419 Ibid [24].
420 Burns and Peyrot, above n 115, 433.
421 Foucault, above n 376, 217; McHoul and Grace, above n 10, 66.
422 McHoul and Grace, above n 10, 70-1.

insolence.[423] Judgements about norms involve assessment of an individual's level of deviancy away from normal behaviours or attitudes.[424] By displaying deviant behaviour, Michelle, Mr B, Michael, Eamon and Walter (discussed above) failed to demonstrate an ability to "be repaired and restored", instead remaining "irremediably deficient". They failed to demonstrate transformation into the law-abiding citizen.

This section analysed normative discourse about certain deviant attitudes and behaviours originally observed by the drug court and shows how the appeal courts use that deviance to construct appellants discursively as failing to demonstrate transformation into the law-abiding citizen. The next section identifies normative discourse considered from a wider perspective, that is, legal coercion to encourage participants into and to remain in the program through judicial interaction and strategies to enhance participant investment in the normative goals of the program. In this section, the focus is on how the appeal courts use information from the drug court related to coercion including the drug courts assessment of the participant/appellant's response to that coercion (suggesting compliance or deviance).

III LEGAL COERCION AND NORMATIVE PROCESS

Legal coercion *initiates* normative process by encouraging participants into the program. Legal coercion is described as active and forceful intervention intended to 'break the cycle of substance abuse, addiction, and crime'.[425] Analysis of the appeal decisions reveals appellants' being represented discursively as passivated (suggesting representation as *subject to process* or *the actions of others*) when the appeal court refers to their commencement in the program. Five appellants are represented as having been "recommended"[426] or "referred"[427] for assessment for participation in the program.

423 Hunt and Wickham, above n 377, 21.
424 McHoul and Grace, above n 10, 71.
425 C West Huddleston, Karen Freeman-Wilson and Donna L Boone, *Painting the Current Picture: A National Report Card on Drug Courts and Other Problem Solving Court Programs in the United States* (National Drug Court Institute, USA, 2004), 1. This statement is also cited in Burke, above n 186, 40.
426 *Monterola v Police* [2009] SASC 42, [3]; *Ashton v Police* [2008] SASC 174, [7].
427 *Parsons v Police* [2008] SASC 339, [32]; *Police v Van Boxtel* [2013] SASC 82, [25]; *R v Place* [2002] SASC 101, [97].

Two appellants are represented as having been "determined" eligible[428] or not eligible for the program.[429] Nineteen appellants are represented as having been "accepted",[430] "placed",[431] "admitted"[432] or "released"[433] into the program.

Two appeal decisions yielded explicit findings of legal coercion. In *Monterola v Police*[434] (*Monterola*) Rex Monterola was released on strict bail conditions which "required him" to participate in the program.[435] He is recommended for participation in the program;[436] accepted into the program;[437] and released on strict bail conditions which require him to participate in the program.[438] In *Madden v Police*[439] (*Madden*) the appellant Jarrod Allan John Madden was found not suitable for "management in"[440] the program:

> The Magistrate was provided with three reports on the appellant assessing his suitability for the Magistrates Court Diversion Programs. The authors of those reports assessed the appellant as being unsuitable for participation in either the Mental Health Diversion Program or for management in the Drug Court Program.[441]

The representation of appellants' as passivated when outlining *initial* commencement in the program shows the appeal courts acknowledging the role of legal coercion to initiate program participation, the first step towards recovery from drug dependence. The use of coercion in drug

428 *Crockford v AMC & Anor* [2008] SASC 62, [20].
429 *Madden v Police* [2005] SASC 304, [21].
430 *Monterola v Police* [2009] SASC 42, [3]; *Parsons v Police* [2008] SASC 339, [13]; *Andreasen v Police* [2004] SASC 255, [4]; *Reed v Police* [2007] SASC 26, [28]; *Richards v Police* [2007] SASC 368, [25]; *Robson v Police* [2007] SASC 395, [4]; *Police v B,WR* [2005] SASC 163, [9]; *Roberts v Police* [2013] SASC 117, [6]; *Hughes v Police* [2012] SASC 183, [5]; *Police v Bieg* [2008] SASC 261, [7]; *R v Place* [2002] SASC 101, [97].
431 *R v Pumpa* [2013] SADC 157, [33]: This is a decision of the District Court on an application that the accused not be sentenced as a serious repeat offender under section 20B(a1) of the *Criminal Law (Sentencing) Act 1988* (SA); *Kells v Police* [2007] SASC 224, [3].
432 *Ryan v Police* [2003] SASC 108, [9]; *Lawrie v DPP* [2008] SASC 21, [6]; *R v Caplikas* [2002] SASC 258, [66].
433 *Monterola v Police* [2009] SASC 42, [3]; *Crockford v AMC & Anor* [2008] SASC 62, [20]; *Police v Bieg* [2008] SASC 261, [7].
434 [2009] SASC 42.
435 *Monterola v Police* [2009] SASC 42, [3].
436 Ibid.
437 Ibid.
438 Ibid.
439 [2005] SASC 304.
440 Ibid [19]: The appellant was also determined not suitable for referral to the Mental Health Diversion Program.
441 Ibid.

courts to get offenders into treatment and for keeping them in treatment is evident in literature.[442] Coercion to respond to treatment is justified by research indicating the effectiveness of treatment when combined with criminal justice sanctions,[443] research suggesting coerced treatment can achieve the same results as voluntary treatment[444] and research suggesting treatment for drug dependence can

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442 See especially Michael Hough, *Drugs Misuse and the Criminal Justice System: A Review of the Literature,* Home Office Paper 15 (Home Office, London, 1996), 35 citing M Douglas Anglin and Yih-Ing Hser, 'Legal Coercion and Drug Abuse Treatment: Research Findings and Policy Implications' in James A Inciardi (ed), *Handbook of Drug Control in the United States* (Greenwood, Westport, 1990): In relation to "treatment and coercion" Hough found: '… the majority of findings, including those from the best-designed studies, suggest that clients receiving legally coerced treatment respond no worse than others. Legal coercion seems to be an effective way first of getting drug misusers into treatment early and, secondly, of keeping them there', at 35; David Farabee, Michael Prendergast and M Douglas Anglin, 'Effectiveness of Coerced Treatment of Drug-Abusing Offenders' (1998) 62(1) *Federal Probation* 3: who reviewed 11 published studies on the relationship between criminal justice referrals for drug-abusing offenders and treatment outcomes. The findings of these studies were varied yet supported coercive measures as increasing the likelihood of offenders remaining in treatment, at 7. See Steven Belenko, 'Research on Drug Courts: A Critical Review' (1998) 1(1) *National Drug Court Institute Review* 1, 4; Sally L Satel, *Drug Treatment: The Case for Coercion* (American Enterprise Institute Press, USA, 1999), 1. See also Tiger, above n 187; Huddleston, Freeman-Wilson and Boone, above n 425, 3; Warner and Kramer, above n 38, 91; Hora, Schma and Rosenthal, above n 46, 475-6; Joula Dekker, Kate O'Brien and Nadine Smith, *An Evaluation of the Compulsory Drug Treatment Program (CDTP)* (NSW Bureau of Crime Statistics and Research, NSW, 2010); Longshore et al, above n 38; Lurigio, above n 38; William H McGlothlin 'Criminal Justice Clients' in Robert I DuPont, Avram Goldstein and John O'Donnell (eds), *Handbook on Drug Abuse* (National Institute on Drug Abuse (NIDA), USA, 1979), 203; M Douglas Anglin, Mary-Lynn Brecht, and Ebrahim Maddahian, 'Pre-treatment Characteristics and Treatment Performance of Legally Coerced versus Voluntary Methadone Maintenance Admissions' (1989) 27(3) *Criminology* 537; Warner and Kramer, above n 38, 91; Francis X Baird and Arthur J Frankel, 'The Efficacy of Coerced Treatment for Offenders: An Evaluation of Two Residential Forensic Drug and Alcohol Treatment Programs' (2001) 34(1) *Journal of Offender Rehabilitation* 61.

443 Carl G Leukefeld and Frank Tims, 'An Introduction to Compulsory Treatment for Drug Abuse: Clinical Practice and Research' in Carl G Leukefeld and Frank Tims (eds), *Compulsory Treatment for Drug Abuse: Research and Clinical Practice,* Monograph Series 86 (National Institute on Drug Abuse Research, USA, 1988), 1. See also M Douglas Anglin and Yih-Ing Hser, 'Criminal Justice and the Drug-Abusing Offender: Policy Issues of Coerced Treatment' (1991) 9 *Behavioural Sciences and the Law* 243, 247, 253; Hough, above n 442, 35; M Douglas Anglin, 'The Efficacy of Civil Commitment in Treating Narcotic Addiction' in Carl G Leukfield, and Frank M Tims (eds), *Compulsory Treatment of Drug Abuse: Research and Clinical Practice,* Research Monograph No 86 (National Institute on Drug Abuse, 1988); Frederick Rotgers, 'Coercion in Addictions Treatment' (1992) *Annual Review of Addictions Research and Treatment* 403, 409; A Uchtenhagen et al 'Evaluation of therapeutic alternatives to imprisonment for drug-dependent offenders. Findings of a comparative European multi-country study' (2008) 10(2) *Heroin Addiction and Related Clinical Problems* 5, 9; Alex Stevens et al, 'The Relationship between Legal Status, Perceived Pressure and Motivation in Treatment for Drug Dependence: Results from a European Study of Quasi-Compulsory Treatment' (2006) 12 *European Addiction Research* 197; Karen K Parhar et al, 'Offender Coercion in Treatment: A Meta-Analysis of Effectiveness' (2008) 35(9) *Criminal Justice and Behavior* 1109, 1109.

444 See, eg, Hough, above n 442, 5; Anglin and Hser, above n 442; Makkai, above n 24, 2; Leukefeld and Tims, above n 443; Satel, above n 442, 2-3: According to Satel, '… evidence shows that addicts who get treatment through court order or employer mandates benefit as much as, and sometimes more than, their counterparts who enter treatment voluntarily'; Huddleston, Freeman-Wilson and Boone, above n 425, 4: Huddleston et al compiled a report for the National Drug Court Institute on drug court research. They reviewed four national studies which included patients in treatment who had been 'court ordered or otherwise mandated' into a drug treatment program. They conclude: 'Two major findings emerged. First, the length of time a patient spent in treatment was a reliable predictor of his or her post-treatment performance. Second, coerced patients tended to stay in treatment longer than their "non-coerced" counterparts. In short, the longer a patient stays in drug treatment, the better the outcome', at 4. See also D D Simpson and S J Curry (eds), 'Special Issue: Drug Abuse Treatment Outcome Study (DATOS)' (1997) 11(4) *Psychology of Addictive Behaviors* 211; D D Simpson and S B Sells, 'Effectiveness of Treatment for Drug Abuse: An Overview of the DARP Research Program' (1983) 2 *Advances in alcohol and substance abuse* 7; Hubbard et al, *Drug Abuse Treatment: A National Study of Effectiveness* (University of North Carolina Press, USA, 1989); Center for Substance Abuse Treatment, *National Treatment Improvement Evaluation Study,*

reduce drug related crime.[445] Investigation of how the appeal court uses information about or suggesting coercion to construct representations of the participant/appellant is important because legal coercion is an important component of drug court treatment practice. In contrast, the appeal court may use information suggesting legal coercion in a different context to inform the sentencing and appeal outcome.

A Choosing to Enter the Program

"Coercion" is a term '… used more or less interchangeably with "compulsory treatment", "mandated treatment", "involuntary treatment", "legal pressure into treatment" [and] refers to an array of strategies that shape behaviour by responding to specific actions with external pressure and predictable consequences'.[446] Compulsory and coerced treatment are distinct concepts. Compulsory treatment occurs when 'the individual is forced to enter treatment primarily as a result of a direct legal order, that is, either a civil commitment or an order disposing of a criminal case'.[447] This includes pre-sentence drug court programs where participation forms part of the sentence. On the other hand, coerced treatment enables individuals to choose either treatment for drug dependence or legal sanctions.[448] Coerced treatment also offers a reduction in sentence to participants who successfully

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Preliminary Report: Persistent Effects of Substance Abuse Treatment – One Year Later (US Department of Health and Human Services, USA, 1996); Wayne Hall, 'The Role of Legal Coercion in the Treatment of Offenders with Alcohol and Heroin Problems' (1997) 30 *The Australian and New Zealand Journal of Criminology* 103: Hall reviewed American research into the effectiveness of legal coercion in treating drink-driving offenders and heroin dependent property offenders. Hall found 'there is reasonable evidence that all major forms of community based treatment for heroin dependence are effective in reducing heroin use and crime, regardless of whether they are provided under 'legal pressure' or not', at 113. This statement was made with particular reference to methadone maintenance treatment, therapeutic communities and out-patient counselling, rather than court based drug programs. Hall concludes that 'the research literature on the effectiveness of drug treatment under legal coercion probably provides an optimistic assessment of its likely effectiveness under contemporary conditions in our over-crowded and under-resourced criminal justice and treatment systems', at 114. Furthermore, '… the effectiveness of legally coerced treatment will be impaired if such programs are poorly resourced and managed, and if they are driven by unrealistic expectations of what can be achieved', at 114.

445 Hough, above n 442, 5; Makkai, above n 24, 4-5; Richard S Gebelein, *The Rebirth of Rehabilitation: Promise and Perils of Drug Courts, Sentencing and Corrections: Issues for the 21st Century* (National Institute of Justice, USA, 2000), 3. See also Robert L Hubbard et al, 'The Criminal Justice Client in Drug Abuse Treatment' in Carl G Leukefeld and Frank Tims (eds), *Compulsory Treatment for Drug Abuse: Research and Clinical Practice*, Monograph Series 86 (National Institute on Drug Abuse Research, USA, 1988), 57.

446 Huddleston, Freeman-Wilson and Boone, above n 425, 4.

447 Stefanie Klag, Frances O'Callaghan and Peter Creed, 'The Use of Legal Coercion in the Treatment of Substance Abusers: An Overview and Critical Analysis of Thirty Years of Research' (2005) 40 *Substance Use & Misuse* 1777, 1778.

448 Ibid.

complete the program.[449] This includes post sentence programs where a sentence is imposed upon program completion, such as the SA drug court. The application of legal pressure — whether compulsory or coerced — to encourage offenders into drug treatment so that deviant behaviours can be addressed is a form of disciplinary power (and normative process) in action because both types of legal pressure initiate entry into drug treatment. Coercion to enter the program is the beginning of the process of coercion towards transformation sought by the drug court.

Coercion into treatment and during treatment is important to drug court practice. It provides incentives for participants to enter and to engage in the normative recovery goals of the program. Coercion responds to deviant attitudes and behaviours and forms an intricate part of the process of normalisation that occurs in drug courts. The appeal decisions discussed above, suggest the appeal courts discursively represented some participants as passivated (subject to process or the actions of others) when commencing the program.

In contrast, cases discussed in the next section show the appeal courts discursively representing other participant/appellants as activated (responsibilised) for commencing the program. Representation of participant/appellants as activated or passivated when commencing the program partly justified characterisations of the participant/appellant as making or failing to make positive steps towards recovery which informed the sentencing/appeal outcome. In particular, the appeal courts in limited decisions represent the appellant's commencement in the program as a positive active step towards recovery that was initiated by the participant's themselves, despite subsequent failure in the program. In other findings the appeal courts specifically identify voluntary withdrawal from the program in circumstances where the potential for a suspended sentence of imprisonment for

449 Ibid 1779 citing David Farabee and Carl G Leukefeld, 'Recovery and the criminal justice system' in Frank M Tims, Carl G Leukefeld and Jerome J Platt (eds), *Relapse and Recovery in Addictions* (Yale University Press, USA, 2001), 40; Norman S Miller and Joseph A Flaherty, 'Effectiveness of coerced addiction treatment (alternative consequences): a review of the clinical research' (2000) 18(1) *Journal of Substance Abuse Treatment* 9; Carey, Finigan and Pukstas, above n 186, 23, 27, 28. See also Adele Harrell and John Roman, 'Reducing Drug Use and Crime among Offenders: The Impact of Graduated Sanctions' (2001) 31(1) *Journal of Drug Issues* 207, 217.

successful completion was to be denied. These findings are important because these appellants may have entered the program expecting to receive a suspended sentence of imprisonment for successfully completing the program. These appeal decisions and other findings related to legal coercion to commence the program are discussed below.

This first section explores how some appeal decisions revealed or suggested legal coercion may have motivated some participants to enter the program through constrained choice between continued remand in custody or treatment in the community, and a reduction in sentence. It is through constrained choice that drug court participants were motivated to initiate engagement in the normative process of the program.

1 Custody vs Treatment in the Community

The South Australian program treats middle to hard end recidivist offenders. A requirement for acceptance into that program is the applicant must be facing a sentence of imprisonment of two years or more.[450] 10 appeal decisions indicate the appellant was in custody before starting the program.[451] Other appellants were likely in custody, however, that is not clearly indicated in the decision. For those appellants in custody before applying for the program it is possible bail had been refused by the courts previously. Participation in the program in those circumstances has the incentive of release back into the community, rather than serving a sentence of imprisonment. This is consistent with research suggesting an opportunity for drug treatment and avoidance of imprisonment is a powerful motivator to apply for participation in the program.[452] Four appeal decisions include discourse

450 This is based on my experience representing clients in that court. This requirement appears to have been adjusted to 'charged with an offence that is related to their drug use (but not necessarily a drug offence), for which they are likely to be imprisoned': See Courts Administration Authority <www.courts.sa.gov.au/OurCourts/Magistrates Court/Intervention Programs/Pages/Drug-Court.aspx> (last viewed 5 December 2014).

451 *Chandler v Police* [2002] SASC 130, [11]; *R v Gasmier* [2011] SASCFC 43, [13]-[14]; *Ashton v Police* [2008] SASC 174, [7]; *Lawrie v DPP* [2008] SASC 21, [6]; *Crockford v Adelaide Magistrates Court & Anor* [2008] SASC 62, [18]-[20]; *Monterola v Police* [2009] SASC 42, [3]; *Parsons v Police* [2008] SASC 339, [20], [32]; *Police v Bieg* [2008] SASC 261, [7]; *Hughes v Police* [2012] SASC 183, [5(2)]; *R v Caplikas* [2002] SASC 258, [66].

452 Eley et al, above n 391, 33, 34; Andrew Fulkerson, Linda D Keena and Erin O'Brien, 'Understanding Success and Nonsuccess in the Drug Court' (2013) 57(10) *International Journal of Offender Therapy and Comparative Criminology* 1297, 1305; Gemma Kothari, John Marsden and John Strang, 'Opportunities and Obstacles for Effective Treatment of Drug Misusers in the Criminal Justice System in England and Wales' (2002) 42 *British Journal of Criminology* 412, 416; Carey, Finigan and Pukstas, above n 186.

representing the appellant as activated (responsibilised) for commencing the program. In *Chandler*[453] Michelle "entered" the program;[454] in *Ketoglou v Police*[455] (*Ketolou*) Simela Ketoglou "participated" in the program;[456] in *Police v Van Boxtel*[457] (*Van Boxtel*) Joseph Van Boxtel "commenced" the program;[458] and in *R v Gasmier*[459] (*Gasmier*) Shane Gasmier "made an application" for participation in the program.[460] Representation as activated to commence the program suggests the appeal courts acknowledged appellants' actively seeking to participate in the program. This suggests the participant/appellant initiated a positive step towards recovery. In *Chandler*[461] and *Parsons*[462] the appeal courts go further by explicitly acknowledging those appellants (who were in custody before the program) had actively sought to address their drug dependence, despite failure in the program: 'the appellant had a commitment to change of attitude and lifestyle';[463] '… he applied for, and was accepted into, the Drug Court Program, which demonstrates a genuine desire on his part to change his life. As it turned out that failed'.[464] These findings suggest the appeal courts have considered commencing the program to be a positive step towards recovery, in spite of the coercion to enter the drug court, and this has been taken into account during the sentencing/appeal process.

2 Reduction in sentence

According to Deputy Chief Magistrate Cannon from the SA drug court:

> In the Drug Court model in Australia a degree of paternalistic coercion is used. Defendants do volunteer, but they are only selected if they face an immediate term of imprisonment, and the threat is that it will be imposed if they do not comply with the program. If they graduate in the South Australian model the imprisonment is suspended. In some States the imprisonment is imposed but suspended for as long as they are successful in the drug court program. This coercion is a core feature of Drug Court …[465]

453 *Chandler v Police* [2002] SASC 130.
454 Ibid [11].
455 [2008] SASC 243.
456 Ibid [11]. In addition, *Lawrie v DPP* [2008] SASC 21, [6] also "participated".
457 [2013] SASC 82.
458 Ibid [25].
459 [2011] SASCFC 43.
460 Ibid.
461 *Chandler v Police* [2002] SASC 130.
462 *Parsons v Police* [2008] SASC 339.
463 *Chandler v Police* [2002] SASC 130, [15].
464 *Parsons v Police* [2008] SASC 339, [64].
465 Cannon, above n 24, 132.

Legal coercion operates through the incentive of a possible reduction in sentence, including a suspended sentence for successfully completing the program. Carey et al, however, suggest programs that sentence in advance of participation in the program likely 'prevent more punitive … sentences when participants fail'.[466] This finding is not the focus of this research project, however, the observation that sentencing practices vary for participants who fail the program is relevant because at least 11 appeal decisions are about participants who failed the program. Those 11 appellants clearly had their program terminated.[467] Furthermore, the grounds of appeal in some appeal decisions argued for credit for guilty pleas (a requirement to enter the program),[468] home detention bail[469] and time in custody[470] (accrued during the program through program requirements and sanctions). Other appeals argued there had been insufficient weight afforded to rehabilitation and whether or not to suspend the sentence based on program participation in the original sentencing process.[471] These factors if taken into consideration would produce a reduction in sentence.

For participants facing a sentence of imprisonment, a potential reduction in sentence could be a powerful motivator for change. The coercive power of a reduced sentence (in the context of sentencing and diversion courts) was recognised by Gray J in *R v McMillan*[472] who stated '[i]f satisfactory progress is made then the "criminal proceedings" may be discontinued or alternatively a lesser penalty may be imposed than would otherwise have been after the period of treatment has been

466 Carey, Finigan and Pukstas, above n 186, 29.

467 *Parsons v Police* [2008] SASC 339, [37]; *Hughes v Police* [2012] SASC 183, [5]; *Crockford v Adelaide Magistrates Court & Anor* [2008] SASC 62, [45]; *Andreasen v Police* [2004] SASC 255, [4]; *Roberts v Police* [2013] SASC 117, [6]; *Police v Van Boxtel* [2013] SASC 82, [25]; *Kells v Police* [2007] SASC 224, [3]; *Police v B, WR* [2005] SASC 163, [12]; *Lawrie v DPP* [2008] SASC 21, [6]; *Robson v Police* [2007] SASC 395, [5]; *Police v Bieg* [2008] SASC 261, [7]: details excluded. In these appeal decisions, the appeal court has clearly stated that the appellant's participation in the program was terminated. There are other decisions, where time in the program ended, however it is not clear whether or not the program was formally terminated: See, eg, *Richards v Police* [2007] SASC 368; *Ashton v Police* [2008] SASC 174; *Field v Police* [2009] SASC 354, [16]; *Ryan v Police* [2003] SASC 108; *Ketoglou v Police* [2008] SASC 243, [30]: did not complete 12 months in the program.

468 *Parsons v Police* [2008] SASC 339, [51]-[65]; *Lawrie v DPP* [2008] SASC 21, [14]-[15], [28].

469 *Kells v Police* [2007] SASC 224, [6]-[8]; *Parsons v Police* [2008] SASC 339, [45]-[50]; *Lawrie v DPP* [2008] SASC 21, [14]-[15], [28].

470 *Parsons v Police* [2008] SASC 339, [45]-[50]; *Chandler v Police* [2002] SASC 130, [8].

471 *Chandler v Police* [2002] SASC 130; *Monterola v Police* [2009] SASC 42; *Ashton v Police* [2008] SASC 174; *Reed v Police* [2007] SASC 26; *Robson v Police* [2007] SASC 395; *Parsons v Police* [2008] SASC 339, [66].

472 (2002) 81 SASR 540.

effectively undertaken'.[473] Analysis found discourse suggesting consideration of a reduction in sentence in two contexts: 1) a reduced sentence as an incentive to enter the program; 2) varied circumstances (including participants who did not successfully complete the program) where a reduced sentence was or was not imposed. Consideration of a reduction in sentence by the appeal court was partly informed through information from the drug court and other sources of information ie outstanding parole, seriousness of the offending and support in the community.

In three appeal decisions, withdrawal from the program was characterised by the sentencing and appeal courts as having been "voluntary". Those appellants withdrew when it appeared inevitable they would be sentenced to serve an immediate term of imprisonment upon program completion. This suggests some participants no longer had the incentive of a reduced sentence operating as coercion to remain in the program. In *Chandler*[474] Michelle withdrew '[u]pon discovering that she would have to serve nearly seven years of the unexpired portion of her parole'.[475] In *Reed*[476] Michael withdrew after a relapse into drug use and allegations of 'an altered medical certificate'.[477] This was considered by the appeal court as 'simply bowing to the inevitable, as he was failing in regard to his attendance at that programme'.[478] This suggests had Michael not withdrawn, the program would have been terminated. In *Place*[479] Mr Place is represented as passivated in the decision to withdraw from the program: it was '... always known [details excluded] that even a successful completion to the drug counselling would still see [him] in prison for these offences'.[480] It was agreed [details excluded] that Mr Place would leave the program 'in light of that pressure and [his] then recent behaviour'.[481] In these appeal decisions, the appeal court represents the potential for suspension of a sentence of imprisonment as diminished, and subsequently each participant chose to withdraw from the program.

473 Ibid [60].
474 *Chandler v Police* [2002] SASC 130.
475 Ibid [12].
476 *Reed v Police* [2007] SASC 26.
477 Ibid [28].
478 Ibid [31].
479 *R v Place* [2002] SASC 101.
480 Ibid [97].
481 Ibid.

Michelle and Mr Place voluntarily withdrew from the program when a sentence of imprisonment became the inevitable penalty. Michael withdrew following breaches of program conditions, perhaps simply pre-empting removal from the program.

In one appeal, *Monterola*[482] Rex Monerola graduated from the program.[483] The sentencing magistrate took into account the efforts Rex made while in the program,[484] the fact Rex did not commit similar dishonesty offences[485] and abstinence from drug use for extended periods but nevertheless imposed a sentence of immediate imprisonment.[486] The appeal court considered the drug court reports as 'in the main positive and indicate that the appellant was endeavoring to resolve his drug problems and had recognised the detrimental effects that drugs and consequent offending had on his lifestyle'.[487] Despite this assessment about progress in the program, Rex received a sentence of immediate imprisonment when sentenced by the drug court and also later on appeal.[488] This was based on an assessment of Rex's criminal history and previous breaches of suspended sentences making him 'an unlikely candidate for suspension of sentence, notwithstanding his completion of the Drug Court program'.[489] In recognition of Rex's progress in the program, the appeal court reduced the non-parole period (the period of imprisonment to be served) to make 'allowance for the appellant's progress towards rehabilitation'.[490]

Monterola raises issues when considering how a reduction in penalty acts as an incentive to enter and then perform well in the program, this incentive being part of the normative approach adopted by drug courts. To graduate a participant, then sentence them to a term of immediate imprisonment undoes the achievements gained through treatment in the community as well as undermines any "internal adjustments" made on the path to recovery. A similar concern was posited

482 *Monterola v Police* [2009] SASC 42.
483 Ibid [3], [6], [7].
484 Ibid [6].
485 Ibid [8].
486 Ibid.
487 Ibid [18].
488 Sentencing considerations are explored further in Chapter Five.
489 [2009] SASC 42, [22].
490 Ibid [18].

by Gray J in *Thompson*[491] when considering deferral of sentencing to allow for rehabilitation in the community:

> The requirement that there be a real expectation founded upon solid grounds and not mere sentimentality that such reform is likely to occur cannot be over emphasised. The prospect of failure and subsequent imprisonment has the very real potential to leave an offender with a justifiable sense of grievance, an outcome to be avoided. There is also the prospect of a sentence ultimately being imposed after failure to demonstrate a capacity to reform, and reform resulting in the imposition of a greater penalty that may otherwise be the case.[492]

In three appeal decisions, the appeal court clearly states the appellant received none or very little credit for their poor participation in the program. In *Andreasen v Police*[493] (*Andreasen*) Steven Daniel Andreasen has a history of dishonesty offences related to his drug dependence. He participated in the program for a short period and it appears he may have absconded. Steven failed to meet attendance reporting requirements [details excluded] and his participation was terminated.[494] The sentencing magistrate concluded, '[i]n my view after reviewing your involvement in the Drug Court program there is no proper basis for any further reduction or suspension of the sentence of imprisonment'.[495] In *Kells v Police*[496] (*Kells*) Stephen Richard Kells, 30 years of age, had his participation in the program terminated due to further offending.[497] Stephen did not receive a discount for time spent on home detention bail (possibly as a condition of his time in the program).[498] The appeal court considers such a discount as discretionary and no error had been made in the sentence.[499] In *Van Boxtel*[500] Joseph Van Boxtel's program was terminated for failing to participate in a urine test, removal of the home detention monitoring bracelet and his arrest for further offences while in the program.[501] The appeal court concludes, '[t]he grounds upon which any leniency could be extended

491 *R v Thompson* [2012] SASCFC 149.
492 Ibid [34].
493 [2004] SASC 255.
494 Ibid [4].
495 Ibid [6].
496 [2007] SASC 224.
497 Ibid [3].
498 Ibid [6].
499 Ibid [8].
500 *Police v Van Boxtel* [2013] SASC 82.
501 Ibid [25].

were limited, especially as the respondent was not being sentenced after a successful completion of a Drug Court program'.[502]

In four appeal decisions the appellant did not successfully complete the program, yet received either recognition for progress towards recovery or more lenient sentences based on factors other than drug court participation. In *Ashton v Police*[503] (*Ashton*) Jason Wayne Ashton completed 12 months in the program, but relapsed prior to graduation. The sentencing magistrate imposed an immediate term of imprisonment because Jason relapsed into drug use at the end of the program. The magistrate did impose a lesser head sentence and non-parole period to reflect gains made while in the program.[504] In *B, WR*[505] the sentencing magistrate noted if Mr B had been sentenced earlier, the court would likely have imposed a suspended sentence of imprisonment because of substantial progress towards rehabilitation.[506] Instead, Mr B's program was terminated due to re-offending and this deprived 'him of the possible benefits attributable to a successful completion of the program'.[507] The appeal court, however, suspended the sentence because '[t]here were and are good prospects of rehabilitation, which prospects will be reduced if he is to be imprisoned again'.[508] This decision took into consideration assistance provided to police.[509] In *Lawrie v DPP*[510] (*Lawrie 1*) Nigel Thomas Lawrie, an Aboriginal man, aged 24 participated in the program for eight months. Nigel had been in a relationship with a woman for eight years and had three children under six years of age. Nigel's program was terminated for breaching home detention bail.[511] At the time he failed the program, he was attending an inquest into a death in custody involving his cousin. When suspending the sentence of imprisonment, the sentencing magistrate considered 'the appellant does have the potential for rehabilitation notwithstanding the frequency of his offending and had arrived at a point in his life

502 Ibid [35].
503 [2008] SASC 174.
504 Ibid [14].
505 *Police v B, WR* [2005] SASC 163.
506 Ibid [9].
507 Ibid.
508 Ibid [29].
509 Ibid.
510 [2008] SASC 21.
511 Ibid [6].

where he could embark upon a process of genuine redemption'.[512] In *Parsons v Police*[513] (*Parsons*) Sam Benjamin Parsons' program was terminated due to non-compliance with program conditions.[514] On appeal, the sentence of imprisonment was suspended on the grounds Sam had served 10 months in custody[515] and had a relationship with a young woman who was opposed to drug taking.[516]

The variation in sentencing approach evident in the appeal decisions above, appears consistent with Carey et al who found significant variance in the sentencing practices across programs in the United States for participants who failed the program.[517] Their concern was a frequent finding that participants failing the program received longer periods of imprisonment than similar offenders not eligible for the program.[518] In contrast to the findings of Carey et al, with the exception of *Monterola*, the appeal decisions outlined above are about participants who did not successfully complete the program. However, in *Ashton, B, WR, Lawrie* and *Parsons* the appeal courts nevertheless constructed the participant/appellant discursively as having made some progress towards recovery. This justified a reduction in sentence or a suspended sentence of imprisonment. This sentencing approach is consistent with the use of coercion by drug courts to get participants into the program through the incentive of a reduction in sentence. Furthermore, the findings show how participants who do not complete the program may be considered to have made remarkable progress in some areas of their lives and receive a suspended sentence of imprisonment or a reduction in the sentence.

IV LEGAL COERCION DURING THE PROGRAM

Belenko asserts that drug courts 'provide more comprehensive and closer supervision of the drug-using offender than other forms of community supervision'.[519] This is attributed to high levels of

512 Ibid [8].
513 [2008] SASC 339.
514 Ibid [13].
515 Ibid [78].
516 Ibid [69], [79].
517 Carey, Finigan and Pukstas, above n 186, 28.
518 Ibid 29.
519 Belenko, above n 442, 21. See also Steven Belenko, 'Research on Drug Courts: A Critical Review 1999 Update' (1999) *National Drug Court Institute Review* 1; William M Burdon, John M Roll, Michael L Prendergast and Richard A Rawson, 'Drug Courts and Contingency Management' (2001) 31(1) *Journal of Drug Issues* 73, 77; Burke, above n 186, 48.

judicial engagement in the management and supervision of participants. Judicial officers monitor participant progress through team meetings and written reports. They use this information during court hearings when dealing directly with the participant.[520] Judicial involvement means that '[t]he coercive power of the court is used to encourage success and compliance with treatment goals'.[521] Discourse related to judicial involvement during program participation was located in some appeal decisions (outlined below). This information was used by the appeal court to assess whether or not the appellant could be considered successful in becoming the law-abiding citizen.

A Judicial Involvement

An overview of the appeal decisions indicates reliance on the sentencing remarks in the lower court as a source of information about progress or non-progress in the program, rather than progress reports or other sources of information from the drug court. Only five decisions — *Van Boxtel*,[522] *Crockford v AMC & Anor*[523] (*Crockford*), *Chandler*,[524] *Ashton*[525] and *Monerola*[526] — include discourse directly sourced from the drug court other than the sentencing remarks. All the appeal decisions rely on discourse from the sentencing remarks either directly quoted or recontextualised into the body of the appeal decision as a source of information about progress or non-progress during the program. More reliance on sentencing remarks from the drug court and less reliance on other sources of information ie drug court reports as a source of information about participant progress suggests recognition by the

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520 Carey, Finigan and Pukstas, above n 186, 58-9. See also Burke, above n 186, 41; Gill McIvor, 'Therapeutic Jurisprudence and Procedural Justice in Scottish Drug Courts' (2009) 9(1) *Criminology & Criminal Justice* 29, 35.

521 Hora, Schma and Rosenthal, above n 46, 475. See also Laura Sian Cresswell and Elizabeth Piper Deschenes, 'Minority and Non-Minority Perceptions of Drug Court Program Severity and Effectiveness' (2001) 31(1) *Journal of Drug Issues* 259, 260.

522 *Police v Van Boxtel* [2013] SASC 82: A drug court progress report dated 12 November 2012, at [25] and an Eligibility Assessment Report dated 14 August 2012, at [26]. Also considered was a Magistrates Court Diversion Program Final Report dated 3 February 2012, at [23].

523 [2008] SASC 62: The court was provided with a number of affidavits and exhibits from the solicitors who represented the plaintiff in the drug court and from the drug court prosecutors. These exhibits include all progress reports and a progress addendum report, at [21], [22], [24], [28], [35].

524 *Chandler v Police* [2002] SASC 130: A report from the Senior Community Corrections Officer with the Drug Court, at [13].

525 *Ashton v Police* [2008] SASC 174: A Drug Court Progress Report – Final Report dated 14 March 2008, Exhibit "A" attached to the Affidavit of D Misell, 2 May 2008.

