

# Model Criminal Justice Treatment Act

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# Model Criminal Justice Treatment Act

## Policy Statement

The Drug Use Forecasting System and other studies reveal that most drug and non-drug crimes are committed by persons who are under the influence of alcohol and illicit drugs. Drug abusing and addicted offenders thus account for a significant percentage of all crimes committed throughout the United States.

Substance abuse and addiction is related to crime rates in a number of ways. Many property offenses, for example, are committed by persons who need to raise money to support their drug habit. Substance abuse can also induce or accelerate criminal behavior. Persons who crave or are under the influence of a mind or mood altering drug, for example, may be unable to empathize with a potential victim, and at least certain drugs reduce an offender's inhibitions and actually seem to stimulate violence.

Moreover, a person under the influence of an intoxicating substance is typically much less able or willing to anticipate future consequences. This, in turn, undermines the concept of general deterrence — the notion that criminal behavior can be discouraged by threatening the swift, certain imposition of some form of punishment.

A comprehensive, systemwide effort to identify and to treat alcohol and other drug abuse and addiction will reduce both violent and property-related crime. Enhancing the ability of the criminal justice system to provide meaningful treatment opportunities is an effective crime prevention strategy.

Recent empirical studies confirm that drug treatment works for offenders who are compelled to engage the treatment process as a condition of pretrial release, sentence, probation or parole. It simply makes sense to use the criminal justice system to constructively induce substance abusing and addicted offenders to accept help and to enter and to stay in treatment for as long as necessary to deal effectively with their drug problem.

Because of the nature of addiction, few drug abusing or addicted persons “volunteer” for treatment on their own initiative. Typically, the decision to undergo treatment and to engage the rehabilitative process is a result of pressure or coercion brought to bear by others, including family members, friends, employers, school officials, medical and health care professionals or by the criminal justice system, including law enforcement and prosecuting agencies and court. State legislatures must recognize that in many if not most criminal cases, the necessary coercion will have to come from courts and law enforcement agencies, precisely because addicts are often in denial and may perceive little incentive to initiate the difficult rehabilitative process.

Arrests can serve as critical opportunities for intervention. This can only occur, however, when the criminal justice system has in place realistic policies, procedures and resources to identify sub-

stance abusing and addicted offenders and to motivate these offenders to overcome their denial, to accept help and engage the treatment process.

The Model Criminal Justice Treatment Act attempts to marshal and unify all of the resources and legal tools available within the criminal and juvenile justice systems so as to make the best possible use of these resources in reducing the incidence of substance abuse and addiction, and thereby reducing the incidence of crime. These important resources upon which the Model Act relies include individuals in recovery from alcohol and other drug abuse and addiction. Input from this population is explicitly provided for in sections on reporting and implementation, and training for criminal justice and juvenile justice professionals. The Model Act embraces the following general principles, which should be adopted in one form or another in every criminal justice system throughout the nation:

#### **EARLIEST POSSIBLE INTERVENTION**

In order for treatment to be as effective as possible, identification and intervention resources should be provided to substance abusing and addicted offenders at the earliest possible opportunity within the criminal justice process. Accordingly, the decision to require an offender to undergo some meaningful form of treatment should not wait for a final conviction or adjudication. Rather, diagnostic assessments and treatment services should be provided as soon as possible following the arrest, and should continue throughout the dispositional process.

#### **UNIVERSAL DRUG TESTING**

Each jurisdiction should establish a comprehensive program for testing all persons who enter the criminal justice or juvenile justice systems as soon as possible following a felony arrest. Such testing should be done in a safe and reliable manner designed to produce accurate results which can then be used to determine whether and to what extent further diagnostic assessment is necessary to determine the offender's need for alcohol or drug treatment services.

#### **COMPREHENSIVE DIAGNOSTIC ASSESSMENTS**

Although drug testing remains a useful if not indispensable tool in identifying offenders in need of alcohol and other drug treatment services, courts and other actors within the criminal justice system should not rely entirely on drug test results. For one thing, such tests cannot reliably reveal whether the defendant is drug dependent. Each jurisdiction must therefore establish a comprehensive program for providing a professional alcohol and other drug diagnostic assessment of selected defendants to determine the scope and nature of their substance abuse or addiction problem. It is critical to note that not all substance abusing offenders are drug dependent. Some drug profiteers, for example, are motivated by greed, rather than an addiction to alcohol or illicit drugs. It is therefore essential to establish a system by which to reliably distinguish on a case-by-case basis those offenders who are profiteers, and those who are truly drug dependent and who might benefit from participation in an alcohol and other drug treatment program.

### **MATCHING INDIVIDUAL TREATMENT NEEDS TO AVAILABLE PROGRAMS**

As part of the diagnostic assessment process, each jurisdiction should establish a system by which to ensure that defendants in need of some form of alcohol and other drug treatment are placed in an appropriate licensed program to ensure the most appropriate use of available resources. To accomplish this, the program conducting the individual diagnostic assessment should make specific recommendations to the court or other appropriate dispositional authority concerning the type of treatment program and length of stay which is both necessary and available to address the offender's individualized needs. These assessments and resulting recommendations should be based upon objective medical diagnostic criteria established by some appropriate authority, such as the single state authority on alcohol and other drugs.

### **ENSURING THAT LEGAL DECISIONS ARE BASED ON OBJECTIVE, PROFESSIONAL RECOMMENDATIONS**

Although the decision to order a defendant to participate in some form of licensed treatment program is ultimately a legal one to be decided by a court or other appropriate agency, such as a parole board, such decisions should be based upon the specific recommendations of licensed alcohol and other drug treatment and diagnostic programs. In other words, while courts should never abdicate the responsibility to impose an appropriate sentence or disposition, they should defer or at least accord considerable weight to the recommendations of licensed professionals. Accordingly, a statutory "presumption" should be established whereby the court or parole authority should ordinarily rely upon and follow the case-specific recommendations of the program which conducted the individual diagnostic assessment. Where the court or other authority for any reason elects to disregard or depart from the specific recommendations of the assessment program, the court or parole authority should be required to state the reasons for its decision on the record. Moreover, copies of these statements of reasons should be compiled and provided to some appropriate government authority, such as the single state authority on alcohol and other drugs, to enable it to determine the extent to which courts and parole authorities throughout the jurisdiction are following the recommendations of treatment professionals.

### **HOLDING DEFENDANTS ACCOUNTABLE**

For the criminal justice system to maintain credibility, all drug abusing or addicted offenders must be held accountable for their past and future actions. Offenders ordered to undergo alcohol and other drug treatment should be subject to careful monitoring, which should include but not be limited to periodic drug testing. These defendants should be subject to realistic, escalating sanctions which would be imposed in the event of a violation of any term or condition of the treatment program. The consequences for violations should be both realistic and predictable, to deter such violations. In developing a realistic continuum of sanctions, policymakers must recognize that an occasional relapse is often part of the difficult recovery process. Such sanctions might include, but need not be limited to, withholding privileges, requiring defendants to submit to more intensive or frequent monitoring and supervision requirements, or returning the person to a traditional form of incarceration.

### **DEFINING ROLES AND RESPONSIBILITIES**

The roles and responsibilities of all of the professional actors within the criminal justice system must be carefully defined. It is important, for example, to distinguish the function of monitoring an offender's compliance with court-ordered terms and conditions on the one hand, from the responsibility actually to provide treatment services on the other hand. Similarly, it is important, to the extent possible, to distinguish the function of providing a professional diagnostic assessment or evaluation from the function of providing treatment services. Where the availability of licensed programs allows, the treatment and assessment services should be provided by different programs. This helps avoid potential conflicts of interest and the appearance that a given diagnostic assessment program might profit by determining that an offender is in need of the particular form of treatment that the assessor happens to provide.

However, the Commission recognizes that in many areas, the number of qualified, licensed programs is limited. It may therefore be necessary for the same program to undertake both the assessment and treatment functions. In such instances the single state authority on alcohol and other drugs should implement necessary monitoring procedures.

### **TREATMENT SERVICES PROVIDED BY LICENSED PROGRAMS**

All diagnostic assessment and treatment services should be provided by programs which are licensed by the appropriate authority outside the traditional criminal justice or correctional system, namely, the single state authority on alcohol and other drugs. This should be done with respect to services provided to defendants awaiting trial or final disposition of the charges, those who are sentenced to any form of probation, those who are under parole or post-incarceration supervision, and even those who are serving a term of imprisonment in a traditional correctional facility. Where necessary, government agencies should enter into contracts with licensed professional programs to refer clients or provide in-house services. This is necessary to ensure that all treatment services meet current medical and therapeutic standards and to ensure that limited fiscal resources are at all time used to obtain the most effective services. This approach would not preclude and would actually make it easier for a defendant management agency (such as probation or parole agency or TASC program) to supervise each defendant's progress or lack thereof and to "broker" available services, that is, to make certain that each defendant is linked up with an appropriate treatment program.

