DRUG COURT OF NEW SOUTH WALES

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| ***Policy 12*** | **Selection of participants** |
| ***Last Reviewed*** | **December 2020** |

# PURPOSES OF POLICY

* To ensure that the process of selection of participants for Drug Court programs is transparent, equitable and efficient.
* To enable participants to be selected for programs expeditiously, so as to reduce delay which can interfere with the effectiveness of treatment.
* To provide additional access to a Drug Court program for Aboriginal or Torres Strait Islander (“ATSI”) identifying offenders to assist in addressing the overrepresentation of Aboriginal persons in custody.
* To enable referring courts to finalise cases of offenders who are not accepted by the Drug Court efficiently and expeditiously.

# DEFINITIONS

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| ***Act*** | means the Drug Court Act 1998 |
| ***Applicant*** | means a person who is willing to be referred to the Drug Court under Section 6 of the Drug Court Act 1998 |
| ***Drug Court*** | means the Drug Court of N.S.W. |
| ***Drug Court program*** | means the conditions accepted by the participant and imposed by the Court under section 7(3)(a) of the Act. |
| ***Drug Court team*** | means a Drug Court Judge, the Registrar, the solicitor from the Legal Aid NSW (LA), the solicitor from the Office of the Director of Public Prosecutions, the Police Prosecutor, the Community Corrections co-ordinator and the Clinical Nurse Consultant who are attached to the Drug Court, and/or the alternates for each. |
| ***Participant*** | means a “drug offender” as defined in the Drug Court Act 1998 |

# POLICY

# *1 Referral of applicants*

**1.1** To be eligible to enter a Drug Court program a person must meet the criteria set out in Section 5 of the Drug Court Act 1998, and clause 5 of the Drug Court Regulation.

**1.2** If a person appearing before a referring Court appears eligible and willing to take part in a Drug Court program, that Court must refer the person to the Drug Court[[1]](#endnote-1).

**1.3** If a sentencing Judge or Magistrate directs that a person be referred to the Drug Court, the Court Officer at the referring court advises the Drug Court registry by telephone of the name and case details of the applicant.

**1.4** As the program resources are limited, a ballot may need to be held to determine which referred offenders can be considered for a Drug Court program[[2]](#endnote-2).

# *2 The manner of selection*

**2.1** Once each week the Drug Court Judge, in consultation with the Drug Court team, will determine the number of program places available for females and for males.

**2.2** The names of apparently eligible applicants for entry will be placed on the ballot list.

**2.3** The Registrar will not include on the ballot list the name of any applicant who has been referred to the Drug Court by a Court that is not a referring Court as defined in the Regulation.

**2.4** The Registrar will not include on the ballot list the name of an applicant who appears to have had their case or cases adjourned to a referring Court for the sole purpose of gaining access to a Drug Court program. This clause does not prevent a participant being included in the ballot who has been granted an appropriate adjournment to a referring court (for example, to allow the adjourned matters to link up with other matters properly at a referring court).

**2.5** Subject to the pre-ballot procedures set out in clauses 2.12 to 2.19, a computer generated random selection will be made from the pool of apparently eligible applicants to meet the number of available places.

**2.6** The Judge may direct that the ballot selection process address the circumstances of the day. For example, it may be appropriate to take all the referred applicants who have not had a previous Drug Court opportunity, and only take, again for example, one of the three referred applicants who have had a previous Drug Court program opportunity or a Compulsory Drug Treatment Order. *See also Clause 6 below.*

**2.7** If there are sufficient places available for all applicants of a particular gender, applicants of that gender may be accepted without being placed in a ballot, even though a ballot may be necessary for applicants of the other gender.

**Applicants who may not be “eligible” offenders**

**2.8** If it is apparent to the solicitor for the ODPP or the Police Prosecutor that a referred person is not an eligible offender, the ODPP solicitor or Police Prosecutor will advise the Registrar and the solicitor for Legal Aid of that fact as soon as possible, preferably by email.