526 *Monerola v Police* [2009] SASC 42: A Drug Court Final Report, Exhibit YJAM 15 to the McMahon affidavit, at [4]. A Drug Court Assessment Report, Exhibit YJAM 1 to the McMahon affidavit, at [5]. Drug court progress reports, contained in YJAM 2 to McMahon affidavit, at [18].

appeal courts of judicial involvement in monitoring participants and the distinctive role of drug court magistrates in sentencing participants upon program completion. Judicial involvement is linked with coercion during the program to keep participants in treatment. The use of coercion during the program by the drug court magistrate is to encourage program compliance and progress towards recovery. Much treatment information is generated to inform the drug court magistrate about each participant's day-to-day progress, and this information is then used by the drug court magistrate to coerce participant investment in the program through praise and admonishments, excuse testing, rewards and sanctions.

In two appeal decisions, judicial involvement was explicitly acknowledged. In *Reed*[527] the appeal court recontextualised submissions made by prosecution:

> On the critical issue of rehabilitation, the Magistrate gave consideration to the appellant's performance on the Drug Court programme and to his history of offending. … the Magistrate had considerable knowledge of the appellant's performance on the Drug Court programme as she had been involved in aspects of his monitoring.[528]

In *Van Boxtel*[529] the appeal court states:

> … the Magistrate's approach to sentencing of the respondent was influenced, to an extent, by the fact he was sitting in the Drug Court and that, prior to sentencing, the respondent had been subject to supervision by that Court. It is preferable for the respondent to be re-sentenced in that same context.[530]

The appeal decisions include discourse demonstrating direct judicial interaction with participants, through praise and admonishments, excuse testing, and the use of rewards and sanctions. This information was used by the appeal courts to construct representations of the participant/appellant as either making progress or failing to make progress towards recovery which then partly informed the appeal decision.

527 *Reed v Police* [2007] SASC 26.
528 Ibid [29].
529 *R v Van Boxtel* [2013] SASC 82.
530 Ibid [63].

1 Direct interaction

Judicial involvement in the supervision and management of participants through direct interaction with the participant in court is a key aspect of drug courts.[531] Judicial interaction with participants is central to achieving the normative goals of the program. One appeal decision, *Ashton*[532] yielded findings of the magistrate supervising, monitoring and encouraging progress through the incentive of a suspended sentence. The appeal court outlines how the appellant Jason attended his final review and was told by the drug court magistrate that he would graduate from the program and receive a suspended sentence if there is a good report on the next occasion.[533] This provides an example of how constrained choice generated by the drug court places responsibility for consequences of the decision on the participant with the aim to trigger or enhance investment on the part of the participant in the normative goals of the program.[534] The appeal court acknowledges that Jason was offered the choice of a suspended sentence or an immediate sentence of imprisonment by the drug court. Before the graduation and sentencing date,[535] Jason was called back to the drug court for an additional review before the magistrate due to positive urine test results.[536] At that hearing his matter was relisted for sentencing (not graduation) a few days later.[537] The sentencing remarks (directly quoted) show the magistrate continuing to address Jason about his progress in the program: '<u>Yours</u> <u>has been an unusual journey</u> in that <u>you had done very very well</u> on the programme <u>for the first 6 months or so</u>';[538] and '[n]oting <u>the many plusses</u> that <u>you have gained</u> along the way'.[539]

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531 Office of Justice Programs, above n 54, 15. See, eg, McIvor, above n 520, 35; Burdon et al, above n 519, 74; Carey, Finigan and Pukstas, above n 186, 54, 59; Eley et al, above n 391, 53. See also John S Goldkamp, 'Judicial "Hands On" in Drug Courts: Moving from Whether to How Drug Courts Work' (Paper presented at the 1st Key Issues Conference of the International Societies of Criminology, Paris, May 2004) as cited in McIvor, above n 520, 35: Goldkamp found lower levels of recidivism where participants had high levels of contact with the same judge.

532 *Ashton v Police* [2008] SASC 174.

533 Ibid [11].

534 See, eg, Burns and Peyrot, above n 115, 423.

535 *Ashton v Police* [2008] SASC 174, [11].

536 Ibid.

537 Ibid.

538 Ibid [14].

539 Ibid.

2 Praise and admonishments

Wexler suggests that law-abiding behaviours are encouraged through judicial praise.[540] In the appeal decision above, Jason was praised for performing well throughout most of the program.[541] In *Ashton* the magistrate admonished Jason for drug use: '… a gradual slide occurred, which was almost like a death wish that you imposed upon yourself'.[542] Drug court staff expressed concern about a high reading for a urine test. The magistrate states, 'I have heard some figures from the clinical staff regarding a very recent use of amphetamines by you. The amount taken by you was extremely and dangerously high and I am certain would have been of some considerable danger to your health'.[543]By recontextualising the direct interactions that occurred between the magistrate and Jason, the appeal court represents Jason as failing the program due to drug use despite further opportunities to demonstrate recovery and receive a suspended sentence. This subsequently informs the sentencing/appeal decision. Similar findings of admonishments were in *Crockford*[544] where the drug court magistrate threatened removal from the program to encourage progress: '[should] any problems [arise], then the plaintiff's matter would be listed for a termination argument';[545] 'if the plaintiff appeared on a future occasion … and there was a repeat of this type of behavior … the plaintiff would be 'off the program''.[546] This interaction which occurred in the drug court is now used by the appeal court to construct a representation of the appellant's behaviour during the program.

3 Excuse testing

Rehabilitation through judicial involvement can occur through desistance narratives in court which assist offenders to describe, explain and make sense of their lives.[547] "Explanatory narratives" by participants are considered to occur alongside desistance behaviour and the process of explaining can

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540 Wexler, above n 152. See, eg, McIvor, above n 520, 39.
541 [2008] SASC 174, [14].
542 *Ashton v Police* [2008] SASC 174, [14].
543 Ibid.
544 *Crockford v Adelaide Magistrates Court & Anor* [2008] SASC 62.
545 Ibid [33].
546 Ibid.
547 David B Wexler, 'Robes and Rehabilitation: How Judges Can Help Offenders "Make Good"' (2001) 38(1) *Court Review* 18, 20: outlining research conducted by Maruna into desistance narratives. See Shadd Maruna, *Making Good: How Ex-Inmates Reform and Rebuild Their Lives* (American Psychological Association, 2001); McIvor, above n 520, 42.

help to sustain desistance.[548] Burns and Peyrot, for example, observed judicial officers translating excuses (explanatory narratives) as either '… that of a person who can benefit from his mistakes, move forward and take responsibility, or someone who is essentially unchanged, a manipulative addict who lacks self-control and the personal motivation for recovery'.[549] These alternative translations depended on 'whether or not the person admits that he or she is in need of help'.[550]

Excuse testing, particularly placing responsibility back onto the participant, was evident in *Chandler*, *B, WR*, *Reed*, *Ryan* and *Richards* as discussed in the context of responsibilisation, individualisation and deviance in Part II of this chapter. For example, in *Ryan*[551] denial of drug use was considered and found inadequate as an excuse by the appeal court. By denying drug use, Eamon did not admit he was in need of help. He was constructed discursively as dishonest and not genuine. His dishonest behaviour during the program was characterised by the sentencing magistrate as 'colour[ing] any positive outcomes'.[552]

In *Ashton*[553] Jason Ashton is represented as activated for explaining that a relapse into drug use was triggered by stress of the impending sentence. The final progress report, recontextualised into the appeal decision indicated: '[t]he author of the report could not accept the appellant's reasons for his relapse into drug use …'.[554] In contrast to *Ryan*, Jason requested help by being allowed more time in the program. The appeal court, however, found Jason did not demonstrate a commitment to addressing his drug dependence. The appeal court observes further adjournment to allow Jason to continue rehabilitation would 'unsatisfactorily place the appellant's status in limbo … especially since he claimed to have relapsed due to his impending sentence'.[555] The appeal court determined

548 Ibid.
549 Burns and Peyrot, above n 115, 425-6.
550 Ibid 426.
551 *Ryan v Police* [2003] SASC 108.
552 Ibid [11].
553 *Ashton v Police* [2008] SASC 174.
554 [2008] SASC 174, [12].
555 Ibid [17].

'the appellant has not demonstrated a commitment to addressing the problems (the primary one being drug use) out of which his offending arose'.[556]

4 Rewards and sanctions

Disciplinary (or normative) power uses rewards and penalties as incentives to advance normalisation of an individual's deviant behaviour or attitude.[557] Key Component Six in *Defining Drug Courts: The Key Components* states, '[a] coordinated strategy governs drug court responses to participants' compliance'.[558] The focus is 'behaviour shaping and modification that is the cornerstone of the drug court approach', and '[t]his involves the strategies that drug courts use to respond to different participant behaviour'.[559] In the SA drug court:

> Rewards are used to reinforce positive behavior [sic] and consist of non-monetary "social reinforcers" such as recognition for progress or sincere effort and program staff provide small tangible rewards such as bus tickets and food vouchers to reinforce sustained compliance with the treatment regime.
>
> The Magistrate applies graduated sanctions for noncompliant [sic] behaviour. A point system operates and points are awarded for minor non-compliance. Increasingly severe sanctions may be issued for more serious or continued problem behavior [sic]. These sanctions may include bail revocation and a period of incarceration.[560]

Dr Cannon AM from the SA drug court observed:

> We do think our program is deficient in the rewards we offer. There is the carrot of a suspended sentence, and the important judicial encouragement, but we should provide more rewards along the way, such as participation in recreational activities and providing more employment opportunities.[561]

In *Crockford*[562] George Crockford was dealt with by the drug court for non-compliance of the programs requirements as follows:

> After hearing submissions … declined to list the matter for termination, deciding, instead, to allocate the plaintiff:
>
> - two points for his home detention breaches;

556 Ibid.
557 Hunt and Wickham, above n 377, 21.
558 Carey, Finigan and Pukstas, above n 186, 47. See also Office of Justice Programs, above n 54, 13.
559 Carey, Finigan and Pukstas, above n 186, 47, 52-3; Harrell and Roman, above n 449, 208-11, 217; Burdon et al, above n 519, 74, 78-9, 80, 84; Burke, above n 186, 42, 45; See also Dive, above n 39, 2: which outlines sanctions used in the Drug Court of NSW; McIvor, above n 520, 45; Eley et al, above n 391, 54.
560 See <http://www.courts.sa.gov.au/OurCourts/MagistratesCourt/InterventionPrograms/Pages/Drug-Court.aspx#progress> (last viewed 11 September 2015).
561 Cannon, above n 24, 132.
562 *Crockford v Adelaide Magistrates Court & Anor* [2008] SASC 62.

- two points for his behaviour; and
- two points for a dilute sample in his drug testing.[563]

Whilst the application of points for behaviours is formulated, there remains judicial discretion in the allocation of points and in determining whether or not to list matters for termination hearings. In the SA drug court there is a written guideline setting sanctions and demerit points for specific behaviours. When points reach 20 or more, the magistrate decides whether or not a termination hearing is required.[564] The discretion to allocate or not allocate points can be used to coerce more compliant behaviour.

There was evidence of sanctions in four appeal decisions aside from *Crockford*. The appellants in *Hughes v Police*[565] (*Hughes*), *Reed*,[566] *Place*[567] and *Parsons*[568] were remanded into custody for stabilisation or detoxification and then released back into the program. Discourse suggesting rewards for progress in the program was located in *Ashton*[569] and *Lawrie 1*.[570] In these decisions, the appeal court includes information about progress through stages of the program, including loosening of bail and supervision conditions. In *Ashton*[571] Jason Ashton progressed through program stages including home detention bail, curfew and residence only bail conditions.[572] In *Lawrie 1*[573] Nigel Lawrie was moved into phase two of the program[574] which likely included removal of home detention bail conditions. Being allowed to progress through program stages is considered a reward as this often includes relaxing bail conditions and other drug court attendance requirements. The decisions

563 Ibid [32].
564 Ibid [12].
565 [2012] SASC 183, [5]: the appellant was remanded into custody for drug use.
566 *Reed v Police* [2007] SASC 26, [28]: the appellant was remanded into custody for drug use.
567 *R v Place* [2002] SASC 101, [97]: the appellant was remanded into custody for drug use.
568 *Parsons v Police* [2008] SASC 339, [35]: the appellant left the premises for 12 hours without permission of the drug court case manager. He remained remanded into custody for 10 days and was then released back into the program.
569 *Ashton v Police* [2008] SASC 174.
570 *Lawrie v DPP* [2008] SASC 21.
571 *Ashton v Police* [2008] SASC 174.
572 Ibid [7].
573 *Lawrie v DPP* [2008] SASC 21.
574 Ibid [6].

outlined above — *Crockford*,[575] *Hughes*,[576] *Reed*,[577] *Place*,[578] *Parsons*,[579] *Ashton*[580] and *Lawrie 1*[581] — were the only findings of rewards and sanctions evident in the appeal decisions. Arguably other appellants were in the program long enough to experience rewards or sanctions. In 20 decisions, the period of time spent in the program is stated or can be calculated. Six appellants were in the program between 1-3 months;[582] four appellants for 3-6 months;[583] four for 6-9 months;[584] six for 9-12 months.[585] Discourse about rewards and sanctions has potential to inform the courts about progress through the program within the context of the drug court's disciplinary regime. Limited acknowledgement of rewards and sanctions (which indicates progress during the program) by the appeal courts suggests this information may not have been considered by the appeal courts, assuming other instances of rewards and sanctions were experienced by the appellants.

B Participant Investment

Drug courts use normative/disciplinary power to coerce participant investment in the normative goals of the program. Normative discourse is consistent with the goals of the SA drug court as evident in the following table copied from the Courts Administration website. The degree to which the SA drug

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575 *Crockford v Adelaide Magistrates Court & Anor* [2008] SASC 62.

576 *Hughes v Police* [2012] SASC 183, [5].

577 *Reed v Police* [2007] SASC 26, [28].

578 *R v Place* [2002] SASC 101, [97].

579 *Parsons v Police* [2008] SASC 339, [35].

580 *Ashton v Police* [2008] SASC 174.

581 *Lawrie v DPP* [2008] SASC 21.

582 1-3 months = *Police v Van Boxtel* [2013] SASC 82: commenced 3 September 2012, terminated 8 October 2012, at [25]; *Roberts v Police* [2013] SASC 117: commenced 11 February 2013, terminated 8 April 2013, at [6]; *Ketoglou v Police* [2008] SASC 243: participated 'in the latter part of 2004 and early 2005', at [30]; *Police v Bieg* [2008] SASC 261: commenced 18 July 2007, terminated 10 October 2007, at [7]; *Crockford v Adelaide Magistrates Court & Anor* [2008] SASC 62: commenced 20 August 2007, at [20], terminated 22 October 2007, at [35]; *R v Proom* [2003] SASC 88: participated for two months, at [18].

583 3-6 months = *Ryan v Police* [2003] SASC 108: commenced program end of August 2002, at [9], sentenced in drug court 16 December 2002, at [4]; *R v Place* [2002] SASC 101: commenced program October 2000, withdrew April 2001, at [97]; *Hughes v Police* [2012] SASC 183: commenced 28 February 2011, terminated 29 August 2011, at [5]; *R v Caplikas* [2002] SASC 258: admitted towards end of 2000, compliant for six months, at [66].

584 6-9 months = *Chandler v Police* [2002] SASC 130, [11]; *Robson v Police* [2007] SASC 395, [41]; *Lawrie v DPP* [2008] SASC 21, [25]; *Andreasen v Police* [2004] SASC 255: commenced May 2003, arrested 2 December 2003, at [4]-[5].

585 9-12 months = *Parsons v Police* [2008] SASC 339: commenced 3 September 2007, at [32], terminated 16 June 2008, at [22]; *Habra v Police* [2004] SASC 430: commenced 5 June 2002, completed 9 July 2003, at [7]; *Police v B, WR* [2005] SASC 163: commenced June 2003, at [9], terminated May 2004, at [10]-[12]; *Ashton v Police* [2008] SASC 174: commenced 21 February 2007, at [7], sentenced in drug court on 5 March 2008, at [1]; *Monterola v Police* [2009] SASC 42: commenced 27 August 2007, completed 12 September 2008, at [3]; *R v Pumpa* [2013] SADC 157: successfully completed, at [33].

court relies upon normative discourse and disciplinary power is apparent in how this table outlines the transformative treatment goals of the program and the treatment strategies for attaining those goals. The treatment goals of the program are the normative aims of the program and include attitudes such as self-awareness, commitment to honesty, developing values, setting life goals and decreasing dishonest behaviour. The second column also provides evidence of the four key ways drug courts use normative power: legal coercion, judicial monitoring, surveillance and participant investment as outlined in this chapter. Surveillance is discussed in detail in Chapter Four. Legal coercion, judicial monitoring and surveillance are evident in "court monitoring", "case management", "rewards and sanctions", "drug testing and discussions about use" whilst participant investment is evident in the normative treatment goals.

Table Four: List of the goals and strategies for treatment in the SA drug court.[586]

Table has been removed due to copyright restrictions

[586] Courts Administration Authority of South Australia, *Drug Court* <http://www.courts.sa.gov.au/OurCourts/MagistratesCourt/InterventionPrograms/Pages/Drug-Court.aspx > (last viewed 16 May 2015).

Normative power is considered most effective when participants are in the latter stages of the program because the participant is more likely to be morally committed to the program.[587] Participant investment is likely to occur where the participant has a sense of self-agency in decision-making and perceives procedural fairness.[588] Research on procedural justice suggests reduced recidivism when defendants perceive the court *process* as fair. This principle applies even when the stakes are high for defendants such as when they are facing a penalty of imprisonment.[589] As Tyler argues:

> A key antecedent of trust is justification. When authorities are presenting their decisions to the people influenced by them, they need to make clear that they have listened to and considered the arguments made. They can do so by accounting for their decisions. Such accounts should clearly state the arguments made by the various parties ... [and] explain how those arguments have been considered and why they have been accepted or rejected.[590]

Research into drug courts suggests 'the strongest predictor of reduced future criminality [is] a defendant's [positive] attitude towards the judge'.[591] This attitude towards the judge is also a strong predictor of reduction in drug use and compliance with program requirements.[592]

Perceptions of procedural fairness by participants can also be considered perceptions of being given a "choice". This was evident in *Ashton* and *Crockford* where they were warned about the consequences of continued non-compliant behaviour. Warnings about consequences placed responsibility for the consequences of further non-compliant behaviour on the participants. In continuing with deviant behaviour, they failed to demonstrate "an internal decision to change" to the drug court and to the appeal courts. Discourse from the appeal decisions about internal transformation is discussed further in the next chapter.

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587 Steen, above n 31, 64-5: This is based on organisational theories of compliance, at 52-3. Steen also explores normative power strategies and the norms underlying those strategies in drug courts through discussion of the history of the drug court movement, at 53-4. See also Eley et al, above n 391, 45.

588 See, eg, McIvor, above n 520, 34, 38, 40.

589 Jonathan D Casper, Tom Tyler and Bonnie Fisher, 'Procedural Justice in Felony Cases' (1988) 22(3) *Law Society Review* 483.

590 Tom R Tyler, 'Social Justice: Outcome and Procedure' (2000) 35(2) *International Journal of Psychology* 117, 122.

591 Greg Berman and Emily Gold, 'Procedural Justice from the Bench: How Judges can improve the effectiveness of Criminal Courts' (2012) 51(2) *The Judges' Journal* 20, 20.

592 Ibid. See also Gottfredson et al, 'How Drug Treatment Courts Work: An Analysis of Mediators' (2007) 44(1) *Journal of Research in Crime and Delinquency* 3; Matrix Knowledge Group, *Dedicated Drug Court Pilots: A Process Report* (Ministry of Justice, London, 2008).

V SUMMARY

This chapter analysed and discussed the data through the lens of disciplinary/normative power. In this chapter, the courts were found to construct discursively responsibilised appellants using normative discourse covering deviant attitudes and behaviours related to drug court participation. In some instances deviant behaviours identified during program participation were translated by the appeal courts as states of mind indicative of a failure to transform into the law-abiding citizen. The main source of information about program participation were the drug court sentencing remarks recontextualised into the appeal decisions. The appeal courts also acknowledged judicial interaction in the monitoring of participant progress during the program. Information about judicial interaction with participants was then used to assess progress towards recovery.

The hallmark of a disciplinary regime is surveillance, the monitoring and collection of information which informs decision-makers about deviant behaviours so that they can be addressed. The next chapter considers surveillance discourse, discourse about program compliance, located in the appeal decisions.

4. SURVEILLANCE AND COMPLIANCE DISCOURSE

> A court-ordered program must build a chain-link fence around the drug-using offender whose links consist of frequent supervision contacts and drug testing, direct access to full information on the drug offender's progress, immediate responses to program failures, and frequent progress report hearings before a single Drug Court judge and permanent staff.[593]

The previous chapter outlined the relationship between disciplinary power and normative understandings of the transformation of deviant behaviours and attitudes of drug court participants towards those consistent with the law-abiding citizen. In this chapter, insight is provided into the operation of disciplinary power through surveillance, which in drug courts constitutes monitoring for compliance with program requirements. This chapter posits that surveillance and the collection of information assists drug courts to implement, justify and sustain acts of disciplinary power.[594] Analysis for sources of information recontextualised into the appeal decisions finds the drug court and the appeal courts using information about compliance, particularly non-compliance, with program requirements to construct representations of progress or non-progress towards recovery (movement towards transformation). This chapter outlines that compliance discourse. This is followed by discussion about the discursive link between compliance discourse, successful completion and recovery evident in the appeal decisions.

I DEFINING COMPLIANCE DISCOURSE

The previous chapter considered discourse about the operation of normative power in drug courts evident in the appeal decisions. This includes strategies to coerce or motivate participants to engage with the normative goals of the program. In doing so, participants became invested in those goals enabling them to demonstrate progress towards recovery to the drug court and subsequently to the appeal courts. In a disciplinary regime, normalisation requires the presence of the subject and observance of their behaviour.[595] The quote at the beginning of this chapter describes monitoring for

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593 Jeffrey S Tauber, 'A Judicial Primer on Unified Drug Courts and Court-ordered Drug Rehabilitation Programs' (Paper presented at the California Continuing Studies Program, Dana Point, California, August 20 1993), 11. See also Kevin Whiteacre, *Drug Court Justice: Experiences in a Juvenile Drug Court* (Peter Lang, New York, 2008), 76.

594 Pat O'Malley (ed), *Crime and the Risk Society* (Ashgate Publishing, England, 1998), xii.

595 Deidre Greig, 'Professions and the Risk Society' (1997) 4 *Psychiatry, Psychology and Law* 231, 238.

program compliance as building "a chain link-fence around the drug using offender". This is consistent with disciplinary regimes because it is:

> ... surveillance that makes it possible to qualify, to classify and to punish. It establishes over individuals a visibility through which one differentiates them and judges them ... At the heart of the procedures of discipline, it manifests the subjection of those who are perceived as objects and the objectification of those who are subjected.[596]

Assessments about recovery and non-recovery involve ongoing surveillance including 'the keeping of records, the writing of reports, and monitoring and inspection'[597] to promote desirable forms of conduct. This writing and record keeping:

> … makes it possible to describe individuals as objects and track their development, or lack thereof, as well as to monitor through comparison phenomena within the larger aggregate of population.[598] Finally, the accumulation of documents through the examination forges the individual as a case defined in terms of a status bound up with all of the "measurements", "gaps" and "marks" characteristic of disciplinary power.[599]

In drug courts, the desired conduct that is sought from participants is day-to-day compliance with the program's requirements. Wolf and Colyer observed monitoring for compliance and progress in a drug court with 'information provided by treatment providers and case managers to the judge prior to each hearing'.[600] Similarly, in the SA drug court the magistrate is provided with written progress reports prior to court hearings. As discussed in the previous chapter, desirable forms of conduct are encouraged through regular contact between the judge and participant during court hearings to review progress (compliance with program requirements) and through rewards and sanctions. This case management approach was described by Judge Burke as one '... designed to incentivize compliance with the program and to disincentive failures'.[601]

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596 Foucault, above n 376, 184-5.

597 Hunt and Wickham, above n 377, 21.

598 Marcelo Hoffman, *Foucault and Power: The Influence of Political Engagement on Theories of Power* (Bloomsbury, New York and London, 2014), 31 citing Foucault, above n 376, 189-91.

599 Ibid citing Foucault, above n 376, 192.

600 Wolf and Colyer, above n 173, 236: They observed the interactions between the judge, treatment providers, case managers and participants during 104 drug court sessions and recorded/coded the problems identified by participants and the extent participants appeared to be compliant with program requirements.

601 Burke, above n 186, 47; See also Damien Carrick, 'Drug Courts', *ABC Radio National*, Tuesday 14 March 2000 <http://www.abc.net.au/Radionational/programs/lawreport/drug-courts/3464696#transcript> (last viewed 11 January 2017): Professor Arie Freiberg (guest speaker - at the time, Professor at Melbourne University Department of Criminology) and Susanna Lobez (presenter) discuss pilot drug court programs in Australia.

In a disciplinary regime, normalisation:

> ... is essentially corrective rather than punitive in orientation, concerned to induce conformity rather than to exact retribution or expiation. It involves, first of all, a means of assessing the individual in relation to a desired standard of conduct: a means of knowing how the individual performs, watching his movements, assessing his behaviour, and measuring it against the rule. Surveillance arrangements and examination procedures provide this knowledge, allowing incidents of non-conformity or departures from set standards to be recognized and dealt with, at the same time 'individualizing' the different subjects who fall under this gaze.[602]

Research suggests drug courts operate in a manner consistent with a disciplinary regime, with some degree of non-compliance expected as part of the recovery process.[603] Relapse into drug use, breaches of program requirements and some limited re-offending are measured and sanctioned during the program.[604] This is based on research indicating drug dependence is a relapse prone condition[605] and there is to be expected some level of continued use or drug substitution. In drug courts, these forms of deviance are addressed through coercion ie judicial admonishments and sanctions. The drug court "chain-link fence" is consistent with the interaction between surveillance and normalisation because surveillance in drug courts is monitoring for instances of non-compliance which can then be responded to accordingly. Monitoring for program compliance by drug courts occurs within the context of the normative institutional social practice of drug courts to monitor and address participant progress from a treatment perspective. Exploring how the appeal courts subsequently use compliance information is important because from a treatment perspective some deviance in behaviour and attitude is expected, actively sought and then addressed as a normative process. Information about deviance that occurs during the program may be considered differently by subsequent courts because illicit drug use, breaching bail and offending are illegal behaviours. Discourse analysis finds the original sentencing and appeal courts recontextualising discourse about compliance and non-compliance with program requirements to construct discursive representations of progress or non-

602 Garland, above n 376, 145 citing Foucault, above n 376.

603 See, eg, Steen, above n 31, 55, 60-2; John Terrence A Rosenthal, 'Therapeutic Jurisprudence and Drug Treatment Courts: Integrating Law and Science' in Nolan, above n 30, 145, 162-3; Philip Bean, 'Drug Courts, the Judge, and the Rehabilitative Ideal' in Nolan, above n 30, 235, 239-40, 248-9.

604 See, eg, Hora, Schma and Rosenthal, above n 46; Cannon, above n 24, 129; Wolf and Colyer, above n 173; Burke, above n 186, 41, 45; McIvor, above n 520, 32.

605 Anglin and Hser, above n 442, 258-9.

progress towards recovery. Information about program compliance originally collected during the program to monitor participant behaviour was subsequently used by different courts for a different purpose, that is, to construct representations of the participant/appellant within the sentencing/appeal framework as a subject capable of being reformed, or not. These findings are outlined below.

II COMPLIANCE WITH PROGRAM REQUIREMENTS

Analysis of the appeal decisions located discourse about compliance and non-compliance with program requirements in 17 decisions.[606] Discourse about compliance or non-compliance was evident in relation to drug testing and results (13 decisions), bail conditions (10 decisions), re-offending (12 decisions) and responding to case managers or counsellors (four decisions). This discourse characterised the participant as mostly compliant or non-compliant with program requirements. Non-compliance was used by the drug court to justify acts of disciplinary power through sanctions and program termination. In the appeal decisions, this information was recontextualised to partly justify the appeal outcome.

In at least 11 decisions the program was terminated for non-compliance.[607] Three decisions detail non-compliance with program conditions leading to program termination. These decisions provide insight into how the original sentencing and appeal courts use information about non-compliance when representing the appellant as failing the program and therefore failing to demonstrate transformation. They also provide insight into the extent some participants were non-compliant before program termination. In *Parsons*[608] the appeal court represents the appellant Sam

606 *Parsons v Police* [2008] SASC 339; *Hughes v Police* [2012] SASC 183; *Crockford v Adelaide Magistrates Court & Anor* [2008] SASC 62; *R v Place* [2002] SASC 101; *Andreasen v Police* [2004] SASC 255; *Chandler v Police* [2002] SASC 130; *Reed v Police* [2007] SASC 26; *Roberts v Police* [2013] SASC 117; *Ryan v Police* [2003] SASC 108; *Police v Van Boxtel* [2013] SASC 82; *Ashton v Police* [2008] SASC 174; *R v Caplikas* [2002] SASC 258; *Field v Police* [2009] SASC 354; *Richards v Police* [2007] SASC 368; *Kells v Police* [2007] SASC 224; *Police v B, WR* [2005] SASC 163; *Lawrie v DPP* [2008] SASC 21.

607 *Parsons v Police* [2008] SASC 339, [37]; *Hughes v Police* [2012] SASC 183, [5]; *Crockford v Adelaide Magistrates Court & Anor* [2008] SASC 62, [45]; *Andreasen v Police* [2004] SASC 255, [4]; *Roberts v Police* [2013] SASC 117, [6]; *Police v Van Boxtel* [2013] SASC 82, [25]; *Kells v Police* [2007] SASC 224, [3]; *Police v B, WR* [2005] SASC 163, [12]; *Lawrie v DPP* [2008] SASC 21, [6]; *Robson v Police* [2007] SASC 395, [5]; *Police v Bieg* [2008] SASC 261, [7]. See also *Richards v Police* [2007] SASC 368; *Ashton v Police* [2008] SASC 174; *Field v Police* [2009] SASC 354, [16]; *Ryan v Police* [2003] SASC 108; *Ketoglou v Police* [2008] SASC 243, [30]: In these decisions it is not clear the program was formally terminated.

608 *Parsons v Police* [2008] SASC 339.

as activated and responsible for his non-compliance with program conditions.[609] The findings include: 'the defendant found the conditions of the drug program difficult to comply with';[610] 'the defendant struggled to comply with the conditions imposed';[611] and '[t]he appellant had issues during his time on the program'.[612] Sam's program was terminated by the drug court 'because he had failed to comply with the conditions of the program'.[613] While on home detention bail 'he had breached the conditions of his bail in that on occasions he was found to have a positive alcohol reading';[614] on '43 occasions … the defendant left the premises, returning late, or left without a leave pass in contravention of his bail conditions';[615] and Sam "removed"[616] or 'cut the electronic bracelet from his wrist'[617] on at least two occasions.[618] Sam 'voluntarily hands himself in to police' after absconding on one occasion.[619] Sam also 'damaged property at Anglicare'.[620] Sam is charged with breaches of bail on four occasions during the program.[621] The remainder of the breaches (for which he was not charged) are considered by the appeal court as forming 'part of the background to the defendant's conduct'.[622]

In contrast, the appeal court represents Sam discursively as passivated in relation to detection for drug and alcohol use while in the program. Sam is 'found to have a positive alcohol reading';[623] "tests positive" to alcotests on three occasions;[624] and 'tested positive for cannabis on four occasions, positive for amphetamines on four occasions, positive to opiates on three occasions, and positive to morphine on one occasion'.[625] Sam is represented as activated by his counsel when referring to the

609 Ibid [13], [22], [34], [37].
610 Ibid [22].
611 Ibid [34].
612 Ibid [37].
613 Ibid [13].
614 Ibid [20].
615 Ibid [21].
616 Ibid [33].
617 Ibid [20].
618 Ibid [37].
619 Ibid [33].
620 Ibid [37].
621 Ibid [21].
622 Ibid.
623 Ibid [20].
624 Ibid [34], [36].
625 Ibid [37].

positive test for morphine when his counsel asserts that 'he was taking the morphine for pain relief'.[626] The appeal court concludes, '[h]e was terminated finally from the program …'.[627] In summary, Sam was non-compliant with positive alcohol readings,[628] positive tests for cannabis, amphetamines, opiates and morphine;[629] leaving his residence without leave passes or returning late on 43 occasions;[630] removing his electronic bracelet (absconding);[631] and damaging property.[632] Nevertheless, as outlined in Chapter Three (p 81), the appeal court considers his starting the program as demonstrating 'a genuine desire … to change his life', however, that attempt failed.[633]

In *Hughes*[634] the appellant Tanya Jean Hughes, aged 36, (possibly of Aboriginal descent) was in the program for approximately four months. The original sentencing remarks (directly quoted) summarise non-compliance during six progress reviews and in doing so represents Tanya discursively as activated and responsible for her behaviour. The findings include: 'Your first review was very good';[635] 'By the end of your third review … you were placed back into custody for stabilisation because of your constant methamphetamine and cannabis use';[636] 'your fourth review only disclosed one declared cannabis use and a number of home detention breaches';[637] 'On your fifth review there was a declared cannabis use and a failure to attend testing';[638] 'the serious criminal trespass residential and theft … was disputed';[639] 'Your sixth review had a cold sample, a late attendance for testing and four more breaches of home detention';[640] 'you failed to attend three urine tests';[641] 'you were arrested in Port Augusta for fresh offending'.[642] Tanya's program participation is terminated due to 'your fresh

626 Ibid.
627 Ibid.
628 Ibid [20], [34], [36].
629 Ibid [37].
630 Ibid [21].
631 Ibid [20], [33], [37].
632 Ibid [37].
633 Ibid [64].
634 *Hughes v Police* [2012] SASC 183.
635 Ibid 5 [2].
636 Ibid.
637 Ibid.
638 Ibid.
639 Ibid.
640 Ibid.
641 Ibid.
642 Ibid 5 [3].

offending, your continual drug usage, your provision of substituted samples and the fact that you went missing without leave in breach of your bail'.[643]

Tanya is represented as activated by the original sentencing magistrate and the appeal court when they consider her progress or lack of progress during the program. The magistrate determined 'you performed badly and made no satisfactory progress'[644] and concludes 'your failure to successfully complete a program is not relevant to the sentence I must impose'.[645] Similarly, the appeal court refers to "her failure to complete" the program.[646] On the other hand, Tanya is represented as passivated when the appeal court and the magistrate determine the consequence of poor performance in the program. The magistrate concludes, 'I intend to treat you and sentence you on the basis as if you had not been on the Drug Court program'.[647] The appeal court concludes, '[t]here can be no argument that the Magistrate correctly approached the question of the appellant's failure to successfully complete the Drug Court program when sentencing'.[648]

By including information about program non-compliance, the appeal court represents Tanya as having failed to successfully complete the program.[649] Tanya consistently breached home detention bail, was remanded into custody for stabilisation due to drug use, re-offending, providing cold samples (suggesting urine substitution) and failing to attend or was late to urine testing.[650] Tanya absconded and the program was terminated.[651] The appeal court combines information about program non-compliance with information from a psychological report, restated in the original sentencing remarks, to represent Tanya as having failed to demonstrate transformation. The findings include:

643 Ibid.
644 Ibid.
645 Ibid.
646 Ibid 5 (mentioned twice).
647 Ibid 5 [3].
648 Ibid 5.
649 Ibid.
650 Ibid.
651 Ibid.

'You realise your drug use is your problem and, whilst you say you were motivated to try and deal with it, as the program shows you were not able to do so'.[652]

Similarly, in *Crockford*[653] discourse from four progress reviews is quoted or restated in the decision. The appellant George Crockford received "points" for breaching home detention bail, inappropriate behaviour towards staff and for providing a dilute urine sample.[654] George's program was terminated due to 'abusive language or conduct towards programme staff'.[655] The justification provided by the drug court for program termination (quoted) was that George by way of conduct and words '… declared himself to be unwilling to continue as a participant'.[656]

In five decisions, *Hughes*,[657] *Place*,[658] *Reed*,[659] *Andreasen*[660] and *Parsons*[661] the appeal courts represent the participant as non-compliant leading to the sanction of a remand into custody. In *Place*,[662] for example, Mr Place was remanded into custody for 14 days for drug use.[663]

> You remained there [in the programme], with significant success, until April 2001. In that time, you substantially reduced your drug habit, notwithstanding some breaches^ which saw your home detention bail revoked for 14 days in January this year. Significantly, you were not then removed from the programme.[664]

Remanding participants into custody for 14 days is standard procedure in the SA drug court to address relapse into drug use and non-compliance with program requirements. The original sentencing remarks (quoted) in *Place* specifically observe that Mr Place's relapse led to a remand into custody

652 Ibid 6 [26].
653 *Crockford v Adelaide Magistrates Court & Anor* [2008] SASC 62.
654 Ibid [32].
655 Ibid [45].
656 Ibid.
657 *Hughes v Police* [2012] SASC 183, [5].
658 *R v Place* [2002] SASC 101.
659 *Reed v Police* [2007] SASC 26, [28].
660 *Andreasen v Police* [2004] SASC 255, [6]: the appellant commenced the program in May 2003. In June, he was on remand in custody. It is possible this is related to the appellant's participation in the program at that time.
661 *Parsons v Police* [2008] SASC 339, [35]: After leaving home without permission of his case manager and was away for 12 hours. The appellant was released back into the program 10 days later.
662 *R v Place* [2002] SASC 101.
663 Ibid [97].
664 Ibid.

rather than program termination: '[s]ignificantly, you were not then removed from the programme'.[665] This suggests acknowledgement by the sentencing judge that relapses can occur during the recovery process.