### **EMPOWERING TREATMENT PROGRAMS TO EXERCISE APPROPRIATE CONTROL**

In order for defendants to take alcohol and other drug treatment programs seriously, they must understand that the recommendations of treatment programs will carry great weight with courts, parole authorities and defendant management agencies. Legislation should also make clear that treatment programs will be supported by the criminal justice system in holding offenders accountable for rule infractions, and that these programs are free to expel offenders who fail to satisfactorily engage the treatment process or who threaten to disrupt the operations of the treatment program.

### **MANDATORY TREATMENT**

Legislation should make clear that once an offender has been diagnosed with the disease of alcohol or drug abuse or addiction, the court or appropriate parole authority should, in the absence of special circumstances, be required to order the offender to participate in some appropriate licensed treatment program. As a general proposition, no offender diagnosed as drug or alcohol dependent should be permitted to exit the criminal justice system until he or she has undergone an appropriate form of treatment. The decision whether that treatment is to be provided in prison or elsewhere should be made by the courts based not only upon traditional sentencing criteria, but also upon the professional diagnostic assessment of each offender and the specific recommendations of the assessment program. The addict in denial should be given few choices. If, for example, he or she is unwilling to accept treatment and rigorous monitoring instead of imprisonment, then the court should oblige him or her by providing that treatment during a term of incarceration. Where the substance abusing or addicted offender refuses to engage the treatment process during a term of incarceration, he or she should remain ineligible for parole, early release or any other benefits afforded prisoners in good standing until he or she has made satisfactory progress in the treatment program. Under such a comprehensive statutory scheme, in other words, the offender should not have the option of choosing “passive” or “idle” incarceration in lieu of the rigors of a meaningful treatment program. In this way, the criminal justice system can be used constructively to motivate offenders to positively accept treatment and to engage the treatment process.

### **AFTERCARE AND SUPPORT SERVICES**

It is an axiomatic that persons who are addicted to alcohol and other drugs who engage in the treatment process will face a lifelong struggle to remain substance free. That is why treatment professionals refer to persons who are “recovering,” rather than to persons who have “recovered.” While it is appropriate and necessary to require substance abusing or addicted defendants to undergo treatment during a term of confinement which may be imposed as part of the dispositional process, it is no less essential to provide persons diagnosed pursuant to this Act as drug or alcohol dependent with adequate aftercare and support services upon their release into the community following a term of court-ordered residential treatment or incarceration. Accordingly, this Act is designed to require such services, supervision and monitoring as a continuing condition of probation or parole following release.

### **PROGRAMMATIC EVALUATION**

A rational statutory scheme would make certain not only that individual offenders are carefully monitored and held fully accountable for their actions, but also that treatment programs are held accountable and are subject to rigorous empirical evaluation. Such objective, outside monitoring and evaluation is necessary to ensure the credibility of the entire system, to educate the public that treatment works with respect to the offender population and to develop further information about effective approaches to treatment. In conducting a thorough evaluation, treatment programs and defendant management and monitoring agencies should be required to maintain accurate data and statistics. Moreover, in developing an appropriate research methodology, evaluators should use sufficiently sophisticated and sensitive measures of short and long-term impact, such as the number of substance-free and crime-free days while under supervision, relative decreases in the

amount of substances abused, the relative time to re-arrest, the number of days engaged in gainful employment, vocational or educational programs and other information concerning the long-term effect of court-ordered interventions.

**DETERMINING SYSTEM-WIDE RESOURCE NEEDS AND EDUCATING INDIVIDUALS  
WORKING IN THE CRIMINAL JUSTICE SYSTEM**

In most jurisdictions, those working within the criminal justice system complain, with justification, that there are inadequate resources dedicated to provide treatment services. However, all too often, these individuals may not be aware of all that they can do to take full advantage of those resources which do exist. Accordingly, an education program should be established for courts, probation and parole departments, prosecutors, defense attorneys and other individuals within the criminal justice system so that they have at least a rudimentary understanding of the different methods and modalities for assessing and treating alcohol and other drug abuse and for taking full advantage of those public and private resources and programs which are available within the jurisdiction. Moreover, the single state authority on alcohol and other drugs can play a key role in monitoring the use of the rehabilitative provisions of the Model Criminal Justice Treatment Act to make certain that available resources are used in the most appropriate manner.

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# Highlights of the Model Criminal Justice Treatment Act

## GOALS

- To reduce violent and property-related crime by creating a systemwide effort to identify and treat alcohol and other drug abusing and addicted offenders.
- To use the criminal justice system to constructively motivate substance abusing and addicted offenders to enter and stay in treatment for the necessary duration to deal effectively with their alcohol and other drug abuse problem.
- To develop a criminal justice system which embraces the following principles:
  - (1) early intervention for more effective treatment;
  - (2) universal drug testing;
  - (3) comprehensive diagnostic assessments to determine treatment needs;
  - (4) matching individual treatment needs to available programs;
  - (5) mandatory treatment for offenders diagnosed with a substance abuse problem or addiction;
  - (6) reliance on licensed assessment and treatment programs to provide services which meet current medical and therapeutic standards;
  - (7) clearly defined roles for programs providing assessment and treatment services;
  - (8) holding offenders accountable for their criminal actions;
  - (9) support for treatment programs by holding offenders accountable for program rule violations;
  - (10) empowerment of treatment programs through the right to discharge offenders who fail to constructively engage in the treatment process or are disruptive;

- (11) adequate aftercare services for offenders who are released into the community;
- (12) programmatic evaluation to ensure program accountability and improvement; and
- (13) education of criminal justice professionals about alcohol and other drug abuse and available resources and programs.

## DRUG TESTING

- Requires mandatory drug testing of individuals arrested for felonies and specified misdemeanors to assist in identifying persons with substance abuse problems.
- Requires a defendant management and monitoring agency to conduct the drug testing. e.g., pretrial services agency, Treatment Alternatives to Street Crime (TASC) program.
- Requires drug testing to be a condition of pretrial release, probation, or parole or similar release from a correctional facility.

## ASSESSMENTS

- Requires designated arrestees to undergo an assessment to determine whether the person is drug or alcohol dependent, or otherwise in need of substance abuse or addiction treatment. An assessment is mandatory if:
  - (1) the person refuses to undergo a drug test;
  - (2) the drug test results reveal the unlawful presence of a controlled substance or the abuse of alcohol;
  - (3) the person requests an assessment or admits to unlawful use of a controlled substance or alcohol abuse in the year preceding the arrest;

- (4) the present or a pending charge involves illegal drugs or driving under the influence of alcohol or other drugs; or
- (5) the person has within the last five years had a conviction involving illegal drugs or driving under the influence of alcohol or other drugs, or been granted a conditional discharge, or been sentenced to treatment during incarceration.
- Requires a court to also order an assessment if the court for any reason believes the person is drug or alcohol dependent or would otherwise benefit from an assessment.
- Requires an inmate, under specified circumstances, to undergo an assessment before receiving a grant of parole or other release from a correctional facility.
- Requires an assessment program providing services under the Model Act to be licensed by the single state authority on alcohol and other drugs.
- Requires an assessment to be a condition of pretrial release or probation.

#### **USE OF DRUG TEST RESULTS OR ASSESSMENTS**

- Provides drug test results or assessments to the court, prosecutor, person who underwent the test or assessment, appropriate parole authority, and assessment and treatment programs.
- Allows limited use of the test results or assessment, including determining a person's suitability for conditional discharge, the conditions of pre-trial release, the appropriate sentence, or the conditions of parole or other similar release from a correctional facility.
- Authorizes use of test results or assessments in a prosecution for contempt or perjury.
- Requires any information learned by an assessment or treatment program to be kept confidential pursuant to 42 U.S.C. §290dd-3.

#### **COST OF DRUG TESTS OR ASSESSMENTS**

- Requires a person who undergoes a drug test or assessment to pay, consistent with the ability to pay, reasonable fees to cover the cost of the test or assessment.
- Exempts from the payment requirement individuals acquitted of the charges, against whom the charges were dropped, or who satisfy other particular qualifications.

- Requires drug testing fees to be forwarded to the defendant management and monitoring agency.
- Requires assessment fees to be forwarded to the appropriate assessment program.