**2.9** The Registrar will submit that information, together with any available documents, to the Judge in chambers or in court. The Judge will then determine whether or not the referred person should be included in any ballot conducted.

**2.10** The Judge may also decide that the referred person’s application to the Drug Court be deferred to a later ballot, so as to allow any necessary information regarding eligibility to be obtained.

**2.11** If it is later found that a referred person has been incorrectly excluded from the ballot, then the Judge may determine that the offender (if still unsentenced) be included in a subsequent ballot.

**Applicants who may not be “appropriate**”[[3]](#endnote-3)

**Pre-ballot**

**2.12** A “pre-ballot” procedure can assist in ensuring that persons who are apparently inappropriate for the program do not displace persons who are apparently “appropriate” for a Drug Court during the ballot process. To prevent the loss of “appropriate” participants, or the inclusion in the Drug Court Ballot of “inappropriate” participants, the Drug Court will, before the ballot is run, scrutinise the question of the “appropriateness” of the referred applicants. The pre-ballot procedure also prevents raising expectations with the applicant and her or his family that a Drug Court opportunity may be available, when in fact there is no real prospect of a program being provided.

**2.13** Previous participation in a Drug Court program, or the previous opportunity of undertaking a Compulsory Drug Treatment Order, is relevant to the question of being “appropriate”. This factor is to be taken into account when the number of applicants and/or the number of participants currently on program is high. See also paragraph 6 of this policy.

**2.14** If it is apparent to the solicitor for the ODPP or the Police Prosecutor that a referred person may not be an “appropriate” person, given his or her antecedents, the ODPP solicitor or Police Prosecutor will advise the Registrar and the solicitor for Legal Aid of that fact as soon as possible, preferably by email.

**2.15** The Registrar will submit that information, together with any available documents, to the Judge in chambers or in court. The Judge may form the preliminary view, on the information provided, that the referred person appears to be ineligible and/or inappropriate for a Drug Court program. The judge will provide brief reasons for forming that opinion.

**2.16** The referred person may then be deferred to a ballot in one or two weeks. This will provide an opportunity for the Legal Aid solicitor to inform the referred person of the preliminary view reached by the Judge, and to provide advice and assistance.

**2.17** If on the deferred ballot date the court is informed that the referred person wishes to proceed with the application for a Drug Court program, the referred person will be included in the ballot. If the referred person is successful in the ballot, the court will conduct a hearing under s7A(2) of the Drug Court Act to determine if the person should be accepted into the program.

**2.18** If on the deferred ballot date the court is informed that the referred person does not wish to proceed with the application for a Drug Court program, the referred person will not be included in the ballot.

**2.19** The Judge may, at any time, defer a referred person’s application to the Drug Court to a later ballot, so as to allow any necessary information regarding appropriateness to be obtained.

**Post Ballot - Initial Referral**

The court cases of applicants who are successful in the ballot will be adjourned to the Drug Court for an “Initial Referral” appearance.

**2.20** On the Initial Referral appearance at Drug Court, the solicitor for the ODPP may make submissions as to whether he or she is an “appropriate” person for a Drug Court program.

**2.21** In respect of each applicant, the solicitor for the ODPP may submit that the applicant is;

* an “appropriate” person,
* not an “appropriate” person, or,
* a person who may or may not be “appropriate”, and requests that the court determine that issue.

**2.22** The Court will make a determination as to “appropriateness”. That decision may be made either immediately or on a later date.

**2.23** The Court may, after hearing submissions, determine that;

* on the information available, the person is appropriate for a Drug Court program.
* on the information available, the person is not appropriate for a Drug Court program.
* the person is an appropriate person, but only if additional special conditions are added to his or her program plan.
* if it considers it warranted, the Court may adjourn the Initial Referral proceedings if it is of the view that it would be assisted by the preparation of a psychiatric or other report.