In other decisions, the courts represent the participant as non-complaint with program conditions, however details about non-compliance are excluded. In *Chandler*[666] submissions made by defence counsel (restated) refer to 'the appellant's failure to complete'[667] the program and 'the appellant's failure to comply'.[668] Similar to *Place*, the appellant Michelle's program was not terminated. She chose to leave the program.[669] In *Andreasen*[670] Steven Andreasen is represented as having 'failed to meet his attendance obligations' leading to program termination, '… he failed to meet his attendance reporting obligations and his participation in that program has been terminated'.[671] In *R v Caplikas*[672] (*Caplikas*) Matthew Caplikas participated in the program for six months. During this time he was living with his father, employed and drug free. It is unclear whether Matthew's program was terminated. However, Matthew is represented as making good progress for six months, followed by drug use connected with 'renewed association with his drug using friends'.[673]

> He was released on home detention under his father's supervision. He was employed for six months and remained drug free for a similar period. However, he again found the regime too strict for his liking.[674]

And:

> In July 2001 the respondent was given a quantity of amphetamines in discharge of a debt owed to him. He used some of the drugs and this in conjunction with his renewed association with his drug using friends saw his drug abuse continue.[675]

665 Ibid.
666 *Chandler v Police* [2002] SASC 130.
667 Ibid [16].
668 Ibid.
669 Ibid [12]: Due to an unexpired balance of parole of seven years which would need to be served.
670 *Andreasen v Police* [2004] SASC 255.
671 Ibid [4].
672 [2002] SASC 258.
673 Ibid [66].
674 Ibid.
675 Ibid.

In the findings above, the courts used information about program compliance originally sought by the drug court to monitor for relapse during the program to partly inform its own assessment of whether or not the participant demonstrated internal transformation. An assessment of internal transformation is important as it informs the appeal court about prospects of rehabilitation, a sentencing consideration which could affect the sentencing/appeal outcome.

Discourse about non-compliance leading to program termination fell into four broad categories: urine testing, bail, re-offending and responses to case managers and counsellors, as outlined below.

A Drug Testing

Discourse about drug testing was evident in 13 decisions.[676] Information about non-compliance with drug testing was recontextualised in *Parsons*, *Hughes*, *Crockford* and *Place* (discussed above). In *Roberts v Police*[677] (*Roberts*) Damian Jordan Roberts participated in the program for two months, however his program was terminated due 'to his inability to provide urine samples' which was considered by the appeal court 'an integral part of the program'.[678] In *Ryan*[679] the appellant Eamon 'tested positive for methylamphetamine on more than one occasion' but denied drug use.[680] It is not clear whether his program was terminated. In *Van Boxtel*[681] the program was terminated for failure to participate in a urine test, removing the home detention monitoring bracelet and re-offending.[682] In *Reed*[683] the appellant Michael voluntarily withdrew from the program following relapses into drug use.[684]

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676 *Parsons v Police* [2008] SASC 339; *Hughes v Police* [2012] SASC 183; *Crockford v Adelaide Magistrates Court & Anor* [2008] SASC 62; *R v Place* [2002] SASC 101; *Reed v Police* [2007] SASC 26; *Roberts v Police* [2013] SASC 117; *Ryan v Police* [2003] SASC 108; *Police v Van Boxtel* [2013] SASC 82; *Ashton v Police* [2008] SASC 174; *R v Caplikas* [2002] SASC 258; *Monterola v Police* [2009] SASC 42; *Ketoglou v Police* [2008] SASC 243; *Habra v Police* [2004] SASC 430.

677 [2013] SASC 117.

678 Ibid [6].

679 *Ryan v Police* [2003] SASC 108.

680 Ibid [9].

681 *Police v Van Boxtel* [2013] SASC 82.

682 Ibid [25]: Further information excluded.

683 *Reed v Police* [2007] SASC 26.

684 Ibid [28], [31].

In the findings above, participants were sanctioned for drug use through the "point" system leading to remands into custody or eventually program termination. As Whiteacre observes, '[s]urveillance through drug testing connects treatment to punishment'.[685] Drug testing is considered:

> ... the most objective and efficient way to establish a framework for accountability and to gauge each participant's progress. Modern technology offers highly reliable testing to determine if an individual has recently used specific drugs ... [Alcohol and drug testing] is central to the drug court's monitoring of participant compliance. It is both objective and cost effective.[686]

Drug testing is a tool through which disciplinary power and normalisation operate during program participation. Drug tests are considered most effective when linked to sanctions for positive test results,[687] and are used by drug courts to monitor for relapse and program compliance. Information about drug tests that occurred during the program was revisited by the appeal courts.

Analysis identified discourse about compliance with drug tests from program participation recontexualised into seven appeal decisions. In *Ashton*[688] the appeal court restates Jason's urine test results from commencement in the program until sentencing, which included periods of abstinence and some drug use.[689] Jason did not complete the program due to drug use. In the discourse below, Jason is represented as activated and responsible for drug use.

> From the time of commencing the Program until September 2007, all of the appellant's urine tests returned negative results. The appellant had declared methylamphetamine use in August 2007. Throughout

685 Whiteacre, above n 595, 76.

686 Ibid 77. See also Office of Justice Programs, above n 54: This report outlines the key components of drug courts and recognises the importance of drug testing to monitor for drug use. Key component five provides that abstinence from drug use be 'monitored by frequent alcohol and other drug testing' during the treatment phases of the program, at 11; Burke, above n 186, 44.

687 Eley et al, above n 391, 67: Eley et al observed participants on the Glasgow Drug Court acknowledging the deterrent power of drug tests to refrain from illicit drug use, at 44. See also Carey, Finigan and Pukstas, above n 186, 46; McIvor, above n 520, 45: McIvor observes that drug testing (in Scottish drug courts) was considered the main deterrent for drug use and assisted participants to maintain their progress towards recovery. This view about drug testing as a main deterrent in Scottish drug courts is interesting to note considering when the Scottish drug courts were first established they did not have any 'legislated sanctions available to deal with more serious or persistent non-compliance, other than to terminate the order and impose an alternative (usually custodial) sentence', at 33. Instead, they were limited in response to non-compliant behaviour with the powers to 'impose sanctions, such as varying the frequency of reporting and/or testing', at 32-3. Since 2003, the courts can impose penalties of imprisonment up to 31 days and community service for non-compliance with program requirements, at 33. This is unlike the SA drug court which since inception has used the powers of the *Bail Act 1985* (SA) to grant and revoke bail to facilitate periods in custody as a sanction for non-compliance; Hough, above n 442: Hough observes: '[d]rug testing provides a technology to make ... coercion meaningful', at 44; Anglin and Hser, above n 442, 256.

688 *Ashton v Police* [2008] SASC 174.

689 Ibid [10]-[12].

> September and October 2007 the appellant's urine tests returned positive results, with a final reading for methylamphetamine on 2 November 2007. After returning negative test results in the intervening months, the appellant then suffered a further relapse into illicit drug use commencing on 14 January 2008, which he initially declared and for which he was later tested in February 2008. On 11 February 2008, 18 February 2008 and 25 February 2008, the appellant tested positive for methylamphetamine. Two subsequent positive results were considered^ to have arisen from the appellant's methylamphetamine use in late February 2008.[690]

Similarly, in *Caplikas*[691] the appeal court restates Matthew Caplikas' drug use history and notes 'the only time he abstained from drugs was during the year 2000 when he participated on the Drug Court program'.[692] In *Reed*[693] counsel representing the appellant argued that Michael's 'first five months on the Drug Court programme were relatively drug free'.[694] In these decisions, the appellants were characterised by the courts as prone to relapse into drug use in the future, based on past relapses into drug use and this assessment partly informed the appeal outcome.

In *Place*[695] the sentencing judge outlines a period in the program when Mr Place had "significant success" in 'substantially reduc[ing] your drug habit' and 'even though you did not finish the course at the Drug Court ... you are now drug free as a consequence of it ...'.[696] In *Monterola*[697] the sentencing magistrate constructs Rex Monerola as having 'managed to remain abstinent of drugs for some lengthy periods of time'.[698] In *Ketoglou*[699] Simela Ketoglou's counsel submitted Simela made 'significant steps' towards recovery including program participation and overcoming a heroin addiction.[700] In *Habra v Police*[701] (*Habra*) the appeal court acknowledges drug use during the program and observes Joseph Habra was 'free of illicit drug addiction' by the end of the program.[702]

690 Ibid [10].
691 *R v Caplikas* [2002] SASC 258.
692 Ibid [65]: The respondent (Matthew Caplikas) was drug free for six months before relapsing into drug use, at [66].
693 *Reed v Police* [2007] SASC 26.
694 Ibid [27].
695 *R v Place* [2002] SASC 101.
696 Ibid [98].
697 *Monterola v Police* [2009] SASC 42.
698 Ibid [8].
699 *Ketoglou v Police* [2008] SASC 243.
700 Ibid [30].
701 [2004] SASC 430.
702 Ibid [7].

In these appeal decisions, the appellants were considered to have demonstrated normative behaviour and movement towards transformation based on compliance with drug testing.

In the SA drug court, successful participants must demonstrate significant reduction or abstinence from drug use during the program.[703] An expected period of time abstinent from drug use was not evident in the appeal decisions. However, the courts did acknowledge periods of abstinence as outlined above.

B Bail

In 10 decisions the appeal courts considered non-compliance with bail conditions (in addition to drug testing). In *Place*[704] Mr Place breached bail conditions during the program, but further details are excluded.[705] In *Crockford*[706] the applicant George received "points" in the drug court for breaching home detention bail. The reported breaches of bail include minor breaches ie returning home "minutes" late or being out of range of the home detention monitoring device for "minutes".[707] In *Monterola*[708] the sentencing magistrate mentions periods the appellant Rex spent on home detention bail[709] and observes that Rex breached those bail conditions.[710] Rex was not removed from the program for those breaches (he graduated from the program). In these decisions, participants were not removed from the program for breaching bail. In the SA drug court, participants are assessed points for non-compliance with program conditions ie for breaching bail and drug use. From a legal perspective, when participants breach bail they are committing an offence for which they can be

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703 Courts Administration Authority of South Australia, *Drug Court* <http://www.courts.sa.gov.au/OurCourts/MagistratesCourt/InterventionPrograms/Pages/Drug-Court.aspx> (last viewed 16 May 2015). In contrast, drug courts from other jurisdictions have required periods of abstinence: See, eg, Carey, Finigan and Pukstas, above n 186, 42 who found courts varied (between 30 days – 6 months) with the amount of time a participant was to abstain from drug use before graduation; Lyons, 'Judges as therapists', above n 82, 414: Lyons observed Canadian drug courts requiring periods of abstinence from drug use ranging from 2 – 4 months before graduation.

704 *R v Place* [2002] SASC 101.

705 Ibid [97].

706 *Crockford v Adelaide Magistrates Court & Anor* [2008] SASC 62.

707 Ibid [32]: The applicant also received points for inappropriate behaviour towards staff and for providing a dilute urine sample. Minor home detention breaches are listed, at [22], [24], [37].

708 *Monterola v Police* [2009] SASC 42.

709 27 months, 2 weeks and 3 days, at [7].

710 Ibid [7]: It is unclear whether or not the appellant was charged with those breaching offences. The appeal court mentions charges of breaching bail which were dealt with by way of fine and not subject to the appeal, at [2].

charged. Participants are not usually charged for minor breaches of bail. Instead, the drug court monitors their progress through the point system which measures levels of compliance with program conditions. This information was subsequently recontextualised into the appeal decisions.

Seven appellants absconded from the program and the program was terminated.[711] In *Parsons*[712] Sam removed electronic monitoring and absconded on two occasions.[713] Sam breached bail on 43 other occasions (leaving the premises, returning late, leaving without a leave pass).[714] Sam was charged for four significant breaches[715] and received a conviction without further penalty for those breaches when sentenced. In *Field v Police*[716] (*Field*) home detention bail was cancelled because the appellant Samuel Troy Field was not 'at the designated residence'.[717] In *Richards*[718] Walter Richards removed the home detention monitoring device and left the premises without permission of his case manager.[719] Walter was charged for breaching bail and received a penalty of two months imprisonment for that breach when sentenced.[720] In *Lawrie 1*[721] the program was terminated for breaching home detention bail, particularly for not residing where directed.[722] Nigel Lawrie was charged with breaching bail on three occasions, twice for breaching curfew conditions, and once for breaching home detention by appearing under the influence of alcohol and not residing at the correct address.[723] Whilst Nigel pleaded guilty to all three counts, the penalty imposed is unclear. In *Van Boxtel*[724] Joseph Van Boxtel removed the home detention monitoring bracelet and absconded from

711 *Hughes v Police* [2012] SASC 183: absconded from program, at [5]; *Field v Police* [2009] SASC 354: home detention bail was cancelled, absconded, at [16]; *Parsons v Police* [2008] SASC 339: positive alcohol readings, removed electronic monitoring, at [20], removed monitoring and absconded on two occasions, at [33], [37], breached bail on 43 occasions while in the program and was charged with breach of bail for four significant breaches, at [21]; *Police v Van Boxtel* [2013] SASC 82: cut off bracelet and absconded from program, at [15]; *Richards v Police* [2007] SASC 368: removed electronic monitoring device and absconded, at [20].
712 *Parsons v Police* [2008] SASC 339.
713 Ibid [20], [33], [37].
714 Ibid [20]-[21].
715 Ibid [21].
716 [2009] SASC 354.
717 Ibid [16]: Further information is excluded.
718 *Richards v Police* [2007] SASC 368.
719 Ibid [20], [24].
720 Ibid [20].
721 *Lawrie v DPP* [2008] SASC 21.
722 Ibid [6]: Further details excluded.
723 Ibid: See Table of Offences numbers 72-4 at the end of the appeal decision.
724 *Police v Van Boxtel* [2013] SASC 82.

the program.[725] Whilst Joseph was charged with breaching bail on one occasion while in the program the penalty imposed is unclear.[726] In *Hughes*[727] Tanya Hughes absconded from the program.[728] Tanya was charged with breaching bail on that occasion.[729] The penalty for that offence is not clear in the decision. In *Andreasen*[730] Steven Andreasen may have absconded from the program, described as having 'failed to meet his reporting obligations and his participation in that program has been terminated'.[731]

Whilst there may be a degree of tolerance with minor breaches of bail, these participants were charged for significant breaches of bail such as removing home detention monitoring devices or absconding from the program.[732] In *Richards*[733] the appeal court considered release on home detention bail as a "privilege" with 'the alternative [being] detention in custody'.[734] Breaching home detention bail was considered a serious breach of trust '... even more so where the person on bail has been trusted to participate in the Drug Court program and breaches that trust'.[735] Breaching bail was characterised by the appeal court as Walter failing 'by his own conduct to take advantage' of the program.[736] This is indicative of the important role compliance with bail conditions plays when progress or non-progress towards recovery is considered by the appeal courts.

The findings outlined above are important because there appears little consideration in literature about the significance of compliance with bail conditions in drug courts.[737] In these appeal decisions,

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725 Ibid [25]: Further information excluded. Participation in the program was subsequently terminated.
726 Ibid: See Appendix A – Summary of Offences at the end of the appeal decision.
727 *Hughes v Police* [2012] SASC 183.
728 Ibid [5].
729 Ibid [4].
730 *Andreasen v Police* [2004] SASC 255.
731 Ibid [4].
732 *Hughes v Police* [2012] SASC 183, [5]; *Field v Police* [2009] SASC 354, [16]; *Parsons v Police* [2008] SASC 339, [20], [33], [37], [21]; *Police v Van Boxtel* [2013] SASC 82, [15]; *Richards v Police* [2007] SASC 368, [20]. However, in *Lawrie v DPP* [2008] SASC 21, the appellant was charged with minor breaches of home detention bail, twice for 'not being home between the hours of 17:00 and 10:00am' and once for being under the influence of alcohol and not at the correct residing address, at [6], Table of Offences.
733 *Richards v Police* [2007] SASC 368.
734 Ibid [23].
735 Ibid [24].
736 Ibid [25].
737 See, eg, Lyons, 'Judges as therapists', above n 82: In a study of Canadian drug courts, Lyons observed participants were 'required to contend with a rigorous program including bail conditions such as abstaining from drugs and

breaches of bail which may have been accepted as part of drug court treatment process were later reconsidered by the appeal courts to demonstrate program non-compliance and lack of response to the program. More significant breaches resulted in criminal charges.

C Re-offending

12 appellants re-offended during the program. Not all re-offenders had the program terminated for offending. In *Monterola*[738] Rex Monterola re-offended during the program[739] but was not removed from the program.[740] In the sentencing remarks (quoted), the sentencing magistrate observes, 'I take into account your progress through the Drug Court Program and in particular the fact that you have not committed dishonesty offences whilst on the program …'.[741] The sentencing magistrate distinguished between the driving offences which occurred during the program and Rex's history of committing dishonesty offences. Similarly, in *Lawrie 1*[742] Nigel Lawrie was charged with theft of alcohol during the program but not removed from the program at that time.[743]

Five appellants had participation terminated for re-offending: *Kells*,[744] *Van Boxtel*,[745] *B, WR*,[746] *Robson v Police*[747] (*Robson*) and *Hughes*.[748] In contrast, three appellants committed serious offences

alcohol, observing curfews, staying out of assigned areas, reporting any drug use and high-risk situations to the court, and participating in treatment to the satisfaction of the treatment counselors [sic]', at 413-4.

738 *Monterola v Police* [2009] SASC 42.

739 Ibid [4]: Two separate driving offences. These were dealt with by way of fines and not subject to the appeal, at [2].

740 Ibid [6].

741 Ibid [8].

742 *Lawrie v DPP* [2008] SASC 21.

743 Ibid: See Appendix list of offences no 71. The offence occurred on 2 May 2007. Participation in the program was terminated on 8 August 2007, at [6].

744 *Kells v Police* [2007] SASC 224, [3]: Further details excluded.

745 *Police v Van Boxtel* [2013] SASC 82, [25]: Further information excluded. The offending was being on premises without lawful excuse, Appendix A - Summary of Offences no 31 at end of appeal decision.

746 *Police v B, WR* [2005] SASC 163, [12]: The charges were three counts of non-aggravated serious criminal trespass, two counts of theft and one count of property damage, at [10].

747 [2007] SASC 395, [4]: aggravated serious criminal trespass (non-residential) and theft between 16 and 19 November 2006. Was arrested and charged on 23 January 2007.

748 *Hughes v Police* [2012] SASC 183, [5]: The appellant was charged with theft which occurred on 28 February 2011, the day she commenced the program. The charge was laid in the drug court in April 2011. A further charge of serious criminal trespass (residential) and theft occurred during the program on 5 May 2011. The sentencing remarks, however, state the charges were laid on 15 April 2011. Those charges were disputed and the appellant was released back into the program on 1 June 2011. In addition, there is "fresh offending" (not clearly specified) after she absconded from the program. It is likely the appellant was charged with breaching bail and giving false details.

during the program but were not removed from the program for that offending. In *Ryan*[749] Eamon re-offended during the program,[750] however, that offending is not the focus of the appeal court when representing him as having failed the program. Instead, the court represents Eamon as testing positive confirming drug use and then denying drug use.[751] Furthermore, there is a suggestion Eamon substituted his urine samples with someone else's urine.[752] Counsel representing Eamon conceded he 'has drug problems with the drug program [sic]'.[753] In *Chandler*[754] Michelle re-offended during the program.[755] A psychological report recontextualised into the appeal decision alludes to her 'lengthy history of drug abuse and constant drug related offending'.[756] Counsel representing Michelle argued the offending occurred 'upon her release from gaol without adequate support systems being provided to assist her …'.[757] Whether the offending was a consideration in her withdrawal from the program is not clear with emphasis placed on her own decision to withdraw from the program due to an unexpired balance of parole yet to be served.[758]

In *Caplikas*[759] it is unclear if Matthew Caplikas re-offended while in the program or within months of the program ending.[760] Similarly, in *Andreasen*[761] whilst not clear, it is possible Steven

749 *Ryan v Police* [2003] SASC 108.

750 Ibid [9]: the appellant was accepted into the program in August 2002. He re-offended on 13 November 2002. The offences are illegal use of a motor vehicle, theft of a packet of cigarettes and a cigarette lighter, driving without due care, fail to stop, and drive unlicensed, at [2E].

751 Ibid [9].

752 Ibid.

753 Ibid [13].

754 *Chandler v Police* [2002] SASC 130.

755 Ibid [11]-[12]: The appellant participated in the program from May 2000 until January 2001. There are unspecified offences (likely false pretences and/or theft) from this period (up until January 2001) for which she was sentenced, at [3]-[4].

756 Ibid [14].

757 Ibid [16].

758 Ibid [12]: The unexpired balance of parole was triggered by a breaching offence which occurred on 23 September 1999, prior to her acceptance in the program.

759 *R v Caplikas* [2002] SASC 258.

760 Ibid: The offences are serious and violent and include armed robbery, attempted rape, indecent assault and assault with attempt to rob, at [46]. The offences occurred 15 September – 29 October 2001. The respondent was on the drug court program at least until July 2001 when he relapsed into drug use, at [66]. At the time of the offences, he was under supervision under the terms of a bond, at [66]. It is possible (but not confirmed) the bond was part of a drug court sentence.

761 *Andreasen v Police* [2004] SASC 255.

Andreasen re-offended whilst in the program or after absconding from the program.[762] In *Habra*[763] Joseph Habra re-offended eight days[764]and then one month[765] after completing the program. Joseph was refused re-entry into the program.[766] The sentencing magistrate observes that offending while under the influence of illicit drugs 'negated 12 months of relatively close observation ending less than a month beforehand'.[767] These findings appear consistent with the expectation there will be a reduction in the frequency of offending during program participation.[768]

D Failure to Respond to Case Managers or Counsellors

In four decisions, failure in the program was partly attributed to the participant not following directions from drug court staff. In these instances, the participant was represented as activated for their non-compliance. In only one decision, *Crockford*[769] the program was terminated for failing to respond appropriately to drug court staff. George Crockford failed to follow directions by going out of range of home detention monitoring after being warned not to do so[770] and failed to negotiate leave passes to attend appointments.[771] A drug court report (quoted) describes George as 'extremely rude, hostile, uncooperative and unwilling to follow direction. He is also unwilling to accept responsibility for his own behaviour'.[772]

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762 Ibid: The appellant was on home detention bail for six months, at [6]. This is a common bail condition for drug court participants. He commenced the program in May 2003, at [4]. He re-offended in November and December 2003, at [2] – two charges of theft and unlawful possession, one charge of providing a false name and address, at [6].

763 *Habra v Police* [2004] SASC 430.

764 Ibid [8].

765 Ibid [9].

766 Ibid [10].

767 Ibid [15].

768 Makkai, above n 24, 4. See also James Ward, Richard Mattick and Wayne Hall, *Key Issues in Methadone Maintenance* (University of New South Wales Press, NSW, 1992); Douglas Lipton, *The Effectiveness of Treatment for Drug Abusers Under Criminal Justice Supervision* (National Institute of Justice Research Report, Washington, 1996); Hall, above n 444: Hall observes, '[t]he case for treating heroin dependent offenders under coercion is reinforced by evidence they are likely to relapse to drug use on their release, and hence to re-offend and return to prison', at 104.

769 *Crockford v Adelaide Magistrates Court & Anor* [2008] SASC 62.

770 Ibid [24], [37].

771 Ibid [26], [38].

772 Ibid [26].

In *Place,*[773] regarding responsiveness to treatment and program compliance, the appeal court implies Mr Place responded to his first counsellor[774] but did not establish a rapport with another counsellor.[775] Subsequent breaches of bail were attributed, in part, to Mr Place's lack of rapport with the new counsellor:

> In April, your counsellor had changed and your regime was upset. You were unable to establish the same rapport with her replacement and breached your bail conditions. It was always known^ that even a successful conclusion to the drug counselling would still see you in prison for these offences. By May 2001, the pressure of this knowledge became extreme and it was agreed^ that you would leave the Drug Court programme in light of that pressure and your then recent behaviour^. It was then that you were committed to this court for sentence.[776]

Similarly, (as discussed in Chapter Three) in *Reed*[777] the appeal court notes Michael Reed did not seek assistance from support services and drug court staff when relapsing into drug use.[778] In *B, WR*[779] the prosecutor observes Mr B failed to seek assistance from drug court staff when threats were made about a drug debt.[780] The importance of monitoring for program compliance is evident in *Madden*[781] where the appellant Jarrod Allan John Madden was assessed as unsuitable 'for management in the Drug Court Program'[782] and 'a poor candidate for meaningful participation' because it was unlikely Jarrod would comply 'with the court ordered supervision which participation in those respective programs entailed'.[783] This assessment by the magistrate was based on previous breaches of parole and bail conditions.[784]

This section outlined discourse concerned with program compliance. Information gathered through monitoring during program participation, for the purpose of observing and addressing

773 *R v Place* [2002] SASC 101.
774 Ibid [97]: Details excluded.
775 Ibid.
776 Ibid.
777 *Reed v Police* [2007] SASC 26.
778 Ibid [28].
779 *Police v B, WR* [2005] SASC 163.
780 Ibid [20].
781 *Madden v Police* [2005] SASC 304.
782 Ibid [19].
783 Ibid.
784 Ibid.

deviance from the norms of the program, was revisited when the participant was originally sentenced and then later by the appeal courts.

III COMPLIANCE AND "SUCCESS"

Data analysis finds the original sentencing and appeal courts using compliance discourse to subsequently construct representations of the participant/appellant as compliant or non-compliant during the program. This section demonstrates how these courts conceptually connect recovery from drug dependence (transformation into the law-abiding citizen) with program compliance (the normative goals of the program). This conceptualisation by the sentencing and appeal courts appears consistent with literature suggesting that compliance discourse may also be considered a dominant form of discourse in drug courts, with successful participation being equated with program compliance, rather than internal transformation which is not directly detectable.

In at least 11 appeal decisions the program was terminated for non-compliance.[785] In 12 decisions the participant was rearrested for further offending, leading to program termination for at least five participants.[786] In four decisions the participant was imprisoned during the program for drug use[787] and one participant for breaching bail.[788] In 13 decisions the participant tested positive for substance use.[789] Discourse about non-compliance through drug use and re-offending did not necessarily lead to program termination. However, Jason Ashton, Matthew Caplikas and Michael

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785 *Parsons v Police* [2008] SASC 339, [37]; *Kells v Police* [2007] SASC 224, [3]; *Robson v Police* [2007] SASC 395, [5]; *Lawrie v DPP* [2008] SASC 21, [6]; *Police v B, WR* [2005] SASC 163, [12]; *Police v Bieg* [2008] SASC 261, [7]; *Police v Van Boxtel* [2013] SASC 82, [25]; *Roberts v Police* [2013] SASC 117, [6]; *Andreasen v Police* [2004] SASC 255, [4]; *Hughes v Police* [2012] SASC 183, [5]; *Crockford v Adelaide Magistrates Court & Anor* [2008] SASC 62, [45].

786 *Kells v Police* [2007] SASC 224, [3]: for further offending; *Police v Van Boxtel* [2013] SASC 82, [25]: for further offending; *Police v B, WR* [2005] SASC 163, [10], [12]: for further offending; *Hughes v Police* [2012] SASC 183, [5]: for further offending. Also see *Robson v Police* [2007] SASC 395, [4]-[5]: The appellant was arrested and charged with major indictable offences while in the program. The nature of the charges made him no longer eligible to participate in the program. Those charges were later reduced to lesser charges, at [7].

787 *R v Place* [2002] SASC 101, [97]; *Hughes v Police* [2012] SASC 183, [5]: both were remanded into custody by the drug court for stabilisation/detoxification.

788 *Parsons v Police* [2008] SASC 339, [35]: after leaving home without permission of his case manager and was away for 12 hours. Was released back into the program 10 days later.

789 *Reed v Police* [2007] SASC 26, [28]; *Ryan v Police* [2003] SASC 108, [9]; *Ashton v Police* [2008] SASC 174, [10], [12]-[14]; *R v Place* [2002] SASC 101, [97]; *Monterola v Police* [2009] SASC 42, [3]-[4]; *R v Caplikas* [2002] SASC 258, [66]; *Parsons v Police* [2008] SASC 339, [34], [36]-[37]; *Hughes v Police* [2012] SASC 183, [5]: In each of these decisions the appeal court has considered drug use during the program.

Reed did not successfully complete the program due to drug use. Some appellants had their program terminated for issues peripheral to drug testing such as missing tests: 'the respondent had failed to participate in a urine test';[790] being unable to provide urine samples: 'his participation in the program was terminated because of his inability to provide urine samples, which was an integral part of the program';[791] denial of drug use following positive test results;[792] or for allegations of substitution of urine,[793] but not necessarily for drug use. In these instances, the participant could not be accurately monitored for drug use and this information was taken into consideration by the appeal courts.

An evaluation of the SA drug court (SA report) outlines the reasons given for program termination during the first three years of operation.[794] The reasons are non-compliance, re-offending, having a warrant issued, bail breaches, positive urine tests, failure to appear in court, imprisonment and referrals to the mental impairment court.[795] Non-compliance includes failure to comply with case managers' instructions, avoiding case managers, not attending urine tests and breaches of home detention bail, curfew or other bail conditions. Non-compliance was provided as the reason for program termination where there was more than one incidence of behaviour such as failure to adhere to a case manager's direction, non-attendance at urine testing or breach of home detention or curfew bail conditions.[796] Re-offending led to program termination when the offending posed 'a risk to the community' such as property and violent offences.[797] Positive urine tests indicating drug use led to program termination if the participant was not making gains towards abstinence despite further support and assistance. Half of all program participants had their program terminated for "non-

790 *Police v Van Boxtel* [2013] SASC 82, [25].
791 *Roberts v Police* [2013] SASC 117, [6].
792 *Ryan v Police* [2003] SASC 108, [9].
793 *Ryan v Police* [2003] SASC 108, [9]; *Hughes v Police* [2012] SASC 183, [5]. However, in *Crockford v Adelaide Magistrates Court & Anor* [2008] SASC 62, [32] the applicant received "two points" for providing a cold sample, indicating substitution of urine. This did not trigger program termination.
794 Skrzypiec, above n 33, 18-20: This report is limited to the first few years of the program when it was in the pilot phase. The SA drug court has since evolved in relation to practice and procedure, the adoption of drug use risk assessment tools to screen potential participants, the nature and frequency of treatment for drug dependence and the provision of other treatment and rehabilitative services: See Ziersch and Marshall, above n 24, 6-8.
795 Skrzypiec, above n 33, 19, Table 10.
796 Ibid 19.
797 Ibid: Participants were generally not removed from the program for minor offending such as traffic offences.

compliance" and two participants in five had their program terminated for re-offending with only a small proportion of terminations due to drug use.[798] The report found non-compliance the most common reason for program termination.[799]

This thesis adopts a broader definition of non-compliance compared to the SA report. The SA report considers issues that impact on the courts ability to monitor and supervise participants such as not following case managers' instructions or avoiding case managers', not attending urine tests and breaching bail conditions as non-compliance. Other issues such as positive urine tests and re-offending are separate categories to non-compliance. The reasons for program termination identified in the SA report are similar to issues of non-compliance raised in the appeal decisions (ie issues with urine testing, breaching bail, re-offending and failure to adhere to case managers' directions). The SA report suggests the most common reason for program termination was more than one incidence of non-compliance with program requirements.[800] Four appellants were persistently non-compliant during the program, *Parsons*, *Hughes*, *Crockford* (discussed in Part II) and *Van Boxtel*. In *Van Boxtel*[801] participation was terminated for failing to participate in urine testing, removing home detention monitoring and further offending.

The compliance discourse in the appeal decisions and the SA report suggest discourse about program compliance could be considered a dominant form of discourse in the drug court and in the appeal decisions when referring to program participation. If that is the case, then a "successful" participant could be considered one who has complied with program conditions. Information on the SA drug courts website further suggests a connection between program compliance and successful completion. Under the heading "Determining progress and successful completion" is the following:

> The points system of allocating points for non-compliance provides a total that can provide an easy overview of progress. Points are awarded for failure to attend treatment sessions, minor breaches of bail,

798 Ibid: The report also suggests 'a substantial number of participants … absconded from the program' which subsequently led to program termination, at 20.
799 Ibid 20.
800 Ibid 19.
801 *Police v Van Boxtel* [2013] SASC 82, [25].

> lying about drug use or delivering a positive drug test. Relapses in drug use are common during the early phases of the program but continued drug use is a sign that progress is not being made.
>
> Successful completion is achieved if the person remains on the program for the 12 month period without reoffending and progresses through the treatment and is able to significantly reduce or totally abstain from drug use.[802]

Similarly, Brewster in a drug court evaluation from the United States (US report), found the judge, treatment staff and probation officers 'were realistic about the likelihood that many of the participants might suffer relapses early on but agreed that there should be some way to measure their long-term success'.[803] The indicators of success (or lack of success) put forward by those involved were program termination, rearrest and imprisonment during the program, vocational and housing status, and substance use.[804] These indicators were similarly evident as compliance discourse in the appeal decisions as discussed above. The findings relating to vocational and housing status are discussed in Part IV below.

> Whiteacre observes that a successful drug court participant could be described as:
>
> … one who follows the rules of the program, attends the required treatment meetings and courtroom hearings, turns in clean drug tests, progresses through the treatment phases, does not get rearrested, finally graduates from the program within a specified time span, and has the original charges dismissed or expunged.[805]

Similarly, in *Ashton*[806] it seems a high level of compliance (perhaps complete compliance) was expected as a measure of successful completion. Jason Ashton's program compliance is described by the appeal court as follows:

> During the time he was on the Program, he secured full-time employment, gained permanent accommodation, attended counselling, improved his support network, complied with bail conditions and demonstrated extended periods of abstinence from illicit drug use. He punctually attended all appointments and his rehabilitation through the Program seemed on track.[807]

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802 Courts Administration Authority of South Australia, *Drug Court* <http://www.courts.sa.gov.au/OurCourts/MagistratesCourt/InterventionPrograms/Pages/Drug-Court.aspx > (last viewed 16 May 2015).
803 Brewster, above n 185, 184.
804 Ibid.
805 Whiteacre, above n 595, 89.
806 *Ashton v Police* [2008] SASC 174.
807 Ibid [8].

Jason relapsed into drug use near the end of the program. Consequently, the drug court magistrate considered his time in the program as a failure: 'I believe you need to complete the program with a "gold star" as opposed to what I have to classify as being a failure',[808] despite Jason's compliance and significant achievements in many areas of his life. In three other decisions the appeal courts articulate a standard to be reached during the program to be considered a successful participant. In *Ryan v Police*[809] the appeal court observes, '[i]f the appellant had performed well in the drug program, this was a matter which might have offered some hope of rehabilitation which, in turn, could have been reflected in a lesser allowance for personal deterrence than that which might otherwise have been made'.[810] In *Police v Van Boxtel*[811] the appeal court posits, '[t]he grounds upon which any leniency could be extended were limited, especially as the respondent was not being sentenced after a successful completion of a Drug Court program'.[812] In *R v Proom*[813] the appeal court observes in some situations the sentence should be reduced to 'encourage what seem[s] to be strong prospects of rehabilitation linked to real progress in breaking addiction'.[814] These findings suggest an expectation by the appeal courts that participants demonstrate real progress towards recovery from drug dependence.