#### **COURT-ORDERED TREATMENT**

- Requires the court to immediately order a person to participate in a treatment program recommended by an assessment program if the court agrees with the recommendation.
- Requires the court to state on the record any reasons or disagreement with the recommendation, and provide notice of the decision and reasons to the single state authority on alcohol and other drugs.
- Authorizes the court to refuse to order the recommended treatment despite court agreement with the recommendation if extraordinary and compelling reasons exist. e.g., a person is serving a mandatory life sentence or is subject to capital punishment.
- Requires treatment to be a condition of pretrial release, probation, or parole or other release from a correctional facility.
- Requires the court to designate a treatment program which must be licensed by the single state authority on alcohol and other drugs.
- Permits a treatment program to refuse a referral pursuant to the Model Act if the program administrator deems the person inappropriate for admission to the program.
- Allows a treatment program to immediately discharge an individual who fails to comply with program rules and treatment expectations or who refuses to constructively engage in the treatment process.

#### **CREDIT FOR TIME SERVED**

- Allows credit for time served for each day a person is committed to residential treatment if the treatment program so recommends based upon the person's satisfactory progress.

#### **MITIGATING FACTOR**

- Establishes satisfactory progress in a treatment program, as determined by that program, as a mitigating factor for purposes of sentencing, probation, or parole.

### **SANCTIONS**

- Requires development of a schedule of presumptive sanctions to be imposed upon violation of any court-ordered term or condition of the defendant's participation in a treatment program.

### **REPORTING REQUIREMENTS**

- Requires the defendant management and monitoring agency to report periodically to the court on a person's compliance with court-imposed terms and conditions.
- Requires a treatment program to notify the defendant management and monitoring agency if a person fails to comply with program rules and treatment expectations; terminates participation in treatment; or refuses to constructively engage in the treatment process.
- Requires every agency or program that provides services or issues an order pursuant to the Model Act to report monthly on activities and other designated information. Every agency or program shall keep case specific records, aggregate data and statistics as required by the single state authority on alcohol and other drugs.

### **DUTIES OF THE SINGLE STATE AUTHORITY**

- Requires the single state authority on alcohol and other drugs (SSA):
  - (1) to report annually to the legislature and governor regarding the need for and implementation of the Model Act;
  - (2) to establish an advisory board of state and local enforcement, judicial, and corrections officials, defense attorneys, assessment and treatment programs, and past consumers of treatment services;

- (3) to convene, within two years, a conference to develop recommendations concerning improved and enhanced implementation of the Model Act;
- (4) to establish and maintain a substance abuse educational program for police, prosecutors, judges, corrections officer, and private and public defense attorneys. The program shall discuss the causes, effects, indicators, and treatment of illegal drug use and dependency, and alcoholism.;
- (5) to promulgate rules and regulations for implementation of the Model Act.
- (6) to draft standards to ensure the full continuum of care for persons ordered to undergo treatment pursuant to the Model Act;
- (7) to designate assessment and treatment programs with special skills in providing services to criminal or juvenile justice referrals; and
- (8) to aggressively pursue all federal funding and matching funds through federal sources and programs to support the assessment and treatment services provided pursuant to the Model Act.

### **IMMUNITY FROM CIVIL LIABILITY**

- Grants licensed assessment and treatment programs immunity from civil liability for damages caused by services provided in a good faith, non-negligent manner. The immunity extends only to actions taken in accordance with the Model Act.
- Grants qualified persons immunity from civil liability for damages caused by taking a specimen of breath, blood, urine, or other bodily substance in a non-negligent, medically accepted manner. The immunity extends only to actions taken in accordance with the Model Act.

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# Model Criminal Justice Treatment Act<sup>1</sup>

## **Section 1. Short Title.**

The provisions of this [Act] shall be known and may be cited as the “Model Criminal Justice Treatment Act.”

## **Section 2. Legislative Findings and Purpose.**

(a) A growing body of research demonstrates the destructive impact of alcohol and other drug abuse or addiction on personal health and health care costs, the spread of communicable disease, educational performance and attainment, work force participation, safety and productivity in the workplace, and financial stability. These indicators of social erosion are in turn related to crime in many obvious but hard to measure ways. Given the recognized relationship between crime and substance abuse and addiction, it is necessary and appropriate to use, adapt, and expand the resources and remedies available within the criminal justice and juvenile justice systems to intervene to address the problem of substance abuse dependency and thereby to help reduce the demand for illicit drugs and to reduce drug-related crime.

(b) Studies, such as the Drug Use Forecasting studies conducted by the National Institute of Justice, reveal that a large percentage of persons arrested for both drug and non-drug offenses (such as thefts, burglaries, robberies, assaults, rapes and homicides) test positive for recent drug use. Many offenses are committed by adults and juveniles who are under the influence of a controlled substance or alcohol, or are committed in order to raise revenues to support the person’s drug habit. Some mind and mood altering drugs, moreover, seem to induce criminal and often violent behavior,

reducing the person’s inhibitions as well as his or her ability to anticipate future consequences, thereby undermining the deterrent thrust of the criminal law. Some drugs may also reduce an offender’s ability to empathize with a potential victim, resulting in episodes of seemingly mindless violence. Finally, some crimes, including crimes of violence, are committed in the normal course of conducting illicit drug businesses and enterprises. These include strong arm robberies and “rip-offs”, violent retaliations for such offenses, and efforts to protect markets and “turf” by means of intimidation and terrorism directed against would-be competitors and drug purchasers who patronize competing drug distributors.

(c) Research has demonstrated that substance abuse and addiction is treatable within the offender population and that appropriate actions by criminal justice professionals can foster the effectiveness of treatment. This research further demonstrates that the effectiveness of substance abuse treatment is directly related to the length of stay in treatment. The threat of criminal justice sanctions, in turn, can motivate offenders to enter treatment to stay in treatment for as long as necessary to effect positive change. Court-ordered treatment must be of sufficient duration and intensity, must be supported by periodic comprehensive drug testing to maintain program integrity, must be provided by professional staff who have received adequate training and who continue to receive training and adequate supervision, and must provide for the continued collection and analysis of program data to allow for both process and impact evaluation. Moreover, the drug and alcohol treatment programs must be licensed by the [single state authority on alcohol and other drugs],

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<sup>1</sup> The text of the Model Criminal Justice Treatment Act employs terminology typically used in state criminal justice systems to refer to adult defendants. The Commission strongly believes that the remedial and rehabilitative principles, policies and procedures recommended in the Model Act should apply to underage persons who enter the juvenile justice system. Accordingly, each state legislature should amend the text of this Model Act as necessary to encompass juveniles who are taken into custody for an act which if committed by an adult would be a felony or misdemeanor, or who are adjudicated delinquent.

and must be appropriate in type, duration, and intensity based upon the length and level of treatment derived from an alcohol and other drug assessment of each individual's needs, balanced with the public's right for protection.

(d) The purpose of this [Act] is to establish a comprehensive system for identifying at the earliest possible opportunity those adults and juveniles who enter the criminal justice and juvenile justice systems who actively abuse a controlled substance or alcohol, who are drug dependent, or who are otherwise in need of substance abuse treatment and monitoring. It is the intent of this [Act] to provide a continuum of care to address these offenders' needs. It is also the purpose of this [Act] to afford realistic, meaningful and cost-effective substance abuse assessment, treatment, and monitoring services; to ensure the effective management of persons undergoing court-ordered substance abuse treatment; and to hold substance abusing offenders accountable for their past and future actions by means of an effective combination of rewards, threats and swiftly imposed punishments and sanctions designed to take full advantage of the coercive influence of the criminal justice and juvenile justice systems.

(e) Few addicts voluntarily seek help for a substance abuse problem. Many drug dependent persons deny that they have a problem. Consequently, the decision to participate in treatment typically is the result of pressure brought to bear by others, including family members, friends, co-workers, employers, medical and health care professionals, school officials or by courts or law enforcement agencies. Since a significant percentage of referrals for substance abuse treatment come from courts and law enforcement agencies, the judiciary and the law enforcement community act as a major point of entry to the substance abuse treatment system. It is in the public interest to use the coercive powers of the courts and their jurisdiction over persons charged with committing crimes to constructively influence substance abusing and addicted offenders, and to provide strong incentives for these offenders to accept help and to participate and remain as long as necessary in meaningful treatment and monitoring programs.

