A Sobering Inquiry:

How New Zealand's Alcohol and Other Drug Treatment Court has Removed Fundamental Legal Protections From Drug and Alcohol Dependent Participants

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"The treatment model whose rejection I am suggesting is beguiling. Diagnose the social danger presented by the criminal. Give the treatment of choice. Observe if it takes. Relate release to cure. The criminal and society will both gain thereby. It would be a great trick if we could do it, certainly if we could do it without abuse of fundamental human rights; but we cannot."[1]

I. Introduction

This dissertation analyses how New Zealand's Alcohol and Other Drug Treatment (AODT) Court has developed a process that leaves participants vulnerable to the power of the criminal justice system. This is through the removal of protections that are conventionally upheld through the operation of the adversarial system.

A. Background

The AODT Court was introduced in New Zealand in 2012 as an alternative, non-adversarial response to crime driven by drug dependency.[2] Modelled on the internationally recognised drug treatment court model, it provides for drug-dependent offenders to access treatment through the criminal justice system. While judicial diversion of offenders from court to treatment is not a new phenomenon, the innovative feature of drug treatment courts is that this diversion is formalised through policy, meaning defendants are purportedly less dependent on the characteristics of the judge and their willingness to exercise discretion.[3]

The AODT Court was developed in New Zealand as a judicial response to what is often referred to as the 'revolving door' of drug offending in the criminal justice system. Judges saw the same people recycling through the criminal justice system and implemented a drug treatment court in New Zealand.[4] There is widespread recognition that unaddressed drug and alcohol abuse is a significant driver of crime.[5] Recent research found that 87 per cent of New Zealand's

[1] Norval Morris *The future of imprisonment* (University of Chicago Press, Chicago, 1974) at 15.
[2] Katey Thom, Stella Black and Rawiri Pene "Crafting a Culturally Competent Therapeutic Model in Drug Courts: A Case Study of Te Whare Whakapiki/the Alcohol and Other Drug Treatment Court in Aotearoa New Zealand" (2018) 3 Int'l J Therapeutic Juris 117 at 125.
[3] Melissa Bull "A comparative review of best practice guidelines for the diversion of drug related offenders" (2005) 16 International Journal of Drug Policy 223 at 223.
[4] Katey Thom and Stella Black *Ngā whenu raranga/Weaving strands: #1 The therapeutic framework of Te Whare Whakapiki Wairua/The Alcohol and Other Drug Treatment Court* (1 2017) at 5.
[5] New Zealand Department of Corrections "Tackling alcohol and drug abuse" (August 2013) <corrections.govt.nz/resources/newsletters_and_brochures/tackling_alcohol_and_drug_abuse.html>

prisoners have been diagnosed with a substance abuse disorder at some time in their life, and 47 per cent had a current substance use disorder diagnosis.[6] Based on these considerations, and following international developments, the AODT Court was established to provide an alternative criminal justice response to drug-related offending.

The AODT Court process utilises s 25 of the Sentencing Act 2002 to offer offenders a place in a treatment programme before they are sentenced. Graduation from treatment is taken into account at a subsequent sentencing hearing, which guarantees the participant a sentence of intensive supervision instead of likely imprisonment.[7] The Court is still in its pilot phase: decisions about continued financial and political support from the government will be announced in 2019.[8] Despite being part of the criminal justice landscape for over seven years, barely any research has been done in regard to how the AODT Court is operating. This is standard for alternative justice mechanisms introduced within the environment of the "comprehensive law movement" – key focus remains on the projected benefits of these programmes.[9]

B. The Danger of Moving Away From the Adversarial System

Adversarialism has become the main system of justice in most western jurisdictions across the world.[10] Key elements are that the parties are in control of arguing their case, and the decision maker is a neutral referee who hears and considers each side.[11] A particular strength of the system is that it encourages the full realisation of a defendant's individual rights. This is made possible through a number of protections: the independence of the judiciary, the autonomy of the parties, the requirement of zealous advocacy, and importantly, the recognition that observance of the law is a more realistic and attainable goal than the pursuit of justice.[12]

One of the essential and defining elements of the drug treatment court model is that proceedings are non-adversarial.[13] Following best practice standards, the AODT Court asserts that non-

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[6] New Zealand Department of Corrections *Comorbid substance use disorders and mental health disorders among New Zealand prisoners* (2016) at 23.
[7] Katey Thom and Stella Black *Ngā whenu raranga/Weaving strands: #2 The processes of Te Whare Whakapiki Wairua/The Alcohol and Other Drug Treatment Court* (2 2017) at 25.
[8] Office of the Minister of Justice and Office of the Minister of Health *Report-back on the Alcohol and Other Drug Treatment Court Pilot and other AOD-related Initiatives (Report to Cabinet Social Policy Committee)* (2016) at 1.
[9] Katey Thom "Exploring Te Whare Whakapiki Wairua/The Alcohol and Other Drug Treatment Court pilot: theory, practice and known outcomes" [2017] NZCLR 180 at 182.
[10] Arie Freiberg "Non-adversarial approaches to criminal justice" (2007) 16 JJA 1 at 1.
[11] Ellen E Sward "Values, Ideology, and the Evolution of the Adversary System" Ind LJ at 312.
[12] Freiberg, above n 10, at 2.
[13] Peggy F Hora, William G Schma and John T 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 L Rev 439 at 453.J Scott Sanford and Bruce A Arrigo "Lifting the Cover on Drug Courts: Evaluation Findings and Policy Concerns" (2005) 49 International Journal of Offender Therapy and Comparative Criminology 239 at 253.

adversarialism encourages collaboration and promotes wellbeing through a "holistic and healing approach".[14] Lawyers, prosecutors, police and treatment providers all collaborate on a case as a 'treatment team'. Judges are heavily involved in overseeing how participants' cases progress. Information about a participant's progression through treatment is shared openly with members of the team.[15]

By moving away from traditional procedure, some of the important values that the adversarial system has guaranteed for so long are undeniably sacrificed. For example, the adversarial nature of the traditional court process provides the defence lawyer a platform to be a zealous and effective representative for the client in order to argue against the opposing counsel. This platform is minimised by the fact that a defence lawyer in the AODT Court must collaborate *with* the treatment team, and is only to represent their client's interests without undermining the common goal of recovery. The competitive nature of the adversarial system also gives rise to high compliance with due process, as each lawyer has an incentive to uphold procedural rules in order to protect their client. However in the AODT Court, practices have developed that do not conform to due process requirements, and defence lawyers are no longer incentivised to oppose potential breaches of due process as they work alongside police prosecutors in the treatment team. Being grounded in judicial innovation and discretion, rather than the guidelines and precedent of the adversarial system, the AODT Court does not adhere strictly to traditional principles of sentencing. With no guidelines to drive a principled approach, there are no assurances that participants are protected from potential whims of the judiciary in the operation of the Court.

C. This Dissertation

This dissertation considers how the fundamental change in process means that rights and protections defendants are normally assured are overridden in the AODT Court due to the non-adversarial nature of proceedings.

Legal, rights-based implications such as this have been overlooked by a school of enthusiastic drug treatment court supporters.[16] Overwhelmingly, literature is produced from psychological and therapeutic perspectives, neglecting the arguably more important perspective of how this model fits into the legal system itself.[17] Another popular focus in the drug treatment court dialogue is whether it provides effective treatment. However, without examination of more foundational and legal aspects of the drug treatment court model, this "effectiveness debate" is

[14] Katey Thom and Stella Black *Ngā Whenu Raranga/Weaving strands: #3 The roles of Te Whare Whakapiki Wairua/The Alcohol and Other Drug Treatment Court team* (3 2017) at 35.
[15] LITMUS *Final Process Evaluation for the Alcohol and Other Drug Treatment Court* (2016) at 39.
[16] Benedikt Fischer "Doing Good with a Vengeance: A Critical Assessment of the Practices, Effects and Implications of Drug Treatment Courts in North America" (2003) 3 Criminal Justice 227 at 231.
[17] Mae C Quinn "Whose Team Am I on Anyway--Musings of a Public Defender about Drug Treatment Court Practice" NYU Rev L & Soc Change 37 at 38.

said to be premature and misleading.[18] This dissertation aims to evaluate the AODT Court with a focus on legal rights and processes, contributing to the drug treatment court discourse by raising a number of concerns that have so far been overlooked.

Scrutiny of developments in the justice system is vital to ensure institutions and individuals continue to exercise their power within the scope of their role. Preventing removal of rights and abuse of power and are recognised to be two key values that can be upheld by proper scrutiny of policies, practices and guidelines.[19]

Chapter One considers how duties ordinarily held by lawyers are overridden in the AODT Court, leading to a systematic loss of protection for participants. Obligations such as partisanship, loyalty, zealousness and confidentiality are disregarded as they are seemingly considered inconsistent with a collaborative approach to treatment. Not only does this raise ethical issues for lawyers, but it reduces the extent of protection lawyers can provide, leaving participants vulnerable to the powers of the justice system.

Chapter Two illustrates that the AODT Court fails to practice due process, resulting in participants losing a number of rights they otherwise would be guaranteed through a traditional court process. The right not to be compelled to confess guilt and the presumption of innocence are implicated in the requirement that participants must plead guilty to charges before they can enter the Court. The hearing process obstructs the exercise of open justice, and there is no right to appeal on any judicial decisions made within the Court. By failing to observe due process, the AODT Court is not only procedurally unfair but has the potential to generate substantially unfair outcomes.

Chapter Three asserts that two key principles of sentencing – proportionality and consistency – are not observed in the AODT Court. Unlike conventional distribution of punishment, the AODT Court judiciary are not bound to consider proportionality or sanctioning guidelines, leading to the prospect that the Court dispenses disproportionate and inconsistent responses to offending. The argument is made that although it is not characterised as a sentence, the treatment programme is punitive in nature and therefore ought to be subject to statutory sentencing principles.

The scope of this dissertation is limited to the participants and processes of New Zealand's AODT Court. The structure of the Court relies on internationally recognised 'best practice standards' which have been recommended as foundational guidelines on which to model a drug

[18] Toby Seddon "Coerced drug treatment in the criminal justice system: Conceptual, ethical and criminological issues" (2007) 7 Criminology & Criminal Justice 269 at 280.
[19] Andrew Ashworth and Mike Redmayne *The criminal process* (4th ed, Oxford University Press, Oxford: New York, 2010) at 18.

treatment court.[20] These standards were established in an effort to promote uniformity in the proliferation of drug treatment courts. However, there are widespread concerns that these standards were established before substantial empirical evidence was available, so holding confidence in them can be somewhat challenging. There are also indications that the evidence that is available is unreliable due to being ascertained through methodologically weak study designs, meaning only "cautious claims" can be made from reliance on the best practice guidelines.[21] However, consideration of the value and reliability of these standards is outside of the scope of this dissertation, so where they are mentioned it assumes that they are as reliable and evidence-based as they purport to be.

[20] LITMUS, above n 15, at 3, Bull, above n 3, at 224.
[21] Bull, above n 3, at 232.

II. *Chapter One: How Does The Changed Role Of The Defence Lawyer In The AODT Court Remove Legal Protections from Participants?*

"How arrogant and lazy and convinced of their own infallibility would the prosecution and court become if the defendant had no advocate?"[22]

Some protections that are normally afforded to a defendant are not guaranteed in the AODT Court because of the altered role of the defence lawyer. Issues surrounding the changing role of the defence lawyer are not confined to the drug treatment court model: other non-adversarial systems face similar concerns. The French criminal justice system uses an inquisitorial procedure within which commentators describe the role of the defence lawyer as "symbolic rather than real… designed to ensure that justice appears to be done".[23] The key problems in the AODT Court are that the lawyer is not in the position to zealously advocate for their client as they normally would due to conflicting interests, and there is minimal opportunity for the lawyer to represent their client because of the nature of proceedings. Additionally, ethical challenges arise when participants sign a waiver of their right to lawyer-client privilege.