As discussed in Chapter One, there is debate in literature about what constitutes successful program completion. Cooper argues successful participants complete the program and make a substantial start to their recovery. They demonstrate achievements in many areas, for example, gaining employment, custody of children or participating in education programs.[815] These signs of improved societal functioning may also be evident for non-graduates.[816] These achievements are

808 Ibid [14].
809 [2003] SASC 108.
810 Ibid [14].
811 [2013] SASC 82.
812 Ibid [35].
813 [2003] SASC 88.
814 Ibid [44].
815 Cooper, above n 391, 4.
816 Ibid. See also Dive, above n 39, 3.

observable. Similarly, compliance discourse focusses on deviant behaviours which are also observable. On the other hand, internal changes are not so easily determined:

> It's perhaps the hardest thing because you want to be somewhat objective — you don't really know if they're benefiting. The [treatment] experts are telling you it doesn't appear [that they are], but these experts are not infallible — they may be misperceiving. If they're attending all their meetings, if they're doing all their group sessions, if they're meeting with their counsellor regularly, if they're testing negatively, you have to be very careful . . . I think I would raise it with the person [defendant] in court [and say] "you're doing fine with everything objective, but . . . your counselor [sic] just doesn't think you're getting it" and then hear what the person says. (Interview with Drug Court Judge)[817]

This quote reflects the observations of Wolf and Colyer who reason that recovery from drug dependence is unobservable, but certain behaviours indicative of behavioural change such as compliance with program requirements are observable.[818] Similarly, Bull acknowledges that monitoring in drug courts makes participant behaviour visible.[819] According to Bull, drug courts 'can be characterised as a network of strategies for surveillance which have the capacity to make behaviour visible ... [t]hey are processes which seek to ensure compliance, governing from above through deterrence — the threat of punishment directed at behaviour change'.[820] Lyons also found that compliance with treatment orders and bail conditions equated with successful progress in the program.[821] The visibility of behavior may explain why compliance discourse, which involves observation and correction of deviant behavior, seems a dominant form of discourse in drug courts. The findings show the original sentencing and appeal courts similarly engaging with discourse about compliance with program requirements to assess the "real progress towards recovery" that occurred during program participation.

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817 Burns and Peyrot, above n 115, 430.

818 Wolf and Colyer, above n 173, 254, ft 2: They concluded discourses about compliance provided their research with a way to measure patterns of recovery because compliance is observable.

819 Bull, above n 135, 4-5, 18.

820 Ibid. Whilst Bull concluded drug courts are not just about monitoring and compliance, at 17. This research nevertheless demonstrates how surveillance and compliance discourse is used in drug courts to encourage progress towards recovery.

821 Lyons, 'Judges as therapists', above n 82, 414.

IV COMPLIANCE AND RECOVERY

The risk of focusing on compliance as a measure of successful completion is that compliance may not necessarily indicate internal transformation. As Burns and Peyrot observe:

> Success in drug court requires more than complying with the letter of the law. It is about demonstrating the recovering self. The problem of how defendants demonstrate that they are benefiting from treatment is illustrated in cases where they have complied with all objective requirements and indicators, but according to treatment staff and experts, do not appear to be recovering.[822]

Analysis found compliance discourse discursively linked with discourse about transformation in the appeal decisions. This included the courts connecting program compliance with the participant's own insight into recovery, as outlined below.

A *Program Requirements and Internal Transformation*

20 decisions include discourse suggesting program compliance was equated with recovery. This was evident in *Ashton*[823] where complete compliance appears expected as a measure of recovery (discussed above). 10 decisions (including *Ashton*) include discourse about failure to transform based on information about program non-compliance. 10 decisions include positive discourse about transformation connected with varied levels of program compliance.

1 Failure to transform

In Part II of this Chapter (pp 102-6), the findings in *Parsons*, *Hughes* and *Crockford* show how the courts use discourse about program non-compliance to construct representations of participants as having failed the program and failed to demonstrate transformation. Similarly, the appellants in *Chandler*, *B, WR*, *Reed*, *Ryan* and *Richards* failed to demonstrate transformation as constructed through discourse about deviant behaviours conceptually linked to deviant attitudes (see Chapter Three pp 70-5). The deviant behaviours identified by the courts in those appeal decisions were also instances of program non-compliance. In *Chandler*[824] the appeal court identified ongoing dysfunctional behaviour and concluded that in spite of Michelle's 'commitment to change of attitude

822 Burns and Peyrot, above n 115, 430.
823 *Ashton v Police* [2008] SASC 174.
824 *Chandler v Police* [2002] SASC 130.

and lifestyle', Michelle had 'never been successful in achieving that goal'.[825] In contrast, in *Caplikas*[826] Matthew Caplikas is represented as finding the drug court regime 'too strict for his liking'.[827] Despite program termination for non-compliance, Matthew is represented by the appeal court as having potential to transform and be 'usefully employed if he can reform his tendency for criminal behaviour'.[828]

In five decisions program non-compliance was considered by the courts as lack of genuineness for change suggesting failure to transform. In *Reed*[829] counsel representing Michael Reed at the appeal hearing alluded to 'the appellant's developed awareness of his vulnerability to offending' and 'insight into his vulnerable drug addiction'.[830] Michael requested his own removal from the program and a return to custody.[831] This was considered by the appeal court as '... it might be true that he has shown insight', however, Michael has not taken advantage of the supports available during the program.[832] In *Richards*[833] Walter Richards's pleas for another chance was considered not genuine.[834] In *Ryan*[835] denial of drug use was represented as 'dishonest behaviour' which 'colour[s] any positive outcomes' and which renders his apology in a letter to the sentencing magistrate 'difficult ... to accept as genuine'.[836] An assessment about "genuineness" to change was considered in *R v Proom*[837] (*Proom*). The appeal court stated:

> Addiction to drugs may indicate that assurances by an offender of a desire to be rehabilitated are unreliable, or must at least be treated with caution, and sadly may mean that even a genuine wish to rehabilitate may have to be treated with caution. In the worst case, if there is no reason to think that the addiction will be broken, there will be no basis for leniency by reference to the prospect of rehabilitation.[838]

825 Ibid [15].
826 *R v Caplikas* [2002] SASC 258.
827 Ibid [6].
828 Ibid [67].
829 *Reed v Police* [2007] SASC.
830 Ibid [30].
831 Ibid [27].
832 Ibid [31].
833 *Richards v Police* [2007] SASC 368.
834 Ibid [25].
835 *Ryan v Police* [2003] SASC 108.
836 Ibid [11].
837 [2003] SASC 88.
838 Ibid [50].

In *Habra*[839] it is observed, '[w]hilst there were lapses, the defendant completed the program and was thought to be free of illicit drug addiction'.[840] Whilst Joseph Habra's time in the program was considered a 'practical display of his desire to overcome his addiction and consequent offending',[841] relapsing into drug use and re-offending shortly after completing the program negated the achievements gained during the program.[842]

2 Transformation and compliance

In 10 decisions the appellant demonstrated transformation through varied levels of program compliance. These decisions include discourse about the participant's own insight into recovery and readiness for change. In *B, WR*[843] despite program termination, the sentencing magistrate considered Mr B had 'performed "exceptionally well"' in the program.[844] The appeal court represents Mr B's progress in the program as 'a genuine and apparently successful attempt at rehabilitation'.[845] In *Place*[846] the original sentencing remarks (quoted) indicate Mr Place remained in the program with "significant success" despite some breaches[847] and is now considered to be drug free.[848] In *Lawrie 1*[849] the sentencing magistrate considers Nigel Lawrie's program compliance and determines there is '… potential for rehabilitation ... [having] arrived at a point in his life where he could embark upon a process of genuine redemption'.[850] This assertion is supported by 'the fact that he managed to complete 8 months of the 12 month course [which] is noteworthy' because Nigel then relapsed into drug use during a time when he was attending an inquest into a death in custody.[851]

839 *Habra v Police* [2004] SASC 430.
840 Ibid [7].
841 Ibid [16].
842 Ibid [15].
843 *Police v B, WR* [2005] SASC 163.
844 Ibid [9].
845 Ibid [45].
846 *R v Place* [2002] SASC 101.
847 Ibid [97].
848 Ibid [98].
849 *Lawrie v DPP* [2008] SASC 21.
850 Ibid [8].
851 Ibid [25].

In *Monterola*[852] the appeal court recontextualised compliance discourse when constructing Rex's insight into recovery and therefore potential for internal change. In that decision, the appeal court summarises the drug court progress reports as[853] '… in the main positive and indicate that the appellant was endeavoring to resolve his drug problems and had recognised the detrimental effects that drugs and consequent offending had on his lifestyle'.[854] In *Robson*[855] Daymane Charles Robson, 27 years of age, participated in the program for eight months. Daymane is the father of two children who do not reside with him. The appeal court directly quotes the sentencing remarks referring to a psychological report indicating '... you have developed some self-perception about where you have been and where you are going to go and you are getting old enough now to take a more mature look at your life'.[856] Similarly, in *Van Boxtel*[857] the appeal court directly quotes the sentencing remarks referring to a psychiatric report: 'you are now in a contemplative ... stage of thinking how better to manage the stresses that you were brought up with so you can live a better life for you and your kid and other people around you'[858] and 'You are reaching an age when ... people begin to think about living life better because they realise that it is not going to go on forever'.[859] This is translated by the appeal court as 'the respondent had reached that stage of wanting to change aspects of his life and of developing the motivation to seek help and treatment to do so'.[860] In *Ketoglou*[861] counsel submissions for Simela Ketoglou (restated) suggest Simela made 'significant steps towards her own rehabilitation' including program participation, recovery from heroin addiction and employment.[862]

In three decisions the courts used other sources of information to construct representations about internal transformation in addition to information about program compliance. In *Parsons*[863]

852 *Monterola v Police* [2009] SASC 42.
853 Ibid: Progress reports contained in Exhibit YJAM 2 to McMahon affidavit.
854 Ibid [18].
855 *Robson v Police* [2007] SASC 395.
856 Ibid [42].
857 *Police v Van Boxtel* [2013] SASC 82.
858 Ibid [15].
859 Ibid.
860 Ibid [21].
861 *Ketoglou v Police* [2008] SASC 243.
862 Ibid [30].
863 *Parsons v Police* [2008] SASC 339.

Sam Parsons was mainly non-compliant during the program. Sam is considered by the appeal court as having a choice to 'try and maintain a stable life' because of a relationship he has with a 'young woman who is opposed to drug taking, who has a good, stable job, and who can bring some stability to the defendant's life'.[864] Taking this into account, the appeal court concludes, '[t]he defendant has satisfied me that because he now has a relationship which he wants to continue, and he is really desirous of getting his life in to order, and that he should be given a further opportunity in which to do that'.[865] Similarly, in *R v Pumpa*[866] (*Pumpa*) Shane Pumpa successfully completed the program. During the program Shane 'entered into a stable relationship' and made significant progress with his rehabilitation.[867] In *Gasmier*[868] the appeal court notes Shane Gasmier is a qualified engineer and has a relationship with a woman who does not use drugs.[869]

In these appeal decisions the courts accept varied levels of compliance with program requirements as signs of movement towards recovery. This approach is consistent with the expectation for relapses on the path towards recovery. The findings suggest compliance discourse is connected with discourse about transformation with the courts associating program compliance with the participant's own insight into recovery. This discoursal and conceptual link between compliant behaviour and internal transformation is concerning because compliant behaviour may not necessarily be related to internal transformation.

B Transformation in Prison

In six decisions the courts represent participants as activated and responsible for future transformation while in prison. In *Habra*[870] the sentencing magistrate considered immediate imprisonment an opportunity to address his addiction and offending.[871] After addressing these issues 'one would hope

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864 Ibid [69].
865 Ibid [79].
866 [2013] SADC 157.
867 Ibid [33].
868 *R v Gasmier* [2011] SASCFC 43: The appellant applied to participate on the drug court program at the time he was being sentenced for other matters in the District Court, at [13].
869 Ibid.
870 *Habra v Police* [2004] SASC 430.
871 Ibid [17].

the defendant emerges from prison with a new resolve not to offend seriously'.[872] This suggests Joseph Habra will emerge from prison transformed into the law-abiding citizen instead of through participation in the program. In *Proom*[873] the sentencing remarks (quoted) indicate similar discourse: 'I must impose a significant period in custody, long enough I hope for you to actually beat your addiction'.[874] In *Lawrie 1*[875] the sentencing remarks (restated) refer 'to the time Mr Lawrie has spent in custody reflecting upon his life and his hopes for the future'.[876] In *Van Boxtel*[877] the sentencing remarks (quoted) state '[y]ou did it. You caused it. When you come out, do better'.[878] In *Field*[879] the sentencing magistrate states '[y]ou will have to serve the time. I do hope that when you are released that you lead a law-abiding lifestyle and teach your son and any other children to lead a law-abiding lifestyle. I would hate to see them in your footsteps'.[880]

Discourse about transformation in prison is not consistent with research indicating imprisonment may stop offending temporarily, however, most drug dependent offenders will recommence drug use and offending upon release from custody.[881] Furthermore, it raises the question as to whether imprisonment for some participants might undo any of the gains made while in the program. This appears to have been considered in *B, WR*[882] where the appeal court considers there are 'good prospects of rehabilitation' which will be lost if Mr B is imprisoned.[883] This is a consideration for Rex Monterola[884] who despite graduating received a sentence of immediate imprisonment. Furthermore, in *Ashton*[885] Jason Ashton was refused more time in the program following drug use and was instead sentenced by the drug court magistrate. Both the drug court and

872 Ibid.
873 *R v Proom* [2003] SASC 88.
874 Ibid [24].
875 *Lawrie v DPP* [2008] SASC 21.
876 Ibid [17].
877 *Police v Van Boxtel* [2013] SASC 82.
878 Ibid [57].
879 *Field v Police* [2009] SASC 354.
880 Ibid [20].
881 Klag, O'Callaghan and Creed, above n 447, 1778.
882 *Police v B, WR* [2005] SASC 163.
883 Ibid [29].
884 *Monterola v Police* [2009] SASC 42.
885 *Ashton v Police* [2008] SASC 174.

the appeal court acknowledge Jason's significant progress towards rehabilitation.[886] He nevertheless received a sentence of immediate imprisonment.

C Barriers to Recovery

Drug courts provide participants with a wide range of supports to assist with recovery from drug dependence enabling them to rebuild their lives in the community and become productive citizens.[887] In 16 decisions the presence or absence of social and treatment support contributed towards discourse about program compliance. This included housing, employment, finances, relationships, treatment and counselling.

In *Ashton*[888] gains made during the program include permanent housing, full-time employment, attendance at counselling and improved social support networks.[889] These factors provide Jason Ashton with the stability needed to comply with the program (ie compliance with bail conditions, extended periods of abstinence from drugs, not re-offending and punctual attendance at appointments).[890] Similarly, in *Caplikas*[891] Matthew Caplikas was employed and drug free for six months. The appeal court attributes this period of stability to home detention bail 'under his father's supervision'.[892] In addition to *Ashton* and *Caplikas*, four decisions include positive discourse about employment: *Place*,[893] *Ketoglou*,[894] *Pumpa*[895] and *Gasmier*.[896] Seven decisions include discourse about stable relationships: *B, WR*,[897] *Van Boxtel*,[898] *Ketoglou*,[899] *Parsons*,[900] *Pumpa*,[901] *Gasmier*[902]

886 Ibid [14], [17], [25], [27].
887 Cooper, above n 391, 2-3.
888 *Ashton v Police* [2008] SASC 174.
889 Ibid [8], [14], [25].
890 Ibid [8], [10].
891 *R v Caplikas* [2002] SASC 258.
892 Ibid [66].
893 *R v Place* [2002] SASC 101, [110].
894 *Ketoglou v Police* [2008] SASC 243, [30].
895 *R v Pumpa* [2013] SADC 157, [35].
896 *R v Gasmier* [2011] SASCFC 43, [13].
897 *Police v B, WR* [2005] SASC 163, [15]: Regular contact with his children.
898 *Police v Van Boxtel* [2013] SASC 82, [21]: Stable relationship, good relationship with a social worker.
899 *Ketoglou v Police* [2008] SASC 243, [30].
900 *Parsons v Police* [2008] SASC 339, [69].
901 *R v Pumpa* [2013] SADC 157, [33].
902 *R v Gasmier* [2011] SASCFC 43, [13].

and *Lawrie 1*.[903] In contrast, in *Police v Lawrie*[904] (*Lawrie 2*) the drug court's suspended sentence was revoked after Nigel Lawrie committed further offences. The appeal court observes that offending occurred after 'the respondent had moved away from his family, thus inhibiting his path towards recovery' and whilst 'he was living by himself without the support systems that he needed'.[905]

Five decisions include discourse suggesting lack of support contributed towards program non-compliance. In *Reed*[906] Michael Reed is represented as lacking in family and social support[907] and he failed to seek assistance when relapsing into drug use.[908] In *Monterola*[909] a relapse into drug use is attributed to 'relationship conflicts and poor coping skills'.[910] In *Robson*[911] non-compliance is partly attributed to allegations of domestic violence towards his young son by the partner of his son's mother.[912] In *Place*[913] Mr Place is non-compliant following a change in counsellors.[914] In *Chandler*[915] Michelle has accommodation, financial and relationship issues as well no support from her case manager.[916] Michelle's inability to comply is represented as 'struggling with an independent lifestyle'.[917] She is represented as responsibilised for not taking 'advantage of opportunities'[918] and for failing to comply with program requirements.[919]

In relation to housing, Cooper observes '[m]any drug court participants at the commencement of the program are homeless or live in housing considered unsuitable for progress towards recovery by the drug court'.[920] Jason Ashton was homeless at the start of the program and gained permanent

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903 *Lawrie v DPP* [2008] SASC 21, [11].
904 [2010] SASC 117.
905 Ibid [16].
906 *Reed v Police* [2007] SASC 26, [18].
907 Ibid.
908 Ibid [28].
909 *Monterola v Police* [2009] SASC 42, [4].
910 Ibid.
911 *Robson v Police* [2007] SASC 395, [41].
912 Ibid.
913 *R v Place* [2002] SASC 101.
914 Ibid [97], [98].
915 *Chandler v Police* [2002] SASC 130.
916 Ibid [11], [14].
917 Ibid [14].
918 Ibid [16], [18].
919 Ibid [16].
920 Cooper, above n 391, 5.

Housing Trust accommodation during the program.[921] In contrast, three participants (including Michelle Chandler) struggled to maintain their housing status. In *Crockford*[922] a drug court report suggests George Crockford is at risk of losing his accommodation due to neighbour complaints 'regarding excessive noise and people coming and going at all hours of the night'.[923] In addition, an official complaint is lodged with the Housing Trust.[924] This information is presented in the context of ongoing breaches of bail and a request by drug court staff for program termination.[925] Similarly, in *Parsons*[926] Sam Parsons is accused of damaging Anglicare property,[927] one instance of numerous breaches, immediately followed with '[h]e was terminated finally from the program'.[928]

The discourse outlined above shows how everyday problems can affect program compliance and this is subsequently reconsidered in legal contexts. Wolf and Colyer conducted research into how everyday hassles can be a barrier to recovery in drug courts. In a case study, they observed Beverly as 'unable to progress in the program and her treatment because of a variety of barriers',[929] including the availability of suitable accommodation and issues with access to her children. Similar issues were evident in the appeal decisions. For example, Michelle Chandler has similar issues with housing, finances[930] and gaining access to her child.[931]

Analysis yielded wide ranging issues affecting program compliance, further confirming participants require extensive supports and services. The extent of participant needs is confirmed by a report from the SA drug court on the profiles of drug court participants at the application and assessment stage of the program. This report indicates 23.5 per cent of applicants had accommodation issues due to 'a lack of suitable accommodation or difficulties keeping their current accommodation

921 *Ashton v Police* [2008] SASC 174, [8].
922 *Crockford v AMC Anor* [2008] SASC 62.
923 Ibid [39].
924 Ibid.
925 Ibid.
926 *Parsons v Police* [2008] SASC 339.
927 Ibid [37].
928 Ibid.
929 Wolf and Colyer, above n 173, 246-7.
930 *Chandler v Police* [2002] SASC 130, [11].
931 Ibid [11].

as well as wanting to move because of problems with neighbours or living in an area with other known drug users';[932] 11.9 per cent had experienced periods of homelessness in the past;[933] 47.4 per cent had financial difficulties including 'high levels of debt, such as money owed for utilities, rent and fines, or owing large amounts of money due to drug based transactions';[934] 94.3 per cent were unemployed;[935] 68.4 per cent had left school at year 10 or before;[936] 66.1 per cent were single;[937] 49.6 per cent had children;[938] 48.5 per cent reported impaired family relationships;[939] 82.9 per cent had spent time in custody prior to acceptance into the program;[940] and 61.2 per cent had a criminal history of 10 years or more.[941] Some of these factors (ie issues with accommodation, neighbour complaints, financial problems, unemployment, child custody and impaired relationships) were taken into consideration by the courts when constructing representations of compliance with program requirements and recovery.

In some instances situations arose which were out of the participant's control. In other instances, the participant was complicit in creating a barrier to their own recovery or resisted program conditions. Regardless, the drug court and the appeal courts used this information to construct representations of compliance and movement towards recovery. The findings are outlined below.

1 Complicity

Discourse analysis identified instances of complicity with barriers to recovery by some drug court participants. In *Reed*[942] and in *B, WR*[943] the appellants were complicit by not seeking assistance or support, Michael Reed when relapsing into drug use[944] and Mr B when threatened by drug dealers.[945]

932 Skrzypiec, above n 24, 33.
933 Ibid 34.
934 Ibid.
935 Ibid 14.
936 Ibid 15.
937 Ibid 14.
938 Ibid 29.
939 Ibid 30.
940 Ibid 18.
941 Ibid 21.
942 *Reed v Police* [2007] SASC 26, [28].
943 *Police v B, WR* [2005] SASC 163, [13].
944 *Reed v Police* [2007] SASC 26, [28].
945 *Police v B, WR* [2005] SASC 163, [13].

Michael Reed was further complicit by altering a medical certificate.[946] Other findings of complicity include: *Parsons*[947] where Sam Parsons damaged property; *Caplikas*[948] where Matthew Caplikas reassociated with drug using friends; and *Hughes,*[949] *Van Boxtel*[950] and *Roberts*[951] where the appellants avoided urine testing.

Discourse analysis identified issues which seemed beyond the control of some participants. For example, an inability to deal with financial issues (including drug debts) as encountered in *Chandler*.[952] Also in *Chandler,*[953] *Monterola*[954] and *Robson*[955] the appellants experienced unsupportive and disruptive behaviour from family members, friends and associates.[956] In *Monterola*, for example, Rex Monterola relapsed into drug use on three occasions following relationship conflicts. In *Chandler*[957] and in *Place*[958] there were issues with counselling services and other supports.[959]

In *Habra*[960] and *Robson*[961] the appellants were charged with further offences which occurred before starting the program, there being a delay with the charges being laid in court.[962] Joseph Habra is represented by the sentencing magistrate as having failed a requirement of the program by not admitting 'all offending to the court' (which is not a requirement for acceptance into the program).[963] Daymane Charles Robson was charged with a major indictable offence, making him no longer eligible

946 *Reed v Police* [2007] SASC 26, [28].
947 *Parsons v Police* [2008] SASC 339, [37].
948 *R v Caplikas* [2002] SASC 258, [66].
949 *Hughes v Police* [2012] SASC 183, [5].
950 *Police v Van Boxtel* [2013] SASC 82, [25].
951 *Roberts v Police* [2013] SASC 117, [6].
952 *Chandler v Police* [2002] SASC 130, [11].
953 Ibid.
954 *Monterola v Police* [2009] SASC 42, [4].
955 *Robson v Police* [2007] SASC 395, [41].
956 *Chandler v Police* [2002] SASC 130, [11]; *Monterola v Police* [2009] SASC 42, [4]; *Robson v Police* [2007] SASC 395, [41].
957 *Chandler v Police* [2002] SASC 130, [11], [14].
958 *R v Place* [2002] SASC 101, [97].
959 *Chandler v Police* [2002] SASC 130, [11], [14]; *R v Place* [2002] SASC 101, [97].
960 *Habra v Police* [2004] SASC 430, [7].
961 *Robson v Police* [2007] SASC 395, [4]-[5].
962 *Robson v Police* [2007] SASC 395, [4]-[5], [7]; *Habra v Police* [2004] SASC 430, [7].
963 *Habra v Police* [2004] SASC 430, [11].

to participate in the program.[964] These events beyond the participant's control were later used to partly inform the courts about levels of program compliance. In these findings, Joseph Habra is represented as having not complied with the program requirement of admitting all offences before commencing the program (which was not a requirement), Daymane Robson is no longer eligible to remain in the program.[965]

Wolf and Colyer similarly observed Beverly being complicit in constructing some of the barriers to her recovery, however, other barriers were not under her control.[966] Furthermore, they found 'personal problems … associated with recovery, at least as it is measured by compliance with program requirements'.[967] The types of personal problems experienced by participants observed by Wolf and Colyer included welfare department sanctions which precluded participants from receiving public assistance funds, unstable accommodation, poor mental and physical health, domestic violence, separation from children and delays in receiving treatment.[968] For some participants, simply getting to counselling sessions was problematic with 'many [participants having] to worry about how they can get to counselling sessions without even enough pocket money to take a bus'.[969] From a program compliance perspective it seems essential participants have a high level of support to ensure the stability needed to comply with the requirements of the program.

964 *Robson v Police* [2007] SASC 395, [7]: That charge was later reduced to a lesser charge.

965 To be eligible to participate on the South Australian program, applicants must not have pending major indictable offences.

966 Wolf and Colyer, above n 173, 246-7.

967 Ibid 251.

968 Ibid 250-1.

969 Ibid. Such issues are not uncommon in drug courts. See, eg, Dive, above n 39, 1; Kothari, Marsden and Strang, above n 452, 428: They observe that 'treatment needs to be in place for as long as the offender requires help, not simply for the duration of their sentence', at 428. See also Anglin and Hser, above n 443, 259 who provide that many drug court participants also require longer term intervention after participation in the program in order for them to maintain their recovery from drug dependence.

2 Resistance

The appellants in *Ashton*,[970] *Monterola*,[971] *Habra*[972] and *B, WR*[973] are considered compliant throughout most of the program, whereas the appellants in *Chandler*,[974] *Parsons*[975] and *Hughes*[976] demonstrate persistent non-compliance. Some non-compliance supports the assertion that disciplinary power can never be considered as absolute or complete because 'even in the face of custodial imperatives and restrictive legislation … [or] the combined forces of punishment and therapy … the struggle for autonomy is ever-present and gives rise to resistance'.[977] This might explain why Jason Ashton, for example, became non-compliant late in the program. His explanation for drug use was 'that the stress of [the] impending sentence had triggered another relapse'.[978] Similarly, in *B, WR* Mr B re-offended weeks before graduation. His explanation for re-offending was threats from a drug dealer due to a drug debt.[979] Resistance might explain why Michelle Chandler, Sam Parsons and Tanya Hughes were consistently non-compliant during the program. Those participants appeared non-responsive to judicial encouragement and admonishments as well as rewards and sanctions.

Jason Ashton was told by the drug court magistrate that a report showing clean urine test results at the next hearing would lead to a suspended sentence.[980] Sam Parsons was arrested during the program for breaching bail by disappearing for 12 hours.[981] Sam was eventually bailed and returned to the program, only to continue to be non-compliant.[982] Similar examples of resistance are evident

970 *Ashton v Police* [2008] SASC 174.
971 *Monterola v Police* [2009] SASC 42.
972 *Habra v Police* [2004] SASC 430.
973 *Police v B, WR* [2005] SASC 163.
974 *Chandler v Police* [2002] SASC 130.
975 *Parsons v Police* [2008] SASC 339.
976 *Hughes v Police* [2012] SASC 183.
977 Deidre N Greig, *Neither Bad Nor Mad: The Competing Discourses of Psychiatry, Law and Politics* (Jessica Kingsley Publishers, London and Philadelphia, 2002), 265.
978 *Ashton v Police* [2008] SASC 174, [11].
979 *Police v B, WR* [2005] SASC 163, [9], [13].
980 *Ashton v Police* [2008] SASC 174, [11].
981 *Parsons v Police* [2008] SASC 339, [35].
982 Ibid [36], [37].

in literature. For example, Lyons found resistance to the judge making "therapeutic" interventions by participants refusing to answer questions or give further information about drug use.[983]

Seven appellants demonstrated resistance to the program by removing home detention monitoring and absconding: *Hughes*,[984] *Field*,[985] *Van Boxtel*,[986] *Richards*[987] and *Andreasen*.[988] In *Parsons*,[989] as well as disappearing for 12 hours,[990] Sam Parsons removed electronic monitoring and absconded on at least two occasions.[991] Similarly, in *Lawrie 1*[992] Nigel Lawrie twice went missing overnight. Anglin argues the likelihood of drug addicts absconding from court ordered rehabilitative programs 'becomes more common as controls become stricter'[993] and it is 'necessary to balance the level of constraint that supervision places on addicts against the likelihood that they will abscond if the control becomes too severe'.[994] Similarly, Rotgers observes:

> Research is also needed on the nature of coercive measures themselves, and how coercive measures exert their impact on individuals. Of particular interest in this regard is why many individuals abscond from or leave treatment, even though apparently strong coercive measures are in place to keep them in treatment.[995]

Desistance literature may explain why some participants are resistant to following program conditions including absconding from the program. Desistance from illicit drug use and offending is 'conceptualized as protracted processes rather than discrete events',[996] and research suggests 'drug treatment form[s] a crucial but minor aspect in the larger process of recovery'.[997] Research also

983 Lyons, 'Judges as therapists', above n 82, 418-19: Lyons found many women in the study resisted answering questions about drug use with some perceiving differential and harsher sanctions compared to those received by the men in the program, at 419.
984 *Hughes v Police* [2012] SASC 183, [5].
985 *Field v Police* [2009] SASC 354, [16].
986 *Police v Van Boxtel* [2013] SASC 82, [15].
987 *Richards v Police* [2007] SASC 368, [20].
988 *Andreasen v Police* [2004] SASC 255, [4].
989 *Parsons v Police* [2008] SASC 339.
990 Ibid [35].
991 Ibid [20], [33], [37], [21].
992 *Lawrie v DPP* [2008] SASC 21, Table of Offences — offence no 73.
993 M Douglas Anglin, 'The Efficacy of Civil Commitment in Treating Narcotics Addiction' (1988) 18(4) *Journal of Drug Issues* 527, 534.
994 Ibid 543. See also Rotgers, above n 443, 409.
995 Rotgers, above n 443, 413.
996 Tim McSweeney et al, 'Twisting Arms or a Helping Hand? Assessing the Impact of "Coerced" and Comparable "Voluntary" Drug Treatment Options' (2007) 47(3) *British Journal of Criminology* 470, 485.
997 Ibid: McSweeney et al observe 'that expectations of treatment — whether 'coerced' or not — should be realistic; these options are not a panacea for tackling the wider problems of drug misuse and drug-related crime', at 485.

suggests 'the effects of substance misuse treatment may be cumulative and their impact associated with stages in individual drug-using careers'.[998] Perhaps those participants who resisted the program were not ready to engage meaningfully with the program. As Klag et al observe, '[c]oercion can bring individuals into treatment, but it cannot force them to actively participate and engage in treatment',[999] particularly where 'motivation for treatment is ... poor, unstable, and inconsistent'.[1000] This may partly explain why some appellants failed to complete the program with many having their program participation terminated. Perhaps for some drug court participants, incentives such as treatment whilst living in the community, a reduction in sentence for successful completion and sanctions during the program are not sufficient motivators for change.

V COMPLIANCE AND TREATMENT DISCOURSE

Analysis for inclusion and exclusion of sources of information found the courts constructing versions of progress towards recovery based on compliance discourse recontextualised predominately from the sentencing remarks. Only five decisions include information from drug court progress reports (see p 88). In addition, 10 decisions recontextualised discourse from psychological or psychiatric reports to assess signs of recovery.[1001] Such reports are often provided to the courts as part of the sentencing

998 Ibid 486. See also Michael Gossop, *Treatment outcomes: what we know and what we need to know*, Treatment Effectiveness Series No 2 (National Treatment Agency for Substance Misuse, London, 2005); Stevens et al, above n 443; A Uchtenhagen et al, above n 443.

999 Klag, O'Callaghan and Creed, above n 447, 1781. See also Farabee, Prendergast and Anglin, above n 442, 3. There is, however, a competing view that the effectiveness of legal coercion may be overstated. For example, Klag et al conducted a review of research into the effectiveness of legal coercion. They concluded that '[r]eviews of three decades of research into the effectiveness of coerced substance user treatment have yielded a mixed, inconsistent, and inconclusive pattern of results', at 1782. They also found, whilst some 'studies have found that voluntary clients have better treatment outcomes', other studies indicated 'that mandated clients are more likely to successfully complete treatment compared to voluntary clients', at 1782. Furthermore, they located studies which 'suggest that legal pressure is either unrelated or negatively related to treatment outcomes', at 1782.

1000 Klag, O'Callaghan and Creed, above n 447, 1781.

1001 *Chandler v Police* [2002] SASC 130: psychological report and report from the corrections officer from the drug court, at [13]-[14]; *Habra v Police* [2004] SASC 430: presentence report, at [21], medical report, at [28]-[31], neuropsychological report, at [32]-[33], report from prison health service, at [34]; *Ashton v Police* [2008] SASC 174: final progress report, at [12], psychological report, at [13]; *Parsons v Police* [2008] SASC 339: neuropsychological report, at [41]-[42]; *Kells v Police* [2007] SASC 224: psychological report, psychiatric report and antecedent report, at [3]; *Roberts v Police* [2013] SASC 117: two psychological reports, at [5]; *Robson v Police* [2007] SASC 395: psychological report, at [42]; *Police v Van Boxtel* [2013] SASC 82: psychiatric report, at [15], psychological report, at [20], final report of the Magistrates Court Diversion Program, at [23], drug court progress report, at [25], drug court assessment report, at [26]; *R v Caplikas* [2002] SASC 258: psychiatric report, at [66]; *Hughes v Police* [2012] SASC 183: psychological report, at [18]-[26].

process and the expert providing the report has not necessarily been involved with treating the participant during the program.

Excluded from the appeal decisions were assessments about internal transformation by treatment professionals who worked directly with the participant, with the exception of *Place,*[1002] *Crockford,*[1003] *Ashton*[1004] and *Chandler*.[1005] In *Place*[1006] it is implied that Mr Place responded to his first counsellor[1007] but was unable to establish a rapport with a subsequent counsellor.[1008] In *Crockford*[1009] reference is made to George Crockford's attendance at counselling sessions[1010] and a future appointment for anger management counselling.[1011] In *Ashton*[1012] Jason's regular attendance at counselling is considered one of his "achievements" while in the program.[1013] Jason was offered further counselling after relapsing into drug use.[1014] In *Chandler*[1015] Michelle's case supervisor was unable to provide the supports needed due to her client case load.[1016] In these appeal decisions, the courts focussed on compliance discourse rather than discourse about progress with treatment. The voices of treatment professionals' best positioned to assess progress with treatment and recovery during the program was absent. Indeed, the compliance discourse located in the appeal decisions focusses on behavioural management, rather than internal transformation.[1017]

1002 *R v Place* [2002] SASC 101.
1003 *Crockford v Adelaide Magistrates Court & Anor* [2008] SASC 62.
1004 *Ashton v Police* [2008] SASC 174.
1005 *Chandler v Police* [2002] SASC 130.
1006 *R v Place* [2002] SASC 101.
1007 Ibid [97].
1008 Ibid.
1009 *Crockford v Adelaide Magistrates Court & Anor* [2008] SASC 62.
1010 Ibid [42].
1011 Ibid [38], [41].
1012 *Ashton v Police* [2008] SASC 174.
1013 Ibid [14].
1014 Ibid [12].
1015 *Chandler v Police* [2002] SASC 130.
1016 Ibid [14].
1017 See, eg, Lyons, 'Judges as therapists', above n 82, 415; Greig, above n 979, 197: Greig similarly observed therapeutic/treatment providers justifying therapeutic programs in court by referring to them as if they were simply about behavioural management. This observation by Greig is in the context of tension between mental health treatment plans and correctional services management plans for Garry David whilst in prison.