(f) Most substance abusing and addicted offenders who are convicted of serious crimes and who are sentenced to terms of imprisonment will eventually be released back into the community on parole or at the expiration of their sentence. Without proper treatment, the offender is likely to continue to be drug dependent and to commit new offenses, resulting in further injury

to victims, loss of property and the expenditure of scarce resources to identify, apprehend, prosecute and return him or her to confinement. In these circumstances, the overriding need to protect the public safety requires that all substance abusing and addicted offenders receive appropriate treatment and monitoring services, based on the individual's need as determined by the alcohol and other drug assessment, either in lieu of or during the course of traditional imprisonment, and should continue to receive needed treatment or appropriate aftercare or support or monitoring services as a condition of parole or release from confinement.

(g) Persons charged with a crime who actively abuse or are addicted to a controlled substance or alcohol and who are not undergoing appropriate treatment and monitoring pose a proportionately greater risk of criminal recidivism, missed court appearances and flight. It is therefore appropriate, and consistent with the traditional criteria for setting bail and conditions of pre-trial release, that substance abuse assessment, treatment and monitoring services be provided to persons who are awaiting trial on serious criminal charges.

(h) It is imperative to provide judges at the earliest opportunity with accurate and detailed information concerning an arrestee's use of or addiction to a controlled substance or alcohol and the nature and extent of his or her need for some appropriate form of substance abuse treatment and court monitoring. Although the decision to compel some form of substance abuse treatment and court monitoring as a condition of pretrial release, conditional discharge, probation or final sentence is a legal one to be decided by the court in accordance with statutory criteria, it is essential that the court be provided with an accurate diagnostic assessment based on a thorough and comprehensive evaluation performed by programs or facilities which are licensed by the [single state authority on alcohol and other drugs], which evaluations should be conducted in accordance with medical standards and recognized alcohol and other drug abuse diagnostic criteria.

(i) For treatment and intervention services to be most effective, it is imperative to provide substance abuse assessment, treatment and monitoring at the earliest possible opportunity. In ordering persons who are subject to the jurisdiction of the criminal court to participate in any given course of treatment, the court should rely upon and give appropriate weight to the specific recommendations of programs licensed by the

[single state authority on alcohol and other drugs] with respect to both the type, intensity, and length of treatment which is necessary to address each offender's needs. Moreover, courts in enforcing the terms and conditions of release, probation or conditional discharge must be realistic, and must always be mindful that the difficult process of recovery may be punctuated by an occasional relapse. For this reason, courts in determining what sanctions should be imposed upon a violation should consider the violation in relation to the offender's overall progress or lack of progress made in the ongoing course of treatment, and should give appropriate weight to the recommendations of the licensed treatment program. It is the policy of this state to hold all persons subject to the jurisdiction of the court fully accountable for their actions through comprehensive monitoring and the swift and predictable imposition of realistic sanctions which are designed to motivate offenders so as to achieve long term success.

(j) In order to ensure uniformity and the best possible use of limited resources, the [single state authority on alcohol and other drugs] is to develop and enforce licensing and operational standards for all programs, whether public or private, which provide substance abuse diagnostic assessment, or treatment services to adults or juveniles subject to the jurisdiction of the criminal courts, including but not limited to those services provided to inmates in correctional institutions and facilities.

(k) For treatment and intervention services to be most effective, alcohol and other drug abusing and addicted offenders must be assured that information provided during the course of treatment and counseling is kept confidential in accordance with the provisions of 42 U.S.C. §290dd-3 and 42 C.F.R. Part 2, which govern the confidentiality of alcohol and other drug abuse treatment records. Without such protections, an offender in need of alcohol and other drug treatment services may be discouraged from constructively engaging in the treatment process. Preserving the confidentiality of treatment information and records is not inconsistent with the vital goal of holding alcohol and other drug abusing and addicted offenders fully accountable for their past and future actions. The responsibility for managing offenders and monitoring compliance with court-imposed terms and conditions of pretrial release, sentence, probation or parole should be separate and distinct from the responsibility to provide professional treatment services.

## COMMENT

**This section, a declaration of legislative findings and policy, is divided into paragraphs which summarize the necessity for adopting a comprehensive treatment act to deal with alcohol and other drug abusing or addicted offenders who enter the criminal justice system. It is hoped that this declaration, by identifying the purposes to be achieved by this reform initiative, will aid courts, administrative agencies, treatment and assessment programs and other interested persons and entities in interpreting and implementing the specific provisions of the [Act].**

**A detailed declaration of legislative findings and policy is especially important with respect to this [Act] because this section provides a general framework and outlines in some detail the essential principles necessary to establish a comprehensive system for identifying and providing an appropriate continuum of care for those persons who come within the jurisdiction of the criminal courts who have a drug or alcohol problem. The Commission recognizes that all states already have in place laws, court rules and procedures concerning bail and the conditions of the pre-trial release, pre-trial intervention and similar diversionary programs, probation, parole and sentencing.**

**In the circumstances, it is simply not feasible in model treatment legislation to cover in detail all aspects of the criminal justice process or to resolve all issues which might arise with respect to the handling of alcohol and other drug abusing or addicted offenders. This [Act] instead is designed to define in general terms the essential characteristics of any comprehensive system to use limited resources to address these offenders' needs, to provide a full treatment regimen and to ensure the interests of public protection. The declaration of legislative findings and policy thus establishes a basic framework for adapting existing systems and procedures to meet modern demands. See also the accompanying Policy Statement to the [Model Criminal Justice Treatment Act].**

**Section 22 provides that the provisions of the [Act] are to be "liberally construed to effectuate its remedial and rehabilitative purposes." It is expected that in all cases involving questions of statutory interpretation or construction, the declaration of legislative findings and policy would be consulted so as to reliably determine the precise nature of these remedial and rehabilitative objectives.**

### **Section 3. Definitions.**

As used in this [Act]:

(a) "Controlled substance" shall have the same meaning as that term is defined in [state controlled substances act].

(b) "Assessment" means a diagnostic alcohol and other drug evaluation to determine whether and to what extent a person is drug or alcohol dependent within the meaning of this [Act] or otherwise needs and would benefit from some form of substance abuse or addiction treatment. The assessment shall be conducted by an assessment program as defined by this [Act] in accordance with the standards, procedures and alcohol and other drug diagnostic criteria designated or established by [single state authority on alcohol and other drugs] to provide the most cost-beneficial use of available resources.

(c) "Assessment program" means a not for profit corporation, government agency or other entity which is licensed by [single state authority on alcohol and other drugs] to conduct an assessment pursuant to this [Act].

(d) "Drug or alcohol dependent" means in a state of physical or psychological dependence, or both, arising from the use of a controlled substance or alcohol on a continuous basis. Drug or alcohol dependence is characterized by behavioral and other responses, including but not limited to a strong compulsion to take the controlled substance or alcohol on a recurring basis, regardless of consequences, in order to experience its psychotropic effects, or to avoid the discomfort of its absence. The [single state authority on alcohol and other drugs] may establish standards, procedures and alcohol and other drug diagnostic criteria to determine whether and to what extent a person is drug or alcohol dependent within the meaning of this [Act].

(e) "Substance abuse or addiction treatment" means any type of drug or alcohol treatment ordered by a court, or [parole board or other appropriate authority] to address a person's drug or alcohol dependence or other substance abuse or addiction treatment.

(f) "Test" or "Drug test" means a test conducted in a medically safe and appropriate manner to determine the presence or absence of controlled substance metabolites or otherwise to determine the recent or historical use of a controlled substance by the subject of the test. The test shall be of a type approved for such purposes by the [single state authority on alcohol and other drugs].

(g) "Treatment program" means any governmental agency or other entity which is licensed by the [single state authority on alcohol and other drugs] to provide substance abuse or addiction treatment on a residential or outpatient basis.