A. The Role of the Defence Lawyer

The defence lawyer has held one of the central roles in the criminal justice system since the 18th century when adversarialism emerged.[24] Since then, defence lawyers have been tasked with the immense job of putting the prosecution to proof, ensuring fundamental rights are upheld and protecting their clients from the power of the state.[25]

The Lawyers and Conveyancers Act provides key rules that ensure lawyers fulfil their duties in line with their fundamental role. It states the need for the lawyer's independence from outside influences when working for a client (r 5), the importance of trust and confidentiality within the lawyer-client relationship (rr 5.1 and 8), and the requirement of a lawyer to protect and promote the interests of the client to the exclusion of third-party interests (r 6).[26]

In line with best practice standards, the AODT Court programme operates in a non-adversarial environment in which treatment providers and members of the prosecution and defence all

[22] Stanley A Goldman "Foreword: First Thing We Do, Let's Kill All the Defense Lawyers" (1996) 30 LoyLALRev 1 at 2.
[23] Jacqueline Hodgson "The Role of the Criminal Defence Lawyer in an Inquisitorial Procedure: Legal and Ethical Constraints" (2006) 9 Legal Ethics 125 at 126.
[24] Freiberg, above n 10, at 1.
[25] Tamar Meekins "Specialized Justice: The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm" (2006) 40 Suffolk ULRev 1 at 10.
[26] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008

work together as a team under the judge's guidance. This "collaborative and non-adversarial approach" requires practices that are "remarkably different to traditional lawyering practices".[27] There is concern that alternative courts have induced a systematic loss of the traditional defence lawyer paradigm. Meekins claims that there is an inverse relationship between the development and expansion of the specialised court model and the "effectiveness, competence, and zeal" of defence lawyers in these courts.[28] This is because the alternative process discourages the exercise of traditional lawyering and promotes prosecution and defence lawyers to work together, along with the rest of the team, towards a common goal. The defence lawyer's main function becomes acting as a communicator between the Court and the participant – explaining decisions, conditions and sanctions, to ensure compliance.[29]

Simon claims that one of the only reasons that dramatic change to the defence lawyer's role could pose a "real problem" for the drug treatment court model is when it requires lawyers to violate fundamental ethical commitments.[30] Many lawyers agree that there are serious ethical challenges inherent in defending clients in specialty courts because there is less room to zealously represent their client and to maintain client confidences.[31] The United States National Legal Aid and Defender Association released criminal defence performance guidelines in 1997, accompanied by commentary that recognises ethical difficulties inherent to some alternative systems of criminal justice:[32]

> Stating that ethical and professional obligations apply to counsel engaged in criminal defense may appear to be a restatement of the obvious. However, increasing political, economic and social pressures on the criminal justice system have led to demands that defense attorneys act as "team players," i.e., to keep the system functioning even at the expense of individual clients. While defense counsel may remain sensitive to system difficulties… counsel must not compromise the representation of counsel's own client when seeking to ameliorate such difficulties.

This reflects opinion among drug treatment court commentators that criminal defence lawyers should not relinquish ethical duties for the sake of their client's treatment.[33]

To put the issue in context, any defendant in a court setting is in an inherently disadvantaged position compared to the state, and the liberty of an AODT Court participant is at stake continually throughout the programme. The frequent use of coercive sanctions – including

[27] LITMUS *Formative Evaluation for the Alcohol and Other Drug Treatment Court Pilot* (2014) at 55.Thom and Black, above n 14, at 18.
[28] Meekins, above n 25, at 22.
[29] Fischer, above n 16, at 239.
[30] William H Simon "Criminal Defenders and Community Justice: The Drug Court Example" [2003] Am Crim L Rev 1595 at 1597.
[31] Meekins, above n 25, at 11.
[32] Quinn, above n 17, at 50.
[33] At 75.

periods of imprisonment – clearly justifies the necessity for an advocate to protect drug treatment court participants' interests.[34] Interestingly, best practice standards state that representation by a defence lawyer should be encouraged as it is associated with better outcomes, while ensuring participants' rights are protected.[35]

The following discussion considers three duties of the defence lawyer which are compromised in the operation of the AODT Court.

B. A Lawyer's Duty to Advance Their Client's Interests

Essentially, the defence lawyer's role is to "advance, within the bounds of the law, the client's interests, as the client understands them".[36] Dare's standard conception frames this more forcefully as a duty of "aggressive and single-minded pursuit of the client's objectives".[37] Importantly, these duties frame 'best interests' as those the client holds themselves – not the client's best interests as defined by anyone else. Therapeutic justice reframes this duty to require advocating for the "best possible outcome" for the client.[38] Many alternative courts seek to establish shared interests between the parties: in the drug treatment court model, this 'shared interest' is addiction treatment.[39] The defence lawyer is informed by the "institutional players" – treatment providers and the court – as to what the defendant's best interests are.[40] Meekins suggests that the nature of the defence lawyer's role in the drug treatment court may actually have a negative effect on clients' interests, by "instigating a culture of indifference and incompetent advocacy".[41] One defence lawyer reflected that in the drug treatment court, the best thing for the client is not the best legal result, but "the best life outcome".[42] In the AODT Court, the fundamental interest of each participant is said to be recovery through treatment, regardless of any participant's individual circumstances.[43]

Simon argues that the defence lawyer is simply required to pursue the client's best interests *within* the relevant legal framework. The drug treatment court changes the framework, but still leaves open the opportunity for the lawyer to help the client pursue their best interests "among the options open to him".[44] This is unconvincing in the current context because not only does the AODT Court change the framework, but this new framework severely restricts the interests

[34] Meekins, above n 25, at 16.
[35] National Association of Drug Court Professionals *Adult Drug Court Best Practice Standards: Volume 2* (2015) at 40.
[36] Simon, above n 30, at 1597.
[37] Tim Dare *The counsel of rogues?* (Ashgate Publishing, Surrey, 2009) at 5.
[38] Deen Potter "Lawyer, social worker, psychologist and more: The role of the defence lawyer in therapeutic jurisprudence" (2007) Special series Murdoch University Electronic Journal of Law 95 at 95.
[39] Simon, above n 30, at 1596.
[40] Fischer, above n 16, at 239.
[41] Meekins, above n 25, at 7.
[42] Hora, Schma and Rosenthal, above n 13, at 469.
[43] Thom and Black, above n 4, at 10.
[44] Simon, above n 30, at 1599.

that can realistically be pursued by the lawyer.[45] The legal framework of the drug treatment court model only allows room for one client interest – drug treatment. Any further room for individual clients' interests to be represented is significantly restricted by this narrow starting point. This point is illustrated by reports that practices of defence lawyers in the AODT Court were informed by the goal of recovery to the extent that they would make decisions "contrary to their participant's wishes".[46]

This degree of conflicting interests inevitably leads to inconsistency between the lawyer's and the client's goals.[47] This is illustrated by confusing statements from lawyers:[48]

> "I mean your role is really to look after the interests of the client but of course that is challenged by the fact that actually the interest of the client is their recovery". (AODT Court team #11)

A lawyer in a drug treatment court envisions a successful case as a drug-free client who has reduced likelihood of reoffending.[49] Meanwhile, participants of drug treatment courts are likely to have a diverse range of interests that do not always align with recovery: remaining employed, avoiding sanctions, and minimising frequency of invasive drug testing procedures.[50]

C. A Lawyer's Duty to Act as a Representative For Their Client

A hearing presents an opportunity for a defence lawyer to zealously represent their client's interests – to ensure they are being treated fairly, and that judgments made concerning the case are based on solid evidence and a procedurally fair process. However, none of this occurs in the AODT Court. Drug court lawyers reportedly only rarely intervene between the participant and the judge, instead taking a back seat and allowing the participant to engage in dialogue with the judge.[51] Some even claim that the offender becomes a client of the court.[52] By taking a passive role as a mere part of the treatment team, the lawyer relinquishes the function to 'defend at all costs'.[53] In this environment, there is no scope for the lawyer to zealously represent their client: a requirement of many drug treatment courts is that the participant agrees

[45] The issue of narrowing the client's interests is also experienced in France's inquisitorial system; see Hodgson, above n 23, at 144.
[46] Thom and Black, above n 7, at 15.
[47] Tina S Ikpa "Balancing Restorative Justice Principles and Due Process Rights in Order to Reform the Criminal Justice System" (2007) 24 Wash U JL & Pol'y 301 at 313.
[48] Thom and Black, above n 14, at 15.
[49] Hora, Schma and Rosenthal, above n 13, at 479.
[50] Some treatment programmes do not allow for a participant to continue employment LITMUS, above n 15, at 33; The AODT Court Participant Agreement (2018) at 2 (on file with author) states that drug testing will be conducted by observed urine tests five times a fortnight.
[51] Eric J Miller "Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism" (2004) 65 Ohio St LJ 1479 at 1493.Freiberg, above n 10, at 11.Hora, Schma and Rosenthal, above n 13, at 479.
[52] Hora, Schma and Rosenthal, above n 13, at 469.
[53] Richard C Boldt "Rehabilitative Punishment and the Drug Treatment Court Movement" (1998) 76 WashULQ 1205 at 1254.

to the imposition of any sanctions without the opportunity to challenge them.[54] The defence lawyer often cannot even argue the case that a less restrictive sanction would be more appropriate without this conflicting with their role on the treatment team.[55]

A lawyer operating as a zealous advocate would ordinarily argue against their client being sanctioned at all, or at least in favour of the lowest level of sanction available, in order to comply with their client's interests of minimising state control. However, in the same situation, a lawyer operating as a treatment team member would be more likely to approve of harsh sanctions in the belief that it will help their client to succeed in treatment. Boldt gives an example of defence lawyers agreeing that "small doses of shock incarceration will encourage their clients to take the treatment seriously" which clearly falls far from the zealous advocate paradigm.[56] This is an example of what Quinn describes as non-adversarialism placing defence lawyers in conflict with clients, and interfering with the "provision of competent representation".[57]

There are a number of examples of defence lawyers in drug treatment courts failing to zealously represent their client's case because of the conflicting interest in treatment. Lawyers refuse to make applications to exclude evidence (because it might delay the process or intrude on the process of accepting responsibility for drug use) and encourage their client to disclose drug use (for the sake of fostering honesty about drug use).[58] It is also not generally open to the lawyer to question the credibility of evidence or introduce exculpatory evidence as a means of defending their client's alleged non-compliance, or challenging the factual basis the allegation relies on.[59]

One recommendation that would counter this lack of representation in court is to establish an evidentiary hearing requirement, during which alleged transgressions need to be proved before sanctions are decided on. Due process dictates that there should be a meaningful opportunity for the defence lawyer to challenge allegations against their client.[60] For example, allegations of drug use can be based on positive drug test results, which can be of "questionable reliability".[61] An evidentiary hearing would ensure that participants have the benefit of a defence lawyer to represent them regarding matters that can lead to punitive sanctions.

[54] Meekins, above n 25, at 18.
[55] Freiberg, above n 10, at 11.
[56] Boldt, above n 53, at 1259.
[57] Quinn, above n 17, at 58.
[58] Hora, Schma and Rosenthal, above n 13, at 479.
[59] Boldt, above n 53, at 1260.
[60] Quinn, above n 17, at 73.
[61] At 73.