Other research may provide an explanation for the absence of discourse about recovery from treatment professionals. There is contention about the competing role and goals of treatment providers in programs, with a particular issue with confidentiality:

> Coercion and confidentiality have an uncomfortable relationship with one another. Where a client freely chooses treatment, the obligations of the treatment agency are largely but not exclusively to the client, who can expect confidential treatment — with a few rare exceptions.
>
> Where the client is coerced into treatment by a court as a condition of probation, the treatment providers are, arguably, as accountable to the court as to the client. This accountability is not easily reconciled with current working practice: disclosure by drug workers to probation officers of clients' attendance records or drug tests is one area in which difficult issues arise.[1018]

Similarly Hall observes:

> Treatment staff usually see the drug offender as their client and, hence, as someone who should be involved in making treatment decisions and as someone to whom they owe an obligation to respect the confidentiality of information provided. Treatment staff also expect that their clients will have relapses to drug use and believe that they should be dealt with therapeutically rather than punitively. Correctional and judicial personnel, by contrast, often expect treatment to produce immediate and enduring abstinence. They may see treatment as something directed by the court, and hence regard any instances of drug use in treatment as breaches that treatment staff should report.[1019]

In addition to confidentiality, both Hough and Hall (cited above), and Rotgers[1020] suggest the aims of drug courts may conflict with clinical assessments of treatment professionals 'as to what the most effective treatment might be, how long treatment should last, and what the most reasonable outcome goals are for that individual'.[1021] An explanation for exclusion of information from treatment providers may be located in the following questions by Rotgers:

> What information about a client's progress in treatment does a coercive agent *need* to know? Should a clinician report every slip or relapse, and what are the consequences to the patient's treatment of doing so? What outcome goals should be the focus of treatment? Is total abstinence the only legitimate outcome goal, or are there other, more clinically appropriate goals that might be the focus of treatment for some coerced clients? Who selects the outcome goal? Are these questions the business of the coercive agent, the clinician, the client, two of these but not the other, or all three?[1022]

1018 Hough, above n 442, 47.
1019 Hall, above n 444, 6.
1020 Rotgers, above n 443, 407.
1021 Ibid 407, 412.
1022 Ibid 406.

The absence of discourse about internal transformation from treatment providers may be indicative of treatment providers providing the drug court with information limited to attendance at counselling but not including details about internal responses to treatment. Information about "attendance" is compliance discourse. This discourse has then been recontextualised into the appeal decisions.

The absence of discourse about internal transformation from treatment providers in the appeal decisions may be indicative of the power of the drug court (the coercive agent) to determine treatment goals and to define treatment outcomes. This is consistent with a disciplinary regime where actuarialism, the gathering and use of scientific data and expert knowledges, is *subordinated* to achieving the disciplinary aims of that regime.[1023] The primary aim of drug courts is a reduction in drug related crime through reformation of the individual offender. In this context, the drug court may not necessarily be seeking treatment outcomes but rather social control outcomes. The tension between social control and treatment goals in drug courts is acknowledged by Rotgers who observes, '[i]f social control is a primary goal of coercive treatment, then that needs to be stated clearly, and treatment agents enlisted in that process, if possible. However, ideally, treatment decisions should be kept separate from social control decisions'.[1024] The lack of information from treatment providers in the appeal decisions suggests constraint being exercised by the drug court on how information from treatment providers is considered and disseminated.

VI SUMMARY

This chapter explored compliance discourse created through surveillance to assist the drug court with monitoring participants during the program. That discourse was later recontextualised by the drug court during sentencing and the appeal courts to construct discursive representations of the participant as having made progress or non-progress towards recovery. Analysis for compliance discourse in the appeal decisions in conjunction with literature suggests compliance discourse may be a dominant form of discourse in drug courts. Furthermore, discourse analysis found compliance discourse linked

1023 O'Malley, above n 596, xii.
1024 Rotgers, above n 443, 414.

with discourse about recovery (internal transformation) in 20 decisions. The findings suggest the courts equate successful participation with program compliance. There is a paucity of treatment discourse from treatment providers evident in the appeal decisions. Where treatment discourse is evident, it is limited to compliance discourse.

This chapter suggests that behaviours such as compliance with program requirements were translated by the courts as signs of recovery because those behaviours are observable. The predominance of compliance discourse alongside assessments about internal transformation suggests the drug court and the appeal courts are operating from a disciplinary and social control agenda, rather than from a treatment agenda during the sentencing and appeal process for these participant/appellants.

5. REHABILITATION AND RISK: DISCOURSE ABOUT PUNISHMENT

> Rehabilitation as an object of sentencing is aimed at the renunciation by the offender of his wrong doing and his establishment or re-establishment as an honourable law-abiding citizen … The object of the courts is to fashion sentencing measures designed to reclaim such individuals wherever such measures are consistent with the primary object of the criminal law which is protection of the community.[1025]

This chapter contemplates how punishment through the use of sanctions in the drug court partly justifies the punishment imposed by the original sentencing and appeal courts. In this chapter theoretical understandings about punishment and risk assist to develop an understanding about how the courts use compliance discourse and other information to justify punishment or to suspend a custodial sentence on appeal. 15 appellants received sentences of immediate imprisonment.[1026] In nine decisions the original sentence was upheld.[1027] In three decisions the non-parole period only was reduced.[1028] In two decisions the overall sentence was reduced.[1029] In one decision the suspension of the original sentence was revoked.[1030] Four appellants received suspended or time served sentences

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1025 *Vartokas v Zanker* (1988-89) 51 SASR 277, 279 (King CJ).

1026 In addition, the following appeals were remitted back to the Magistrates Court for resentence following appeal, consequently the new sentence is unknown: *Police v Bieg* [2008] SASC 261, [20] (prosecution appealed); *Police v Van Boxtel* [2013] SASC 82, [65] (prosecution appealed); *Norman v Police* [2005] SASC 12, [15] (N appealed). Furthermore, in *Hughes v Police* [2012] SASC 183, [12] (H appealed) counsel submissions in relation to resentencing were yet to be heard by the court and the new sentence is unknown.

1027 *Ryan v Police* [2003] SASC 108, [4]: 2 years, 10 months and 19 days with a non-parole period of 15 months (R appealed - original sentence, appeal dismissed); *Andreasen v Police* [2004] SASC 255, [6]: 3 years, 6 months with a non-parole period of 2 years and 4 months (A appealed - original sentence, appeal dismissed); *Reed v Police* [2007] SASC 26, [5]: 3 years and 8 months with a non-parole period of 2 years and 9 months (R appealed - original sentence, appeal dismissed); *Kells v Police* [2007] SASC 224, [5]: 26 months with a non-parole period of 11 months (K appealed - original sentence, appeal dismissed); *Richards v Police* [2007] SASC 368, [11]: 30 months with a non-parole period of 18 months (R appealed - original sentence, appeal dismissed); *Ashton v Police* [2008] SASC 174, [6]: 5 years and 6 months with a non-parole period of 18 months (A appealed - original sentence, appeal dismissed); *Roberts v Police* [2013] SASC 117, [2]: 23 months and 1 week with a non-parole period of 12 months (R appealed - original sentence, appeal dismissed); *R v Caplikas* [2002] SASC 258, [47], [100]: 15 years and 8 months with a non-parole period of 7 years and 8 months (prosecution appealed - original sentence, appeal dismissed); *Ketoglou v Police* [2008] SASC 243, [3]: 12 months then to be released on a recognizance after serving 4 months (K appealed - original sentence, appeal dismissed).

1028 *Chandler v Police* [2002] SASC 130, [19]: 10 years, 9 months and 2 days with a non-parole period of 6 years (C appealed – re-sentenced by appeal court which reduced the non-parole period only); *Monterola v Police* [2009] SASC 42, [1]: 3 years and 7 months with a non-parole period of 15 months, at [22] (M appealed – re-sentenced by appeal court which reduced the non-parole period only); *R v Place* [2002] SASC 101, [117]: 11 years and 6 months with a non-parole period of 6 years (P appealed – re-sentenced by appeal court which reduced the non-parole period only).

1029 *Robson v Police* [2007] SASC 395, [50]: 41 months with a non-parole period of 21 months (R appealed – re-sentenced by appeal court – sentence reduced); *R v Proom* [2003] SASC 88, [91]: 6 years with a non-parole period of 3 years (P appealed – re-sentenced by appeal court – sentence reduced).

1030 *Police v Lawrie* [2010] SASC 117, [17]: 3 years with a non-parole period of 15 months, suspended (prosecution appealed – re-sentenced by appeal court – suspension of sentence revoked).

on appeal.[1031] In most of the decisions outlined above, the courts rely on compliance discourse as well as information about the seriousness of the offending, the appellant's criminal history and general background to construct appellants discursively as at risk of future drug related offending and so uphold immediate custodial sentences. These decisions include appellants who were mainly compliant during the program. In two cases, appellants who were consistently non-compliant were considered to have prospects of rehabilitation and so received suspended sentences. In those instances, the appellant was represented as having some form of social stability in the community such as a stable relationship.

Using theories about punishment, rehabilitation and risk, this chapter first explores punishment in the form of sanctions imposed by the drug court to promote program compliance because drug court sanctions address deviant behaviour to encourage progress towards recovery during the program. The chapter then considers discourse in the appeal decisions to show how information generated to monitor participant progress originally created for a therapeutic purpose and other information was recontextualised to inform assessments about future risk of offending and rehabilitation in relation to punishment as the actual sentence.

I PUNISHMENT AS AN OBJECT OF STUDY

Garland argues punishment should not be viewed as the operation of power alone. Rather, the framework of study should include 'interpretation of the conflicting social forces, values, and sentiments, which find expression in penal practice'.[1032] Punishment as an object of study cannot be reduced 'to a single meaning or a single purpose'.[1033] Rather, punishment is a 'multifaceted process'

1031 *Police v B, WR* [2005] SASC 163, [16], [52]: suspended sentence of 12 months imprisonment with a non-parole period of 6 months in the drug court. On appeal, the sentence was reduced to 4 months imprisonment which is time already served in custody (re-sentenced by appeal court); *Lawrie v DPP* [2008] SASC 21, [28]-[29]: suspended sentence of 6 years and 6 months with a non-parole period of 3 years (re-sentenced by appeal court); *Parsons v Police* [2008] SASC 339, [80]: suspended sentence of 3 months imprisonment (re-sentenced by appeal court); *Habra v Police* [2004] SASC 430, [47]: 6 months imprisonment which is time already served in custody (re-sentenced by appeal court). Also *R v Gasmier* [2011] SASCFC 43, [15] received a suspended sentence of 9 months imprisonment (original sentence, appeal dismissed). G, however, is not a former drug court participant. G had applied for the drug court program at the time he was sentenced for these offences, at [13].

1032 Garland, above n 376, 167.

1033 Ibid 17.

involving ‘a complex set of interlinked processes and institutions’.[1034] Punishment is enmeshed in complex relationships between ‘processes of law-making, conviction, sentencing, and the administration of penalties’.[1035] These complex relationships incorporate:

> ... discursive frameworks of authority and condemnation, ritual procedures of imposing punishment, a repertoire of penal sanctions, institutions and agencies for the enforcement of sanctions and a rhetoric of symbols, figures, and images by means of which the penal process is represented to its various audiences.[1036]

According to Garland, ‘... penality communicates meaning not just about crime and punishment but also about power, authority, legitimacy, normality, morality, personhood, social relations, and a host of other tangential matters’.[1037] Furthermore, ‘... if we are to understand the social effects of punishment then we are obliged to trace this positive capacity to produce meaning and create ‘normality’ as well as its more negative capacity to suppress and silence deviance’.[1038] When considering disciplinary power and normative judgements it is important to consider the values or objectives sought by institutions and the methods used to achieve those aims.[1039] State sanctioned punishment limits an individual’s freedom and therefore must have moral and normative justification.[1040]

According to Duff, ‘‘inclusion’ (as a manifestly good thing) and ‘exclusion’ (as a manifestly bad thing)’ are ideals which can assist with understanding how legislation and common law represent the normative constructs of the wider community.[1041] The “ideal” view of law is that ‘[i]t embodies the shared values, the shared understandings and way of life, of the whole community’.[1042] The role of the legislature and judges is ‘to articulate the values embedded in the community’s life’.[1043] This

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1034 Ibid 16.
1035 Ibid 17.
1036 Ibid.
1037 Ibid 252.
1038 Ibid 253.
1039 Ibid 169, 170.
1040 R A Duff and David Garland, ‘Introduction: Thinking about Punishment’ in Antony Duff and David Garland (eds), *A Reader On Punishment* (Oxford University Press, Oxford, 1994), 1-6. See also Boldt, above n 30, 129.
1041 R A Duff, ‘Inclusion and Exclusion: Citizens, Subjects and Outlaws’ (1998) 51(1) *Current Legal Problems* 241, 241.
1042 Ibid 253.
1043 Ibid 254.

view of law includes 'a certain notion of inclusion — those bound by the law must be included within, as members of, a community whose law it is; and that notion of inclusion has normative substance'.[1044] In relation to legal punishment, Greig observes, 'sanctions reflect the value system of a society and communities have a sense of boundary separation between the included and the excluded'.[1045] Similarly, Foucault argues that whilst social groups have a margin of tolerance (for deviant behaviour), they all 'have a threshold beyond which exclusion is demanded'.[1046] From these perspectives, legal punishment is inclusive when it allows the offender to remain in the community, but punishment can also exclude persons from the community. Punishment represents a 'form of moral ordering'; it is '... the Law, the authorative voice of society, using force and authority publicly to enact its basic terms and relationships and to impress them, like a template, upon the conduct of social life'.[1047]

In drug courts, disciplinary power is an act of social inclusion because it defines and promotes normative social behaviour. Participation is also inclusive literally because the program operates in the community. According to Garland, community based practices (which include drug courts) are:

> ... concerned not just to prevent law-breaking, but also inculcate specific norms and attitudes. By means of the personal influence of the probation or after-care officer, they attempt to straighten out characters and to reform the personality of their clients in accordance with the requirements of 'good citizenship'.[1048]

Many drug court participants are released from custody into the community to enable participation. There is an expectation they will remain in the community upon successful completion of the program. This was recognised by the appeal court in *R v Tran*[1049] which stated '[t]he expectation is that a significant number of those concerned will ultimately appear for sentence as persons who have overcome their addiction and have been rehabilitated'.[1050] Furthermore, '[t]he inference is that

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1044 Ibid 242.
1045 Greig, above n 979, 248.
1046 Foucault, above n 9, 45.
1047 Garland, above n 376, 265.
1048 David Garland, *Punishment and Welfare: A history of penal strategies* (Gower Publishing Company Limited, 1985), 238.
1049 [2000] SASC 431.
1050 Ibid [24].

such persons may well have the expectation that their success will be recognised by a merciful sentence, possibly not involving a requirement actually to serve any terms of imprisonment in the first instance'.[1051] From this perspective, sentencing successful drug court participants is intended to facilitate ongoing social inclusion.

The sentencing process is an example of disciplinary power in action because it is about the individualisation of punishment[1052] and '... constitutes a context within which there occurs an assessment of normality and the formulation of prescriptions for enforced normalisation'.[1053] According to Garland:

> Penal law in effect ... [has become] a hybrid system combining the principles of legality with the principles of normalization. Its jurisdiction is thus extended so that it now sanctions not just 'violations of the law' but also 'deviations from the norm'.[1054]

The sentencing process '... is a signifying practice';[1055] it 'is a dramatic, performative representation of the way things officially are and ought to be'.[1056] Furthermore, 'the speech act of sentencing ... signifies condemnation of the behaviour of the individual offender and signals the commencement of punishment'.[1057] During the sentencing process, '[i]t is not just 'the criminal' who is interpellated by the symbols of penality' but also 'the identity of the 'law-abiding citizen' derives in part from the same symbolic frame'.[1058]

1051 Ibid [25].

1052 Garland, above n 1050, 28-9; Foucault, above n 376, 98-9.

1053 Barry Smart, 'On Discipline and Social Regulation: a Review of Foucault's Genealogical Analysis' in David Garland and Peter Young (eds), *The Power to Punish: Contemporary Penality and Social Analysis* (Gower Publishing Company Limited, 1989), 72. See also Garland, above n 1050, 29.

1054 Garland, above n 376, 151: Garland further observes that these hybrid conditions have effectively eroded protections such as due process and the rule of law in many areas where modern administrative power now operates.

1055 Ibid 256.

1056 Ibid 265.

1057 Ibid 261.

1058 Ibid 271.

II REHABILITATION AND RISK

There is evidence of social and political movement away from welfarist and disciplinary regimes *towards* and *into* that of a risk society,[1059] which focusses on intervention and risk minimisation.[1060] A shift from a disciplinary society into that of a risk society has profoundly influenced most areas, including how crime is identified and addressed.[1061] This change is said to be reflected in a fundamental 'ideological shift away from penal welfarism towards increased punitiveness, along with the application of actuarial justice and risk-oriented approaches in responding to adult and youth crime'.[1062] Rather than focus on reformation of the individual offender, risk minimisation practices focus on minimising the risk of categories of offenders through intervention strategies which includes drug court programs. According to Castel, discourse about crime control intervention is considered to be less about the dangerousness of individuals and more about *potential* risk, with risk considered 'autonomous from that of danger'.[1063] Assessing risk still involves surveillance because 'the intended objective is that of anticipating and preventing the emergence of some undesirable event', such as the consequences of deviant behaviour.[1064] Alongside assessment and management of risk is an emphasis on individual responsibility and accountability. From this perspective, crime control is less about addressing the cause of crime through internal transformation of the individual offender and more about predicting and circumscribing the risk of certain behaviours upon the wider

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1059 See eg, Richard Ericson, 'The division of expert knowledge in policing and security' in O'Malley, above n 596, 111: Institutions such as those involved in insurance, social security and regulatory bodies 'refigure the community into communications about risk in every conceivable aspect of life', at 111. Ericson further asserts that 'late modern society has become a 'risk society', at 111 citing Anthony Giddens, *The Consequences of Modernity* (Polity, Cambridge, 1990); Anthony Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Stanford University Press, Stanford, 1991); Ulrich Beck, 'Modern Society as a Risk Society' in Nico Stehr and Richard Ericson (eds), *The Culture and Power of Knowledge* (De Gruyter, New York, 1992); Ulrich Beck, *The Risk Society* (London, Sage, 1992).

1060 See eg, O'Malley, above n 596, xi citing Beck, 'Modern Society as a Risk Society', above n 1061; Ulrich Beck, *Risk Society: Towards a New Modernity* (Sage, New York, 1992); Mary Douglas, *Risk and Blame* (Routledge, London, 1992); Mary Douglas and Aaron Wildavsky, *Risk and Culture* (University of California Press, Berkeley, 1986). See also Nikolas Rose, 'The Death of the Social? re-figuring the Territory of Government' (1996) 25 *Economy and Society* 349 as cited in Greig, above n 597, 238, 349.

1061 O'Malley, above n 596, xi.

1062 Bouhours and Daly, above n 203, 371–94.

1063 Robert Castel, 'From Dangerousness to Risk' in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault Effect: Studies in Governmentality with two lectures and an interview with Michel Foucault* (Harvester Wheatsheaf, Great Britain, 1991), 287.

1064 Castel, above n 1065, 288.

population. The focus shifts from internal transformation of the individual offender as viewed through the lens of a disciplinary regime, to monitoring and assessing the external physical disposition of offenders so that the risk a particular group of offender poses can be addressed.[1065]

From a risk perspective, compliance discourse could be considered less about individual transformation and more about monitoring the cohort of drug court participants for risk behaviours, indicating a *potential* for relapse into drug use and drug related offending. Risk discourse still necessitates surveillance of the individual and the detailed observation from which compliance discourse arises. However, from a risk perspective, program compliance is less about facilitating and measuring internal transformation, and more about managing drug court participants as a risk group. Compliance discourse in this context arises from expert knowledges about risk and the assessment and management of risk. Movement away from disciplinary regimes and practices into a society focussed on risk has implications for understanding compliance and risk discourse located in the appeal decisions because the detection and management of risk during the program informed some discourses of knowledge evident in the appeal decisions.

III PUNISHMENT: DRUG COURT SANCTIONS

According to Garland and Young, "legal punishment" is clearly defined within the formal-legal boundaries of the criminal justice system. They argue '[t]he matrix of criminal and quasi-criminal sanctions imposed in law, and the institutions, practices and agencies which exercise and enforce these sanctions, are in fact quite clearly defined and identifiable *in legal terms* ... in this formal-legal sense, the field of study is already clearly demarcated'.[1066] The formal legal boundaries (and therefore the power to punish) within which drug courts operate are less clear. Case law suggests the drug court remains a court while functioning in its treatment mode. This is the therapeutic/legal context within which compliance discourse arises in drug courts.

1065 O'Malley, above n 596, xii.

1066 David Garland and Peter Young, 'Towards a Social Analysis of Penality' in David Garland and Peter Young (eds), *The Power to Punish: Contemporary Penality and Social Analysis* (Gower Publishing Company Limited, 1989), 9 (emphasis in original).

In *R v McMillan*[1067] Justice Gray posited that diversion courts (including the SA drug court) were 'not "courts" in the traditional sense but rather the forum through which treatment services and rehabilitation programs are coordinated, implemented and individual outcomes monitored'.[1068] In *Crockford*[1069] Justice Layton observed 'the role of a magistrate in relation to the Program is largely supervisory, the reviews of progress of persons in the Program by the Drug Court may be characterised as supervisory administrative decision-making performed by a judicial officer'.[1070] Justice Layton observed the drug court was called '"Drug Court" when referring to a magistrate conducting a participant's review'[1071] and '[i]t appears this name has been adopted by most involved in the process, despite it differing in nature from a conventional court …'.[1072] In *Crockford,* whether or not the drug court could be characterised as a "court" was not decided.[1073] However, it was noted by Justice Layton that during progress hearings, 'the Drug Court … is able to impose sanctions and appears to have all the trappings of a court, with listing procedures and hearing processes modelled on court procedures'.[1074] Furthermore, '[w]hen a magistrate exercises powers to terminate from the program, revoke bail or remand for sentencing — they are acting in their 'capacity as a court''.[1075] The drug court uses its legal authority to promote program compliance. Furthermore, drug courts operate within or as part of the sentencing process. The sentencing process is considered 'an opportunity to manage change in the offender',[1076] the goal being transformation of the drug dependent offender. Whilst drug courts have a therapeutic intention by seeking 'a moral and arguably a cultural cure' presented in terms of 'behavioural change',[1077] they remain positioned inside the criminal justice system and can be conceptualised within the context of the use of state power to punish.

1067 (2002) 81 SASR 540.
1068 Ibid [553].
1069 *Crockford v Adelaide Magistrates Court & Anor* [2008] SASC 62.
1070 Ibid [67].
1071 Ibid [7].
1072 Ibid.
1073 Ibid [71].
1074 Ibid.
1075 Ibid [90].
1076 Dive, above n 39, 2.
1077 Gowan and Whetstone, above n 363, 80.

The complex relationship between program participation and later sentencing and appeal process is evident in how the courts use information about program compliance to justify punishment. The surveillance and report writing which took place during the program produces much information about deviant and compliant behaviour displayed by participants. Similar discourse was located in the appeal decisions. For example, 17 decisions include discourse about non-compliance, with compliance discourse related to drug testing and results, bail conditions, re-offending and responses to case managers or counsellors (Chapter Four). The original intention of discourse about program compliance was for use by the drug court to monitor participant progress and justify acts of punishment through sanctions for deviant behaviour and rewards for compliant behaviour during the program. The findings (outlined below) suggest compliance discourse generated by the drug court is revisited to justify punishment during sentencing and appeal process.

In post-plea courts such as the SA drug court, sentencing is adjourned until program completion. Concerns are raised in case law that adjourning sentence to allow time for rehabilitation could result in an increased penalty. In *Thompson*,[1078] for example, the appeal court stated that remanding sentence to allow for rehabilitation should only be considered when contemplating a decreased non-parole period or a suspended sentence. Similarly, Boldt raised concern that honesty about drug use and criminal activity are important components of recovery, however, this can expose participants to prejudice at sentencing or further charges based on admissions.[1079]

In four decisions, *Ashton*,[1080] *Hughes*,[1081] *Reed*[1082] and *Roberts*[1083] the appeal courts state those appellants are not to be penalised for poor progress or failure to complete the program. The *Criminal Law (Sentencing) Act 1988* (SA) (Sentencing Act) section 10(5) makes achievements gained by a participant in an intervention program relevant to sentence and section 10(6)(b) makes bad

1078 *R v Thompson* [2012] SASCFC 149.
1079 Boldt, above n 30, 127.
1080 *Ashton v Police* [2008] SASC 174.
1081 *Hughes v Police* [2012] SASC 183.
1082 *Reed v Police* [2007] SASC 26.
1083 *Roberts v Police* [2013] SASC 117.

performance or failure to make satisfactory progress in an intervention program not relevant to sentence.[1084] In *Ashton*[1085] the appeal court quotes the second reading speech relating to section 10(6)(b). This emphasises 'it is important not to deter people from undertaking intervention by penalising them for failing in their attempt'.[1086] *Ashton*, *Hughes*, *Reed* and *Roberts* were determined after sections 10(5) and 10(6) were included in the Sentencing Act.[1087]

In *Ashton*, *Hughes*, *Reed* and *Roberts* the appeal courts recontextualised compliance discourse alongside consideration that failure to complete the program is not a sentencing factor. The courts nevertheless represent those appellants discursively as having failed to demonstrate rehabilitation and as posing a risk of future drug use and offending. In *Ashton*[1088] the appeal court considers the sentencing magistrate erred in 'classifying the appellant's results in the latter part of the Program as a failure and taking them into account'[1089] when deciding whether or not to suspend the sentence of imprisonment.[1090] The appeal court nevertheless found there was not "good reason" to suspend the sentence 'hoping that the appellant will rehabilitate himself'[1091] and 'the considerations going to whether the sentence should be suspended are outweighed by the likelihood of the appellant re-offending and the need for the protection of the community'.[1092] In *Hughes*[1093] the sentencing magistrate determined 'your failure to successfully complete a program at law is not relevant to the sentence I must impose. I, therefore, intend to treat you and sentence you on the basis as if you had not been on the Drug Court program'.[1094] The appeal court agrees with this approach stating '[t]here can be no argument that the Magistrate correctly approached the question of the appellant's failure to

1084 These sections commenced on 19/12/2005.
1085 [2008] SASC 174.
1086 Ibid [19]: quoting South Australia, Parliamentary Debates, House of Assembly, 22 September 2005, 3557-3559 (Michael Atkinson, Attorney-General).
1087 *Criminal Law (Sentencing) Act 1988* (SA). These sections have since been amended to 10(4) and 10(5)(b) respectively.
1088 *Ashton v Police* [2008] SASC 174.
1089 Ibid [22].
1090 Ibid [22], [18].
1091 Ibid [27].
1092 Ibid.
1093 *Hughes v Police* [2012] SASC 183.
1094 Ibid [5].

successfully complete the Drug Court Program when sentencing'.[1095] Similar to Jason Ashton, Tanya Hughes is characterised by the courts as 'being a high risk of re-offending in the future'.[1096] In *Reed*[1097] the sentencing magistrate stressed that Michael Reed was not to be punished for failure to complete the program.[1098] However, the magistrate imposed a non-parole period which formed a significant portion of the head sentence because of the appellant's 'poor prospects for rehabilitation'.[1099] This representation includes consideration that Michael had not overcome his drug dependence.[1100] In *Roberts*[1101] the magistrate made it clear there was no penalty for failing to complete the program.[1102] Discourse about failure to complete the program[1103] was preceded by the appellant Damian's 'long history of drug abuse' restated from the original sentencing remarks.[1104]

These provisions of the Sentencing Act are intended to prevent an increase in penalty for failing the program. It nevertheless seems incongruous to provide that achievements gained can be taken into consideration but failure cannot, because compliance discourse demands attention be paid to finding and addressing deviance. Compliance discourse seeks fault which means instances of non-compliance are disclosed and discussed as part of discourse about progress in the program and transformation. Whilst Jason Ashton, Tanya Hughes, Michael Reed and Damian Roberts may not have been directly penalised for failing the program, compliance discourse nevertheless informed the construction of the appellant discursively as having failed to demonstrate transformation, or rehabilitation, which remains a sentencing consideration. In these decisions, the courts used compliance discourse to partly inform assessment of future risk to the community through drug related offending. These discursive representations justified punishment, the appropriate sentence to be imposed.

1095 Ibid.
1096 Ibid [6(26)].
1097 *Reed v Police* [2007] SASC 26.
1098 Ibid [29].
1099 Ibid [34]: The appeal court found no error in setting that non-parole period.
1100 Ibid [32].
1101 *Roberts v Police* [2013] SASC 117.
1102 Ibid [7].
1103 Ibid [6].
1104 Ibid [5].

IV PUNISHMENT, REHABILITATION AND RISK

The quote at the beginning of this chapter provides an example of a court engaging in discourse about rehabilitation and risk. In that example, the court balances rehabilitation against future risk to the community. Analysis identified similar discourse about rehabilitation and risk partly informed through compliance discourse in the appeal decisions. There were competing discourses about program participation, levels of compliance, internal transformation and predictions about re-offending in the future. These discourses contributed towards constructions of the participant as either worthy of inclusion in the community or as a future risk to the community requiring exclusion through a custodial sentence. The next section focusses on two decisions where, despite discourse about significant progress in the program, the sentencing and the appeal courts determined an immediate term of imprisonment was required, based on compliance discourse, rehabilitation and risk.

A Compliance and Risk

In two appeal decisions, the original sentencing court and the appeal court recontextualised compliance discourse to represent the appellant as "mostly" successful during the program, but nevertheless imposed a custodial sentence. In *Monterola*[1105] the appellant Rex completed 12 months in the program[1106] and graduated from the program.[1107] The drug court final report indicates Rex 'demonstrated drug abstinence' during the program 'except for three major relapses into [drug] use'.[1108] The sentencing remarks (directly quoted) state 'I take into account your progress through the Drug Court Program and in particular the fact that you have not committed dishonesty offences whilst on the program, and have managed to remain abstinent of drugs for some lengthy periods of time'.[1109] The appeal court considers the drug court progress reports[1110] as 'in the main positive', indicating

1105 *Monterola v Police* [2009] SASC 42.
1106 Ibid [4].
1107 Ibid [6]-[7].
1108 Ibid [4].
1109 Ibid [8].
1110 Contained in YJAM2 to McMahon affidavit.

Rex ‘was endeavouring to resolve his drug problems and had recognised the detrimental effects that drugs and consequent offending had on his lifestyle’.[1111]

Rex re-offended during the program with two separate driving offences. Information about the nature of the offences is excluded. He graduated from the program which suggests the offences were relatively minor or different in nature to the offending which led to his entry in the program. The appeal court observes, ‘[t]he commission of further offences while on the program are of concern, but they are at least of a different nature to the long history of offending which preceded the appellant’s entry into the drug program’.[1112] Furthermore, the original sentencing remarks (directly quoted) states ‘I … take into account … the fact that you have not committed similar offences during the time you have been on the program’.[1113]

Information about program compliance (and non-compliance) is used by the appeal court to represent Rex as a participant who successfully completed and graduated from the program. This representation included periods of non-compliance through drug use and re-offending. The appeal court represents Rex discursively as having achieved internal transformation by recognising the effect drug use and offending had on his lifestyle, and through assessments from the drug court about behaviours consistent with program compliance, ‘the reports are in the main positive’.[1114] Furthermore, submissions by defence counsel representing Rex at the appeal hearing (restated) suggest program completion and ‘the likelihood of re-offending, given the appellant’s age at the time of the offences and the absence of allegations of like offending since being on the program’ were indicative of rehabilitation.[1115]

1111 Ibid [18].
1112 Ibid.
1113 Ibid [6].
1114 Ibid [18].
1115 Ibid [9].

On the other hand, the prosecutor's affidavit (directly quoted) represents Rex's progress in the program as 'cyclical' when referring to periods of abstinence and drug use.[1116] Furthermore, the prosecutor raised concern about re-offending and drug use at the end of the program[1117] arguing that '… the Court cannot be satisfied that he has overcome his drug addiction and would abstain from offending in the future'.[1118] The prosecutor used information about non-compliance to predict a risk of future drug use and offending. The original sentencing magistrate determined the seriousness of the offences leading to his program participation required sentences of immediate imprisonment, despite graduation from the program.[1119] A lenient non-parole period was set to reflect Rex's 'progress through the program' because he did not commit further dishonesty offences during the program and had periods of abstinence from drug use.[1120] The non-parole period was set aside by the appeal court and replaced with a lower non-parole period.[1121]

Monterola includes interaction between discourses about program compliance, internal transformation and future risk of offending. A similar discoursal interplay was evident in *Ashton*.[1122] Jason was mostly compliant during the program and was told at a progress hearing to 'expect to receive a suspended sentence' so long as there were 'all clean tests'.[1123] Jason relapsed into drug use before graduation. The author of the final progress report (directly quoted) expressed 'grave concerns for his ability to maintain his stability in the community if all [the] restrictions [he was on were to stop]'.[1124] The sentencing remarks (directly quoted) indicate clinical staff verbally provided the court with further information about drug use at the sentencing hearing: 'I have heard some figures from the clinical staff regarding a very recent use of amphetamines by you. The amount taken by you was

1116 Ibid [3].
1117 Ibid.
1118 Ibid.
1119 Ibid [6]-[7].
1120 Ibid [8].
1121 Ibid [20]: The non-parole period set by the sentencing magistrate was 2 years, at [1]. The non-parole period set by the appeal court was 15 months, at [20].
1122 *Ashton v Police* [2008] SASC 174.
1123 Ibid [11].
1124 Ibid [12]: Drug Court Progress Report – Final Report, 14 March 2008, Exhibit "A" to the Affidavit of D Misell, 2 May 2008.

extremely and dangerously high and I am certain would have been of some considerable danger to your health'.[1125] This relapse is considered by the sentencing magistrate as having '… put your health at risk and at risk of re-offending'.[1126] The appeal court dialogically represents the views of the sentencing magistrate stating 'I can certainly understand the difficult position in which the magistrate found himself, because, when considering whether or not to suspend the sentence, the positive test results … would cause concern'.[1127] The appeal court predicted Jason is likely to re-offend should he receive a suspended sentence of imprisonment.[1128]

In addition to discourse about program non-compliance, the appeal court considered the nature of the offending leading to Jason's program participation as 'serious and persistent'[1129] and Jason's past criminal history as 'significant'.[1130] Whilst the appeal court acknowledges rehabilitation,[1131] it nevertheless determines 'the appellant has not demonstrated a commitment to addressing the problems (the primary one being drug use) out of which his offending arose'.[1132]

Monterola and *Ashton* include competing discourses about compliance and non-compliance, risk and internal transformation. In these decisions, both the sentencing magistrate and the appeal courts determined an immediate term of imprisonment was warranted despite significant progress during the program and indications of internal transformation. In imposing that sentence, in both instances, the drug court participant was excluded from further community participation.

B Punishment and Exclusion

Monterola and *Ashton* show how appellants are constructed discursively to justify punishment. In these appeal decisions, discourse about rehabilitation and risk partly informed the justification for punishment through imprisonment. Garland suggests that whilst imprisonment was once viewed as

1125 Ibid [14].
1126 Ibid.
1127 Ibid [23].
1128 Ibid [2].
1129 Ibid [26].
1130 Ibid [27].
1131 Ibid [25].
1132 Ibid [17].

central to the penal system, it is now located in 'a kind of terminal position, forming the endpoint on an extended network of 'alternatives to imprisonment' and specialist establishments.[1133] Similarly, Greig observes '[t]here are degrees of condemnation with sentencing mechanisms, such as parole and corrections' orders offering the possibility of reconciliation at the 'softer' end of the spectrum, whilst the physical, economic and social deprivations intrinsic to custody are a much harsher means of enforcing conformity'.[1134] *Monterola* and *Ashton* represent movement through these networks, including drug court participation with the endpoint, based on assessments of rehabilitation and risk, being imprisonment as an act of segregation.[1135] As Garland observes:

> Typically each measure operates upon two different registers: an expressive, punitive scale that uses the symbols of condemnation and suffering to communicate its message; and an instrumental register, attuned to public protection and risk management. The favoured modes of punitive expression are also, and importantly, modes of penal segregation and penal marking.[1136]

Rex Monterola and Jason Ashton received immediate sentences of imprisonment with reduced non-parole periods for progress during the program.[1137] In *Monterola*[1138] the appeal court determines that '... it is desirable to set a non-parole period which will assist in removing the appellant from the prison system in the not too distant future and allow him to pursue his rehabilitation in the community'.[1139] Rex and Jason were immediately exposed to imprisonment 'through the harsher means of enforcing conformity', but also offered the potential of reconciliation through early parole.