#### COMMENT

**This section provides the definitions of key terms which are used throughout the [Act]. Some of these definitions deserve special note.**

**The definition of the term "assessment" provides that such diagnostic alcohol and other drug evaluations must be conducted in accordance with standards, procedures and alcohol and other drug diagnostic criteria established by some appropriate authority outside the traditional criminal justice system, such as the [single state authority on alcohol and other drugs]. Reliance upon such criteria designated or established by the [single state authority] will ensure professionalism and the highest standards of competence. The [single state authority] is uniquely qualified to develop criteria so as to achieve the most appropriate and cost-beneficial use of limited available resources.**

**The definition of the term "assessment program" makes clear that any entity or agency conducting an assessment must be licensed by the [single state authority]. See also Section 19, concerning the licensure authority of the [single state authority on alcohol and other drugs]. Nothing in this definition would preclude a government agency from being assigned the responsibility to conduct a diagnostic assessment, provided, however, that any such government agency must submit to licensure procedures established by the [single state authority on alcohol and other drugs]. This licensing feature is designed to minimize the problems which can arise when traditional criminal justice actors (such as pre-trial services agencies, probation departments, parole agencies and local and state correctional agencies) decide on their own to enter into the business of providing drug and alcohol diagnostic assessments or treatment without being subject to some form of monitoring or licensing requirements established by an appropriate agency which has professional experience in this field.**

**This [Act] distinguishes the critical function of monitoring an offender's compliance with court-ordered terms and conditions from the responsibility to provide professional diagnostic or treatment services. Thus, a distinction should be drawn between a forensic drug test to determine whether a defendant has violated a**

condition of pre-trial release or probation, as compared to a therapeutic or diagnostic assessment to determine whether and to what extent a given defendant is in need of and would benefit from professional treatment services, and to determine what specific program or treatment modality is appropriate to respond to the individual's needs. The former drug test can easily and reliably be performed by a defendant monitoring and management agency and need not be subject to the strict licensure provisions associated with diagnostic assessments. However, as discussed below and in Section 4, the [Act] does prescribe minimum standards for drug testing, whether such tests are used to determine compliance with court-ordered conditions or to support a diagnostic assessment.

The definition of the term "drug or alcohol dependent" is designed to make certain that the rehabilitative services prescribed in this [Act] are afforded to persons who genuinely need them. This [Act] is not designed to provide mitigating options, for example, to drug dealing profiteers, who are driven by greed rather than an addiction to alcohol or an illicit substance.

The [single state authority on alcohol and other drugs] is authorized to establish standards, procedures and designate drug and alcohol diagnostic criteria to determine whether and to what extent a person is drug or alcohol dependent within the meaning of this [Act]. Compare Section 18, which expressly authorizes the [single state authority] and any other appropriate agency or agencies to promulgate and periodically review and revise rules, regulations, guidelines, directives, standards and protocols necessary to implement the provisions of this [Act]. See also Section 19, which directs the [single state authority] to develop certain licensure standards. This formulation confirms that a determination as to whether and to what extent the person is drug or alcohol dependent is essentially a medical one to be determined by licensed professional programs in accordance with criteria established within the medical profession.

The definition of the terms "test" or "drug test" will allow the [appropriate state agency] to take into account new and emerging technologies. This definition does not attempt to provide detailed guidance concerning the procedures and protocols for drug testing, the handling of specimens in order to maintain the chain of custody, and similar legitimate concerns involving due process considerations and the civil liberty interests of persons required to submit to drug testing. Rather, these issues are left to be decided either in other model statutes or

by rules and regulations promulgated by the [appropriate government agency]. See also discussion of Section 4.

The definition of the term "treatment program" makes clear that all such programs must be licensed by the single state authority. See also Section 19. This requirement applies to all substance abuse or addiction treatment programs, whether residential or out patient, which are operated by private corporations or by government entities.

#### ***Section 4. Mandatory Testing of Arrestees.***

(a) A person who has been arrested for a felony [or misdemeanor] [or misdemeanor involving specified offenses including those under the Model Driving Under the Influence of Alcohol and Other Drugs Act and Model Underage Consumption Reduction Act, or for which the Model Revocation of Professional or Business License for Alcohol and Other Drug Convictions Act applies,] shall be required to submit to a drug test.

(b) The [defendant management and monitoring agency], as defined in this [Act], shall perform the test in accordance with pre-trial drug testing standards, rules or regulations promulgated by the [appropriate governmental agency] which ensure fair, accurate, and reliable testing procedures and protect the chain of custody. The sample or specimen used in the drug test shall be provided by or taken from the person in a medically safe and appropriate manner.

(c) The test shall be performed as soon as practicable after arrest, and where feasible, prior to the release of the person. If the person has not undergone a drug test at the time of his or her release, submission to a drug test shall be a condition of the person's release pursuant to Section 9.

(d) A person who refuses to submit to a drug test shall be required to undergo an assessment pursuant to Section 5.

#### COMMENT

This section, which outlines one of the key provisions of the [Act], provides for universal drug testing of all persons arrested for felonies and certain designated non-felony (i.e., misdemeanor) offenses. Universal drug testing should become an important part of a comprehensive program for beginning the process of identifying those defendants who abuse or are addicted to alcohol or controlled substances.

Subsection (b) provides that the test will be performed by a designated [defendant management and monitoring agency]. Although this term is not defined, it represents a critical concept which is used throughout the [Act]. The [defendant management and monitoring agency] might be a pre-trial services agency, probation department or Treatment Alternatives to Street Crime (TASC) program.

Subsection (b) further provides that any such drug test must be conducted in accordance with pre-trial drug testing standards, rules or regulations promulgated by some appropriate government agency, such as the [single state authority on alcohol and other drugs]. Such rules and regulations must be designed to ensure fair, accurate and reliable testing procedures and to protect the chain of custody. Moreover, the [Act] provides that the sample or specimen must be provided or taken from the defendant in a medically safe and appropriate manner. See also Section 21(b), which affords immunity from civil liability for persons taking or obtaining drug test samples.

The provisions of subsection (c) ensure that drug test results can be taken into account in developing appropriate conditions of pre-trial release and is consistent with a the [Act's] goal to provide intervention services at the earliest possible opportunity within the criminal justice process.

Subsection (d) recognizes that a person arrested for a serious offense who refuses to submit to a drug test may be attempting to conceal an alcohol or drug problem — a typical characteristic of denial, which is often associated with substance abuse or addiction. This feature is designed to ensure that no substance abusing or addicted offender can evade the identification and intervention services afforded pursuant to this [Act].

### ***Section 5. Criminal Justice Referrals for Substance Abuse or Addiction Treatment.***

(a) A person arrested for a felony [or misdemeanor] [or specified misdemeanors] shall be required to undergo an assessment if:

- (1) the person refuses to undergo a drug test required under Section 4;
- (2) the results of the drug test conducted pursuant to Section 4 reveal the presence of a controlled substance for which the person has no lawful prescription or order, or the abuse [use] of alcohol;

(3) the person requests an assessment;

(4) the person admits to unlawful use of a controlled substance within the year preceding the arrest for the present charge, or admits to alcohol abuse or alcoholism;

(5) the present charge involves a violation of [controlled substances act] or [Model Driving Under the Influence of Alcohol and Other Drugs Act or similar state law];

(6) the person has any other pending charge in this state, any other state, or federal court involving a violation described in paragraph (5), or an attempt or conspiracy to commit a violation described in paragraph (5);

(7) the person has within the past five years been convicted in this state, any other state, or a federal court of a felony or misdemeanor involving a violation described in paragraph (5);

(8) the person has within the past five years been granted a conditional discharge pursuant to the [state conditional discharge law], any similar or predecessor law of this state or any other state, or federal law; or

(9) the person has within the past five years been sentenced to probation or treatment during incarceration pursuant to this [Act], any similar or predecessor law of this state or any other state, or federal law.

(b) Notwithstanding the requirements of subsection (a), the court shall order a person to undergo an assessment if the court has reason to believe the person is drug or alcohol dependent, or would otherwise benefit by undergoing an assessment.

(c) If a person required or ordered pursuant to this section to undergo an assessment has not undergone the assessment at the time of the person's release prior to trial or on probation, submission to an assessment shall be a condition of the person's pre-trial release or probation pursuant to Section 9.

(d) If a person required or ordered pursuant to this section to undergo an assessment has not undergone an assessment at the time the person is granted a conditional discharge pursuant to [state conditional discharge law], submission to an assessment shall be a condition of the person's discharge.