Another example of this lack of representation can be found in interviews with AODT Court defence lawyers themselves.[62] One explained that his client was denying a suspected infringement of tampering with his SCRAM (Secure Continuous Remote Alcohol Monitoring) bracelet. Instead of contacting the client and ascertaining their interests in this situation, the lawyer explained that another team member interviewed the participant about these allegations:[63]

> "So Court team #5 has gone out to his worksite today and she's interviewing him about a potential tamper because he's about due to graduate and this is going to put a spanner in the works. So Court team #5 will ring me about that, she'll get back to me tonight on how it went and what he said…" (Court team #11).

The defence lawyer seemingly did not communicate with their client to advise them on the interview, let alone attend the interview in which the team member would likely be seeking to extract a confession. An interview is a vulnerable environment for a defendant to be without representation. Questioning defendants can be understood as a means for police to exert authority.[64] This is reflected in the requirement for police to inform people over whom they have enough evidence to charge of their right to consult and instruct a lawyer before commencing an interview.[65]

While the Practice Note does not strictly apply in the above situation, there is no reason that a dedicated and responsible advocate would not recognise the importance of being present when their client is being questioned, even informally, on a matter that could lead to punitive consequences. When their client is being questioned, lawyers play a pivotal role by informing them of their rights and their position in the law, as well as protecting them from interrogation tactics.[66] Legal advice has been shown to have a significant effect on the outcome of an interview – it is associated with a lower likelihood of confession by the person being questioned, and a significantly higher likelihood of the use of the right to silence.[67]

Based on this knowledge of the importance of legal advice for those subject to state power, discussions or interviews about potential programme transgressions between members of the treatment team and participants, as a matter of due process, should only be instigated in the presence of the defence lawyer. This is a relatively simple solution to provide participants with more than mere superficial protection from their defence lawyer. It would also ensure the

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[62] Thom and Black, above n 14, at 17.
[63] At 17.
[64] Lucia Zedner *Criminal justice* (Oxford University Press, Oxford ; New York, 2004) at 136.
[65] Sian Elias *Practice Note on Police Questioning (s30(6) Evidence Act 2006)* (Courts of New Zealand, 2007) at 1.
[66] Derek Edwards and Elizabeth Stokoe "'You Don't Have to Answer': Lawyers' Contributions in Police Interrogations of Suspects" (2011) 44 Research on Language & Social Interaction 21 at 21.
[67] John Pearse and Gisli Gudjonsson "Police interviewing and legal representation: A field study" (1997) 8 The Journal of Forensic Psychiatry 200 at 201.

problematic process illustrated above does not occur, and interactions between participants and members of the treatment team align more closely with standard due process requirements

D. A Lawyer's Duty to Maintain Strict Confidentiality of Their Client's Information

The Lawyers and Conveyancers Act outlines the lawyer's duty to "protect and to hold in strict confidence all information concerning a client… acquired in the course of the professional relationship".[68] The underlying rationale for this rule is to protect the trust in the lawyer-client relationship and therefore ensure the lawyer can give accurate and effective advice.[69] However, rule 8.4(a) allows disclosure of this confidential information where the client has specifically authorised it.[70] The AODT Court uses this exception to systematically override the duty of confidentiality by requiring participants to sign a waiver on entry to the programme:[71]

> Your lawyer may share any information with the team as it relates to your treatment, wellbeing and safety, and how you are progressing through the court.

This requirement aims to facilitate an environment of "honesty, trust and transparency" in the interest of the team having knowledge of any information that might be relevant to treatment.[72] For example, lawyers are not normally obliged to report to the court when their client divulges that they have breached their bail conditions – however, in the AODT Court, disclosure of this information is expected of the lawyer to facilitate effective treatment.[73] Internationally, drug treatment court defence lawyers have reported difficulties in weighing up the defendant's underlying rights to confidentiality against the lawyer's need to share information with the team.[74] One key issue is that disclosure of information against the will of the client could chill future client-lawyer communication if there is a perception that sharing information would prompt a sanction to be imposed.[75] This means the participant is denied the benefit of a lawyer-client relationship of confidence and trust that is espoused in r 5.[76]

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[68] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 8
[69] William H Simon "The Ethics of Criminal Defense" (1993) 91 MichLRev 1703 at 1720.
[70] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 8.4(a)
[71] Alcohol and Other Drug Treatment Court "Participant Handbook" (2018) at 4 (on file with author).
[72] LITMUS, above n 15, at 42.
[73] Thom and Black, above n 14, at 16.
[74] Shannon Portillo and others "Front-Stage Stars and Backstage Producers: The Role of Judges in Problem-Solving Courts" (2013) 8 Victims & Offenders 1 at 4. Martin Reisig "The difficult role of the defense lawyer in a post-adjudication drug treatment court: Accommodating therapeutic jurisprudence and due process" (2002) 38 CrimLBull 216.
[75] Quinn, above n 17, at 72.
[76] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

These concerns around information sharing are mirrored in the AODT Court.[77] One lawyer reported feeling that although it was standard practice in the Court, and the client had signed a confidentiality waiver, disclosing client information to the team was "not totally open" to the lawyer. They explained that if they became aware of information that their client specifically did not want shared with the team, they would keep it confidential.[78]

It has been recommended that training is carried out regarding lawyer-client privilege in the AODT Court.[79] However, the fact that the practice is causing concern for lawyers, and is not consistently being adhered to regardless of lawyers knowing the process, begs the question of whether it should be continued at all. By removing the requirement of the confidentiality waiver, the lawyer-client relationship could develop into one of trust and confidence as is intended by the Lawyers and Conveyancers Act.[80]

E. The Future for The Drug Treatment Court Defence Lawyer

Currently, the nature of the AODT Court prevents the traditional lawyer-client relationship from developing and leaves participants vulnerable. Participants are in the disadvantaged position of significant inexperience of the system, while being subject to a significant number of court hearings and imposition of sanctions without the assistance of a zealous advocate.[81] The nominal role the defence lawyer plays in AODT Court proceedings begs the question of whether their inclusion in the process is merely symbolic:[82]

> If the lawyer lacks both the opportunity and the authority to engage in effective defence preparation, her engagement… is likely to be little more than symbolic, lending credibility to the legal process rather than providing the accused with any effective defence guarantee.

A brighter future for defence lawyers in the AODT Court could be merely to invoke changes to the lawyer's role within certain procedures. However, a more radical move would entail removing the defence lawyer from the treatment team entirely.

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[77] Lisa Lunt *Preserving the dignity of the mentally unwell: Therapeutic opportunities for the criminal courts of New Zealand* (2017) at 31.
[78] Katey Thom and Stella Black *Ngā Whenu Raranga/Weaving strands: #4 The challenges faced by Te Whare Whakapiki Wairua/The Alcohol and Other Drug Treatment Court* (4 2017) at 8.
[79] LITMUS, above n 15, at 60.
[80] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 5.
[81] See page 31 of this dissertation: participants will attend around 17 court hearings during the first phase of the programme alone.
[82] Hodgson, above n 23, at 144.

1. Modifications of the defence lawyer's role within the treatment team

There are a number of ways that the defence lawyer can become more involved by allowing and encouraging advocacy and representation of the client. Quinn suggests that drug treatment courts develop guidelines that outline regulated procedures allowing the defence lawyer to advocate for their client.[83] Specifically, one recommendation is to clarify the process to be used when the team believes there has been an infringement and seeks to impose a sanction: for example, establishing an evidentiary hearing to establish the factual basis of an alleged infringement before a sanction is applied. This would make progress towards the participant's right to effective representation and due process, if only for particularly important decisions in a participant's case, by allowing the defence lawyer to act as a zealous advocate. Modifying processes in non-adversarial systems in order to accommodate the defence lawyer's duty to protect their client has been done before without entirely reverting back to adversarial foundations. The French criminal justice process has maintained an inquisitorial framework while creating opportunities to allow the defence lawyer a role that is more than symbolic. For example, the lawyer's ability to be present when their client is questioned by police and to request investigation into evidence have been incorporated, which support the development of a more zealous defender within the inquisitorial system.[84]

2. Removing the defence lawyer from the treatment team

Despite the promising examples above, it is difficult to contemplate how all the issues surrounding the defence lawyer's role could be appropriately resolved while maintaining the current non-adversarial, collaborative team process, because these characteristics seem to be the cause of the problem. An alternative approach would be to take the defence lawyer out of the treatment team, relieving them of a number of duties that interfere with their ability to advocate for their client. The treatment team would still pursue the goal of recovery, while the defence lawyer would be free to pursue the goals of their client, ensuring they can zealously represent the participant without being constrained by third party interests.

[83] Quinn, above n 17, at 74.
[84] Hodgson, above n 23, at 144.

III. Chapter Two: Do Participants in the AODT Court Lose Fundamental Due Process Protections?

"Protecting the innocent; preventing abuse of power; and guarding against procedural impropriety are at least as important as convicting the guilty."[85]

There is cause for concern that under the AODT Court, a number of due process rights are not guaranteed. This is due to the changed nature of court principles and procedure, meaning safeguards are no longer in place to systematically protect some rights. Drug courts generally offer an unprecedented degree of power and discretion to the judiciary in the pursuit of treatment, which makes the Court "hopelessly incapable of protecting citizens from therapeutic excesses".[86] The AODT Court, following the drug treatment court model, changes the entire premise of the traditional justice process, meaning rights that are normally upheld by adversarial court procedure – the presumption of innocence, the right not to be compelled to confess guilt, the right to appeal and the right to open justice – are surrendered in pursuit of the goal of treatment. This potential outcome – treatment – is so desirable that it can be "easy to forget the setting," which includes a guilty plea and a conviction as the mere cost of admission. When this setting is recognised, the process becomes just as important as the outcome.[87]

Due process in an adversarial system insists that criminal justice should operate in a formal, adjudicative, fact-finding process.[88] It asserts the importance of individual rights and protections which ensure that those involved in the criminal justice system are protected from the extensive powers of the law.[89] These rights are codified by the NZOBORA but are substantively upheld by the established processes of the adversarial system.[90] However, many alternative justice programmes circumvent the procedural safeguards afforded by traditional courts.[91] Even in the very first United States National Drug Court Conference held in 1993, defence counsel expressed concerns for the protection of due process: specifically, they were concerned that drug treatment courts would force a waiver of rights on entry, including that of the presumption of innocence.[92] This has become a reality: in almost all drug treatment court models, participants waive what we would consider fundamental legal rights on entry to the

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[85] Zedner, above n 64, at 116.
[86] Morris B Hoffman "The Rehabilitative Ideal and the Drug Court Reality" (2001) 14 Federal Sentencing Reporter 172 at 177.
[87] Reisig, above n 74, at 8.
[88] Andrew Sanders, Richard Young and Mandy Burton *Criminal justice* (4th ed, Oxford University Press, USA, New York, 2010) at 23.
[89] Fischer, above n 16, at 243.
[90] New Zealand Bill of Rights Act 1990, ss 21-27.
[91] Ikpa, above n 47, at 314.
[92] John S Goldkamp *Justice And Treatment Innovations: The Drug Court Movement - A Working Paper Of The First National Drug Court Conference, December 1993* (1994) at 14.

court. Reisig states that due process does not appear to be a value because it is considered "a counter to the court's healing purpose".[93]

A. The Right Not to be Compelled to Confess Guilt

The following discussion outlines the way in which the AODT Court overrides the right not to be compelled to confess guilt, and consequently has a detrimental impact on the presumption of innocence. The argument here is not that making a guilty plea is in itself problematic: it is that being compelled to do so under pressure is an affront to justice and due process.