V INCAPACITATION, DETERRENCE AND RISK

Protection of the community (reflected in the quote at the start of the chapter) is *the* primary sentencing consideration in South Australia.[1140] Similarly, drug courts aim to protect the community

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1133 Garland, above n 1050, 28. See also Foucault, above n 376, 115: Foucault suggests 'that imprisonment … [can] cover the whole of the middle ground of punishment, between death and light penalties'.

1134 Greig, above n 979, 248.

1135 Ibid 241-3.

1136 David Garland, 'The Culture of High Crime Societies. Some Preconditions of Recent "Law and Order" Policies' (2000) 40 *British Journal of Criminology* 347, 350. See also Rasmus H Wandall, *Decisions to Imprison: Court Decision-Making Inside and Outside the Law* (Ashgate, Hampshire, 2008), 130.

1137 *Ashton v Police* [2008] SASC 174, [14]: reduced head sentence and non-parole period by one year; *Monterola v Police* [2009] SASC 42, [20].

1138 *Monterola v Police* [2009] SASC 42.

1139 Ibid [20].

1140 *Criminal Law (Sentencing) Act 1988* (SA) s 10.

from drug related crime by reforming the drug dependent offender. Disciplinary power operating in drug courts enables active participation in the community. On the other hand, the courts may consider protection of the community as necessitating incapacitation. In *Thompson*[1141] the appeal court stated 'the protection of the community is the cardinal sentencing objective … [a purpose] served by imprisonment is the prevention of recidivism'.[1142] Incapacitation ideology involves predicting future offending and removal of the offender from the community.[1143]

Analysis suggests compliance discourse, created with the intention of enabling active participation in the community, was recontextualised alongside other information in the appeal decisions to represent appellants as at risk of future offending. This other information included discourse about the seriousness of the offending (26 decisions),[1144] criminal history (22 decisions)[1145] and personal background history (18 decisions).[1146] These factors must be taken into account during

1141 *R v Thompson* [2012] SASCFC 149.

1142 Ibid [29].

1143 Rosenthal, above n 605, 152.

1144 *R v Place* [2002] SASC 101, [91], [94]-[95], [109]-[114]; *Chandler v Police* [2002] SASC 130, [4], [5], [16], [18]; *R v Caplikas* [2002] SASC 258, [54]-[59], [85], [94], [98]; *Ryan v Police* [2003] SASC 108, [15]; *Andreasen v Police* [2004] SASC 255, [8], [11]; *Habra v Police* [2004] SASC 430, [11]; *Police v B, WR* [2005] SASC 163, [26], [28]; *Reed v Police* [2007] SASC 26, [11], [17]; *Kells v Police* [2007] SASC 224, [7]; *Richards v Police* [2007] SASC 368, [23]-[24]; *Robson v Police* [2007] SASC 395, [5]; *Ashton v Police* [2008] SASC 174, [6], [14], [26]; *Police v Bieg* [2008] SASC 261, [3]; *Parsons v Police* [2008] SASC 339, [42], [70]; *Monterola v Police* [2009] SASC 42, [6]; *Police v Van Boxtel* [2013] SASC 82, [35]; *Roberts v Police* [2013] SASC 117, [3], [9], [11]; *Hughes v Police* [2012] SASC 183, [1], [4]; *Field v Police* [2009] SASC 354, [19], [27]; *R v Gasmier* [2011] SASCFC 43, [19]; *Madden v Police* [2005] SASC 304, [2]: on parole whilst offending; *Ketoglou v Police* [2008] SASC 243, [35]; *R v Proom* [2003] SASC 88, [11], [31], [43], [55]. On the other hand, *Lawrie v DPP* [2008] SASC 21, [24]: not serious, no violence and opportunistic; *Police v Lawrie* [2010] SASC 117, [13], [16]: offences breaching the drug court bond found to be 'not nearly as serious or as extensive as the original offending', at [16]. Alternatively, in *R v Pumpa* [2013] SADC 157, deemed a serious repeat offender based on the seriousness of the offences.

1145 The following appellants were found to have "significant" criminal histories: *Chandler v Police* [2002] SASC 130, [18], [19]; *Monterola v Police* [2009] SASC 42, [18], [20], [22]; *Ashton v Police* [2008] SASC 174, [4], [13], [27]; *Reed v Police* [2007] SASC 26, [19]-[24]; *Ryan v Police* [2003] SASC 108, [9]; *Andreasen v Police* [2004] SASC 255, [3], [11]; *Kells v Police* [2007] SASC 224, [3]; *Police v Van Boxtel* [2013] SASC 82, [17], [35]; *Roberts v Police* [2013] SASC 117, [8]; *R v Caplikas* [2002] SASC 258, [66]; *Hughes v Police* [2012] SASC 183, [5]; *Police v B, WR* [2005] SASC 163, [19], [26], [40]; *Field v Police* [2009] SASC 354, [12]; *Parsons v Police* [2008] SASC 339, [39]-[40], [43]; *R v Gasmier* [2011] SASCFC 43, [19]; *Madden v Police* [2005] SASC 304, [13]-[17]; *Robson v Police* [2007] SASC 395, [9], [38]; *Ketoglou v Police* [2008] SASC 243, [8], [52]; *Police v Lawrie* [2010] SASC 117, [14]; On the other hand, in *R v Place* [2002] SASC 101, [110]: sentenced as a first offender; *R v Proom* [2003] SASC 88, [90]: sentenced as a first offender; *R v Pumpa* [2013] SADC 157, [1], [20], [48]: serious repeat offender.

1146 *R v Place* [2002] SASC 101, [92]-[93]; *Chandler v Police* [2002] SASC 130, [9]-[11], [14]; *R v Caplikas* [2002] SASC 258, [60]-[67]; *Habra v Police* [2004] SASC 430, [21], [26]-[35]; *Reed v Police* [2007] SASC 26, [18]; *Robson v Police* [2007] SASC 395, [38]-[41]; *Lawrie v DPP* [2008] SASC 21, [11]-[12], [25]; *Ashton v Police* [2008] SASC 174, [8], [13]; *Monterola v Police* [2009] SASC 42, [5]; *Police v Van Boxtel* [2013] SASC 82, [18]-[21]; *Roberts v Police* [2013] SASC 117, [5]; *Hughes v Police* [2012] SASC 183, [6]; *Field v Police* [2009] SASC 354, [13]-[17]; *Madden v Police* [2005] SASC 304, [18]-[21]; *Ketoglou v Police* [2008] SASC 243, [30]; *R v*

the sentencing process.[1147] This legal discourse is common in sentencing and appeal decisions generally. The focus of this section is how legal discourse interacts with compliance discourse in the appeal decisions to inform the courts assessment of rehabilitation and risk.

Monterola and *Ashton* (discussed above) include legal discourse about the seriousness of the offending,[1148] criminal history[1149] and personal background history[1150] as well as compliance discourse. Both decisions include competing discourse about rehabilitation and risk of future drug related offending. In contrast, *Hughes*[1151] does not include competing discourse about rehabilitation and risk, but instead includes discourse about program non-compliance alongside a background history that suggests risk. Tanya Hughes has an extensive criminal history[1152] and the current offences were serious and numerous.[1153] Consideration about risk of future offending can be implied from focus in the sentencing remarks on Tanya's unsatisfactory program progress which includes absconding, re-offending, drug use and substituted urine samples.[1154] Concern about future crime risk can be inferred from Tanya's personal history recontextualised from a psychological report which forms a significant portion of the appeal decision.[1155] The appeal court characterises Tanya's background history as 'the appellant's difficult and unfortunate background'.[1156] This includes 'physical, emotional and sexual abuse';[1157] unstable relationships and living conditions; being made a ward of the state, continually running away, refusal to 'follow rules' and having 'issues with authority';[1158] living on the streets and running speed for a drug dealer;[1159] a limited employment

Proom [2003] SASC 88, [64]-[71]; *Police v Lawrie* [2010] SASC 117, [16]; *R v Pumpa* [2013] SADC 157, [30]-[41].

1147 See *Criminal Law (Sentencing) Act 1988* (SA) s 10.

1148 *Monterola v Police* [2009] SASC 42, [6]; *Ashton v Police* [2008] SASC 174, [6], [14], [26].

1149 *Monterola v Police* [2009] SASC 42, [18], [20], [22]; *Ashton v Police* [2008] SASC 174, [4], [13], [27].

1150 *Monterola v Police* [2009] SASC 42, [5]; *Ashton v Police* [2008] SASC 174, [8], [13].

1151 *Hughes v Police* [2012] SASC 183.

1152 Ibid [5].

1153 Ibid [4].

1154 Ibid [5].

1155 Over one page of the appeal decision taken from [18]-[26] of the sentencing remarks.

1156 Ibid [6].

1157 Ibid [6], [18].

1158 Ibid [6], [18]-[19].

1159 Ibid [6], [20].

history;[1160] and an extensive drug use history.[1161] Whilst not specifically mentioned, it is possible Tanya is of Aboriginal descent considering this statement, '[y]ou were taken away with your siblings and placed in an Aboriginal family group'.[1162] Of note, is how positive factors are negatively constructed in the appeal decision such as Tanya's education as mainly achieved whilst in prison;[1163] the significance of her relationships with her two sons, '[y]ou probably, aptly, summarised it … when you say the only thing you have are your two sons';[1164] and with partners, Tanya's current partner having spent 10 years of their 13 year relationship in prison.[1165] These factors combined with program non-compliance suggest instability and risk of future drug related offending. Tanya's background history[1166] in the appeal decision concludes with 'drug use is your problem' followed by 'you are assessed at being a high risk of re-offending in the future'.[1167]

This risk discourse is consistent with Wandall's observation that courts consider a defendant's future crime risk based on their prior criminal record and the personal and social circumstances of the defendant (including age).[1168] Wandall interviewed court personnel about incapacitation ideology and how it relates to drug addicts and repeat property offenders. When asked to discuss 'the relevance of prior crimes for decisions to incarcerate and whether prior crimes were used as indicators of future crimes of offenders', a judge responded 'prior crimes were not used as predictions of future crimes and that defendants were not incarcerated for crimes they have not yet committed'.[1169] This statement was then followed by the judge who 'referred to cases concerning drug-addicts and said, 'for them you can say that a consideration of pacification is used. But that is also the only group'''.[1170] When asked is it possible to categorise offenders 'according to whether some are more risky than others'

1160 Ibid [6], [22].
1161 Ibid [6], [20], [25].
1162 Ibid [6], [18].
1163 Ibid [6], [21].
1164 Ibid [24]. See also [6], [23]-[24].
1165 Ibid [6], [23].
1166 Ibid [18]-[26].
1167 Ibid [6], [26].
1168 Wandall, above n 1138, 90, 94.
1169 Ibid 124.
1170 Ibid.

Wandall received responses from court personnel characterising drug addicts as a particularly risky group of repeat offenders.[1171]

In *Hughes*[1172] (above) the courts construct discursively a chaotic and disrupted lifestyle based on information about Tanya's background, drug dependence, criminal history and seriousness of the offences. Similar constructions were located in other decisions, outlined below.

A Chaotic and Disrupted Lives

Similar to *Hughes*, in *Chandler*[1173] the appeal court and the sentencing magistrate represent Michelle Chandler as having lived a chaotic and disrupted life. The magistrate took into account her personal circumstances[1174] including child sexual abuse,[1175] drug and alcohol dependence,[1176] 10 years in custody[1177] and the birth of her son.[1178] Also a period of time when she 'made a valiant attempt to re-establish herself in society'[1179] and gained employment.[1180] Following this period, Michelle encountered financial problems and relapsed into drug related offending.[1181] Michelle has an extensive criminal history which the appeal court considers reduces the opportunity for leniency.[1182] The appeal court considers the seriousness and extent of the current dishonesty offences[1183] and concludes a sentence of 12 years imprisonment with a non-parole period of seven years '… might, in the circumstances appear to be severe, but regrettably it is the inevitable result of a protracted history of offending by the appellant'.[1184]

1171 Ibid 123-4.
1172 *Hughes v Police* [2012] SASC 183.
1173 *Chandler v Police* [2002] SASC 130.
1174 Ibid [19], [5].
1175 Ibid [9].
1176 Ibid.
1177 Ibid.
1178 Ibid.
1179 Ibid [10].
1180 Ibid.
1181 Ibid.
1182 Ibid [18]: This includes over 189 convictions for dishonesty offences.
1183 Ibid: This included more than 47 current dishonesty offences.
1184 Ibid [19].

Similarly, in *Lawrie 1*[1185] the sentencing magistrate and the appeal court considers Nigel Lawrie's "difficult upbringing"[1186] and "traumatic and unstable" background.[1187] In *Reed*[1188] the sentencing magistrate considers Michael Reed's background history including 'his past history of offending, his amphetamine addiction, health and mental issues, [and] lack of family and social support'.[1189] In *Caplikas*[1190] the appeal court recontextualised information to represent Matthew Caplikas' background history as "lacking in structure and discipline" having been raised 'in a chaotic environment where illicit drug use was always present'.[1191] In *Robson*[1192] Daymane Robson is represented similarly as having a "disrupted" and "unsettled" background, including being the victim of physical violence as a child,[1193] witnessing domestic violence[1194] and becoming a ward of the state.[1195] Daymane is characterised as having such an 'appalling childhood ... it is hardly surprising that he felt a stranger in society. It is hardly surprising that drugs recognised his isolation and befriended him'.[1196] In *Van Boxtel*[1197] Joseph Van Boxtel is characterised as having a "difficult childhood", having been subjected to 'physical, psychological and sexual abuse'.[1198] His past offending is characterised as 'impulsive and reckless behaviour'.[1199] The following discourse from that decision represents similar characterisations of a drug user's background history in other appeal decisions:

> Since his mid teens, the respondent has been a significant user of illicit drugs including amphetamines, heroin and marijuana as well as alcohol. Much of his offending has been related to his drugs, or to obtain food because his available money had been used for drugs. Some of his offending may have been committed while he was affected by illicit drugs.[1200]

1185 *Lawrie v DPP* [2008] SASC 21.
1186 Ibid [11].
1187 Ibid [25].
1188 *Reed v Police* [2007] SASC 26.
1189 Ibid [18].
1190 *R v Caplikas* [2002] SASC 258.
1191 Ibid [65].
1192 *Robson v Police* [2007] SASC 395.
1193 Ibid [38].
1194 Ibid.
1195 Ibid [39].
1196 Ibid [11].
1197 *Police v Van Boxtel* [2013] SASC 82.
1198 Ibid [18].
1199 Ibid [19].
1200 Ibid.

In this quote, Joseph "has been a significant user" with "his offending" related to "his drugs".

B The Drug Addict

14 appellants are represented discursively as activated (responsibilised) for their drug dependence and offending. This suggests representation as a 'criminal type', the 'drug addict'. In *Gasmier*[1201] Shane Gasmier 'has a chronic drug problem'.[1202] In contrast, in *Ryan*[1203] Eamon Ryan is considered as 'having the misfortune to suffer drug addiction, including an addiction to heroin'.[1204] In a number of the decisions, drug dependence is described as "became addicted",[1205] "used" or "commenced using",[1206] "abused drugs",[1207] "has had problems with drugs"[1208] and "a long history of drug abuse".[1209] In *Chandler*[1210] Michelle Chandler 'reverted to the use of heroin and indulged in further offending'.[1211] In *B, WR*[1212] Mr B committed offences 'to obtain money to purchase drugs'.[1213] In *Richards*[1214] the offences were considered 'driven by a longstanding drug addiction of the appellant'.[1215] In *Madden*[1216] Jarrod Madden 'had a history of use of illicit drugs' and '... much of his offending may have been related to the use of those drugs'.[1217] In *Robson*[1218] Daymane Robson's 'drug addiction ... was the predominant influence on his recent offending'.[1219] In *Andreasen*[1220] Steven Andreasen's 'offending was brought about by his drug addiction'.[1221] In *Ryan*[1222]the appeal court observes, 'the appellant has had the misfortune to suffer from drug addiction, including an

1201 *R v Gasmier* [2011] SASCFC 43.
1202 Ibid [12].
1203 *Ryan v Police* [2003] SASC 108.
1204 Ibid [9].
1205 *Robson v Police* [2007] SASC 395, [39].
1206 *R v Caplikas* [2002] SASC 258, [65]; *Hughes v Police* [2012] SASC 183, [20], [25]; *Monterola v Police* [2009] SASC 42, [5]; *R v Place* [2002] SASC 101, [92].
1207 *Lawrie v DPP* [2008] SASC 21, [12].
1208 *Kells v Police* [2007] SASC 224, [3]; *Police v Lawrie* [2010] SASC 117, [11].
1209 *Roberts v Police* [2013] SASC 117, [5].
1210 *Chandler v Police* [2002] SASC 130.
1211 Ibid [10].
1212 *Police v B, WR* [2005] SASC 163.
1213 Ibid [40].
1214 *Richards v Police* [2007] SASC 368.
1215 Ibid [25].
1216 *Madden v Police* [2005] SASC 304.
1217 Ibid [20].
1218 *Robson v Police* [2007] SASC 395.
1219 Ibid [34].
1220 *Andreasen v Police* [2004] SASC 255.
1221 Ibid [2].
1222 *Ryan v Police* [2003] SASC 108.

addiction to heroin'.[1223] In *Chandler*[1224] Michelle's 'offending consists of crimes of dishonesty committed to support her drug habit'.[1225] In *Habra*[1226] the offending is characterised as drug related and for 'the purpose of providing funds for his drug addiction'.[1227] However, the sentencing magistrate observes drug use is not the sole reason motivating Joseph Habra's offending behaviour.[1228] In *Reed*[1229] Michael Reed is represented as offending to 'raise funds which the appellant used either on his amphetamine addiction or his gambling addiction'.[1230] The appeal court concludes Michael's 'drug addiction has not been overcome'.[1231] Of note, the appeal court represents Michael's past offending as not related to drug use.[1232] In *Ashton*[1233] the court observes, '[a]t the time of his offending, the appellant had been struggling with an addiction to methylamphetamine'.[1234] In *Kells*[1235]the appeal court notes 'the offending was carried out for the purpose of obtaining money to purchase illicit drugs'.[1236] The discourse outlined above suggests the appeal court is using the participant/appellant's drug use history to frame the appellant as likely to continue drug use and related offending in the future. By positioning the appellant as posing a risk to the community in the future, the courts are able to justify sentences of imprisonment for the protection of the community.

C Offending Categories

Four decisions represent appellants as having committed the "typical" offences of a drug addict. In *Place*[1237] Mr Place committed armed robberies whilst 'using amphetamines heavily and … to finance his habit'.[1238] The appeal court states, '... crimes of armed robbery are frequently committed by

1223 Ibid [9].
1224 *Chandler v Police* [2002] SASC 130.
1225 Ibid [9].
1226 *Habra v Police* [2004] SASC 430.
1227 Ibid [6].
1228 Ibid [12].
1229 *Reed v Police* [2007] SASC 26.
1230 Ibid [10].
1231 Ibid [32].
1232 Ibid [26].
1233 *Ashton v Police* [2008] SASC 174.
1234 Ibid [8].
1235 *Kells v Police* [2007] SASC 224.
1236 Ibid [4].
1237 *R v Place* [2002] SASC 101.
1238 Ibid [93].

persons addicted to and affected by alcohol and other drugs who commit the crimes in order to obtain funds to meet their addiction'.[1239] Similarly in *Proom*[1240] the sentencing judge observes:

> ... much offending of the kind for which Ms Proom was sentenced is committed by people addicted to drugs. The levels of penalty that are imposed include many penalities imposed on drug addicts. In other words, the comparable penalties reflect, in many cases, the presence of addiction.[1241]

In *Gasmier*[1242] the appeal court observes:

> It is an unfortunate regular occurrence that persons who are addicted to drugs commit armed robberies to obtain monies to finance their drug habit. Shootings have also occurred at popular entertainment venues and, with disturbing frequency, in private premises. Many shootings are drug related.[1243]

In *Robson*[1244] the appeal court states:

> There was nothing extraordinary about the offending. It was typical of a non-aggravated serious criminal trespass (non-residential) in search of convertible property in order to support a drug habit.[1245]

These findings show how the courts positioned some appellants into the "category" of the drug addicted offender.

D Serious Offending and Deterrence

Construction of risk based on the seriousness of the offending was located in 26 decisions and criminal history in 22 decisions. Risk discourse based on the seriousness of the offending and criminal history was located in *Monterola*, *Ashton*, *Hughes* and *Chandler* (above). Other findings include *Andreasen*[1246] where counsel for the Crown submitted the nature of the offending was 'ongoing and continuing'.[1247] In *Van Boxtel*[1248] a psychological report (restated) indicates 'the respondent's risk of re-offending was closely related to his ability to control his illicit drug use and, in turn, his ability to manage the ordinary stresses of life'.[1249] The appeal court notes that Joseph Van Boxtel offended

1239 Ibid [100].
1240 *R v Proom* [2003] SASC 88.
1241 Ibid [32].
1242 *R v Gasmier* [2011] SASCFC 43.
1243 Ibid [18].
1244 *Robson v Police* [2007] SASC 395.
1245 Ibid [37].
1246 *Andreasen v Police* [2004] SASC 255.
1247 Ibid [8].
1248 *Police v Van Boxtel* [2013] SASC 82.
1249 Ibid [22].

during and after participation in the Magistrates Court Diversion Program (before entry into the drug court).[1250] In *Reed*[1251] counsel representing Michael Reed highlight Michael's own awareness of a vulnerability to relapse and his request to be returned to prison.[1252]

In *Place*[1253] the appeal court focusses on the seriousness of the offending, particularly the impact on victims. The court also identifies the class of offenders, "drug addict" as commonly committing these offences "to obtain funds to meet their addiction". For example,

> This Court has emphasised that such crimes of armed robbery are frequently committed by persons addicted to and affected by alcohol or other drugs who commit the crimes in order to obtain funds to meet their addiction … the standard of penalty appropriate for those types of armed robberies committed by those types of offenders …[1254]

This approach suggests that despite addressing his drug dependence (and not re-offending), Mr Place continues to be a person from whom the community needs protection and who should be used as an example to others contemplating committing such crimes in accordance with the principles of general deterrence. Mr Place had no history of serious offending. The appeal court observes the community (rather than Mr Place) will benefit from Mr Place 'serving a reasonable term of imprisonment' followed by 'the opportunity of a lengthy period on parole to ensure the completion of his rehabilitation and his return to the community as a useful citizen'.[1255]

In *Reed*[1256] the sentencing magistrate and the appeal court considered the seriousness of the offending.[1257] According to the appeal court, 'the offences having regard to the circumstances of the commission, were extremely serious and ... general deterrence was an important factor'.[1258] The sentencing magistrate took into account Michael's personal background and offending history when

1250 Ibid [22], [24].
1251 *Reed v Police* [2007] SASC 26.
1252 Ibid [27].
1253 *R v Place* [2002] SASC 101.
1254 Ibid [100].
1255 Ibid [116].
1256 *Reed v Police* [2007] SASC 26.
1257 Ibid [11].
1258 Ibid [17].

assessing prospects of rehabilitation and the need for personal deterrence.[1259] Michael had an extensive history of similar offending.[1260] The appeal court concludes, '[i]n light of the appellant's poor prospects of rehabilitation, the Magistrate imposed a non-parole period which was a significant portion of the head sentence imposed ... I see no error in the setting of the non-parole period'.[1261] Similarly, in *Richards*[1262] the appeal court considered breaching drug court bail a breach of trust which warranted a deterrent sentence.[1263]

The seriousness of the offending as a sentencing consideration is closely linked with punishment through deterrent principles, as was considered in *Place*, *Reed* and *Richards* above. Overall, deterrence was considered in 14 decisions.[1264] Deterrence focusses on future events and aims to demonstrate the consequences of future offending to the individual being punished (specific deterrence) and to the wider community (general deterrence) so that others are discouraged from committing similar offences.[1265] According to Bogart, the exercise of power in modern society is both disciplinary and deterrent.[1266] Disciplinary power focusses on altering the offending behaviour of a specific person through punishment (specific deterrence). General deterrence, on the other hand, focusses on maintaining the status quo of existing law-abiding citizens by discouraging them from committing offences:

> If discipline serves as a "corrective" for behavior — i.e., to align conduct more closely to the norm — deterrence serves as a disinclination to depart from a norm already embodied in action: it is not, for example, the criminal who must be deterred, but the law-abiding citizen.[1267]

1259 [2007] SASC 26.
1260 Ibid [19]-[22].
1261 Ibid [34].
1262 *Richards v Police* [2007] SASC 368.
1263 Ibid [23]-[25].
1264 *Ryan v Police* [2003] SASC 108, [14]; *Police v B, WR* [2005] SASC 163, [19]; *Reed v Police* [2007] SASC 26, [7], [14]-[18], [25]; *Richards v Police* [2007] SASC 368, [24]; *Robson v Police* [2007] SASC 395, [30]; *Police v Bieg* [2008] SASC 261, [10], [13]; *Parsons v Police* [2008] SASC 339, [70]; *Monterola v Police* [2009] SASC 42, [10], [15], [17]; *Police v Van Boxtel* [2013] SASC 82, [42]; *R v Place* [2002] SASC 101, [14], [27]-[29], [61], [63], [100], [106]; *R v Caplikas* [2002] SASC 258, [74], [79]; *R v Proom* [2003] SASC 88, [36], [38], [43], [48]-[51], [53], [55], [72]; *Habra v Police* [2004] SASC 430, [17], [24], [43]; *Field v Police* [2009] SASC 354, [19], [29].
1265 Rosenthal, above n 605, 149.
1266 William Bogard, 'Discipline and Deterrence: Rethinking Foucault on the Question of Power in Contemporary Society' (1991) 28(3) *Social Science Journal* 325, 326, 340.
1267 Ibid 341.

General deterrence (community deterrence) was evident in *Place*[1268] where the court conceptualised the offending as part of a category of offences often committed by drug dependent offenders (above). The interplay between disciplinary power and general deterrence is evident in *Proom*[1269] where the appeal court observes Melissa Proom's offending 'was driven by the insatiable needs of her heroin addiction'.[1270] This is followed by observation the sentencing judge 'was correct to emphasise the community concern associated with offences of this type. General deterrence was an important matter'.[1271] In *Proom*[1272] the appeal court states:

> Deterrence through punishment may be a blunt remedy, but courts do what they can to deter addicts from using crime to sustain their addiction. Society is entitled to be protected from persons who commit crime to fund their addiction.[1273]

The appeal court concludes, '[w]hen considerations of deterrence predominate, or require greater weight, there is less scope for leniency on the basis of addiction'.[1274] *Place* and *Proom* (discussed above) show the courts using their own expert institutional knowledge about punishment and risk when considering the appropriate penalties to be imposed for offences committed to sustain a person's illicit drug dependence.

In contrast to the decisions above, in *Habra*[1275] Joseph Habra was originally sentenced 'on the basis that the defendant was full of intelligence, needed personal deterrence and was a person who would respond appropriately to a custodial sentence'.[1276] However, following that sentence Joseph was assaulted in prison and suffered severe and ongoing brain injury. The appeal court represents Joseph as a victim of an assault in prison with need of ongoing medical care and supervision due to 'considerable and possibly permanent brain injuries'.[1277] The fact that Joseph was assaulted in

1268 *R v Place* [2002] SASC 101.
1269 *R v Proom* [2003] SASC 88.
1270 Ibid [71].
1271 Ibid [72].
1272 *R v Proom* [2003] SASC 88.
1273 Ibid [48].
1274 Ibid [51].
1275 *Habra v Police* [2004] SASC 430.
1276 Ibid [43].
1277 Ibid.

custody suggests to the appeal court that his time in custody has been 'onerous'.[1278] If returned to prison Joseph 'is likely to find the experience overwhelmingly difficult, not just as a result of his physical and mental disabilities but also due to the fear of such violence occurring again'.[1279] Furthermore, in custody Joseph 'would have difficulty responding appropriately to situations of confrontation and would require continuous supervision in order to participate in day-to-day tasks'.[1280] The court concludes that Joseph has been adequately punished through time already spent in custody and the ongoing consequences of the assault.[1281]

> The catastrophic consequences of the assault suffered by the defendant whilst in custody and the resultant disabilities constitute special circumstances that allow for a merciful approach to be taken to the re-sentencing of the defendant. … Given the nature and extent of the disabilities and the manner in which they were sustained, the defendant should not be returned to custody.[1282]

In the findings above, appellants are represented as "drug addict" and in doing so the appeal courts assign them to a group of offenders likely to pose a future risk to the community. Assessments about risk then justified the punishment imposed. Wandall observes, '[w]hen the courtroom system decides to incarcerate an offender because he or she is considered a future crime risk, this is more a matter of crime prevention than of the individual offender'.[1283] This is how defendants become 'categorized as being particular criminals, habitual offenders, persistent offenders or alternatively as first-timers or as persons who do not belong in the penal system'.[1284] Similar categorisations were evident in the appeal decisions. Analysis found the courts representing appellants discursively as "drug addicts", living chaotic and disrupted lives, and having committed the expected categories of offences of a drug addict. Furthermore, the seriousness of the offending and criminal histories triggered deterrent sentencing principles. This is consistent with Wandall who observes a common perception in the court system is 'that drug addicts and repeat property offenders of economically low

1278 Ibid [44].
1279 Ibid.
1280 Ibid.
1281 Ibid [46].
1282 Ibid [45].
1283 Wandall, above n 1138, 125.
1284 Ibid 90.

standing constitute an identifiable group of incorrigible offenders against whom imprisonment is used proactively to prevent them from re-offending during a period of time'.[1285] This is consistent in approach to that of a risk, rather than a disciplinary regime as explained below.

Feeley and Simon observe that 'intervention and treatment of the individual offender' has increasingly been replaced by 'techniques that identify, classify and manage' offender groups according to their risk profiles.[1286] Garland similarly observes, offenders may become 'characterized as a being apart, as an outlaw or a 'criminal type' who is less than fully human, in which case it is a relationship (or perhaps a non-relationship) of difference and exclusion which is implied'.[1287] Analysis suggests that a history of drug dependence may continue to inform the courts when making predictions about the risk of future offending. In some circumstances, this prediction may override other signs of progress towards rehabilitation such as abstinence from drug use or other demonstrations of progress towards recovery and a law-abiding way of life in the community, as demonstrated in *Monterola* and *Ashton* discussed earlier in this chapter. Of all the versions about the appellant that could have been constructed by the courts, some appellants continued to be represented as "drug addicts" or "prone to relapse" and likely to offend in the future. This is consistent with Garland who observes:

> Individuals who appear before the courts are addressed, examined, and understood according to the laws implicit conception of a normal person and normal attributes. No matter what the reality of that individual is, the law insists upon seeing him or her in a particular, predefined way, and dispersing judgement accordingly.[1288]

In the appeal decisions, the courts used selected information about compliance with program requirements as well as other sources of information to assess risk of future relapse into drug use and re-offending. This justified punishment on the basis of potential risk to the participant and/or the community. Simon and Feeley observe that criminal sanctioning is formulated according to

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1285 Ibid 123-4.

1286 Malcolm Feeley and Jonathan Simon, 'The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications' (1992) 30(4) *Criminology* 449, 452, 457-8. See also Wandall, above n 1138, 116-7.

1287 Garland, above n 376, 272.

1288 Ibid 268.

'individual-based theories of punishment'.[1289] In contrast, current crime control strategies are 'less concerned with responsibility, fault, moral sensibility, diagnosis, or intervention and treatment of the individual offender' and more concerned with 'techniques to identify, classify and manage groupings sorted by dangerousness'.[1290] Policies about crime control are influenced by governments and political agendas. The appeal decisions outlined above, show how the courts maintain their independence of decision-making by relying upon the courts own institutional expert knowledge about the typical drug dependent offender when considering punishment, rehabilitation and risk. However, by classifying certain groups of offenders as more at risk of future crime, the courts are inherently contributing towards a social risk minimisation agenda.

VI PROSPECTS OF REHABILITATION

Chief Justice King describes rehabilitation as 'renunciation by the offender of his wrong doing and his establishment or re-establishment as an honourable law-abiding citizen'.[1291] Rehabilitation aims to "reclaim" worthy individuals and place them back into the community.[1292] The offender is viewed as having had limited control over the circumstances that led to the offending behaviour[1293] because of some physical or mental disease, or socioeconomic factor which can be addressed through treatment.[1294] Accordingly, rehabilitative punishment is justified 'to "cure" or "reform" the offender'.[1295] The aim of drug courts is rehabilitative. They aspire to reform the drug using offender by addressing drug dependence and other factors contributing towards a criminal way of life. This section explores how the appeal courts represented other appellants as having prospects of future rehabilitation based on compliance discourse and other information. For these appellants, an assessment of having prospects of rehabilitation contributed towards a suspended sentence.

1289 Malcolm M Feeley and Jonathan Simon, 'The New Penology: Notes On The Emerging Strategy Of Corrections And Its Implications' in O'Malley, above n 596, 233.
1290 Ibid 234.
1291 *Vartokas v Zanker* (1988-89) 51 SASR 277, [279] (King CJ).
1292 Ibid.
1293 Rosenthal, above n 605, 151.
1294 Ibid.
1295 Ibid.

A Punishment and Inclusion

Four appellants received suspended or time served sentences on appeal: *B, WR*,[1296] *Parsons*,[1297] *Lawrie 1*[1298] and *Habra*.[1299] *Habra* is discussed earlier in this chapter (pp 168-9) and is not discussed in this section. In *B, WR*[1300] Mr B is represented as "substantially" and "exceptionally" successful in the program, as is *Monterola* and *Ashton* (above). Mr B re-offended a few weeks before graduation from the program. The original sentencing remarks (restated) suggest Mr B performed "exceptionally well"[1301] in the program. Had Mr B graduated 'it was likely that any sentence imposed ... would have been suspended in recognition of his substantial progress towards rehabilitation'.[1302] The fresh offending was serious and of a similar nature to that leading to Mr B's program participation.[1303] The sentencing remarks (restated) indicates acceptance by the magistrate that the offending occurred following threats to Mr B and his family and to raise money for a drug debt.[1304] In relation to rehabilitation and risk, the appeal court determines 'all the indications were that there was a good prospect that he would avoid the use of drugs, and would rehabilitate himself'.[1305] On the other hand, submissions made by prosecution (restated) indicate concern the fresh offences 'were committed at a time when he was receiving substantial support, and had various avenues for assistance'.[1306] This suggests risk of offending in the future. Furthermore, prosecution argued Mr B's extensive criminal history and the seriousness of the offences warranted a sentence based on deterrence.[1307]

1296 *Police v B, WR* [2005] SASC 163: B originally received a suspended sentence from the drug court. Prosecution appealed the sentence on the basis the penalty imposed was inadequate. B is the respondent in this decision.

1297 *Parsons v Police* [2008] SASC 339: P originally received a sentence of immediate imprisonment from the drug court. P appealed that sentence.

1298 *Lawrie v DPP* [2008] SASC 21: L originally received a suspended sentence from the drug court. L appealed the sentence.

1299 *Habra v Police* [2004] SASC 430: H originally received a sentence of immediate imprisonment and appealed that sentence. See also *R v Gasmier* [2011] SASCFC 43: G was a drug court applicant, not a participant.

1300 *Police v B, WR* [2005] SASC 163.

1301 Ibid [9].

1302 Ibid.

1303 Ibid [3]-[4]: non-aggravated serious criminal trespass and larceny (original offences leading to acceptance into the program) and non-aggravated serious criminal trespass and theft (further offending while in the program), at [10].