(e) An inmate confined in a state or county correction-

al facility shall undergo a pre-release assessment before receiving a grant of parole or other release from the correctional facility if:

- (1) the person was at any time ordered to undergo an assessment pursuant to this [Act];
  - (2) the person would have been statutorily required or ordered by a court to undergo an assessment pursuant to this [Act] had this [Act] been effective at the time the person was arrested or indicted for the offense for which he or she is presently serving a term of incarceration;
  - (3) the person at any time during his or her term of incarceration committed an institutional infraction or violation which involved the use or possession of a controlled substance or alcohol; or
  - (4) the [parole board or other appropriate authority] otherwise has reason to believe that the inmate is drug or alcohol dependent within the meaning of this [Act], or would otherwise benefit from substance abuse or addiction treatment or related support services.
- (f) An assessment required pursuant to subsection (e) shall occur within 60 days of the inmate's scheduled parole or other release from the correctional facility

COMMENT

**This section recognizes that while drug testing remains a useful tool in beginning to identify offenders who abuse or are addicted to alcohol and other drugs, courts and other actors within the criminal justice system cannot rely exclusively on drug test results. Rather, there is a need for a more comprehensive system for conducting diagnostic assessments to be performed by licensed programs using approved diagnostic criteria and methodologies.**

**For example, drug test results, including positive results, cannot reliably reveal whether the defendant is drug dependent and in need of treatment services. Moreover, the drug test cannot provide much guidance with respect to the specific type of program or treatment modality which would be appropriate to address the substance abusing defendant's needs.**

**Not all substance abusing offenders are drug dependent. Some drug distributing profiteers, for example, are motivated by greed, rather than an addiction to illicit drugs or alcohol. It is therefore essential to establish a system by which to reliably distinguish on a case-by-case basis those offenders who are profiteers from those**

**who are truly drug or alcohol dependent and who might benefit from participation in a drug or alcohol treatment program.**

**By the same token, given the scarcity of resources available to support professional treatment services, it is essential that the provision of such services be limited to those who are genuinely in need and who might benefit therefrom. The establishment of a comprehensive diagnostic assessment system is necessary to ensure the most appropriate and cost-beneficial use of limited treatment resources.**

**Not every person entering the criminal justice system need undergo a professional diagnostic assessment. Accordingly, subsection (a) establishes certain objective criteria or circumstances from which it must be presumed that a diagnostic assessment is indicated and appropriate.**

**The nine criteria set forth in subsection (a) are objective, that is, can be reliably determined from known attendant circumstances and thus need not be decided by a court exercising discretion. The criteria detail those circumstances which by their nature suggest the distinct possibility that the defendant is drug or alcohol dependent, thus warranting a professional diagnostic assessment to confirm or dispel that suspicion.**

**Subsection (b) requires the court to order a person to undergo a diagnostic assessment where the court has reason to believe that the person is drug or alcohol dependent or would otherwise benefit by undergoing the assessment. It should be noted that while this subsection depends upon a judicial finding (as opposed to the automatic criteria set forth in subsection (a)) the provisions of this subsection are nonetheless mandatory. Accordingly, a court would have no discretion to decline to order the person to submit to a diagnostic assessment where the court has been presented information from which it can reasonably conclude that the person is drug or alcohol dependent. Note that the provisions of this subsection have been left intentionally broad so as to allow the court to consider the widest possible range of circumstances or behavioral characteristics which might reasonably suggest the possibility of drug or alcohol abuse or addiction.**

**Subsection (c) ensures the earliest possible intervention, and is in accord with the legislative finding that in order for treatment to be as effective as possible, identification and intervention resources must be provided to substance abusing and addicted offenders at the earliest possible opportunity within the criminal justice**

process. Diagnostic assessments and resultant treatment services should be provided as soon as possible following the arrest, and should continue throughout the adjudicative and dispositional process. Such assessment and treatment should not be delayed until after conviction or adjudication.

Subsection (e), which outlines one of the major features of this [Act], specifies the timing for a diagnostic assessment which occurs not prior to the disposition of criminal charges, but rather after a conviction and before the person is released from any custodial confinement which may have been ordered as part of the sentencing process. In addition to the goal of achieving the earliest possible intervention, this [Act] clearly sets forth the proposition that no person should be allowed to exit the criminal justice system unless any drug or alcohol problem has been identified and addressed.

Subsection (e) identifies the specific criteria which must be used to determine whether the inmate must submit to a new diagnostic assessment before receiving a grant of parole or other release from the correctional facility. The first three factors are objective, that is, can be determined reliably from the inmate's institutional record and do not involve any exercise of discretion or judgment by parole authorities. These objective, automatic criteria are as follows:

- 1) The person was at any time ordered to undergo a diagnostic assessment pursuant to this [Act]. Accordingly, any person ordered to undergo a diagnostic assessment while awaiting trial who is subsequently convicted and is sentenced to a term of imprisonment must undergo a second diagnostic assessment, which must occur prior to his or her release from confinement.
- 2) The person would have been statutorily required or ordered by a court to undergo an assessment pursuant to this [Act] had the [Act] been in effect at the time the person was arrested or indicted for the offense for which he or she is presently serving a term of incarceration. In essence, this feature ensures the retroactive application of the rehabilitative features of the [Act], and would require parole authorities to consider the objective circumstances set forth in subsection (a) which, had they been in effect, would have mandated the defendant to undergo a pre-trial diagnostic assessment.
- 3) The inmate has at any time during his or her term of confinement committed an institutional infraction or violation which involved the use or possession of

a controlled substance or alcohol. This objective factor is established only where a violation or infraction has been substantiated in accordance with applicable due process requirements governing the prosecution and adjudication of institutional violations. However, even where the institutional infraction was not substantiated, the facts concerning an allegation of drug or alcohol possession or use in violation of institutional rules might still be considered by the parole board or other appropriate authority in the exercise of its discretion pursuant to subparagraph 4, discussed immediately below.

In addition to these three objective or automatic criteria, subsection (e) (4) also mandates a pre-release diagnostic assessment where the parole board or other appropriate authority has reason to believe that the inmate is drug or alcohol dependent within the meaning of this [Act] and would otherwise benefit from substance abuse or addiction treatment or related support services. This feature is similar to the provisions of subsection (b), except that in this instance, the factual determination is to be made by the appropriate parole authority, rather than by a sentencing court.

The language in this section is left intentionally broad to account for unforeseen factors or indications which might suggest the possibility of drug or alcohol abuse or addiction.

Subsection (f) specifies the timing for a pre-release assessment required pursuant to subsection (e). The term "or other release from the correctional facility," as used throughout this [Act], refers to any type of program which is essentially similar to parole, and would include but not be limited to an intensive supervision program, furlough, work release program, placement in a half-way house, or any other program which involves placing the inmate outside the walls of a correctional institution and back into the community. The purpose of this feature is to ensure that any substance abusing or addicted inmate will be diagnosed and provided adequate treatment and support services before being removed from the confines of a prison environment. Once released into the community, it will be far more difficult to prevent access to alcohol or illicit drugs. Drug testing can then only reveal drug use "after the fact."

### **Section 6. Providing Drug Test Results or Assessment.**

(a) Unless otherwise ordered by the court, the drug test results and assessment of a person shall be provided as soon as practicable to the court, or [parole board or other appropriate authority] in the case of an inmate, the prosecutor, the person who submitted to the test or assessment, and to the extent applicable, to the assessment and treatment program.

(b) The assessment shall include recommendations concerning:

- (1) the person's need for substance abuse or addiction treatment; and
- (2) an appropriate and available course of treatment necessary to address the person's needs.

(c) Unless otherwise ordered by the court, anyone receiving test results or an assessment under subsection (a) shall keep that information confidential in accordance with the requirements of 42 U.S.C. §290dd-3.

#### COMMENT

Subsection (b) provides that all diagnostic assessments conducted pursuant to the recommendations concerning an appropriate and available course of treatment in subsection (b)(2) should not be limited to describing the type or modality of treatment, but should also specifically refer to treatment services that are available within the jurisdiction.

### **Section 7. Use of Drug Test Results or Assessment.**

(a) Except as provided in subsection (c), results of a person's drug test required or ordered under this [Act] shall only be used to determine:

- (1) whether the court shall order an assessment;
- (2) appropriate conditions of pre-trial release or disposition of pending charges;
- (3) the person's suitability for conditional discharge and the terms and conditions of such discharge;
- (4) an appropriate sentence or disposition in the event of a conviction;
- (5) appropriate conditions of parole or other release from a correctional facility; or
- (6) an appropriate sanction for violation of a court-

ordered term or condition of the person's participation in a treatment program imposed pursuant to Section 11 of this [Act] or any other law.

(b) Except as provided in subsection (c), an assessment shall only be used for purposes listed in subsection (a)(2)-(a)(6) and to provide background information about an inmate to any person or agency conducting a pre-release assessment pursuant to Section 5.

(c) Nothing in this [Act] shall be construed to preclude the state from using an assessment in a prosecution for contempt, or an assessment or drug test results in a prosecution for perjury.

(d) Any information learned by an assessment or treatment program, including positive drug tests, as a result of the performance of an assessment shall be kept confidential in accordance with the requirements of 42 U.S.C. §290dd-3.

#### COMMENT

In order for treatment and intervention services to be most effective, drug and alcohol abusing and addicted offenders must be assured that information provided during the course of treatment and counseling is kept confidential. Without such assurances, an offender in need of drug or alcohol treatment services might be discouraged from constructively engaging in the treatment process. See Section 2 (k).