1. The right, explained

The right not to be compelled to confess guilt is provided by s 25(d) of the New Zealand Bill of Rights Act.[94] It is an important principle for a number of reasons:

1. Encouragement to plead guilty undermines the principle that the burden of proof rests on the prosecution to prove guilt beyond reasonable doubt. The value of this principle is that it provides a check on state and prosecutorial power – it ensures that the prosecution provides sufficient evidence before a conviction is made, so a weak case is less likely to result in conviction. A guilty plea removes this check, and while it is justifiable for a defendant to remove this check voluntarily, doing so under compulsion is a misuse of power.[95]
2. The burden of proof resting on the prosecution is one of the mechanisms that protects the presumption of innocence.[96] Therefore, pressure to remove this safeguard and plead guilty is contrary to the presumption of innocence.[97]

This argument recognises that there is a widely applied and accepted practice of encouraging defendants to plead guilty by offering a sentence discount as an incentive. The main justification is that bypassing a trial spares witnesses the burden of giving evidence, while saving extensive court time and costs.[98] Some critics assert that encouraging guilty pleas is inconsistent with due process because it requires defendants to "waive virtually all adjudicatory rights" in order to bargain down their level of state punishment.[99] Others state that these rights – the right to remain silent, give evidence, confront accusers, and be heard by a jury – become

[93] Reisig, above n 74, at 2.
[94] New Zealand Bill of Rights Act 1990, s 25(d)
[95] Sanders, Young and Burton, above n 88, at 489.
[96] At 10.
[97] At 491.
[98] *Hessell v R* [2011] NZSC 135 at 28; Sentencing Act 2002, s 9(2)(b)
[99] Christopher Slobogin "Plea Bargaining and the Substantive and Procedural Goals of Criminal Justice: From Retribution and Adversarialism to Preventative Justice and Hybrid-Inquisitorialism Plea Bargaining Regulation: The Next Criminal Procedure Frontier Symposium" (2015–2016) 57 Wm & Mary L Rev 1505. 1507

"bargaining chips" to be exchanged.[100] However, the justifications of efficiency and compassion continue to override these due process concerns.

These justifications, though, are less convincing when the encouragement becomes coercive.

1. The AODT Court purports to guarantee that a defendant can access treatment by pleading guilty.
2. Similarly, the defendant is reliant on the belief that a guilty plea will ensure they avoid imprisonment.
3. These claims are both compulsive and misleading, because they are not guaranteed, as a defendant may be denied entry to, or exited from, the programme after their plea is entered.
4. Upon denial or exit, the defendant is sentenced through the conventional court system based on a guilty plea that they were compelled to make by misleading claims. This plea cannot be withdrawn.

In the context of the AODT Court, the extent of compulsion that can be placed on defendants is more significant because of the alleged benefits. Therefore the loss of due process becomes much more significant.

2. How the AODT Court compels participants to plead guilty

The following discussion considers how the right not to be compelled to plead guilty is overridden in the AODT Court.

A defendant will not be considered for entry into the AODT Court unless they have pleaded guilty to the charge/s they face, because a guilty plea progresses the case to the sentencing stage, allowing the intervention of the AODT Court programme under a s 25(e) adjournment.[101] A guilty plea has the capacity to change a defendant's route in the criminal justice system: instead of facing imprisonment, they will be placed in a drug treatment programme, with a promise that on graduation they will only be subject to a community sentence. Participants and other stakeholders have acknowledged that a key motivator of entering the AODT Court programme is that it is "a way to get out of [a] prison sentence".[102] This presents significant pressure to confess guilt, compared to the conventional opportunity to plead guilty: while a 25 per cent reduction in sentence may bring imprisonment down to a community-based sentence, it cannot often be assured in the same manner as the AODT Court assures defendants they will avoid imprisonment.[103]

[100] Slobogin, above n 99. p1516
[101] Sentencing Act 2002
[102] LITMUS, above n 15, at 35.
[103] *Hessell v R,* above n 97 at 75.

The guilty plea must be made prior to the determination hearing, during which the AODT Court ultimately either accepts the defendant or not. One participant stated their concern on this matter:[104]

> The first process of it is that you plead guilty… before you even get accepted into the programme, so if you plead guilty and then [are] not accepted you're f*** up… It is tricky, because you might not make [it] but you've pleaded guilty. (AODT Court participant 10).

This illustrates that all a guilty plea guarantees is the mere opportunity to stand before the AODT Court to ask for a place in treatment. This means that a participant may be coerced into pleading guilty to their charges, on the basis of seeking treatment, only to be subsequently denied entry to the treatment programme which may have been their only motivation for entering the plea. This means they will lose both the chance to defend their charges at trial, and the opportunity to enter the AODT Court treatment programme.

When a participant fails to complete the AODT Court programme, they exit without graduating, and the case proceeds to traditional sentencing without opportunity for trial because the preceding guilty plea stands. At least one AODT Court participant, after being exited from the programme, has sought to vacate the guilty pleas he made in contemplation of entering the AODT Court. However, his case was directed back to the traditional court system along with the guilty pleas, leaving no opportunity to defend the charges. According to a Litmus report, "the issue was contested, and the AODT Court is looking at whether the participant agreement needs to be further clarified to avoid this situation arising again".[105] This illustrates that there is no opportunity for exited participants to revoke guilty pleas they made in contemplation of entering treatment through the AODT Court programme.

This raises the question as to whether a guilty plea should be able to be withdrawn, either when the participant is denied entry or when they are eventually exited from the AODT Court. The issue as it stands is that a defendant may be compelled to plead based on the proposed benefits – avoidance of imprisonment and addiction treatment – which are later retracted. Meanwhile the plea remains effective, as does the consequent elimination of the prosecution's burden of proof and the presumption of innocence.

[104] LITMUS, above n 27, at 42.
[105] LITMUS, above n 15, at 33.

3. *Why is all of this so problematic?*

It is antithetical to justice to allow a guilty plea to be made on the basis of a potential opportunity for treatment, only to then take away this opportunity and use the guilty plea to convict. It is also suggestive of the possibility of the system exploiting the vulnerabilities of drug-dependent defendants. The AODT Court presents a high cost to participants' liberty: entry means an admission of guilt, a conviction, strict adherence to state control and scrutiny, and a community sentence on graduation. Because of these pervasive costs to a participant's liberty, Reisig states, "due process cannot be overvalued".[106]

The main problem, then, is compulsion. In discussion of restorative justice processes, Reimund states that where an offender is compelled to participate, the concerns about due process implications are greater.[107] There is nothing inherently unjust about a defendant having the opportunity to enter a guilty plea, and it is understandable that the justice system may want to incentivise early guilty pleas where a trial will otherwise cause unnecessary cost and delay. However, where there are considerable benefits to entering a guilty plea, to the extent that it can be considered to have been compelled, the guilty plea should not be upheld as a reliable statement of the defendant's guilt after the stated benefits are simply revoked by the Court.

There are also concerns from a procedural view: the AODT Court's requirement of a guilty plea before entry is considered has the effect of systematically eliminating the prosecution's burden of proof in all cases that proceed through the Court. Therefore, every conviction under this process is made under a system that breaches one of the key principles of the presumption of innocence, through coercion of drug-dependent participants.

Because of these concerns, the following process could be implemented which would avoid the burden of whether guilty pleas were compelled, and therefore whether withdrawal should be an option.

4. *Could the AODT Court operate without the requirement of a guilty plea?*

It is worth considering whether the AODT Court could function without the requirement of a guilty plea. In an alternative process, the opportunity to enter the programme would arise after an offender had been convicted, regardless of whether or not the finding of guilt was determined by a guilty plea. This would ensure the defendant retains their right to put the prosecution to proof on the charges, without being compelled to waive this right. The

[106] Reisig, above n 74, at 6.
[107] Mary Ellen Reimund "The Law and Restorative Justice: Friend or Foe - A Systemic Look at the Legal Issues in Restorative Justice" (2005) 53 Drake L Rev 667 at 684.

offender's interest in taking a place at the AODT Court could be stated by the offender or their legal representative at or before sentencing, after a conviction is entered.

The decision to enter the court would likely still be motivated by the ability to avoid imprisonment. However, the important difference is in the implications of the decision being made based on this pressure to avoid a prison sentence. The current practice requires the defendant to waive the important right to put the prosecution to proof; the proposed change would require a decision instead to participate in a treatment programme through the AODT Court. The latter has significantly reduced negative implications on due process, as the relevant right to be presumed innocent and the related right to put the prosecution to proof are unaffected by a compulsion to avoid imprisonment.

5. The false dichotomy between voluntary and involuntary actions

This issue requires consideration of the voluntary nature of the AODT Court programme. This provides background to inform discussion because theoretically, the Court has the capacity to claim that all impositions by the Court have been voluntarily agreed to by participants, meaning the Court is not unjustly denying rights. It is necessary for AODT Court requirements to be substantively voluntary, in contrast to court-imposed sentences such as imprisonment which can be imposed against an offender's will. This is because the AODT Court programme systematically requires participants to give up rights that are otherwise guaranteed in the criminal justice system. It is unjust for this to be done in an environment where the subject waiving rights is not making a free and voluntary choice to do so. Additionally, the requirement for the AODT Court to be voluntary is self-imposed – the Court stresses as a fundamental principle that participants go through an "informed consent process" in choosing to enter the programme.[108] This aligns with the best practice standard that drug treatment court participation should only occur with informed consent.[109]

In considering whether the AODT Court really is a voluntary choice, it should be recognised that a false dichotomy is often represented between an action being voluntary and involuntary. Typically, mandatory treatment is contrasted with voluntary treatment. However, evidence shows that that this is best conceptualized as a continuum, on which these two ideas are on opposite ends, with coercion sitting somewhere between them.[110] The fact that participants technically have a choice does not immediately make this a free and independent choice. In fact, it is likely that many participants in the AODT Court make a choice grounded in coercion. This is supported by the following explanation of the inherent pressure involved in the choice, and how 'informed' the consent is.

[108] LITMUS, above n 15, at 33.
[109] Bull, above n 3, at 227.
[110] Seddon, above n 18, at 271.

The pressure on entering a voluntary drug treatment court has been referred to as "a gentler form of compulsion" than a compulsory treatment programme would be, because "the defendant feels as if his fate will be worse if he does not opt for the restorative route".[111] This issue is also discussed in relation to drug treatment courts in Britain, which follow a similar procedure to the AODT Court. Critics state that the apparent requirement for consent is a sham, asking "what kind of 'informed consent' can offenders realistically give if the alternative is prison?"[112] As Seddon explains, one of the key components of coerced treatment generally is the threat of the alternative – meaning, the alternative 'choice' must be perceived to be less beneficial or pleasant.[113] This threat is clearly present in the AODT Court, where a reported motivator for entry is that it is a way to get out of a prison sentence".[114] This threat of the alternative presents an environment of high pressure for a participant trying to make an informed and independent decision about their future.

Another difficulty in regards to the voluntary nature of the AODT Court is how informed the process really is. Seddon explains that coercion must include a communicative element in the form of persuasion – a "sales pitch" on the benefits of following a particular course and the dangers of the alternative.[115] The representation of drug treatment courts to offenders as an "offer they cannot refuse… is intrinsic to the whole concept of coercion".[116] This would not be problematic if the communication was a full and fair representation of the court, as this would likely provide the participant sufficient knowledge to make an informed decision based on their own interests. However, there are indications that the process is not comprehensive enough. Commonly, the AODT Court is raised as an option by defence lawyers who "did not always have substantial knowledge about the court", which may be why participants had varying degrees of understanding about the Court process when they committed to it.[117] Participants reportedly do not always understand the process of the Court and the demands of the treatment before they make their 'choice':[118]

> "I didn't actually realise the full ramifications, I'd read it [the handbook] but I didn't really understand [the] programme…" (AODT Court participant 5).