1304 Ibid [13].

1305 Ibid [15].

1306 Ibid [20].

1307 Ibid [19].

Aside from this suggestion about risk of future offending, there is no further discourse about risk in *B, WR*. Rather, the appeal court characterises Mr B as having 'good prospects of rehabilitation, which prospects will be reduced if he is to be imprisoned again'.[1308] When resentencing Mr B, the appeal court imposed a suspended sentence of imprisonment having been 'influenced by the combined effect of the rehabilitation that apparently occurred in the course of the Drug Court Program, the circumstances under which the offences of May 2004 were committed, and the assistance that Mr B has given to the Police' (which likely significantly contributed towards the suspended sentence).[1309] Whilst *B, WR* has similar discourse about rehabilitation and risk as *Monterola* and *Ashton,* the predominant discourse is centred on rehabilitation.

In two decisions the appellant was mostly non-compliant while in the program but nevertheless received a suspended sentence. In these decisions the courts found a prospect for future rehabilitation, not necessarily based on compliance discourse, but rather from other information. In *Parsons*[1310] the appeal court considered Sam Parsons' early guilty pleas demonstrated a 'desire to change his lifestyle and his offending history'.[1311] By applying for the program, Sam demonstrated 'a genuine desire on his part to change his life'.[1312] The appeal court, when assessing whether to suspend imprisonment, considers Sam's relationship with a woman a relevant consideration.[1313] It is unclear in the decision whether that relationship existed during Sam's program participation. The appeal court constructs Sam as a person with prospects of rehabilitation based on his early guilty pleas, his attempt in the program and on his relationship with a law-abiding citizen and concludes:

> The defendant has satisfied me that because he now has a relationship which he wants to continue, and he is really desirous of getting his life in to order, and that he should be given a further opportunity in which to do that. In the circumstances, I conclude that good reason exists to suspend the balance of the sentence.[1314]

1308 Ibid [29].
1309 Ibid [49].
1310 *Parsons v Police* [2008] SASC 339.
1311 Ibid [88].
1312 Ibid [64].
1313 Ibid [69].
1314 Ibid [79].

This can be contrasted against the way both the sentencing magistrate and the appeal court originally represent Sam as a traffic offender with an "appalling" driving history who poses 'a significant danger not only to [himself] but to members of the public'.[1315] Why is it that Sam, consistently non-compliant during the program, and considered a danger to the community, is subsequently found suitable for release into the community by the appeal court? As Wandall observes:

> The link between the defendant's personal and social life and criminal profile extends to a link between the expected *future social stability* and the expected *future criminal profile* of the defendant. A partner, cohabitant, wife, the care-taking responsibility for children, just as well as a permanent occupation, educational activities and concrete plans of employment or education, all serve to create an image of an defendant living in socially stable environment and express the image of a defendant with the prospects of future social stability. In contrast, defendants devoid of such characteristics are seen as having unstable social environments and with future prospects of criminal activity.[1316]

Similarly, in *Lawrie 1*[1317] Nigel Lawrie's program was terminated for non-compliance with program conditions.[1318] Nigel nevertheless received a suspended sentence by the sentencing magistrate because Nigel had 'the potential for rehabilitation notwithstanding the frequency of his offending and had arrived at a point in his life where he could embark upon a process of genuine redemption'.[1319] The appeal court includes information about Nigel's 'traumatic and unstable'[1320] background history which included a 'difficult upbringing',[1321] sexual abuse as a child and drug use history.[1322] The appeal court also includes a current relationship with 'a woman for about eight years' as well as his 'three children aged six, five and four'.[1323] Nigel also participated in the *Mullighan* enquiry and an enquiry into a death in custody.[1324] The appeal court dialogically agrees with the sentencing magistrate's assessment that Nigel has prospects of rehabilitation by stating, '[t]he appellant is still a very young man'[1325] and 'I consider as the magistrate did that there is still a potential for rehabilitation

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1315 Ibid [43].
1316 Wandall, above n 1138, 94-5.
1317 *Lawrie v DPP* [2008] SASC 21.
1318 Ibid [6]: L breached home detention bail conditions and was charged for further offences including theft and three counts of breach bail, see Table of Offences.
1319 Ibid [8].
1320 Ibid [25].
1321 Ibid [11].
1322 Ibid [11], [25].
1323 Ibid [11].
1324 Ibid [25].
1325 Ibid [26]: L was 24 years of age.

and that the sentence should be as short as the interests of justice permit'.[1326] Accordingly, the appeal court suspended the sentence of imprisonment.[1327]

Just as Sam Parsons and Nigel Lawrie are involved in stable relationships, in *Gasmier*[1328] and *Pumpa*[1329] the courts similarly construct signs of rehabilitation through relationships. Similar to Sam Parsons, Shane Gasmier's partner is described as 'a woman who is very opposed to drugs' and Shane is considered to be 'attempting to get his life into order'.[1330] Shane Pumpa had 'entered a stable relationship' during the drug court program.[1331] Similarly, in *Van Boxtel*[1332] Joseph Van Boxtel is considered to have entered 'into a stable relationship' with the birth of a child imminent.[1333] It is unclear in the decision whether that relationship existed during Joseph's program participation. In *B, WR*[1334] Mr B has 'two children with whom he has regular contact'.[1335] This was likely the situation whilst Mr B participated unsuccessfully in the program. These findings of the courts discursively constructing social stability were discussed previously in the context of transformation and compliance (pp 125-8). Overall, eight appellants had some social stability through relationships evident in the appeal decision but not all appellants received suspended sentences.[1336]

1326 Ibid.

1327 Ibid [29].

1328 *R v Gasmier* [2011] SASCFC 43, [13].

1329 *R v Pumpa* [2013] SADC 157, [33].

1330 *R v Gasmier* [2011] SASCFC 43, [13]: At the time G received the suspended sentence, G was applying for admission into the drug court program in relation to other offences. See also *Parsons v Police* [2008] SASC 339, [69], [79].

1331 *R v Pumpa* [2013] SADC 157, [33]. See also *Parsons v Police* [2008] SASC 339, [69], [79].

1332 *Police v Van Boxtel* [2013] SASC 82.

1333 Ibid [21]: The appeal court remitted the case back to the Magistrates Court for resentence. The new sentence is unknown.

1334 *Police v B, WR* [2005] SASC 163.

1335 Ibid [15].

1336 *Police v B, WR* [2005] SASC 163, [15]: maintains regular contact with his two children (a time served sentence on appeal); *Lawrie v DPP* [2008] SASC 21, [11]: long term relationship and three children (suspended sentence on appeal); *Ashton v Police* [2008] SASC 174, [14]: improved family relationships (immediate imprisonment, appeal dismissed); *Parsons v Police* [2008] SASC 339, [69], [79]: now has a relationship with a young woman who is opposed to drug and is employed (suspended sentence on appeal); *Police v Van Boxtel* [2013] SASC 82, [21]: stable relationship, imminent birth of child, mentoring relationship with a social worker (immediate imprisonment, on appeal remitted to Magistrates Court for resentence, new sentence unknown); *R v Proom* [2003] SASC 88, [19]: long term relationship and 18 month old child (imprisonment on appeal); *Ketoglou v Police* [2008] SASC 243, [30]: employment, a supportive partner, a small business, stable domestic circumstances (immediate imprisonment, appeal dismissed); *R v Pumpa* [2013] SADC 157, [33]: stable relationship (serious repeat offender application).

In contrast, in *Lawrie 2*[1337] Nigel Lawrie was imprisoned when he re-offended after completing the program and breached the suspended sentence he received from the drug court.[1338] The appeal decision recontextualised submissions made by Nigel's counsel which indicate at the time of the new offences Nigel 'had moved away from his family, thus inhibiting his path towards rehabilitation'.[1339] A psychological report before the drug court for sentence previously suggests Nigel 'was living by himself without the support systems that he needed' when offending before program participation.[1340]

Wandall observed the personal circumstances of the defendant including age may affect a courts assessment about future crime risk.[1341] The age of the appellant in *Lawrie*, *Gasmier* and *Van Boxtel* was linked with discourse about rehabilitation. On the other hand, in *B, WR* Mr B's age (47) is stated but not linked with any further discourse about rehabilitation or risk.[1342] In *Parsons*, Sam's age is excluded. In *Lawrie*, Nigel is considered a young man with prospects of rehabilitation. Nigel was 24 years of age.[1343] In *Gasmier*, Shane was 33 years of age when sentenced.[1344] The sentencing judge 'considered that there was good reason to suspend the sentence, having regard to the appellant's age, his lack of prior relevant offending, the fact that he had spent considerable time in custody, as well as her acceptance that he was determined to rehabilitate himself'.[1345] In *Van Boxtel*, the sentencing magistrate observed '[y]ou are reaching an age when, at 35, people begin to think about living life better because they realise that it is not going to go on forever. When you are twenty you think you are immortal but when you are forty you realise you are not, and you are reaching that age'.[1346]

1337 *Police v Lawrie* [2010] SASC 117.
1338 Ibid [2]-[3].
1339 Ibid [16].
1340 Ibid.
1341 Wandall, above n 1138, 90, 94.
1342 *Police v B, WR* [2005] SASC 163, [15].
1343 *Lawrie v DPP* [2008] SASC 21, [11].
1344 *R v Gasmier* [2011] SASCFC 43, [12].
1345 Ibid [15].
1346 *Police v Van Boxtel* [2013] SASC 82, [15].

In the findings outlined above, there was suggestion of support in the community. Aside from that commonality, there appears to be no discernible pattern to determining which appellants should remain in the community.

VII SUMMARY

Analysis finds the drug court participant/appellant constructed through competing discourse about rehabilitation and risk of future drug related offending based on compliance discourse and information about the seriousness of the offending, criminal and background history (including drug dependence) and the availability of support in the community. In subsequent legal events following program participation, these appellants are consistently constructed as responsibilised "drug addicts" and considered prone to relapse. Garland observed that legal punishment is individualised and normative,[1347] however, the effect of persistence in characterising former participants as "drug addicts" is a more generalised approach to sentencing that category of offender through assessments of risk.

Discourse about drug court participation when translated into the framework of a sentencing or appeal decision can affect the outcome with real consequences for the participant. The findings suggest compliance discourse, intended to monitor progress during the program, is revisited to assist justify punishment during sentencing and appeal processes. In particular, program non-compliance is used alongside other information to predict future risk of drug use and offending. Assessments about program non-compliance and future risk triggers sentencing principles based on the protection of the community, incapacitation and deterrence which overshadows, for some participants, any achievements gained during the program. This finding is particularly salient because many participants failed the program. Taking into account the appeal decisions represent participants who were not successful in the program, there appears correspondence between assessments of risk

1347 Garland, above n 1050, 28-9.

occurring during the treatment phases of the program usually leading to termination of the program, and later sentencing and appeal process.

15 appellants received sentences of immediate imprisonment on appeal. This included appellants who performed well during the program but were non-compliant near the end of the program, or graduated but nevertheless received a penalty of immediate imprisonment. Four appellants received suspended or time served sentences on appeal with three appellants considered to have prospects of rehabilitation. For two appellants, this included an assessment of stability through existing relationships in the community and the sentence occurred despite consistent non-compliance during the program. It appears compliance discourse resonates with and contributes towards court decision-making because compliance is about behaviour for which individuals can be held responsible and partly informs the courts of the potential for risk of future drug use and offending.

6. CONCLUSION

> [t]he law … *enslaves* other discourses by moulding them to fit its cognitive mode of deciding issues of responsibility and moral accountability. Human agency is abstracted in a semantic process.[1348]

This thesis analyses discourse in appeal decisions about former drug court participants to determine how information about program participation is used alongside other information to construct discursive representations of the participant/appellant in more formal legal contexts. The aim is to theorise the space between treatment during the program and subsequent legal contexts by exploring how the original sentencing and the appeal courts discursively construct and conceptualise the appellant. Exploring how participation discourse is used in these contexts is important because drug courts introduced new institutional knowledges and concepts for the treatment and management of drug dependent offenders into the criminal court system. There is no research seeking to understand how information about program participation is used in subsequent legal contexts. Whilst this research does not address the direct experiences of former drug court participants, it does contribute towards existing research[1349] by seeking how the original sentencing and the appeal courts construct discursive representations of former participants, and the consequences. The research findings show the courts constructing the participant/appellant discursively to fit the framework of sentencing and appeal process. The following discusses the research findings and clarifies how this thesis is a significant and original contribution to existing research.

There is an assumption underlying existing research that the epistemological differences between treatment and legal professions create differences in the discourse arising during the program.[1350] This is evident in literature about the less adversarial process in drug courts[1351] and how sentencing practices in drug courts are a therapeutic process.[1352] Other research identifies how the

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1348 Greig, above n 979, 117 (emphasis in original).

1349 See, eg, Quinn, above n 245, 65, 69.

1350 See, eg, Wolf, above n 50; Bull, above n 135; Lyons, 'Judges as therapists', above n 82; Moore, above n 135; Baker, above n 57. With the exception of research conducted by Bull, this research was not conducted strictly through discourse analysis. However, this research provides examples of existing research into drug court social practice, organisational structure and the processes of decision-making that occurs between treatment and legal professionals during the program.

1351 See, eg, Office of Justice Programs, above n 54; Cannon, above n 24.

1352 See, eg, Cannon, above n 24, 129; Freiberg, above n 24; King, above n 39; Dive, above n 39.

boundaries between treatment and legal discourse becomes blurred during reviews of participant progress, with treatment professionals arguing for legal sanctions intended to achieve therapeutic goals and address deviance from program requirements, and legal team members (including the judge) arguing for more therapeutic responses rather than punitive responses.[1353] Research also finds treatment and legal team members constructing participants discursively as treatable or untreatable subjects to determine potential for internal transformation (recovery from drug dependence) and to justify punishment for program non-compliance.[1354] In contrast, this thesis focussed primarily on discourse in appeal decisions and defined treatment discourse narrowly as discourse about internal transformation through counselling and other therapies for drug dependence.

Treatment discourse was excluded from the appeal decisions. In four decisions, discourse related to treatment was about compliance with treatment orders such as attendance at counselling and not responding to counsellors or case managers.[1355] This discourse was not about internal responses to treatment. Rather than treatment discourse, the main source of information about program participation in all cases is the original sentencing remarks. Five decisions include information such as drug court assessment and progress reports in addition to the sentencing remarks.[1356] 10 decisions include information from psychiatric or psychological reports, not from the drug court, which assess internal transformation and risk of future relapse.[1357] The use of these reports to inform the sentencing process is common practice. This may explain why they were provided to the courts as a source of information indicative of internal transformation, rather than information from drug court treatment professionals.

1353 See, eg, Moore, above n 135; Lyons, 'Judges as therapists', above n 82; Baker, above n 57.

1354 See, eg, Burns and Peyrot, above n 115; Lyons, 'Simultaneously treatable', above n 90; Paik, above n 100; Mackinem and Higgins, above n 107; Baker, above n 57.

1355 *R v Place* [2002] SASC 101; *Crockford v Adelaide Magistrates Court & Anor* [2008] SASC 62; *Ashton v Police* [2008] SASC 174; *Chandler v Police* [2002] SASC 130.

1356 *Police v Van Boxtel* [2013] SASC 82; *Crockford v Adelaide Magistrates Court & Anor* [2008] SASC 62; *Chandler v Police* [2002] SASC 130; *Ashton v Police* [2008] SASC 174; *Monerola v Police* [2009] SASC 42.

1357 *Chandler v Police* [2002] SASC 130; *Habra v Police* [2004] SASC 430; *Ashton v Police* [2008] SASC 174; *Parsons v Police* [2008] SASC 339; *Kells v Police* [2007] SASC 224; *Roberts v Police* [2013] SASC 117; *Robson v Police* [2007] SASC 395; *Police v Van Boxtel* [2013] SASC 82; *R v Caplikas* [2002] SASC 258; *Hughes v Police* [2012] SASC 183.

Drug courts introduced new concepts to the criminal courts with the normative goal of assisting participants with recovery from drug dependence. Some normative discourse in the appeal decisions highlighted the role of judicial interaction and legal coercion to encourage participants into the program, and to retain them in the program. The incentive to commence the program which offers treatment in the community instead of continued incarceration was apparent, with 10 appellants released from custody to commence the program.[1358] Another incentive to participate in the program is the potential for a reduction in sentence at the end of the program. This incentive was evident in three decisions where the appellants withdrew from the program when it became apparent they would receive immediate sentences of imprisonment regardless of any progress towards recovery made during the program.[1359] In one decision, a graduate received an immediate sentence of imprisonment from the drug court which was upheld on appeal.[1360] This contradicts the normative goals of the program and potentially undermined any progress made towards recovery by that participant. In contrast, four appellants who did not successfully complete the program had their progress acknowledged discursively by the original sentencing and the appeal courts and/or received more favourable sentences attributed in part to having made some degree of progress during the program.[1361] The diversity in sentencing outcomes confirms previous research that highlights the complexity of sentencing drug court participants.[1362]

The original sentencing and appeal courts engaged in normative discourse to construct discursive representations of responsibilised participant/appellants. The importance of ongoing judicial interaction in the supervision and management of participants during the program was explicitly recognised in three decisions.[1363] The appeal cases also include normative discourse in the

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1358 *Chandler v Police* [2002] SASC 130; *R v Gasmier* [2011] SASCFC 43; *Ashton v Police* [2008] SASC 174; *Lawrie v DPP* [2008] SASC 21; *Crockford v Adelaide Magistrates Court & Anor* [2008] SASC 62; *Monterola v Police* [2009] SASC 42; *Parsons v Police* [2008] SASC 339; *Police v Bieg* [2008] SASC 261; *Hughes v Police* [2012] SASC 183; *R v Caplikas* [2002] SASC 258.

1359 *Chandler v Police* [2002] SASC 130; *Reed v Police* [2007] SASC 26; *R v Place* [2002] SASC 101.

1360 *Monterola v Police* [2009] SASC 42.

1361 *Ashton v Police* [2008] SASC 174; *Police v B, WR* [2005] SASC 163; *Lawrie v DPP* [2008] SASC 21; *Parsons v Police* [2008] SASC 339.

1362 See, eg, Carey, Finigan and Pukstas, above n 186, 28-9; Harrell and Roman, above n 449, 227.

1363 *Reed v Police* [2007] SASC 26; *R v Van Boxtel* [2013] SASC 82; *Ashton v Police* [2008] SASC 174.

forms of judicial praise[1364] and admonishments,[1365] rewards[1366] and sanctions,[1367] and excuse testing.[1368] The encouragement of participant investment in the normative goals of the program was recognised in two decisions where the participant was warned about the consequences of any further program non-compliance.[1369] Four participants were consistently compliant during most of the program[1370] and three participants were consistently non-compliant despite coercion to engage with the program.[1371] Seven appellants demonstrated resistance by removing home detention monitoring and absconding.[1372] This suggests participant resistance to coercion to accept the normative goals of the program.[1373] Resistance is consistent with existing research which finds drug addicts are more likely to abscond from treatment programs when under high levels of constraint and control.[1374]

This thesis conceptualises compliance discourse broadly as meeting program requirements and non-compliance as failing to meet program requirements, regardless of whether those requirements could also be considered as legal or treatment requirements. Discourse about compliance and non-compliance was located in the following categories: attendance at drug testing and results (13 decisions);[1375] issues with bail conditions (10 decisions);[1376] re-offending during the program (12

1364 *Ashton v Police* [2008] SASC 174; *Crockford v Adelaide Magistrates Court & Anor* [2008] SASC 62.
1365 *Ashton v Police* [2008] SASC 174; *Crockford v Adelaide Magistrates Court & Anor* [2008] SASC 62.
1366 *Ashton v Police* [2008] SASC 174; *Lawrie v DPP* [2008] SASC 21.
1367 *Crockford v Adelaide Magistrates Court & Anor* [2008] SASC 62; *Hughes v Police* [2012] SASC 183; *Reed v Police* [2007] SASC 26; *R v Place* [2002] SASC 101; *Parsons v Police* [2008] SASC 339.
1368 *Chandler v Police* [2002] SASC 130; *Police v B, WR* [2005] SASC 163; *Reed v Police* [2007] SASC 26; *Ryan v Police* [2003] SASC 108; *Richards v Police* [2007] SASC 368.
1369 *Ashton v Police* [2008] SASC 174; *Crockford v Adelaide Magistrates Court & Anor* [2008] SASC 62.
1370 *Ashton v Police* [2008] SASC 174; *Monterola v Police* [2009] SASC 42; *Habra v Police* [2004] SASC 430; *Police v B, WR* [2005] SASC 163.
1371 *Chandler v Police* [2002] SASC 130; *Parsons v Police* [2008] SASC 339; *Hughes v Police* [2012] SASC 183.
1372 *Hughes v Police* [2012] SASC 183; *Field v Police* [2009] SASC 354; *Police v Van Boxtel* [2013] SASC 82; *Richards v Police* [2007] SASC 368; *Andreasen v Police* [2004] SASC 255; *Parsons v Police* [2008] SASC 339; *Lawrie v DPP* [2008] SASC 21.
1373 Greig, above n 979, 265.
1374 Anglin, above n 995, 534, 543.
1375 *Parsons v Police* [2008] SASC 339; *Hughes v Police* [2012] SASC 183; *Crockford v Adelaide Magistrates Court & Anor* [2008] SASC 62; *R v Place* [2002] SASC 101; *Reed v Police* [2007] SASC 26; *Roberts v Police* [2013] SASC 117; *Ryan v Police* [2003] SASC 108; *Police v Van Boxtel* [2013] SASC 82; *Ashton v Police* [2008] SASC 174; *R v Caplikas* [2002] SASC 258; *Monterola v Police* [2009] SASC 42; *Ketoglou v Police* [2008] SASC 243; *Habra v Police* [2004] SASC 430.
1376 *R v Place* [2002] SASC 101; *Crockford v Adelaide Magistrates Court & Anor* [2008] SASC 62; *Monterola v Police* [2009] SASC 42; *Hughes v Police* [2012] SASC 183; *Field v Police* [2009] SASC 354; *Parsons v Police* [2008] SASC 339; *Police v Van Boxtel* [2013] SASC 82; *Richards v Police* [2007] SASC 368; *Lawrie v DPP* [2008] SASC 21; *Andreasen v Police* [2004] SASC 255.

decisions);[1377] and failing to adhere to instructions from managers or counsellors (4 decisions).[1378] Compliance and non-compliance discourse was linked with discourse about recovery (internal transformation) in 20 decisions.[1379]

A consequence of the courts focussing on compliance discourse is that information created during program participation intended for supervising participants and monitoring progress is used later to make judgements about attitudes and internal transformation in subsequent legal contexts. This thesis finds the courts in more formal legal contexts engaging in discourse about deviant behaviour, attitudes and internal transformation partly informed through compliance discourse from the drug court. In five decisions the courts construct versions of progress or non-progress during the program through deviant behaviour which is then conceptually linked to negative attitudes such as dishonesty. Negative attitudes then signalled a lack of internal transformation or ability or willingness to change.[1380] In seven decisions the courts represent the appellants as having chaotic and disrupted lifestyles through information about program non-compliance, lack of treatment and other supports during the program and personal background histories.[1381] In 16 decisions, the presence or absence of social or program support contributed towards discourse about non-compliance.[1382] These

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1377 *Monterola v Police* [2009] SASC 42; *Lawrie v DPP* [2008] SASC 21; *Kells v Police* [2007] SASC 224; *Police v Van Boxtel* [2013] SASC 82; *Police v B, WR* [2005] SASC 163; *Robson v Police*[2007] SASC 395; *Hughes v Police* [2012] SASC 183; *Ryan v Police* [2003] SASC 108; *Chandler v Police* [2002] SASC 130; *R v Caplikas* [2002] SASC 258; *Andreasen v Police* [2004] SASC 255; *Habra v Police* [2004] SASC 430.

1378 *Crockford v Adelaide Magistrates Court & Anor* [2008] SASC 62; *R v Place* [2002] SASC 101; *Reed v Police* [2007] SASC 26; *Police v B, WR* [2005] SASC 163.

1379 *Ashton v Police* [2008] SASC 174; *Parsons v Police* [2008] SASC 339; *Hughes v Police* [2012] SASC 183; *Crockford v Adelaide Magistrates Court & Anor* [2008] SASC 62; *Richards v Police* [2007] SASC 368; *Chandler v Police* [2002] SASC 130; *R v Caplikas* [2002] SASC 258; *Reed v Police* [2007] SASC 26; *Richards v Police* [2007] SASC 368; *Ryan v Police* [2003] SASC 108; *R v Proom* [2003] SASC 88; *Habra v Police* [2004] SASC 430; *Police v B, WR* [2005] SASC 163; *R v Place* [2002] SASC 101; *Lawrie v DPP* [2008] SASC 21; *Monterola v Police* [2009] SASC 42; *Robson v Police* [2007] SASC 395; *Police v Van Boxtel* [2013] SASC 82; *Ketoglou v Police* [2008] SASC 243; *R v Pumpa* [2013] SADC 157.

1380 *Chandler v Police* [2002] SASC 130; *Reed v Police* [2007] SASC 26; Police v *B, WR* [2005] SASC 163; *Ryan v Police* [2003] SASC 108; *Richards v Police* [2007] SASC 368.

1381 *Hughes v Police* [2012] SASC 183; *Chandler v Police* [2002] SASC 130; *Lawrie v DPP* [2008] SASC 21; *Reed v Police* [2007] SASC 26; *R v Caplikas* [2002] SASC 258; *Robson v Police* [2007] SASC 395; *Police v Van Boxtel* [2013] SASC 82.

1382 *Ashton v Police* [2008] SASC 174; *R v Caplikas* [2002] SASC 258; R v Place [2002] SASC 101; *Ketoglou v Police* [2008] SASC 243; *R v Pumpa* [2013] SADC 157; *R v Gasmier* [2011] SASCFC 43; *Police v B, WR* [2005] SASC 163; *Police v Van Boxtel* [2013] SASC 82; *Parsons v Police* [2008] SASC 339; *Lawrie v DPP* [2008] SASC 21; *Reed v Police* [2007] SASC 26; *Monterola v Police* [2009] SASC 42; *Robson v Police* [2007] SASC 395; *R v Place* [2002] SASC 101; *Chandler v Police* [2002] SASC 130; *Crockford v AMC Anor* [2008] SASC 62.

constructions were applied to situations where non-compliance was out of the participant's control[1383] as well as situations where participants were complicit with program non-compliance.[1384]

This thesis provides an original and significant contribution to existing research which defines discourse that occurs in drug courts using therapeutic and legal boundaries. The treatment and legal discourse identified in previous research could also be characterised as normative and about program compliance because some of that discourse is about whether or not participants complied with program conditions.[1385] Similar discourse has filtered into the appeal decisions to partly inform assessments about progress during the program and signs of internal transformation. Whilst this thesis is limited to discourse located in the appeal decisions, the predominance of compliance discourse in the appeal decisions, existing research[1386] and court evaluation reports[1387] combined suggests compliance discourse may be a dominant form of discourse in drug courts. This thesis addresses a gap in research by showing how such discourse is subsequently used in legal contexts to inform assessments about recovery and internal transformation. The findings in this thesis are important because it demonstrates how compliance discourse partly informs and justifies the sentence on appeal.

Existing research demonstrates how drug courts recognise relapse and other deviant behaviours occur as part of the recovery process and also use this information to justify punishment through sanctions, increased monitoring, remands into custody for stabilisation and program termination. This thesis expands that research by showing how the same information is recontextualised alongside other information to justify punishment in sentencing and appeal process. In particular, analysis finds the

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1383 *Chandler v Police* [2002] SASC 130; *Monterola v Police* [2009] SASC 42; *Robson v Police* [2007] SASC 395; *R v Place* [2002] SASC 101; *Habra v Police* [2004] SASC 430.

1384 *Reed v Police* [2007] SASC 26; *Police v B, WR* [2005] SASC 163; *Parsons v Police* [2008] SASC 339; *R v Caplikas* [2002] SASC 258; *Hughes v Police* [2012] SASC 183; *Police v Van Boxtel* [2013] SASC 82; *Roberts v Police* [2013] SASC 117.

1385 See, eg, Moore, above n 135; Lyons, 'Judges as therapists', above n 82; Baker, above n 57; Burns and Peyrot, above n 115; Lyons, 'Simultaneously treatable', above n 90; Paik, above n 100; Mackinem and Higgins, above n 107; Wolf, above n 50; Bull, above n 135, 4-5, 18: Bull observed that drug courts use processes that seek to ensure program compliance through deterrence, however, drug courts were not just about compliance, they also offered participants freedom and an opportunity to change, at 17.

1386 Ibid.

1387 See, eg, Skrzypiec, above n 33; Brewster, above n 185; Taxman and Bouffard, above n 175.

courts making assessments about program compliance, rehabilitation and risk, with more emphasis on risk. Information about program non-compliance was located alongside other information such as the seriousness of the offences leading to program participation (26 decisions),[1388] criminal antecedents (22 decisions)[1389] and personal background history (18 decisions)[1390] to support representation of appellants as responsibilised drug addicts at risk of future drug use and offending. Many appellants were explicitly characterised as responsibilised "drug addicts" at risk of future offending.[1391] The characterisation of the appellant as "drug addict" triggered sentencing principles based on incapacitation, protection of the community and deterrence which justified sentences of immediate imprisonment. Protection of the community and deterrence were dominant sentencing considerations, rather than rehabilitation, for 14 appellants found to be non-compliant during the program.[1392] In contrast, four appellants who were mainly non-compliant in the program were found to have prospects of rehabilitation based on stability in the community through ongoing

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1388 *R v Place* [2002] SASC 101; *Chandler v Police* [2002] SASC 130; *R v Caplikas* [2002] SASC 258; *Ryan v Police* [2003] SASC 108; *Andreasen v Police* [2004] SASC 255; *Habra v Police* [2004] SASC 430; *Police v B, WR* [2005] SASC 163; *Reed v Police* [2007] SASC 26; *Kells v Police* [2007] SASC 224; *Richards v Police* [2007] SASC 368; *Robson v Police* [2007] SASC 395; *Ashton v Police* [2008] SASC 174; *Police v Bieg* [2008] SASC 261; *Parsons v Police* [2008] SASC 339; *Monterola v Police* [2009] SASC 42; *Police v Van Boxtel* [2013] SASC 82; *Roberts v Police* [2013] SASC 117; *Hughes v Police* [2012] SASC 183; *Field v Police* [2009] SASC 354; *R v Gasmier* [2011] SASCFC 43; *Madden v Police* [2005] SASC 304; *Ketoglou v Police* [2008] SASC 243; *R v Proom* [2003] SASC 88; *Lawrie v DPP* [2008] SASC 21; *Police v Lawrie* [2010] SASC 117; *R v Pumpa* [2013] SADC 157.

1389 *Chandler v Police* [2002] SASC 130; *Monterola v Police* [2009] SASC 42; *Ashton v Police* [2008] SASC 174; *Reed v Police* [2007] SASC 26; *Ryan v Police* [2003] SASC 108; *Andreasen v Police* [2004] SASC 255; *Kells v Police* [2007] SASC 224; *Police v Van Boxtel* [2013] SASC 82; *Roberts v Police* [2013] SASC 117; *R v Caplikas* [2002] SASC 258; *Hughes v Police* [2012] SASC 183; *Police v B, WR* [2005] SASC 163; *Field v Police* [2009] SASC 354; *Parsons v Police* [2008] SASC 339; *R v Gasmier* [2011] SASCFC 43; *Madden v Police* [2005] SASC 304; *Robson v Police* [2007] SASC 395; *Ketoglou v Police* [2008] SASC 243; *Police v Lawrie* [2010] SASC 117; *R v Place* [2002] SASC 101; *R v Proom* [2003] SASC 88; *R v Pumpa* [2013] SADC 157.

1390 *R v Place* [2002] SASC 101; *Chandler v Police* [2002] SASC 130; *R v Caplikas* [2002] SASC 258; *Habra v Police* [2004] SASC 430; *Reed v Police* [2007] SASC 26; *Robson v Police* [2007] SASC 395; *Lawrie v DPP* [2008] SASC 21; *Ashton v Police* [2008] SASC 174; *Monterola v Police* [2009] SASC 42; *Police v Van Boxtel* [2013] SASC 82; *Roberts v Police* [2013] SASC 117; *Hughes v Police* [2012] SASC 183; *Field v Police* [2009] SASC 354; *Madden v Police* [2005] SASC 304; *Ketoglou v Police* [2008] SASC 243; *R v Proom* [2003] SASC 88; *Police v Lawrie* [2010] SASC 117; *R v Pumpa* [2013] SADC 157.

1391 *R v Gasmier* [2011] SASCFC 43; *Ryan v Police* [2003] SASC 108; *Robson v Police* [2007] SASC 395; *R v Caplikas* [2002] SASC 258; *Hughes v Police* [2012] SASC 183; *Monterola v Police* [2009] SASC 42; *R v Place* [2002] SASC 101; *Lawrie v DPP* [2008] SASC 21; *Kells v Police* [2007] SASC 224; *Police v Lawrie* [2010] SASC 117; *Roberts v Police* [2013] SASC 117; *Chandler v Police* [2002] SASC 130; *Police v B, WR* [2005] SASC 163; *Richards v Police* [2007] SASC 368; *Madden v Police* [2005] SASC 304; *Andreasen v Police* [2004] SASC 255; *Habra v Police* [2004] SASC 430; *Reed v Police* [2007] SASC 26; *Ashton v Police* [2008] SASC 174.

1392 *Ryan v Police* [2003] SASC 108; *Police v B, WR* [2005] SASC 163; *Reed v Police* [2007] SASC 26; *Richards v Police* [2007] SASC 368; *Robson v Police* [2007] SASC 395; *Police v Bieg* [2008] SASC 261; *Parsons v Police* [2008] SASC 339; *Monterola v Police* [2009] SASC 42; *Police v Van Boxtel* [2013] SASC 82; *R v Place* [2002] SASC 101; *R v Caplikas* [2002] SASC 258; *R v Proom* [2003] SASC 88; *Habra v Police* [2004] SASC 430; *Field v Police* [2009] SASC 354.

relationships.[1393] Where a standard of expected compliance representing success in the program was articulated, it was a high standard such as a gold star standard.[1394]

The intention of drug courts is to rehabilitate individuals from drug dependence by normalising their behaviour and lifestyle. Section 10(6)(b) was included in the *Criminal Law (Sentencing) Act 1988* (SA) to ensure participants would not be penalised for unsuccessful participation in the program. This section was considered on appeal in four decisions.[1395] The findings show how information about program compliance and non-compliance is nevertheless used to inform the courts about prospects of rehabilitation and risk of future relapse. It appears program non-compliance is considered when assessing prospects of rehabilitation because rehabilitation is a normative process inherently about addressing deviant attitudes and behaviours. Assessments about the risk of future relapse into drug use and related offending are similarly connected with deviance and program non-compliance. The findings demonstrate how the nature of compliance discourse, which focusses on deviance, no matter how minor, when moulded into the framework of sentencing and appeal process, can affect the outcome of the decision with real consequences for the participant/appellant.

The appeal courts relied mostly on their own expert knowledge and experience when considering program compliance, rehabilitation and risk. This was evident in the extent of reliance on the original sentencing remarks to inform the appeal decision, the categorisation of many appellants as "drug addict" and the exclusion of treatment information to inform the court about internal transformation (outlined above). In two decisions, the drug court magistrate who originally sentenced the appellant was explicitly considered 'best positioned' to make an assessment about

1393 *Parsons v Police* [2008] SASC 339; *Lawrie v DPP* [2008] SASC 21; *R v Gasmier* [2011] SASCFC 43; *Police v Van Boxtel* [2013] SASC 82.

1394 *Ashton v Police* [2008] SASC 174. See also *Ryan v Police* [2003] SASC 108; *Police v Van Boxtel* [2013] SASC 82; *R v Proom* [2003] SASC 88.

1395 *Ashton v Police* [2008] SASC 174; *Hughes v Police* [2012] SASC 183; *Reed v Police* [2007] SASC 26; *Roberts v Police* [2013] SASC 117.

compliance, rehabilitation and risk based on their personal knowledge of the participant through judicial supervision and information gathered during the program.[1396]

The research findings are likely influenced by the fact many appellants failed to complete the program, with 11 appellants having their participation terminated for non-compliance.[1397] There appears to be correspondence between assessments of risk occurring during the program leading to program termination and assessments of risk in later sentencing and appeal process. By failing the program, the participant/appellant continues to pose a risk of future drug use and offending. This assessment included appellants who were mostly compliant during the program.[1398] Assessment of future risk of relapse justified punishment by immediate imprisonment on appeal in many decisions.[1399] Other appellants received suspended or time served sentences on appeal, with the justification for that form of punishment not related to drug court participation, but rather some form of stability in the community.[1400]

The findings show the appeal courts making limited use of information from the drug court and more reliance on the sentencing remarks for information about program participation. The predominance of discourse about compliance and non-compliance and lack of treatment discourse suggests that representation of the participant/appellant is influenced by legal institutional knowledges and practice, rather than treatment knowledges and practice. The findings are consistent with existing research into how courts construct legal subjects with particular characterisations about

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1396 *Reed v Police* [2007] SASC 26; *Police v Van Boxtel* [2013] SASC 82.