# *3 Aboriginal or Torres Strait Islander referrals*

**3.1** The Drug Court acknowledges the overrepresentation of Aboriginal persons in the criminal justice system, and the proven need to improve access to such programs as the Drug Court program for Aboriginal or Torres Strait Islander (“ATSI”) identifying offenders. The recognition and addressing of special needs is specifically authorised by section 21 of the *Anti Discrimination Act 1977.*

**3.2** To increase the opportunity for ATSI identifying offenders to take part in a Drug Court program, the Registrar and the Drug Court team will have regard to the number of ATSI identifying applicants when determining the number of program places available. The number of available places will be increased by one place in each gender for which there are ATSI identifying offenders.

**3.3** The computer generated random selection will then allocate places. That selection will allocate a minimum of one place to an ATSI identifying offender in each gender for which there are ATSI identifying offenders.

***4 Applicants who are selected***

**4.1** The Registrar will notify the referring Court if an applicant has been accepted, and request that Court to remand the applicant to the Drug Court on a specified date within the next fortnight.

# *5 Applicants who are not selected*

**5.1** The Drug Court will not accept an applicant who is not selected in accordance with clause 2 or 3.

**5.2** The Registrar will notify the referring Court if an applicant has been unsuccessful in a ballot, or if the applicant’s referral has been deferred.

**5.3** An applicant who was not selected in a ballot will not be placed in a subsequent ballot unless the applicant is referred to the Drug Court in respect of an offence other than one related to the unsuccessful ballot.

# *6 Previous participants*

**6.1** The Drug Court acknowledges that a drug-addicted person may need many episodes of treatment to achieve long-term recovery.

**6.2** As the resources of the Drug Court are limited, preference will be given to applicants who have not been Drug Court participants previously.

**6.3** An applicant who has previously been a Drug Court participant is not an appropriate person for a Drug Court program if it is **less than three years** since:

* Final Sentence was imposed in relation to the participant’s last Drug Court program,
* Completion of the non-parole period of any Final Sentence that was imposed (not suspended),
* Completion of an ICO imposed at Final Sentence,

whichever is the later.

**6.4** Subject to paragraph 6.5 below, if the number of referred applicants exceeds the number of available places for the ballot, the judge may decide to exclude from the ballot any or all applicants who have previously had the opportunity of a Drug Court program, or a Compulsory Drug Treatment Order.

**6.5** To increase the opportunity for ATSI identifying offenders to take part in a Drug Court program, a previous participant who identifies as an ATSI person may be included in the ballot, despite having previously had the opportunity of a Drug Court program or a Compulsory Drug Treatment Order.

### *7 Previously refused applicants*

**7.1** To take part in a Drug Court program, the Drug Court must be satisfied that, having regard to the person’s antecedents, it would be appropriate for the person to participate in a Drug Court program[[4]](#endnote-4).

**7.2** From time to time the Drug Court conducts hearings and makes determinations as to whether individuals are appropriate for a Drug Court Program.

* 1. If an applicant referred to the Drug Court has, within **two years** of the date of referral, been formally found to **not** be an appropriate person under s 7A(2) the applicant is not an appropriate person for a Drug Court program, and the Registrar will notify the referring Court that the applicant has not been accepted. The two year exclusion does not apply to applicants who have only been “held not to be appropriate” and excluded pre-ballot in accordance with clause 2.15 above.

1. Section 6 Drug Court Act 1998 [↑](#endnote-ref-1)
2. Section 7A(2)(d) provides that there must be “facilities to supervise and control the person’s participation in such a program” available before a person can be sentenced under the Act. [↑](#endnote-ref-2)
3. Section 7A(2)(c) provides that the Drug Court may place a person on a Drug Court program if “…having regard to the person’s antecedents, it would be appropriate for the person to participate in a program” [↑](#endnote-ref-3)
4. Section 7A(2)(c) [↑](#endnote-ref-4)