> "No one really explained anything to me. I was like, oh well, this is another opportunity to stay out of jail so why not? But still at the same time I didn't know what was happening." (AODT Court participant 14).

[111] Ikpa, above n 47, at 315.
[112] Seddon, above n 18, at 272.
[113] At 272.
[114] LITMUS, above n 15, at 35.
[115] Seddon, above n 18, at 271.
[116] At 272.
[117] LITMUS, above n 27, at 41.
[118] At 41.

In an extreme example, an exited participant claimed their defence lawyer made the decision to enter the court for their client, while the participant just wanted to take prison time.[119]

The suggestion that this evidence makes is that the combination of an inherently pressured environment and an inadequate provision of relevant information may have the effect of putting potential participants in a coercive setting. This could be minimised by the defence lawyer giving a more thorough and comprehensive explanation of the true nature of the Court. In ensuring potential participants gain substantive knowledge about possible implications the court could have, this process would be more likely to ensure that waivers of rights are only being made voluntarily.

B. The Right to Open Justice

The principle of open justice is fundamental for a number of reasons: it encourages justice to be seen to be done, fosters fair outcomes arrived at by fair procedures, and improves the veracity of evidence relied upon.[120] Open justice also promotes integrity of both counsel and judge, if only for the reason that there is less incentive to stray from proper process when subject to public scrutiny.[121]

Popovic recognises that in the pursuit of therapeutic outcomes or experiences, many alternative justice processes "fall into the trap" of sidestepping open justice.[122] This can be seen in a key process of the AODT Court: pre-court meetings are held in absence of the participant, behind closed doors, putting the fairness of the entire subsequent process at risk. Best practice standards recommend that pre-court meetings, wherein team members share observations about participants' progress in treatment, take place in the absence of the defendant before every hearing. This is suggested for the benefit of the Judge's preparedness before he or she is required to interact with participants in open court.[123]

This meeting proves problematic for two reasons. The fact that there was a private interaction at all can raise the perception of a lack of impartiality and fairness, based on the notion that matters which are material to decisions made by the judge have been discussed behind closed

[119] LITMUS, above n 15, at 35.
[120] Jelena Popovic "Court Process and Therapeutic Jurisprudence: Have we Thrown the Baby out with the Bathwater?" [2006] Murdoch University Electronic Journal of Law 60 at 63.
[121] Michael S King "Judging, judicial values and judicial conduct in problem-solving courts, indigenous sentencing courts and mainstream courts" (2010) 19 JJA 133 at 158.
[122] Popovic, above n 120, at 63.
[123] National Association of Drug Court Professionals *Adult Drug Court Best Practice Standards: Volume 1* (2013) at 22.

doors. This perceived unfairness is felt by those who are involved in the proceeding at hand but not parties to the particular interaction – namely, the participants themselves.[124]

More significantly, if the meeting does *in fact* bring to light relevant information that the judge will use to make important decisions, the perceived unfairness becomes substantive unfairness. As King explains:[125]

> …information provided in that context may be untested, the parties may not have the opportunity to respond to it and the fact-finding and decision-making process of the court may therefore be compromised.

In the AODT Court, the pre-court meeting is primarily used to discuss any apparent breaches of treatment or bail conditions, and to consider whether participants have met the requirements to move to the next phase of the programme.[126] It is also where the judge determines which sanctions and incentives will be imposed.[127] These decisions have a significant impact on a participant's experience in the Court – namely, the length of time they remain in the programme and the extent to which they are subject to sanctions. As a matter of fair procedure, too, the court cannot claim to be impartial if it does not give the participant the option to be present and contribute.[128] By not being privy to this meeting, the participant has no opportunity to hear the information being used to justify decisions, or defend themselves against any misinformation. Within the traditional adversarial process, the presence of the defence lawyer would likely provide sufficient protection of the participant's interests. However, in the drug treatment court environment, the defence lawyer works as a part of the treatment team. This role does not support the zealous representation of their client's interests that would normally be expected of the defence, as discussed previously in Chapter One.

Although the participant will later have an opportunity to speak to the judge in open court, by this point many of these decisions have already been made. The hearing process is essentially a superficial demonstration of judicial deliberation: Portillo describes the decisions as being "performed for the participant" in the courtroom.[129]

It has been reported that most professionals present at the AODT Court pre-court meetings had ongoing concerns as to what information could be shared in this meeting, and the extent to

[124] King, above n 121, at 154.
[125] At 154.
[126] LITMUS, above n 27, at 57.
[127] LITMUS, above n 15, at 52.
[128] King, above n 121, at 158.
[129] Portillo and others, above n 74, at 18.

which the content of the meeting should be disclosed to participants.[130] These concerns are shared with other drug treatment court actors internationally.[131]

Suggestions have been made to change the "rubber stamp" nature of the open court process, by making a requirement that decisions are made not in the closed meeting but in the courtroom, after having a meaningful and exploratory discussion with the participant.[132] Along with this change, participants in the AODT Court should be given the opportunity to attend pre-court meetings. This is a simple solution that would address the significant due process concerns raised. If this change were to be successfully implemented, the team meeting could easily be retained as an information-gathering process without bringing the fairness of the subsequent court hearing into disrepute.

C. The Right to Appeal

Another important due process right is the right to appeal judicial decisions.[133] While this "fundamental element of procedural fairness" is a straightforward process in most other legal processes in New Zealand, there is no opportunity to appeal or review decisions made in the AODT Court.[134]

Terminating a participant from the AODT Court programme is one decision that is entirely at the presiding judge's discretion – and this decision is final. Some stakeholders acknowledged inconsistent application of policies regarding programme termination.[135] This immediately raises red flags – one of the key reasons for the right to appeal is to ensure judicial decisions are consistent in application, and to protect against arbitrary and inaccurate decision-making.[136] As Calhoun points out, the importance of ensuring accurate judgment is the most significant when a defendant's liberty is at stake.[137] The decision to terminate a participant's position in the AODT Court programme is not in itself a judgment on conviction or sentence, which are the specific judgements which a defendant has the right to appeal on.[138] However, it indirectly has the same effect, as it sends the defendant into a sentencing hearing which will almost inevitably result in a sentence of imprisonment.

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[130] LITMUS, above n 27, at 57.
[131] King, above n 121, at 158.
[132] At 159. King suggests that the court process acts as a mere rubber stamp for decisions that are made in team meetings.
[133] New Zealand Bill of Rights Act 1990, s 25(h)
[134] Robert K Calhoun "Waiver of the Right to Appeal" Hastings Const LQ at 161.
[135] LITMUS, above n 15, at 97.
[136] Calhoun, above n 134, at 163.
[137] At 164.
[138] Conviction and sentence are the stated judgements against which a defendant has a right to appeal under the New Zealand Bill of Rights Act 1990, s 25(h)

The inability to appeal AODT Court decisions has been largely ignored by commentators, despite a number of comprehensive reports being produced outlining the process and procedures of the Court.[139] This could be due to the fact that legal and rights-based perspectives are overlooked in favour of psychological and therapeutic perspectives.[140] This brief discussion may spark an important conversation as to why AODT Court participants are not afforded the due process of appeal. Nonetheless, it is recommended that the Court looks earnestly into the justifications for not providing a channel of appeal, and introducing appeal rights if no legitimate justification can be provided.

This wide range of due process faults illustrate the key processes of the AODT Court where the non-adversarial system is failing to maintain important protections of participants' rights. By losing procedural fairness, the AODT Court has real potential to generate substantially unfair outcomes, with no clear systems in place to prevent or redress them.

[139] See: Thom and Black, above n 4.
[140] Fischer, above n 16, at 231.

IV. Chapter Three: Does The AODT Court Overlook Fundamental Statutory Sentencing Principles?

"Ideally, principles act as a constraint on the pursuit of the rationales of punishment… they limit, for example, the temptation to impose harsh sentences… in order to mirror exactly the severity of the most heinous crime".[141]

A key concern regarding the sentencing of AODT Court participants is whether sentencing principles such as proportionality and consistency are adhered to. Zedner states that because of the individualistic nature of rehabilitative treatment, it is prone to the imposition of disparate sentences between offenders convicted of like offences.[142] This is a common predicament for alternative justice programmes: finding a balance between individualized, offender-based sanctions and proportionate punishment.[143] Whether a failure to uphold proportionality and consistency should be considered a significant problem depends, according to Zedner, on how much weight one gives to these principles. From a retributive foundation, where punishment must contain "pain and blame", proportionate and consistent sentencing is crucial in order to maintain the link between penalty and blameworthiness. Conversely, under a rehabilitative framework, treatment can be seen to displace the need for this type of punishment, making disproportionality and inconsistency less problematic.[144]

The following discussion outlines the place of proportionality and consistency in the AODT Court, and how these principles could be incorporated more substantively.

A. Proportionality: Does the Time Fit the Crime?

Proportionality is a well-established principle in sentencing practices around the world. It can be loosely associated with the notion of 'an eye for an eye', and is foundational to the 'just deserts' retributive theory of punishment, but it has developed to become more nuanced than the historic notion of mirror punishment.[145] The classic conception of proportionality is that offenders should be punished in a manner that reflects the gravity and seriousness of offending.[146] It is hard to dispute the importance of proportionality. Where a punishment does not reflect the actions of the wrongdoer, it fails to be a fair and legitimate response by the state. The link between crime and deserved suffering of some kind is central to everyone's sense of

[141] Zedner, above n 64, at 179.
[142] At 98.
[143] Daniel P Mears "Sentencing Guidelines and the Transformation of Juvenile Justice in the 21st Century" (2002) 18 Journal of Contemporary Criminal Justice 6 at 10.
[144] Zedner, above n 64, at 98.
[145] MJ Fish "An Eye for an Eye: Proportionality as a Moral Principle of Punishment" (2008) 28 Oxford Journal of Legal Studies 57 at 57.
[146] Tyrone Kirchengast "Proportionality in Sentencing and the Restorative Justice Paradigm: 'Just Deserts' for Victims and Defendants Alike?" (2010) 4 Criminal Law and Philosophy 197 at 197.

justice.[147] Disproportionate punishments are unjust for the simple reason that they have the effect of condemning an offender more or less than is warranted by their offending.[148] From a retributivist view, it is only fair to give offenders their 'just deserts'.[149] From a more pragmatic approach, proportionality should be a guiding principle in sentencing because it limits the capacity for a judge to apply arbitrary punishment, makes sentencing more credible and therefore legitimises the justice system in the eyes of the public.[150] The importance of the principle is also recognised by statute. The Sentencing Act requires judges to take into account the gravity and seriousness of the offending, and any circumstances that would make a particular sentence "disproportionately severe".[151] While these justifications are well-established within the traditional justice system, they are harder to incorporate into a system founded on rehabilitative justice, meaning proportionality can be effectively disregarded in programmes such as the AODT Court.