1397 *Parsons v Police* [2008] SASC 339; *Kells v Police* [2007] SASC 224; *Robson v Police* [2007] SASC 395; *Lawrie v DPP* [2008] SASC 21; *Police v B, WR* [2005] SASC 163; *Police v Bieg* [2008] SASC 261; *Police v Van Boxtel* [2013] SASC 82; *Roberts v Police* [2013] SASC 117; *Andreasen v Police* [2004] SASC 255; *Hughes v Police* [2012] SASC 183; *Crockford v Adelaide Magistrates Court & Anor* [2008] SASC 62.

1398 See, eg, *Monterola v Police* [2009] SASC 42; *Ashton v Police* [2008] SASC 174.

1399 *Chandler v Police* [2002] SASC 130; *Ryan v Police* [2003] SASC 108; *Andreasen v Police* [2004] SASC 255; *Reed v Police* [2007] SASC 26, [5]; *Kells v Police* [2007] SASC 224; *Richards v Police* [2007] SASC 368; *Robson v Police* [2007] SASC 395; *Ashton v Police* [2008] SASC 174; *Monterola v Police* [2009] SASC 42; *Roberts v Police* [2013] SASC 117; *R v Place* [2002] SASC 101; *R v Caplikas* [2002] SASC 258; *R v Proom* [2003] SASC 88; *Ketoglou v Police* [2008] SASC 243; *Police v Lawrie* [2010] SASC 117.

1400 *Police v B, WR* [2005] SASC 163; *Lawrie v DPP* [2008] SASC 21; *Parsons v Police* [2008] SASC 339; *Habra v Police* [2004] SASC 430.

the offender,[1401] the offence,[1402] and in particular, categorise offenders as particular types of offenders.[1403]

Drug courts are described as treatment courts and conceptualised as different to mainstream courts because of less adversarial process and the focus on treating drug dependent offenders. However, by conceptualising the drug court as a court, a legal entity rather than a treatment entity, normative discourse about compliance and risk created in that court (and recontextualised into later legal contexts) may be considered more in line with legal institutional knowledges and practices than is recognised in case law and wider literature. As this thesis is limited to the discourse evident in the appeal decisions, at the very least, this thesis has demonstrated the types of information about program participation that is used in later legal contexts, and how it is used to construct representations of the participant/appellant to fit the sentencing and appeal process to justify punishment. The absence of treatment discourse in the appeal decisions, does not necessarily mean that discourse is absent from the drug court during the program.

It appears that normative and compliance discourse originating from the drug court resonates with later court decision-making because compliance is about behaviour which can be identified and for which individuals can be held responsible. Compliance discourse informs the drug court and later courts of the potential for risk of relapse and offending. In the quote at the start of this section, Greig describes how the law enslaves and moulds other discourses to fit within established cognitive modes of legal decision-making. To do so, the courts test and transform material 'to match a legal reality'.[1404] This thesis demonstrates how all the possible stories that could be told about the participant/appellant, including their time during the drug court program, was filtered and compressed to meet the criteria underlying the sentencing and appeal process.

1401 Gurevich, above n 206; Phoenix, above n 205.
1402 See, eg, Bouhours and Daly, above n 203; MacMartin and Wood, above n 202.
1403 Wandall, above n 1138.
1404 Greig, above n 979, 117.

APPENDIX ONE

Table Three: Sample of record of initial analysis for inclusion and exclusion

Case	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	INCL	EXCL
	Tran 2000	Place 2002	Chandler 2002	Caplikas 2002	Ryan 2003	Proom 2003	Lawrence 2003	Andreasen 2004	Halsra 2004	Norman 2005	B, WR 2005	Waugh 2005	H,T 2005	Madden 2005	Becker 2005	Reed 2007	Kells 2007	Richards 2007	Robson 2007	Lavorie (1) 2008	Ashton 2008	Bieg 2008	Parsons 2008	Keteglou 2008	Crockford 2008	Monterola 2009	Fidd 2009	Lawrie (2) 2010	Gaunier 2011	Hughes 2012	Thompson 2012	Petrel 2012	Van Bedel 2013	Roberts 2013	Pampa 2013	Pennington 2015		
Representation/Construction																																						
Appellant	✓	✓	✓	✓	✓	✓	_	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	_	✓	✓	_	✓	✓	_	_	✓	✓	_	✓	30	6
Defendant	_	_	_	_	_	_	_	_	✓	✓	_	_	✓	_	✓	_	_	_	_	_	_	_	✓	_	✓	_	✓	_	_	_	✓	✓	_	_	✓	✓	11	25
Offender	✓	✓	✓	✓	✓	✓	✓	✓	✓	_	✓	_	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	34	2
Victim	_	_	_	_	_	_	_	_	✓	_	_	_	_	_	_	_	_	_	✓	_	_	_	_	_	_	_	_	_	_	_	_	_	_	_	_	_	2	34
Drug addict	✓	✓	✓	✓	✓	✓	✓	✓	✓	_	✓	✓	_	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	_	✓	✓	✓	✓	_	32	4
Sentencing considerations																																						
Actual rehabilitation	✓	_	_	_	_	✓	_	_	_	_	_	_	✓	_	_	_	_	_	_	_	_	✓	_	_	✓	_	_	_	_	_	✓	_	_	_	_	_	6	30
Prospects of rehabilitation	✓	✓	✓	✓	✓	✓	_	_	✓	_	✓	✓	✓	✓	✓	✓	_	_	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	_	✓	✓	✓	_	✓	✓	29	7
Personal deterrence	✓	✓	_	✓	✓	✓	_	_	✓	_	✓	✓	_	_	✓	✓	_	✓	✓	_	_	✓	✓	✓	_	✓	✓	_	_	_	✓	_	_	_	_	✓	19	17
General deterrence	✓	✓	_	✓	_	✓	_	_	_	_	✓	✓	_	_	✓	✓	_	✓	✓	_	_	✓	✓	✓	_	✓	✓	_	✓	_	✓	_	_	_	_	✓	19	17
Protection of community	_	✓	_	✓	_	✓	_	_	✓	_	_	_	✓	_	✓	✓	_	✓	_	_	✓	_	✓	_	_	_	✓	_	✓	_	✓	_	_	_	✓	✓	15	21
Seriousness of offences	✓	✓	✓	✓	✓	✓	_	✓	✓	_	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	_	✓	✓	✓	✓	33	3
Extensive history of offending	_	_	✓	✓	✓	_	_	✓	_	_	✓	✓	✓	✓	✓	✓	✓	✓	✓	_	✓	_	_	✓	_	✓	✓	✓	✓	✓	✓	_	✓	✓	✓	✓	25	11
Assessment of progress on drug court program																																						
"Significant success"	_	✓	_	✓	_	_	_	_	_	_	✓	_	_	_	_	_	_	_	_	_	✓	_	_	✓	_	✓	_	_	_	_	_	_	_	_	_	6	30
Substantially reduced drug use	_	✓	_	✓	_	_	_	_	_	_	✓	_	_	_	_	✓	_	_	_	_	✓	_	✓	✓	_	✓	_	_	_	_	_	_	_	_	_	_	8	28
Drug free	_	✓	_	✓	_	_	_	_	✓	_	✓	_	_	_	_	✓	_	_	_	_	✓	_	_	✓	_	✓	_	_	_	_	_	_	_	_	_	_	8	28
Completed program / graduated	_	_	_	_	_	_	_	_	✓	_	_	_	_	_	_	_	_	_	_	_	_	_	_	_	_	✓	_	_	_	_	_	_	_	✓	_	3	33
Imprisonment was inevitable	_	✓	✓	_	_	_	_	_	_	_	_	_	_	_	_	✓	_	_	_	_	_	_	_	_	_	✓	_	_	_	_	_	_	_	_	_	4	32
"Exhausted resources"	_	_	✓	_	_	_	_	_	_	_	_	_	_	_	_	✓	_	✓	_	_	_	_	✓	_	_	_	_	_	_	_	_	_	_	_	_	_	4	32
Issues urine testing / results	_	✓	_	✓	✓	_	_	_	_	_	_	_	_	_	_	✓	_	_	_	_	✓	_	✓	_	✓	✓	_	_	_	✓	_	_	✓	✓	_	_	11	25
Breaches of bail	_	✓	_	_	✓	_	_	✓	_	_	_	_	_	_	_	_	_	✓	_	✓	_	_	✓	_	✓	✓	✓	_	_	✓	_	_	✓	_	_	_	11	25
Reoffended while on program	_		✓	_	_	_	_	✓	_	_	✓	_	_	_	_	_	✓	_	✓	✓	_	_	✓	_	_	✓	_	_	_	✓	_	_	✓	_	_	_	10	26
Failure to comply	_	✓	✓	✓	✓	✓	_	✓	_	_	✓	_	_	_	_	✓	✓	✓	_	✓	✓	✓	✓	_	✓	✓	✓	_	_	✓	_	_	✓	✓	_	_	20	16
Program terminated	_	✓	✓	✓	✓	✓	_	✓	_	_	✓	_	_	_	_	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	_	✓	_	_	✓	_	_	✓	✓	_	_	21	15
Lifelihood of relapse / reoffending	_	_	✓	✓	✓	✓	✓	✓	✓	_	_	✓	_	✓	_	✓	_	✓	_	✓	_	✓	_	_	_	_	✓	_	_	✓	_	_	✓	_	_	_	15	21
Sources of Information																																						
Sentencing Remarks	_	✓	✓	✓	✓	✓	_	✓	✓	_	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	_	✓	✓	✓	✓	✓	✓	_	✓	✓	_	✓	30	6
Charges/Apprehension Reports	_	✓	✓	✓	✓	✓	✓	✓	✓	_	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	_	✓	_	_	_	30	6
Drug Court Report	_	_	✓	_	_	_	_	_	_	_	_	_	_	✓	_	_	_	_	_	_	✓	_	_	_	✓	✓	_	_	_	_	_	_	✓	_	_	_	6	30
Time in custody	_	✓	✓	✓	✓	_	✓	✓	✓	_	✓	✓	_	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	_	✓	_	_	✓	✓	_	_	✓	_	_	✓	24	12
Time on home detention	_	✓	_	✓	_	_	_	✓	_	_	✓	✓	_	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	_	_	✓	_	_	_	✓	_	_	_	✓	_	_	18	18
Unexpired parole	_	_	✓	_	✓	_	✓	_	_	_	_	_	_	✓	_	_	_	_	_	_	_	_	_	_	_	_	✓	_	_	✓	✓	_	✓	_	✓	_	9	27
Criminal history	_	✓	✓	✓	✓	_	✓	✓	✓	_	✓	✓	✓	✓	✓	✓	✓	_	✓	✓	✓	_	✓	✓	_	✓	✓	✓	✓	✓	✓	_	✓	✓	✓	✓	29	7
Psych (either) report	_	_	✓	✓	_	✓	_	_	✓	_	_	_	_	_	✓	_	✓	_	✓	_	✓	_	✓	✓	_	_	_	✓	_	✓	✓	✓	✓	✓	✓	_	17	19
Presentence report	_	_	_	_	_	✓	_	_	✓	_	_	_	✓	_	_	_	✓	_	_	✓	_	_	_	✓	_	_	✓	_	_	_	_	_	_	_	✓	✓	9	17
Letter to court written by appellant	_	_	✓	_	✓	_	_	_	_	_	_	_	_	_	_	_	_	_	_	✓	_	_	_	_	✓	_	_	_	_	_	_	✓	_	_	_	4	32
Defence at sentencing	_	_	_	_	_	_	_	_	✓	_	_	_	_	✓	_	✓	_	_	_	_	_	_	✓	_	✓	_	_	_	_	_	_	_	_	_	_	✓	6	30
Prosecution at sentencing	_	_	_	_	✓	_	_	_	_	_	_	_	_	_	_	✓	_	_	✓	_	_	_	_	_	✓	✓	_	_	_	_	_	_	_	_	_	✓	6	30
Submissions on appeal - defence	_	✓	✓	✓	✓	✓	_	✓	✓	_	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	_	_	✓	✓	✓	_	✓	30	6
Submissions on appeal - prosecution	_	✓	✓	✓	✓	✓	_	✓	✓	_	✓	✓	✓	_	✓	✓	✓	_	✓	✓	_	✓	_	✓	✓	✓	✓	✓	✓	✓	_	✓	✓	_	_	✓	26	10
Background History																																						
Child abuse	_	_	✓	✓	_	_	_	_	_	_	_	_	_	_	_	_	_	_	✓	✓	✓	_	_	✓	_	_	_	✓	_	✓	_	_	✓	_	_	✓	10	26
Drug dependence	✓	✓	✓	✓	✓	✓	✓	✓	✓	_	✓	✓	_	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	_	✓	✓	✓	✓	✓	_	32	4
Alcohol addiction	_	✓	✓	✓	_	_	_	_	_	_	_	_	_	_	✓	_	_	_	_	✓	_	_	✓	_	_	_	✓	✓	_	_	_	_	_	_	✓	✓	10	26
Previous convictions	_	✓	✓	✓	✓	_	✓	✓	_	_	_	✓	✓	✓	✓	✓	✓	_	_	_	✓	_	✓	_	_	✓	✓	_	✓	✓	✓	✓	✓	✓	✓	✓	24	12
Previous imprisonment	_	_	✓	✓	✓	_	✓	✓	✓	_	_	✓	_	✓	✓	✓	✓	_	✓	_	✓	_	_	_	_	_	✓	_	✓	✓	✓	✓	✓	_	✓	✓	21	15
Dependents/relationships	✓	✓	✓	✓	_	✓	_	_	_	_	✓	_	✓	✓	✓	✓	_	_	✓	✓	✓	_	✓	✓	_	✓	✓	✓	✓	✓	✓	✓	_	✓	✓	✓	25	11
Rehabilitative attempts	✓	_	✓	✓	_	✓	✓	_	✓	_	_	✓	_	_	✓	_	_	✓	✓	_	_	_	_	✓	_	_	✓	✓	_	✓	✓	✓	✓	_	✓	_	18	18
Drug Court Program																																						
Rehabilitation resources (including counselling)	_	✓	✓	_	_	_	_	_	✓	_	_	_	_	_	_	✓	_	_	_	_	✓	_	_	_	✓	✓	_	_	_	✓	_	_	✓	_	_	_	9	27
Case management /supervision /monitoring (including bail and drug testing)	_	✓	✓	✓	✓	_	_	✓	✓	_	✓	_	_	_	_	✓	_	✓	_	✓	✓	_	✓	_	✓	✓	✓	_	_	✓	_	_	✓	✓	_	_	18	18
Time on program																																						
2-3 months	_	_	_	_	✓	✓	_	✓	_	_	_	_	_	_	_	_	_	_	_	_	_	✓	_	_	✓	_	_	_	_	_	_	✓	✓	_	_	7	29
6 months	_	✓	_	✓	_	_	_	_	_	_	_	_	_	_	_	_	_	_	_	_	_	_	_	_	_	_	_	_	_	✓	_	_	_	_	_	3	33
8 months	_	_	✓	_	_	_	_	_	_	_	_	_	_	_	_	✓	_	_	✓	✓	_	_	_	_	_	_	_	_	_	_	_	_	_	_	_	_	4	32
9 months	_	_	_	_	_	_	_	_	_	_	_	_	_	_	_	_	_	_	_	_	_	✓	_	_	_	_	_	_	_	_	_	_	_	_	_	_	1	35
> 12 months	_	_	_	_	_	_	_	_	✓	_	✓	_	_	_	_	_	_	_	_	_	✓	_	_	_	_	✓	_	_	_	_	_	_	_	✓	_	5	31

INCLUSION (✓) / EXCLUSION (_)

APPENDIX TWO

Case Summaries[1405]

	CASES	DRUG COURT PARTICIPANT (JUST COMPLETED – SENTENCED IN DRUG COURT)
1	*Chandler v Police* [2002] SASC 130 Supreme Court — Magistrates Appeal — by the appellant — (Nyland J)	*Michelle Lea Chandler (female), age 37*: Michelle is the mother of a 16 year old son who is in the care of her mother. Michelle spent most of the previous 10 years in custody. She has a history of sexual abuse as a child, drug and alcohol dependence, an extensive criminal history since childhood and as an adult has been convicted of 189 offences of dishonesty committed to support her drug dependence. Just prior to her participation in the program, Michelle was released from custody, gained employment and became a partner in a hotel. That business failed, leaving her in debt. Soon thereafter, Michelle relapsed into heroin use and re-offended. She was accepted into the drug court program after spending 4 months in custody. Michelle participated in the program from May 2000 – 16 January 2001 (approx. 8 months on a 12 month program). She withdrew from the program on the understanding she had an unexpired balance of parole of seven years yet to serve in custody whether or not she successfully completed the program. It appears she re-offended during the program. Michelle received an immediate sentence of imprisonment from the drug court and appealed that sentence. On appeal, she was re-sentenced, receiving an immediate term of imprisonment.
2	*Ryan v Police* [2003] SASC 108 Supreme Court — Magistrates Appeal — by the appellant — (Perry J)	*Eamon Patrick William Ryan (male), age 50*: Eamon has an extensive offending history connected to his drug dependence, including heroin. He participated in the program for a short period commencing in August 2002. His participation was terminated after allegations of substitution of urine following positive drug tests for methamphetamine and denial of drug use. Eamon received a sentence of immediate imprisonment from the drug court. The appeal was dismissed.

[1405] The cases are listed according to the three columns of cases outlined in Table Two and discussed in the methodology chapter. Each case was subjected to discourse analysis. Not all cases were found to include discourse relevant to the thesis, particularly some cases in the broader third column, "Discussion of drug court program / sentencing principles / unresolved offences in other courts / applying for the program".

3	*Andreasen v Police* [2004] SASC 255 Supreme Court — Magistrates Appeal — by the appellant — (Gray J)	*Steven Daniel Andreasen (male), age not provided:* Steven has a history of dishonesty offences related to his drug dependence. He participated in the program from May 2003 for a short period. After failing to meet attendance reporting requirements [details excluded], his participation was terminated. It appears he may have absconded. There are further offences which appear to have occurred after the program ended. Steven received a sentence of immediate imprisonment from the drug court. The appeal was dismissed.
4	*Police v B, WR* [2005] SASC 163 — Supreme Court — Magistrates Appeal by prosecution — (Doyle CJ)	*Mr B (name suppressed) (male), age 47:* Mr B is the father of two children with whom he maintains regular contact. He participated in the program from June 2003 – May 2004. Mr B was due to graduate from the program on 28 May 2004. On 8 May 2004 he re-offended with offences of a similar nature to those committed before the program. Mr B argued he re-offended due to threats made to his family because of a drug debt. His participation was terminated and he was sentenced in the drug court. Mr B received a suspended sentence of imprisonment. On appeal, he was re-sentenced receiving a time served sentence.
5	*Reed v Police* [2007] SASC 26 — Supreme Court — Magistrates Appeal — by the appellant — (Layton J)	*Michael Reed (male), age not provided:* Michael has a history of fraudulent offending committed before and after developing an addiction to amphetamine. He also has a gambling addiction. Michael participated in the program from 23 November 2005 – (possibly) May/June 2006 when he withdrew from the program following a relapse into drug use and allegations of altering a medical certificate to excuse his non-attendance. Michael received an immediate term of imprisonment from the drug court. The appeal was dismissed.
6	*Kells v Police* [2007] SASC 224 — Supreme Court — Magistrates Appeal — by the appellant — (David J)	*Stephen Richard Kells (male), age 30*: Stephen was a participant in the program. His participation was terminated due to further offending. No further information about his background history or participation in that program is included. He received an immediate term of imprisonment from the drug court. The appeal was dismissed.

7	*Richards v Police* [2007] SASC 368 — Supreme Court – Magistrates Appeal — by the appellant — (Bleby J)	*Walter John Richards (male), age not provided:* Walter was a participant in the program. His participation was terminated after he removed the home detention monitoring device and absconded. There are a number of charges for breaches of bail which appear related to his time during the program. No further information about his background history is included. Walter was not sentenced in the drug court but was sentenced in the Elizabeth Magistrates Court where he received an immediate term of imprisonment. The appeal was dismissed.
8	*Robson v Police* [2007] SASC 395 — Supreme Court — Magistrates Appeal — by the appellant — (Bleby J)	*Daymane Charles Robson (male), age 29*: Daymane was subjected to violence and neglect as a child and was made a Ward of the State by age 14. He was using amphetamines whilst still at school. He has two children who do not reside with him. Daymane was a participant in the program. The dates of his participation are unclear. Daymane progressed in the program for 8 months. His participation was terminated following allegations of a major indicatable offence. When he was sentenced in the drug court the major indictable offence remained unresolved. Later the outstanding offence was amended to a minor indictable offence and Daymane appeared before a different magistrate for sentence. Daymane received an immediate term of imprisonment. He was re-sentenced by the appeal court to an immediate term of imprisonment.
9	*Lawrie v DPP* [2008] SASC 21 — Supreme Court — Magistrates Appeal — by the appellant — (Kelly J)	*Nigel Thomas Lawrie (male), age 24 (of Aboriginal descent)*: Nigel was subjected to neglect and sexual abuse as a child and commenced using drugs at a young age, including heroin and amphetamines. During the program, he participated in the *Mullighan* enquiry which resulted in the perpetrator being charged. Nigel has been in a relationship with a woman for the past eight years and has three children aged six, five, and four. He was a participant in the program from 13 Dec 2006 – 8 August 2007 (8 months). His program was terminated following breaches of bail for which he was charged and for re-offending. Nigel received a suspended term of imprisonment from the drug court. He was re-sentenced by the appeal court receiving a suspended sentence of imprisonment. [See also: *Police v Lawrie* [2010] SASC 117 in which this sentence is discussed in a subsequent prosecution appeal on an application for the drug court suspended sentence to be revoked following further offending].

10	*Ashton v Police* [2008] SASC 174 — Supreme Court — Magistrates Appeal — by the appellant — (David J)	*Jason Wayne Ashton (male), age not provided:* Jason has an extensive criminal history including 14 sentences of immediate imprisonment and 4 suspended sentences of imprisonment. At the time of his offending leading to participation in the drug court, Jason was using methamphetamine, homeless and unemployed. He was a participant in the program from 21 February 2007 – 5 March 2008 (12 months). During the program, he gained permanent housing trust accommodation, abided by drug court requirements and demonstrated periods of abstinence from drug use. At his final review he was told by the drug court magistrate that should he return to court on the next occasion with a good report he would graduate from the program and receive a suspended sentence. Before the sentencing date, the matter was called on by drug court staff due to concerns about a relapse into drug use. Jason was sentenced a few days later and received an immediate sentence of imprisonment. The appeal was dismissed.
11	*Police v Bieg* [2008] SASC 261 — Supreme Court — Magistrates Appeal — by prosecution — (David J)	*Michael Patrick Bieg (male), age 30*: Michael was a participant in the program from 18 July – 10 October 2007 (3 months). His participation was terminated and he was released from the program on bail. No further information about his background history is included. When sentenced by the drug court he received a suspended term of imprisonment. Prosecution appealed the sentence. The appeal was allowed and remitted for re-sentence before another magistrate.
12	*Parsons v Police* [2008] SASC 339 — Supreme Court — Magistrates Appeal — by the appellant — (Sulan J)	*Sam Benjamin Parsons (male), age not provided:* Sam has a history of driving offences, a significant drug dependence and is diagnosed with Attention Deficit Hyperactivity Syndrome. He was a participant in the program from 3 September 2007 – 16 June 2008. His participation was terminated due to failure to comply with program requirements. At the time of the appeal, Sam was in a relationship with a woman who had stable employment and was opposed to drug taking. No further information about his background history is included. He received an immediate term of imprisonment from the drug court. On appeal, he was re-sentenced and received a suspended term of imprisonment, based on time already served in custody.
13	*Monterola v Police* [2009] SASC 42 — Supreme Court — Magistrates Appeal — by the appellant — (Nyland J)	*Rex Monterola (male), age 45:* Rex is the eldest of three children and has five children between the ages of eight and 28. He commenced using methamphetamines at age 27 and morphine at age 42. He suffers from depression and anxiety following marriage breakdowns, and has attempted suicide on several occasions. He was a participant in the program from 27 August 2007 – 12 September 2008. Rex successfully completed

		and graduated from the program. He received an immediate term of imprisonment from the drug court. The appeal was allowed in relation to the non-parole period only, which was reduced.
14	*Hughes v Police* [2012] SASC 183 — Supreme Court — Magistrates Appeal — by the appellant — (David J)	*Tanya Jean Hughes (female), age 36 (possibly of Aboriginal descent):* Tanya has a history of neglect and abuse as a child. She was made a Ward of the State at age 11, lived on the streets from age 12 and commenced using amphetamines. Tanya has two sons from previous relationships aged 15 and 18. The eldest son is about to have a child with his partner. Tanya has been in a relationship for 13 years with her current partner who has been in prison for the past 10 years. Tanya has an extensive criminal history and has previously spent time in custody. Tanya was a participant in the program from 28 February – 29 August 2011. Her participation was terminated due to offending, continual drug use, substituted samples and absconding from the program. She received an immediate term of imprisonment from the drug court. The appeal was allowed and counsel submissions were yet to be heard in relation to sentence.
15	*Police v Van Boxtel* [2013] SASC 82 — Supreme Court —Magistrates Appeal — by prosecution — (White J)	*Joseph Van Boxtel (male), age 36:* Joseph was subjected to neglect and abuse as a child. He commenced using heroin and amphetamines as a teenager but managed to complete an apprenticeship as a painter. He has an extensive criminal history. Joseph was a participant in the program from 3 September – 8 October 2012. His participation was terminated due to failure to participate in a urine test, removal of the home detention monitoring bracelet and his arrest for further offences during the program. He received an immediate term of imprisonment from the drug court. The appeal was allowed and the matter remitted to the Magistrates Court for re-sentence.
16	*Roberts v Police* [2013] SASC 117 — Supreme Court — Magistrates Appeal — by the appellant — (David J)	*Damian Jordan Roberts (male), age 30:* Damian, at the time he was sentenced, was unemployed and single. He is the father of two young children who are not in his care. Damian has a history of cannabis and methamphetamine use. He was a participant in the program from 11 February – 8 April 2013. His participation was terminated because he was unable to provide urine samples. Damian received an immediate term of imprisonment by the drug court magistrate. The appeal was dismissed.

		DRUG COURT PARTICIPANT (NOT SENTENCED IN DRUG COURT)
17	*R v Place* [2002] SASC 101 — Supreme Court of Criminal Appeal — District Appeal — by the appellant — (Doyle CJ, Prior, Lander, Martin and Gray JJ)	*Mr Place (first name not provided) (male), age 42:* Mr Place was raised in an affluent family, has a good employment history and no significant offending history. He commenced heroin and amphetamine use as a teenager. Mr Place has one son, aged 15 years from a previous marriage. Following the breakdown of his marriage, Mr Place started using amphetamines heavily and committed armed robberies to fund his dependence. Mr Place participated in the program from October 2000 – May 2001. He withdrew from the program following breaches of program requirements, a relapse into drug use and difficulty establishing a relationship with his new counsellor. In addition, Mr Place was aware that he would receive an immediate term of imprisonment regardless of progress during the program. After he ceased program participation, Mr Place was arraigned to appear in the District Court for sentence. He received an immediate term of imprisonment by the District Court. He was re-sentenced by the appeal court to an immediate term of imprisonment.
18	*Crockford v AMC ANOR* [2008] SASC 62 — Supreme Court — Civil Judicial Review — by the appellant — (Layton J)	*George Crockford (male), age not provided:* George was non-compliant with program requirements including breaches of bail, a dilute urine sample and was at risk of losing his accommodation. His participation was terminated due to abusive language to staff. This is a judicial review of a decision by a magistrate to terminate participation in the drug court program and not an appeal against sentence.
		PREVIOUS DRUG COURT PARTICIPANT
19	*R v Caplikas* [2002] SASC 258 — Supreme Court of Criminal Appeal - District Appeal — by prosecution — (Perry, Williams and Gray JJ)	*Matthew John Caplikas (male), age 20:* Matthew participated in the program from the end of 2000 – July 2001 (approx. 6 months). Matthew remained drug free for the first six months in the program before relapsing into drug use, using a mixture of amphetamine, cocaine and heroin. Matthew's participation was terminated following a return to his previous drug using associates and lifestyle. The offences subject to appeal occurred after his time in the drug court program. In the District Court he received a sentence of immediate imprisonment. Matthew was re-sentenced by the appeal court to a sentence of immediate imprisonment.

20	*R v Proom* [2003] SASC 88 — Supreme Court of Criminal Appeal — District Appeal — by the appellant — (Doyle CJ, Duggan and Gray JJ)	*Melissa Mandy Proom (female), age 19:* Melissa developed heroin dependence in her teenage years. She has one child, aged two years. She participated in the program for two months. Participation was terminated. It appears the offences before the District Court for sentence occurred after her participation in the program. In the District Court she was sentenced to serve a term of immediate imprisonment. The appeal was allowed. Melissa was re-sentenced to serve a term of immediate imprisonment.
21	*Habra v Police* [2004] SASC 430 — Supreme Court — Magistrates Appeal — by the appellant — (Gray J)	*Joseph Habra (male), age not provided:* Joseph participated in the program from June 2002 – 9 July 2003 and successfully graduated. Joseph received a suspended sentence of imprisonment by the drug court magistrate. He re-offended 8 days and then one month after completing the program. Joseph was sentenced by the Magistrates Court for those further offences to a sentence of immediate imprisonment. Soon after receiving that sentence Joseph was assaulted in prison and suffered severe and ongoing brain injuries. The appeal court re-sentenced Joseph who received a suspended sentence of imprisonment.
22	*Ketoglou v Police* [2008] SASC 243 — Supreme Court — Magistrates Appeal — by the appellant — (White J)	*Simela Ketoglou (female), age not provided:* Simela was admitted into the drug court program to address her heroin dependence. She re-offended after her time in the program. This appeal relates to penalties imposed for that offending and issues in relation to the suspended sentence bonds imposed by the drug court. Simela was ordered to serve time in custody in relation to suspended sentences arising from the drug court sentence due to further offending. The appeal was dismissed.
23	*Field v Police* [2009] SASC 354 — Supreme Court — Magistrates Appeal — (Gray J)	*Samuel Troy Field (male), age 25:* Samuel has a long history of dishonesty offences and previously served time in custody. He is the father of two young children. Samuel was a drug court participant from 2002 – 2003. It appears he may have absconded from the program in 2003 while on home detention bail. No further information is provided about time in the drug court program.
24	*Police v Lawrie* [2010] SASC 117 — Supreme Court — Magistrates Appeal — by prosecution — (David J)	*Nigel Thomas Lawrie (male), age not provided:* Nigel is a former drug court participant. His original sentence from the drug court was appealed [See: *Lawrie v DPP* [2008] SASC 21] and he received a suspended sentence of imprisonment with a good behaviour bond. Nigel subsequently relapsed into drug use and re-offended during a period when he was living by himself. An application was made by prosecution to

		the Magistrates Court to revoke the drug court suspended sentence. This application was refused. On appeal Nigel was re-sentenced to serve a term of immediate imprisonment.
25	*R v Pumpa* [2013] SADC 157 — District Court — "serious repeat offender application" — by the applicant — (Beazley J)	*Shane David Leslie Pumpa (male), age not provided:* Shane is a former drug court participant. He successfully completed the program and received a suspended sentence from the drug court on 6 August 2012. Shane relapsed into drug use and re-offended in April 2013 (to raise money to pay a debt owed to a drug dealer). This is an application for a declaration that he is not to be sentenced as a serious repeat offender. Application declined.
		REFERENCES TO "DRUG COURT PROGRAM" BUT NOT A PARTICIPANT (Discussion of drug court program / sentencing principles / unresolved offences in other courts / applying for the program)
26	*R v Tran* [2000] SASC 431 — Supreme Court of Criminal Appeal — District Appeal — (Prior, Olsson and Debelle JJ)	*Hai Long Tran (male), age 22:* Hai is not a drug court participant. This appeal outlines the pilot drug court program and how this relates to sentencing principles for drug offences.
27	*R v Lawrence* [2003] SADC 112 — District Court — NPP application — — by the applicant — (Allan J)	*Michael David Lawrence (male), age not provided:* Michael is requesting a further non-parole period be set to allow for referral to apply for admission into the drug court program. Application refused.
28	*R v Waugh* [2005] SASC 470 — Supreme Court of Criminal Appeal — District Appeal — (Doyle CJ, Sulan and White JJ)	*Shaun Matthew Waugh (male), age 31:* Shaun argued the co-offender — a participant in the drug diversion program was more likely to receive a suspended sentence if successful in that program — parity in sentencing.

29	*Norman v Police* [2005] SASC 12 — Supreme Court — Magistrates Appeal — by the appellant — (Anderson J)	*Jamie Steven Norman (male), age not provided:* Jamie had an unresolved offence dealt with in a different court at the time he was a participant in the drug court program. He was brought from custody for a trial without prior notice. This proceeded with Jamie unrepresented. He received a sentence of immediate imprisonment. Appeal allowed and matter remitted.
30	*H, T v Police* [2005] SASC 143 — Supreme Court — Magistrates Appeal — (Sulan J)	*Appellants name suppressed in this decision (female), age not provided:* Ms H,T is not a drug court participant — discussion of aims of diversion programs and sentencing principles.
31	*Madden v Police* [2005] SASC 304 —Supreme Court — Magistrates Appeal — (White J)	*Jarrod Allan John Madden (male), age not provided:* Jarrod is not a drug court participant — whether an inability to participate on either the drug court or the diversion program is a relevant consideration in the sentencing process.
32	*R v Becker* [2005] SASC 186 — Supreme Court of Criminal Appeal — District Appeal — (Gray, Sulan and Layton JJ)	*Matthew Paul Becker (male), age 31*: Matthew is not a drug court participant. Outline of aims and rationale of diversionary programs. Detailed discussion of the drug court program which is considered to be well established, evaluated with favourable outcomes and continues with support from government. Outline of sentencing principles.
33	*R v Gasmier* [2011] SASCFC 43 — Supreme Court of Criminal Appeal — (Sulan, David and Kourakis JJ)	*Shane Gasmier (male), age 33:* At the time of sentence, Shane made an application to participate in the drug court program in relation to other offences.
34	*R v Patzel* [2012] SASCFC 108 — Supreme Court of Criminal Appeal — (Gray, Sulan and Stanley JJ)	*Jason Mark Patzel (male), age 28:* Jason was not a drug court participant. General discussion of diversion programs which include intensive treatment and regular court supervision. Jason did not have an opportunity to enter such a program.
35	*R v Thompson* [2012] SASCFC 149 — Supreme Court of Criminal Appeal — (Kourakis CJ, Gray and Anderson JJ)	*Lindsey Morgan Thompson (male), age early to mid-twenties*: Reference to section 19B of the *Criminal Law (Sentencing) Act 1988* (SA) to defer sentence for assessment and participation in an intervention program in the community. This provision is used by the drug court. Detailed discussion about remanding matters to allow for rehabilitation and factors which should be considered before granting such a remand. This includes whether or not imprisonment is inevitable due to the seriousness of the offending. Discussion of sentencing principles: rehabilitation, deterrence and retribution.

36	*R v Pennington* [2015] SASCFC 98 — Supreme Court of Criminal Appeal — (Gray, Sulan and Lovell JJ)	*Jason Phillip Pennington (male), age 35 (of Aboriginal descent):* Discussion of section 10(3)(c) of the *Criminal Law (Sentencing) Act 1988* (SA) which states a court when sentencing must not have regard to the fact the defendant has not participated in an intervention program, or has performed badly or failed to make satisfactory progress in an intervention program. There are presently three programs used by the court: the Drug Court Program, the Magistrates Court Diversion Program (dealing with mental impairment) and the Violence Intervention Program. The concept of an "intervention programme" has a limited meaning.

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