Subsection (c) makes clear that nothing in the [Act] would preclude a prosecutor from using the results of a diagnostic assessment in a prosecution for contempt or perjury. Thus, for example, a defendant should not be permitted to take the witness stand at trial and deny ever having used drugs where the court is in possession of a reliable positive drug test or diagnostic assessment indicating that the defendant admits to drug abuse.

The provisions of this subsection are necessarily subject to the provisions of subsection (d), which confirms that all information derived from drug tests, assessments or participation in a treatment program is subject to the requirements of federal confidentiality laws. These laws impose strict limitations on when such information may be used in a criminal investigation or prosecution. Nothing in this [Act] should be construed to authorize the use of information in violation of these confidentiality laws, which, in any event, necessarily preempt and supersede state laws, rules and regulations.

**Section 8. Court-Ordered Treatment.**

(a) Except as provided in subsection (f), a court shall immediately order a person to participate in a treatment program if:

- (1) the assessment program recommends that the person participate in the treatment program; and
- (2) the court has reason to believe that participation in the recommended program will benefit the person by addressing his or her drug or alcohol dependency or other substance abuse needs.

(b) Where the court determines pursuant to subsection (a) that participation in the treatment program will not benefit the person notwithstanding a recommendation by the assessment program that the person participate in such treatment program, the court shall state the reasons for its determination on the record and shall provide notice of the decision and the reasons therefor to the [single state authority on alcohol and other drugs].

(c) The court shall designate a treatment program as defined by this [Act] to provide the recommended treatment to the person. However, nothing in this [Act] shall prevent a treatment program from refusing to accept a criminal justice referral under this [Act] if the program administrator deems the person to be inappropriate for admission to the program. Additionally, a treatment program shall retain the right to immediately discharge any individual who fails to comply with program rules and treatment expectations or who refuses to constructively engage in the treatment process.

(d) If a person is released prior to trial or on probation, or granted parole or other release from a correctional facility, participation in the treatment plan shall be a condition of the person's release, probation, or parole pursuant to Section 9.

(e) If a person is granted a conditional discharge pursuant to [state conditional discharge law], participation in the treatment plan shall be a condition of the person's discharge.

(f) Upon a finding of extraordinary and compelling reasons on the record, the court may refuse to order the person to participate in a treatment plan as recommended by the assessment program even though the court has reason to believe that such participation will benefit the person. The court shall provide a copy of the findings to the [single state authority on alcohol and other drugs].

## COMMENT

**This section establishes a mandatory treatment policy, requiring persons diagnosed to be drug or alcohol dependent to participate in some appropriate treatment program. It makes clear that once an offender has been diagnosed as suffering from drug or alcohol abuse or addiction, the court or appropriate dispositional authority is required, in the absence of special circumstances, to order the offender to participate in some appropriate treatment program.**

**The decision whether that treatment is to be provided in prison or elsewhere should be made by courts based not only upon traditional sentencing criteria, but also upon the professional diagnostic assessment of each offender and the specific recommendations of the assessment program. An addict in denial should be given few choices. If, for example, he or she is unwilling to accept treatment and rigorous monitoring instead of imprisonment, then the court should mandate treatment during a term of incarceration. Where the substance abusing or addicted offender refuses to engage in the treatment process during a term of incarceration, he or she should remain ineligible for parole or early release until there is satisfactory progress in the treatment program.**

**Under this comprehensive statutory scheme, the offender should not have the option of choosing "passive" or "idle" incarceration in lieu of the rigors of a meaningful treatment regimen. In this way, the [Act] is designed to use the criminal justice system constructively to motivate offenders to accept treatment and to engage in the treatment process.**

**Subsection (a) requires the court immediately to order the defendant to participate in treatment following the required findings and recommendations. This provision thus implements the legislative policy of providing the earliest possible intervention; the decision to require an offender to undergo some meaningful form of treatment should not wait for a final conviction or adjudication. Treatment services should be provided as soon as possible following the arrest, and should continue throughout the adjudicative and dispositional process.**

**Although this section provides unambiguously that the court must "immediately" order the person to participate in a treatment program, this provision would not necessarily be violated where the defendant is placed on a waiting list. It is the responsibility of the assessment program in accordance with the provisions of Sec-**

tion 6 (b) (2) to make specific recommendations concerning an appropriate course of treatment which is “available.” In addition, other provisions of this [Act] are designed to enable the [single state authority on alcohol and other drugs] to take steps to ensure that limited and scarce treatment resources are distributed equitably and in an appropriate, cost-beneficial manner. See, e.g, Section 16(c) and Section 17.

Subsection (a) essentially establishes a presumption whereby the court should ordinarily follow the recommendations of the assessment program with respect to whether the defendant is in need of substance abuse treatment and would benefit thereby. When the assessment program recommends that the person participate in treatment, it has essentially made an initial determination not only that the person is in need of treatment, but that he or she necessarily would benefit from participating in such a treatment program by addressing his or her drug or alcohol dependency.

The reporting requirement in subsection (b) is not intended to provide a basis for an appellate remedy. This feature is only intended to provide the [single state authority] with the flow of information to enable it to perform its critical oversight function with respect to the entire treatment services system. The [single state authority] should be kept apprised of such determinations on a system-wide basis so that it can determine how the [Act] is being implemented and how often persons who have been diagnosed by professionals to be in need of treatment are not receiving treatment as a result of judicial findings to the contrary.

Under subsection (c) the treatment program administrator may refuse admission to persons deemed inappropriate for admission to the program. Such decisions by the program administrator would not be subject to judicial review pursuant to this [Act].

Similarly, this subsection makes clear that the treatment program retains the right immediately to discharge any individual who fails to comply with program rules and treatment expectations or who refuses to constructively engage in the treatment process.

Subsection (f) establishes the limited circumstances where a court may decline to order a defendant to undergo treatment notwithstanding the assessment program’s recommendation of treatment and the court’s belief is satisfied that participation in the recommended treatment program would in fact benefit the person by addressing his or her drug or alcohol dependency or other substance abuse needs. Specifically, the court in

those circumstances may only refuse to order the person to participate in treatment as recommended by the assessment program upon a finding on the record of extraordinary and compelling reasons. Although the court ultimately retains responsibility for imposing conditions of pre-trial release, probation, conditional discharge or sentence, it is expected that the court will give substantial weight to the professional recommendations of the assessment program.

Such extraordinary and compelling circumstances might exist where the defendant is facing capital punishment or a mandatory term of life imprisonment, and the court determines that it would be inappropriate to dedicate limited treatment resources to address such a defendant’s needs, since it would be unlikely that he or she would ever be released back into the community.

As noted above, the [single state authority] would not be authorized under this [Act] to review or overrule the court’s decision. However, it is ultimately the responsibility of the [single state authority] to monitor and oversee all determinations affecting the distribution and use of limited treatment resources.

### ***Section 9. Conditions of Pre-Trial Release, Probation, or Parole or Other Release from a Correctional Facility.***

- (a) If a person is released on bail, bond, personal recognizance, or to the custody of any person or public or private agency pending trial or disposition of the pending charges, the person shall agree as a condition of release:
- (1) to submit to an initial drug test as required by Section 4;
  - (2) to submit to subsequent random periodic drug tests to be performed by the [defendant management and monitoring agency];
  - (3) to undergo an assessment as required by Section 5 and to cooperate fully with the assessment program;
  - (4) to participate in a treatment program as required by Section 8 and to cooperate fully with the treatment program;
  - (5) to satisfactorily fulfill any other terms and conditions ordered by the court, including:
    - (A) periodic telephone contact or office visits to a designated person or agency;

(B) periodic unannounced visits by a designated person or agency to the person's home or place of commitment;

(C) a curfew or restricted travel and associations;

(D) electronic monitoring; or

(E) pre-trial work or school release;

(6) to cooperate fully with the [defendant management agency's] monitoring of the person's compliance with court imposed terms and conditions of release;

(7) to pay drug testing and assessment fees in accordance with .

(b) If a person ordered pursuant to Section 8 to undergo treatment is placed on probation following a conviction for the present offense, the person shall agree as a condition of probation to the terms set forth in paragraphs (a)(2)-(7).

(c) If an inmate who has been ordered pursuant to Section 8 to undergo treatment, or has been assessed to be in need of alcohol and other drug treatment pursuant to Section 5(e), is granted parole or other release from a correctional facility, the inmate shall agree as a condition of parole or other release to comply with the terms set forth in paragraphs (a)(2), and (a)(4) - (a)(7). For the purposes of this subsection, the functions of the [defendant management and monitoring agency] under subsection (a) shall be performed by the [appropriate parole monitoring agency].