1. Proportionality in a rehabilitative setting

It can be challenging to integrate the principle of proportionality with non-traditional approaches to criminal justice because they rely on entirely different premises. Traditional responses to crime are based on goals of retribution, accountability and deterrence, goals which tend to support proportionate punishment. Retributive justice primarily responds to an offender's past actions – it is not as concerned to make an impact on the offender's future conduct or the state of crime rates. Responding to a crime retributively requires consideration of the offender's degree of blameworthiness, as assessed by their degree of culpability and the nature and seriousness of the harm caused.[152] In contrast, drug treatment courts are founded on principles of therapeutic jurisprudence and rehabilitation, which do not value punishment in the retributive sense.[153] Rehabilitative justice focuses on the future, and how the justice system will impact the offender and society, by considering incapacitation and treatment.[154] This leads to a disconnect of ideals – proportionality seeks to import fairness through determinate, formalistic, objective and consistent responses to crime, while rehabilitative justice takes an open and flexible approach to each individual case.[155]

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[147] Morris, above n 1, at 75.
[148] Andrew von Hirsch "Recent Trends in American Criminal Sentencing Theory" (1983) 42 MdLRev 6 at 25.
[149] Kirchengast, above n 146, at 197.
[150] Michael Tonry "Remodeling American Sentencing: A Ten-Step Blueprint for Moving Past Mass Incarceration: Remodeling American Sentencing" (2014) 13 Criminology & Public Policy 503 at 512.Kirchengast, above n 146, at 197.
[151] Sentencing Act 2002, s 8.
[152] Richard S Frase "Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: Proportionality Relative to What" (2004–2005) 89 Minn L Rev 571 at 590.
[153] Hoffman, above n 86, at 176.
[154] Frase, above n 152, at 592.
[155] Kirchengast, above n 146, at 210.

Proportionality is essentially a way to link the offence with the sentence in a way that seems 'fair'. This does not easily align with the rehabilitative goal to move the focus from the offence to the offender and their future. However, prioritizing the offender's health and future leaves no room to oblige the state to act fairly, or proportionately. As Hoffman explains, rehabilitative justice tends to be "uncoupled to any concept of proportionality", because the court takes on the responsibility of curing an offender instead of punishing them for their offending.[156] Indeed, one of the most significant criticisms of rehabilitative justice is that it replaces punishment with treatment without considering issues of proportionality.[157] By failing to constrain judgments within the proportionality principle, rehabilitative justice systems lack "enforceable limits on judicial intervention".[158] The aim of treatment and resocialization becomes the primary yardstick with which to respond to offending. This enables judicial action to be justified on the basis that it is in the participant's best interests, instead of the conventional yardstick of harm caused by the offender, which is more readily measured and controlled.[159]

2. Proportionality as a limiting principle in the AODT Court

In order to defend rehabilitative justice as a legitimate goal, there is support for the idea that proportionality can be a limiting principle instead of a determinative one – it can inform the boundaries of what punishment may be appropriate, to create a range before determining the final sentence with regard to other considerations.[160] This concept of proportionality as a mere limiting principle seems to have been embraced by the AODT Court through the imposition of eligibility criteria.

The AODT Court requires participants to fit within specific criteria in order to be eligible for the programme. The sentence they face for the charge/s that bring them to the Court cannot exceed three years' imprisonment.[161] They must also pose the desired level of risk of re-conviction and re-imprisonment, confirmed by a RoC*RoI score of between 0.5 and 0.9.[162] Where an offender's conduct falls within this eligibility range, it can be assumed that the Court considers the imposition of the AODT Court will not be a disproportionate response. On acceptance to the Court, participants are all subject to the exact same expectations: to complete the treatment programme, and achieve 180 days of sobriety.[163]

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[156] Hoffman, above n 86, at 176.; Miller, above n 51, at 1510.
[157] Miller, above n 51, at 1510.
[158] Lode Walgrave "Restoration in Youth Justice" (2004) 31 Crime and Justice 543 at 548.
[159] At 573.
[160] von Hirsch, above n 148, at 14.
[161] Keri Welham "A court that heals" (2014) 25 Matters of Substance 6 at 11.
[162] Katey Thom and Stella Black *Ngā whenu raranga/Weaving strands: #2 The processes of Te Whare Whakapiki Wairua/The Alcohol and Other Drug Treatment Court* (2 2017) at 13. However, note that this RoC*RoI score is not required where the defendant is charged with their third aggravated drink driving offence.
[163] At 16.

Therefore, the Court takes proportionality into consideration only as a limiting factor as to which participants it will accept – not the imposition of the programme itself. The perspective of proportionality as a range is open to the fundamental objection, according to von Hirsch, that this range is often so broad that offenders who have committed similar offences are subject to vastly different levels of punishment, while still remaining within the bounds of what is considered a proportionate range.[164] In the context of the AODT Court, the objection is in the alternative – that participants have committed a considerable range of offences, but are subjected to a "one-size-fits-all" response from the Court – a programme of intensive treatment. This does not leave room for a fair, proportionate response to the original offending in the application of the treatment programme: it requires that participants undertake and complete treatment or risk being sentenced to imprisonment.

3. Why the treatment programme should still observe proportionality

The structure of the AODT Court means that the treatment programme is not part of an offender's sentence – the opportunity for treatment arises upon guilty plea, and sentencing occurs after graduation from treatment. Therefore, the Sentencing Act requirement to apply sentences that are proportionate to the offending does not specifically apply to placement in a treatment programme. However, considerations of proportionality are relevant and necessary when treatment is enforced by the court because it can be punitive and intrusive.

A handful of specialist court critics state that initiatives such as the AODT Court fail to observe the principle of proportionality because the process is "less overtly punitive" than imprisonment would be.[165] However, the overwhelmingly frequent claim is that the AODT Court may have a disproportionately *harsh* impact on participants. This proposition does not come naturally based on a common conception of what a treatment programme might look like, especially in comparison to a sentence of imprisonment. However, partly due to the outright absence of any proportionality requirement, and partly due to the ultimate goal being at least six consecutive months of absolute sobriety through demanding and frequent participant contribution, therapeutic approaches can be more constricting of liberty than imprisonment.[166]

Many offenders have "painful and unwelcome" experiences of treatment programmes, and they can reportedly be more intrusive and constricting of liberty than traditional punishment.[167] In fact, some offenders state they would prefer imprisonment as it would be less onerous.[168] "For

[164] Andrew von Hirsch "Proportionality in the Philosophy of Punishment" (1992) 16 Crime and Justice 55 at 75–76.
[165] Lunt, above n 77, at 45.
[166] Miller, above n 51, at 1551.
[167] Zedner, above n 64, at 96–97.
[168] Stacy Lee Burns and Mark Peyrot "Reclaiming Discretion: Judicial Sanctioning Strategy in Court-Supervised Drug Treatment" (2008) 37 Journal of Contemporary Ethnography 720 at 720.

some defendants, the amount of time and effort involved in going through and completing court-supervised treatment is just not worth it."[169] Miller attributes this to the fact that there is no inherent limitation to what the court will impose in therapeutic justice programmes.[170] This can be contrasted to the various mechanisms that limit the imposition of disproportionate sentences in the traditional justice system, such as the principles in section 8 of the Sentencing Act and guideline judgments.[171]

von Hirsch and Ashworth analyse punishment seriousness based on the degree to which a given punishment or sanction intrudes on the interests of the offender, such as freedom of movement, choice regarding activities and associates and privacy. "The more important the interests intruded upon by a penalty are, on this theory, the severer it is."[172] von Hirsch also states that how onerous a punishment is will be relevant to this question of severity.[173] One way drug treatment courts are recognised to be potentially disproportionate is in their enforcement of "lengthy and intensive restrictions of liberty".[174] The following explains how the AODT Court programme is both intense and lengthy, providing an argument that it may be disproportionately harsh on some participants.

4. Intensity of participation

One relevant aspect of most drug treatment courts, as is common to many "lifestyle correction or holistic disciplining" regimes, is the intense and extensive degree of control it holds over participants' lives.[175] In the absence of traditional, more discernible forms of punishment, discipline and intervention is dispersed throughout participants' lives.

The AODT Court, like other drug treatment courts, compels attendance at treatment, drug tests, court hearings and community work, while requiring a barrage of reports and observations on participants. Fischer refers to this mechanism as a "comprehensive and pervasive system of behaviour surveillance and correction… to secure compliance and conformity".[176]

Indicators of intensity can include how often drug testing, court appearances and treatment meetings take place, as well as the overall length of time a participant must be in treatment and

[169] At 738.
[170] Miller, above n 51, at 1551.
[171] Julian V Roberts "Sentencing Reform in New Zealand: An Analysis of the Sentencing Act 2002" (2003) 36 ANZJ Crim 249 at 258.
[172] Andrew Von Hirsch and Andrew Ashworth *Proportionate sentencing* (Oxford University Press, Oxford: New York, 2005) at 147.
[173] von Hirsch, above n 164, at 80.
[174] Walgrave, above n 158, at 547.
[175] Fischer, above n 16, at 237.
[176] At 237.

abstinent from drugs before graduating from the programme.[177] There can be more supervision, treatment requirements and mandatory testing involved in the AODT Court than would be expected of an offender in prison.[178] While it is fair to say that imprisonment imposes many conditions that may be more intrusive, such as the loss of liberty and constant supervision, drug treatment court advocates have asserted that drug treatment courts are "more intense, more difficult to complete, more onerous and far more intrusive on liberty than a term of imprisonment." [179] The AODT Court requires at least five random urine tests a fortnight, to ensure no more than four days between tests.[180] This frequency can be increased as a sanction at any point in the programme.[181] Without an increase in frequency, this adds up to over 130 mandatory drug tests in a twelve-month period. Court appearances decrease in frequency throughout the programme, but in phase one, which takes on average 236 days (7.8 months) to complete, participants must attend a court hearing once every two weeks.[182] This adds up to nearly 17 court hearings for the first phase of the programme alone.

After being praised for choosing to avoid the harsh penalty of imprisonment, participants are subject to court-imposed sanctions for up to 18 months.[183] Many drug treatment courts use revocation of bail – temporary imprisonment packaged as a 'motivational sanction' – to punish non-compliance. The repeated use of this sanction can lead to some drug treatment court participants experiencing "more jail . . . than he or she would have, had the case been adjudicated in the normal fashion".[184] The AODT Court imposing remand to custody makes up 14 per cent of all sanctions across the two courts. This is a highly punitive measure to be employed before participants have been sentenced for their charges. Section 25(1)(d) of the Sentencing Act permits the operation of the AODT Court in adjournment between conviction and sentencing in order "to enable a rehabilitation programme or course of action to be undertaken".[185] The legislation does not provide for adjournment in order to impose short episodes of imprisonment. The only authority to impose imprisonment, then, must be found in the Bail Act, which allows a judge to impose bail on an offender pending sentencing.[186] By using the Bail Act as an avenue for AODT Court participants to enter treatment, judges can be said to be "innovatively interpreting" the legislation.[187] This is similar to many other drug

[177] Douglas Longshore and others "Drug Courts: A Conceptual Framework" (2001) 31 Journal of Drug Issues 7 at 15.
[178] Fischer, above n 16, at 238.
[179] At 238.
[180] LITMUS, above n 15, at 86.
[181] Thom and Black, above n 7, at 22.
[182] LITMUS, above n 15, at 49.
[183] Anida L Chiodo "Sentencing Drug-Addicted Offenders and the Toronto Drug Court" (2001) 45 Crim LQ 53 at 86.
[184] Fischer, above n 16, at 238.
[185] Sentencing Act 2002, s 25(e)
[186] Bail Act 2000
[187] Paula Maurutto and Kelly Hannah-Moffat "Shifting and targeted forms of penal governance: Bail, punishment and specialized courts" (2012) 16 Theoretical Criminology 201 at 203.

treatment court processes, wherein bail conditions are used to "manage risk, compel treatment and require that offenders use and report to community agencies".[188]

However, there are warning signs that the Bail Act is being mis-used in the AODT Court. It provides discretion for the Court to legally enforce a wide range of intense conditions on participants by threat of potential imprisonment. For example, the AODT Court effectively imposes conditions that require participants to be honest with the Court, to report any drug use, and to sign waivers of lawyer-client confidentiality, which are out of the scope of normal conditions imposed under the Bail Act. Courts of New Zealand stated that common bail conditions include curfews, bans on alcohol consumption, and not moving the place of residence without the court's approval. Electronically Monitored (EM) bail is referred to as a "restrictive form of bail".[189] EM bail restricts the subject to remaining at their place of residence but can allow leave for approved purposes, such as employment. In comparison, some AODT Court participants are forced to leave their employment because of the substantial treatment requirements.[190] Meanwhile, they are subject to conditions that include random drug tests multiple times a week and attendance at court hearings every fortnight for over seven months.[191]

This shows that the invasive requirements of the AODT Court are not merely used to encourage compliance – they are enforced by the legitimate threat of revocation of bail. This clearly illustrates the power of the Court over participants, and confirms that the treatment programme is an example of state sanctioned punishment.

It is also important to recognise that the intense requirements of the treatment programme do not cease immediately on graduation. The subsequent sentence of intensive supervision – which is often imposed on AODT Court graduates for twelve months – maintains state control in participants' lives. The sentence involves weekly meetings with a probation officer for the first three months, reducing in frequency to fortnightly and then monthly. Other conditions include abstinence from drugs and alcohol, required disclosure of drug use to a probation officer, and continued participation in treatment.[192] Essentially, it is a continuation of the AODT Court programme, decreasing over time.

There is an argument, then, that subjecting participants to such stringent and intense conditions in their treatment and subsequent sentence could be a disproportionately harsh response to their charges.

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[188] At 207.
[189] Courts of New Zealand "Bail decisions" < courtsofnz.govt.nz/about-the-judiciary/how-decisions-are-made/bail>
[190] LITMUS, above n 15, at 33.
[191] At 49, 86.
[192] At 101.

5. *Length of intrusion upon liberty*

Another factor that inevitably relates to the severity of a sentence is how long it is imposed for. The Ministry of Justice has recognised that people engaged in the criminal justice system are often at their most vulnerable, and that ensuring that people spend as little time in the system as possible is one way to help them through the process.[193] Additionally, the longer a person is subject to state control, the longer their individual liberty will be infringed upon. This is only justifiable if it is considered proportionate to the gravity of their offending.

The fact that the AODT Court is based on rehabilitative goals has an important implication on the length of time it takes. Where the goal is treatment, "there is no upper limit on the time spent in an institution to effect a cure".[194] The AODT Court has been operating at an unexpectedly slow rate of case disposition compared to the international drug court practice it is modelled on. The average time it takes for a participant to graduate is 18 months, while evidence suggests that the optimum time is somewhere *between* 12 and 18 months.[195] Only 56 per cent of AODT Court graduates finish before this 18-month mark.[196] American research has shown that drug treatment courts retain offenders in treatment considerably longer than most other correctional programmes.[197] As the AODT Court seems to be particularly slow-moving, it is likely that this is even more pronounced in New Zealand.

The AODT Court has potential to require participation in a programme that is significantly longer than what would otherwise be imposed through traditional sentencing alone. To be accepted into the AODT Court, a defendant's potential sentence of imprisonment for their charge/s cannot exceed three years.[198] Following graduation, participants are sentenced for their charges, usually to a lengthy community-based sentence of intensive supervision.[199] A sentence of intensive supervision is imposed where more stringent or longer-lasting conditions than those available through regular supervision are required. The offender must report to their probation officer more regularly and may be subject to treatment, training or further appearances at the court.[200]

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[193] Ministry of Justice *Annual Report: 1 July 2015 to 30 June 2016* (E.64, 2016) at 6
[194] Miller, above n 51, at 1551.
[195] LITMUS, above n 15, at 4; National Association of Drug Court Professionals, above n 123, at 42.
[196] LITMUS, above n 15, at 103: The time spent in the AODT Court until graduation ranged from 53 to 121 weeks. It was anticipated that the AODT Court programme would take between 52 and 78 weeks (12–18 months) to complete, or longer if warranted. 30 percent of graduated cases are taking between 80 and 99 weeks to complete and 14 percent are taking 100 weeks or more.
[197] Just Speak *Unlocking Prisons: How we can improve New Zealand's prison system* (2014) at 82.
[198] Welham, above n 161, at 11.
[199] LITMUS, above n 15, at 103.
[200] Just Speak, above n 197, at 28.

If an offender is facing a sentence of imprisonment of less than two years, they are released after half of this period, with no requirement for special conditions. An offender sentenced to two years or more is eligible for parole after serving only a third of their sentence, and is subject to standard parole conditions.[201] This means that an offender who is sentenced to 18 months' imprisonment will likely be released, subject to no conditions, after nine months. In fact, this sentence of imprisonment may even be substituted with a community-based sentence such as home detention for up to one year. If the same offender were to enter the AODT Court, they would take, on average, between 12 and 18 months to graduate. This would be followed by a sentence of intensive supervision, which is usually around 12 months for an AODT Court graduate but can be up to two years.[202]

This illustrates that AODT Court participants could be subject to state control for months, even years, longer than a sentence that would otherwise be imposed for the same charge. Due to a lack of public access to judgments or sentences from the AODT Court itself, this is an issue that cannot be further expanded on at present.[203] While time spent subject to state supervision is not in itself the primary indicator of the severity of a sentence, without further disclosure from the AODT Court, questions as to whether there ought to be proportionality concerns cannot be dispelled.

6. Making the AODT Court more proportionate

This discussion has illuminated a number of points. Proportionality is fundamental to any conception of justice, but can be difficult to integrate with rehabilitation. This may be why the AODT Court seems to apply proportionality as a limiting principle, whereby a range of offences are considered to be loosely aligned proportionately with the treatment programme. However, the AODT Court imposes treatment requirements which can fairly be described as punitive, along with sanctions which are punitive by definition, and enforces these by threat of imprisonment under the Bail Act. Furthermore, the intensity and length of the treatment programme are such that there may be legitimate concerns that the AODT Court may act in a disproportionately harsh manner.

As Ashworth and Redmayne point out, it is counter-intuitive to impose a rehabilitative programme for less than the full course in order to adjust the state response in the name of proportionality. However, they also recognise that rehabilitative programmes can impose considerable impositions in comparison to the seriousness of the offence, leaving "urgent questions of disproportionality to be addressed".[204]

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[201] At 30.
[202] LITMUS, above n 15, at 101.
[203] The author requested access to AODT Court judgments, but has not received them at the date of publication.
[204] Ashworth and Redmayne, above n 19, at 57.

It is worth considering whether the limits used to inform the AODT Court's boundaries of proportionality – the eligibility criteria – should be amended. Longshore and others agree that intensive drug treatment court programmes are likely to be more acceptable to participants who have been convicted of more serious offences, while other participants are likely to be averse to high-intensity programmes as compared to what might be a lighter traditional sanction.[205] As illustrated above, participants can spend a significantly longer period of time subject to intrusive state control under the AODT Court than they would in the traditional court system, an indicator that the outer limits of the eligibility criteria are too wide.

B. Judicial Discretion at the Cost of Consistency and Predictability?

One of the primary principles of justice is of consistency – that like cases should be treated alike.[206] This principle is endangered in situations where the judiciary holds wide-reaching discretion in decision-making. Simon explains that models of therapeutic justice tend to provide broad discretion that gives free reign to the decision-maker in contemplation of acting in the best interests of the subjects.[207] The nature of rehabilitative justice means that decision-makers have to exercise wide discretion to take an individual's circumstances into account. This, however, gives rehabilitative justice room to "impose disparate sentences on those convicted of like offences."[208]

1. The importance of consistency and predictability

Promoting consistency means that cases are less likely to be decided based on arbitrary considerations, and supports the application of common guidelines and standards. Guidelines have the capacity to make sentencing "more consistent, transparent and predictable… and make judges more accountable for their decisions about citizens' liberties".[209] There is an acknowledged association between unstructured discretion and unwarranted disparity in judicial decisions.[210] This illustrates what is probably common sense to most – that unbridled discretion can lead to inconsistency decision-making.

An example of the legal system upholding consistency is the development of guideline judgments. These derive from judicial decisions in appellate courts, whereby judges set out frameworks for future consideration of the issue, including sentence indications and the implications of relevant factors. Precedent set by guideline judgments is widely observed and

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[205] Longshore and others, above n 177, at 14.
[206] Sentencing Act 2002 s 8(e)
[207] Simon, above n 30, at 1597.
[208] Zedner, above n 64, at 98.
[209] Michael Tonry "Setting sentencing policy through guidelines" in Rex and Tonry (eds) *Reform and Punishment: The Future of Sentencing* (Willan Publishing, Devon, 2002) at 101.
[210] Geraldine MacKenzie "Achieving Consistency in Sentencing: Moving to Best Practice" (2002) 22 UQLJ 74 at 76.

applied by the lower courts, leading to greater coherence in sentencing.[211] There is a recognised link between consistency and the attainment of justice and public confidence. [212]

It is also in the AODT Court's interest to work under clear guidelines because otherwise delivery of key services can become "ineffective and ad hoc".[213] This has been seen in drug treatment courts in the United Kingdom, where inconsistent processes for drug testing, interventions, and enforcement practices undermined ultimate outcomes for participants.[214] Reaching a common understanding of expectations requires the communication of a consistent message throughout actors in the treatment team.[215] Research shows that with clear communication and subsequent implementation of consistent procedure, treatment outcomes were improved.[216]

Inconsistent procedures make it difficult for participants to understand what is expected of them, and to be able to predict how processes would play out. The benefits of sanctions being consistent and therefore predictable is reported by numerous academics: sanctions are more effective at enforcing compliance when participants can predict the process.[217] This includes more successful abstinence from drug use, and better compliance with other programme requirements.[218] In the drug treatment court context, predictability gives participants an idea of how the court is likely to respond to a transgression. Namely, what type of transgression will be met with a sanction, what type of sanction will be exercised, and the fact that the court will respond consistently in this manner.[219] Therefore, expectations of participants should be clear, court action should be consistent with these expectations, and sanctions should be swiftly and regularly applied.[220] Importantly, clear predictability can instil an awareness in participants that they have the power to avoid sanctions: without it, there is a risk of participants falling into "learned helplessness".[221]

In any legal process, transparency is important to encourage continuity in judgments, the development of precedent and the capacity for review. This is especially important for therapeutic justice initiatives which are still new and continuously progressing: this process

[211] Zedner, above n 64, at 176.
[212] MacKenzie, above n 210, at 75.
[213] Bull, above n 3, at 230.
[214] At 230.
[215] At 230.
[216] At 231.
[217] Christine H Lindquist, Christopher P Krebs and Pamela K Lattimore "Sanctions and Rewards in Drug Court Programs: Implementation, Perceived Efficacy, and Decision Making" (2006) 36 Journal of Drug Issues 119 at 121; Longshore and others, above n 177.
[218] Bull, above n 3, at 230.
[219] Lindquist, Krebs and Lattimore, above n 217, at 121; Longshore and others, above n 177, at 15.
[220] Douglas B Marlowe and Kimberly C Kirby "Effective use of sanctions in drug courts: Lessons from behavioral research" (1999) 2 National Drug Court Institute Review 1.
[221] Longshore and others, above n 177, at 16.

should occur openly and with full disclosure.[222] The AODT Court does not seem to be working such under a framework. There is no indication that judicial sanctioning guidelines even exist, meaning it is unlikely that precedent for applying sanctions in the AODT Court is developing through the usual channels. Additionally, there is no public access to AODT Court policy, sanctioning process or sentencing judgments. It is interesting to compare this environment of non-disclosure to the stated values of the Court and expectations on participants – "openness, honesty and transparency".[223]

2. *Judicial discretion in judicial application of sanctions*

It is important to consider how sanctions are imposed in the AODT Court as they provide the key punitive mechanism to force compliance in the AODT Court. It is easy to overlook sanctions as a punishment and consider them merely as a legitimate part of a drug treatment programme. However they are often just as invasive, challenging and restricting as any other state-sanctioned punishment.[224]

Internationally, drug treatment courts vary in how they apply sanctions: some consider contravention of programme requirements as more acceptable than others, and consequently some are quicker to exercise punitive sanctions than others.[225] It is unrealistic to attempt to standardize international application of sanctions across drug treatment courts, but it would be a positive step to consider how the AODT Court might regulate the process to ensure that participants are sanctioned in a consistent and predictable manner.

There is concern that the sanctions exercised in the AODT Court have inconsistent application.[226] Both within each Court, and between the Auckland and Waitakere Courts, there is reported variation in the rate of exits, which could reflect inconsistent decision-making.[227] Importantly, there is no information on judicial guidelines for imposing sanctions, meaning this system may be entirely based on judicial discretion in each individual case.

3. *Inconsistent and unpredictable sanctions in the AODT Court*

The decision-making process undertaken by the judge is considerably under-researched in this context. Drug courts tend to emphasise that decisions in regards to sanctions are made collaboratively by the whole team, but there is little information as to how this process works in practice.[228] The available information points to the conclusion that drug treatment court

[222] Simon, above n 30, at 1597.
[223] LITMUS, above n 15, at 58.
[224] Lindquist, Krebs and Lattimore, above n 217, at 119.
[225] Longshore and others, above n 177, at 8.
[226] LITMUS, above n 15, at 97–99.
[227] At 99.
[228] Lindquist, Krebs and Lattimore, above n 217, at 122.

judges generally hold very wide discretion in utilizing sanctions, regardless of the stated team approach.[229] One of the factors judges consider in deciding whether to impose a sanction is "how best to ensure there are opportunities for learning", which judges refer to as finding a 'teachable moment'.[230] Another reported consideration is how the sanction will motivate participants.[231] The ambiguous nature of factors such as these provide judges with wide discretion to impose sanctions as they see fit. This is bolstered by the nature of the court: therapeutic justice encourages individualised justice and treatment being in the best interests of participants. This environment is likely to have an adverse effect on the consistency of decisions made in the AODT Court.

Court records can be valuable indicators of consistency. Longshore and others use the example of a court's response to a participant's first positive drug test: a court which shows less variation between responses to this type of transgression is said to be both more consistent and predictable.[232] The fact that the AODT Court does not make judgments or individual case information publicly available proves problematic. However, the records that are available make it possible to consider whether judges in the operating AODT Courts seem to exercise their discretion in similar, and therefore potentially consistent, ways. The frequency of sanctions used varies between the courts, which may reflect differences in judicial practice.[233] For example, one third of the sanctions in the Waitakere AODT Court came in the form of a verbal reprimand from the judge, while verbal reprimands only made up 13 per cent of sanctions in the Auckland Court. The judge in the Auckland Court imposed "additional volunteer work" as a sanction 12 per cent of the time: this made up 0 per cent of sanctions in the Waitakere Court.[234] One stakeholder perceived a significant difference in exercise of sanctions between the Auckland and Waitakere Courts, noticing that:[235]

> a positive drug test may receive a sanction of a weekend in prison in one court, while in the other a participant may receive applause for being honest.

While this information does not shed light on the predictability of sanction use *within* each court, it casts doubt as to whether there is any consistency in the application of sanctions *between* the courts. Participants being treated differently based on their location would be an affront to the statutory and principled requirement for like cases to be treated alike in the criminal justice system. There is evidently a need for the AODT Court to clarify its exercise of judicial discretion.

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[229] At 142.
[230] LITMUS, above n 27, at 57.
[231] Thom and Black, above n 14, at 27.
[232] Longshore and others, above n 177, at 16.
[233] LITMUS, above n 15, at 53.
[234] At 57.
[235] LITMUS, above n 27, at 66.

4. Can sanctions be standardised while retaining flexibility?

This discussion illustrates that there is value to be gained from making the use of sanctions more consistent and therefore predictable. One mechanism for achieving this is to standardise the use of sanctions by providing guidelines as to how they should ideally be used. Initial research shows that a number of drug treatment court actors would object to standardization, on the basis that it would be detrimental to flexibility that is currently enjoyed, especially by judges.[236] Emphasis is placed on the need to tailor sanctions to individual participants.[237] These concerns are understandable: it is desirable to retain discretion in order to address individual needs as they arise. However, it is worth considering whether guidelines could be applied while retaining an element of flexibility. As Mackenzie distinguishes, methods that guide discretion that serve to structure discretion rather than restrict it have an important part to play in the system.[238] This would ensure that the Court could reap the benefits of predictability of sanctions, while not entirely giving up the team's discretion.

(a) California's Proposition 36

One model to consider is California's Proposition 36, which diverts offenders from a sentence of imprisonment to a drug treatment programme. Since this initiative is contained in statute, there are more particular guidelines in place than in drug treatment courts established by judicial innovation alone.[239] However, through statute interpretation and application, judges retain significant discretion.[240]

The biggest change that standardisation has made is the constraint on what is referred to as "shock incarceration". As in the AODT Court, judges in Californian drug treatment courts before Proposition 36 could revoke bail as a "last resort" sanction.[241] Interestingly, judges considered this judicial response as a motivating "wake-up call" to facilitate rehabilitation, rather than a punishment.[242] Another key guideline provides that a defendant should only be dismissed from the programme after three violations, or 'strikes', and specifies factors to be considered in a decision to exit a participant, such as whether the participant has refused to participate, repeatedly violated rules, or inhibited the functioning of the programme.[243] However, flexibility remains as to what is classified as a violation, and how much weight different factors should be given.[244]

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[236] Lindquist, Krebs and Lattimore, above n 217, at 142.
[237] At 119.
[238] MacKenzie, above n 210, at 90.
[239] Drug Court Act 1998 (NSW).
[240] Burns and Peyrot, above n 168, at 739.
[241] At 732.
[242] At 732.
[243] At 734.
[244] At 726.

While Prop 36 provides an interesting development in the drug treatment court narrative, there is speculation that this standardization does not adequately foster predictability and consistency in judicial decision-making. Judges still retain sufficient discretion to employ sanctions in a creative way that does not align with how the statute was intended to operate. For example, the criteria requires "continuous and repeated violations" and a consideration of a number of factors before a judge can hold that a defendant should be terminated from the programme. However, judges reportedly use discretion at an early stage in the process to declare that a defendant is "unamenable" to treatment based on a failure to turn up just once, at an initial assessment or treatment.[245]

(b) New South Wales' drug treatment court guidelines

Another jurisdiction of note in this context is New South Wales. With recognition that "certain, consistent and swift" imposition makes sanctions most effective, the drug treatment court team developed guideline sanctions.[246] On entry, participants receive these guidelines which outline categories of transgressions that may be met with particular types of sanctions, the severity of which depends on the nature of the breach and the participant's subsequent action.[247] For example, one category, 'Attending Drug Court' lists a number of different levels of non-attendance and provides a specific 'guideline sanction' for each degree of infringement.[248]

Clearly judicial discretion cannot be eliminated from the courts: rules must remain somewhat flexible in order to be applicable to individual cases, and judges will continue to use this flexibility to import their own considerations of justice into each case. However, the AODT Court could minimise inconsistent and unpredictable sanctioning by utilising a set of guidelines similar to those in California and New South Wales.

The AODT Court has failed to substantively apply sentencing principles that are valuable and important in their own right. Both consistency and proportionality are fundamental to most conceptions of justice. They are integral to ensuring that those subject to the criminal justice system are afforded transparent, predictable and principled judgment. It is understandably challenging to incorporate these into a process which doesn't see itself as punitive. However, it is unavoidable that sentencing principles need to be more thoughtfully considered where participants are subject to judgment that carries punitive consequences, enforced by threat of imprisonment.

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[245] At 734.
[246] Bull, above n 3, at 230.
[247] Stephanie Taplin *The New South Wales Drug Court evaluation* (New South Wales Bureau of Crime Statistics & Research, 2002) at 20.
[248] Drug Court of New South Wales *Policy 4: Sanctions and Rewards* (2016) at 4. <http://www.drugcourt.justice.nsw.gov.au/Pages/dc_publications/dc_pub_policydocs.aspx>

V. Conclusion

It is understandable that there is a push for development of alternative methods to pursue justice. However, it is paramount to ensure that initiatives introduced into the criminal justice system are examined in depth, with careful consideration of how people implicated in the system are affected.[249] This is where the literature has thus far fallen short. An extensive conversation has stemmed from the development of the drug treatment court model, primarily focussed on the therapeutic and psychological impacts.[250] Meanwhile, substantial concerns for the vulnerability of participants are overlooked.

This dissertation has discussed a number of concerns that are raised when considering the ramifications of the AODT Court from a legal process perspective. These are generally due to the non-adversarial and highly discretionary nature of the Court. In particular, the AODT Court has embraced a non-adversarial framework without substantive consideration of the implications on participants. This has led to the loss of a number of fundamental values which are ordinarily upheld for the protection of often vulnerable defendants in the criminal justice system.

The collaborative team approach followed by the AODT Court creates conflicting interests and goals, and generates ethical challenges that interfere with the development of the lawyer-client relationship. Chapter one considers the future of the drug treatment court lawyer, concluding that while some problems could be addressed by relatively minor changes of procedure, a more desirable approach would be to remove the lawyer from the treatment team and allow them to independently represent the participant. Considering the lawyer's role in the AODT Court at current could be cautiously labelled as nominal anyway, it is unlikely that this would prove to be a loss for the treatment team. Instead, it would allow participants more substantial exercise of their rights with a dedicated, zealous advocate.

The due process concerns presented by the AODT Court, while being significant legal process issues, do not seem overly complex to resolve. Chapter two recommends an alternative process of entry whereby a guilty plea is not requisite factor: instead, a mere guilty *conviction* will suffice. This would avoid the problematic environment of a coerced guilty plea and allow defendants to exercise their full range of trial rights. Another procedural change suggested is allowing participants to enter the pre-court meeting where evidence is to be discussed about their case. This change, along with the requirement that sanctioning decisions are made in the court hearing after discussion with the participant, rather than in a closed meeting, would go a long way towards upholding the value of open justice. Finally, the question of appeal rights implores attention within the context of the New Zealand Bill of Rights Act right to appeal on

[249] Fischer, above n 16, at 231.
[250] Quinn, above n 17, at 38.

decisions of sentence.[251] There seems to be no justification to deny the appeal of these decisions.

The sentencing of AODT Court participants – including application of sanctions – is highly discretionary, and does not appropriately incorporate proportionality and consistency into judgment, despite these principles being considered fundamental to the notion of justice. Practical solutions include the narrowing of the eligibility criteria to better reflect the severity of the treatment programme and the development of judicial guidelines to promote consistency and predictability.

The central importance of this dissertation lies in the fact that it is an initial, and perhaps the first, exploration of the legal implications of the AODT Court on participants. It comes at the perfect time for policy-makers and legal commentators to consider the future of the AODT Court pilot in New Zealand.[252] Importantly, how the Court proceeds will have a great impact on a significant number of defendants implicated in the criminal justice system. Whether or not their legal rights will be protected is up for debate.

[251] New Zealand Bill of Rights Act 1990, s 25(h)
[252] The future of the AODT Court pilot will be decided in 2019, when the Ministry of Justice will consider whether or not to roll out the programme nationally.

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