(d) The person shall acknowledge as a condition of pre-trial release, probation, or parole or other release from a correctional facility, that failure to comply with the terms set forth in subsections (a), (b), or (c) may result in the court's modification of the conditions of pre-trial release or probation, or the [parole board's or other appropriate authority's] modification of parole or other release.

(e) Nothing in this [Act] shall preclude a person from petitioning the court to modify the person's conditions of pre-trial release or probation, or the [parole board or other appropriate authority] to modify the person's parole or other release from a correctional facility.

#### COMMENT

**This section establishes certain basic terms and conditions which courts or other appropriate authorities must impose upon defendants who are subject to the mandatory treatment policy set forth in Section 8.**

**This section is intended only to establish minimum standards. Nothing in this [Act] would preclude the court or other appropriate authority from imposing such additional requirements or conditions as may be appropriate in the circumstances and as may be authorized by law. Many states already have laws or court rules concerning appropriate terms and conditions of pre-trial release, conditional discharge, probation or parole. This [Act] is intended to supplement but not necessarily to supplant any such other existing laws or rules.**

**Individuals who enter the criminal justice system who actively abuse or are addicted to a controlled substance or alcohol and who are not undergoing appropriate treatment and monitoring pose a proportionately greater and undue risk not only of criminal recidivism, but also of missed court appearances or flight. It is therefore appropriate that substance abuse assessment, treatment and monitoring services should be provided to persons who are awaiting trial on serious criminal charges. See Section 2(g). As noted throughout the [Act], in order for treatment to be as effective as possible, identification and intervention resources must be provided to substance abusing and addicted offenders at the earliest possible opportunity within the criminal justice process.**

**This section does not specify the sanctions which could or ought to be imposed upon a defendant who refuses to accept or consent to the conditions of pretrial release. See discussion of Section 9(d). State laws and procedures vary with respect to the authority of courts to compel specific performance. Nothing in this [Act] would preclude a finding of criminal or civil contempt, and, at a minimum, a defendant's unwillingness to comply with the statutorily required terms and conditions should be taken into account in determining the likelihood of flight, missed court appearances, potential for criminal recidivism and other factors relevant to the release decision and the fixing of an appropriate bail or bond.**

**Finally, with respect to defendants awaiting trial, it should be noted that the requirement for "immediate" treatment established pursuant to Section 8 would apply to persons who are, for any reason, detained while awaiting trial. In other words, this [Act] would generally require that some appropriate treatment and intervention services be provided to defendants found to be in need of such services pursuant to Section 8 who are unable to make bail or who are otherwise not released on bail, bond, recognizance or to the custody of another while awaiting trial or disposition of the pending charges.**

Subsection (b) provides that persons ordered pursuant to Section 8 to undergo treatment who are placed on probation following a conviction must agree as a condition of probation to the terms set forth in paragraphs (a)(2-7). Where the defendant refuses to agree to such required minimum conditions of probation, it is expected that the court would revoke the probationary sentence and that the defendant would instead be sentenced to a term of incarceration or imprisonment. This feature is designed to provide powerful incentives to accept and engage in the treatment process. A defendant who refuses to accept and comply with these minimum terms of probation would be required to undergo and accept treatment prior to release from confinement pursuant to subsection (c).

Subsection (c) deals with convicted defendants who have been sentenced to a term of imprisonment and who are now facing the prospect of release from custodial confinement by means of parole or any similar release program. (See discussion of the phrase “or other release from the correctional facility” in the commentary to Section 5(f)) Subsection (c) makes clear that the inmate must agree as a condition of such release to accept the minimum requirements set forth in paragraphs (a) (2-7). Where an inmate refuses to accept any or all of these minimum required terms and conditions, the inmate would remain ineligible for release from custodial confinement before the expiration of his or her full term notwithstanding any other law governing parole, release, or the calculation of earned time, “good time,” work or “commutation” credits.

The provisions of subsection (c) are designed to implement the policy that no drug or alcohol dependent person should be permitted to exit the criminal justice or correctional systems unless and until he or she has undergone an assessment and had his or her treatment needs identified. See also Section 5(e), which requires a pre-release diagnostic assessment of certain inmates. Note in this regard that where an assessment conducted pursuant to Section 5(e) reveals that the inmate is in need of drug or alcohol treatment, participation in a treatment program would become a statutorily required condition of parole or other form of release. In these circumstances, the parole authorities would not have the discretion to conclude that the inmate does not require some form of appropriate treatment or support services. However, the parole board would be authorized to determine which program the inmate would be required to participate in as a condition of parole or other form of release.

Subsection (e) confirms that this [Act] is not meant to limit the authority of the court or parole authorities to modify terms and conditions of pre-trial release, conditional discharge, probation or parole on petition of the defendant, the prosecutor, correction authorities, probation agencies, treatment programs or any other interested persons or organizations. However, the provisions of this subsection should not be construed to authorize a court or parole board to circumvent the provisions of this [Act] which mandate participation in an appropriate treatment program. This subsection not authorize a court or parole board to decline to order a defendant to participate in an appropriate treatment program, where such participation is required pursuant to the provisions of Section 8 or any other provision of this [Act].

### ***Section 10. Report on Progress in Court-Ordered Treatment and Compliance with Court-Imposed Conditions.***

- (a) If a person has been ordered pursuant to Section 8 to participate in a treatment program, the designated treatment program shall report periodically to the [defendant management and monitoring agency] on the person's progress in the treatment program. The [defendant management and monitoring agency] shall periodically forward information about the person's progress and compliance with any court-imposed terms and conditions to the court.
- (b) The designated treatment program shall promptly notify the [defendant management and monitoring agency] if the person:
  - (1) fails to comply with program rules and treatment expectations; or
  - (2) refuses to constructively engage in the treatment process; or
  - (3) terminates his or her participation in the treatment program.

Upon such notification, the [defendant management and monitoring agency] shall promptly report the person's actions to the court [or other appropriate authority].

#### COMMENT

Pursuant to Section 14, where a defendant has been ordered to participate in a residential, inpatient treatment program and he or she leaves the premises of the program facility without authorization, such act of absconding constitutes the criminal offense of “escape,”

**and this especially serious violation must be promptly reported to appropriate authorities.**

### ***Section 11. Sanctions.***

(a) Each agency responsible for monitoring and supervising a defendant's participation in a treatment program pursuant to this [Act] [or, where appropriate, the administrative office of the courts] shall in accordance with [state administrative procedures act] develop and publish a schedule of presumptive sanctions to be imposed upon violation of any court-ordered term or condition of the defendant's participation in the treatment program. The schedule of presumptive sanctions shall be designed to hold all defendants accountable for their actions and to ensure a proportionate, predictable and uniform response to all violations. The schedule shall account for the seriousness of the violation, the defendant's record of prior violations and his or her overall progress or lack of progress in the course of treatment, as determined by the treatment program's report. Authorized dispositions may include but need not be limited to imposing new terms and conditions of supervision; requiring a defendant to submit to more frequent drug tests or more intensive forms of monitoring or supervision; extending the term of supervision, temporarily suspending or permanently revoking a defendant's participation in the treatment program; or any other sanction or combination of sanctions as may be authorized by law.

(b) Every person ordered pursuant to Section 8 to participate in a treatment program shall be provided a copy of the published schedule of presumptive sanctions promulgated pursuant to subsection (a) of this section, and shall acknowledge in the writing the receipt thereof.

(c) Upon a positive drug test or any other significant violation of any term or condition of a defendant's participation in a treatment program ordered pursuant to this [Act], the court [or other appropriate authority] shall immediately impose such sanction or combination of sanctions as are prescribed in the appropriate schedule developed pursuant to subsection (a) of this section, unless the court [or other appropriate authority] is clearly convinced that the presumptive sanction is inappropriate in the circumstances and that the need to depart from the presumptive sanction clearly overrides the need to deter the defendant and others from committing future violations. Notwithstanding the foregoing or any other provision of law, in the absence

of compelling and extraordinary circumstances, the court [or other appropriate authority] shall not impose a lesser sanction or sanctions than that prescribed in the appropriate schedule except upon the recommendation of the treatment program. Where the court [or other appropriate authority] elects not to impose a presumptive sanction, the court [or appropriate authority] shall make a written finding setting forth the reasons for its decision, and a copy of such written finding shall be provided to the [single state authority on alcohol and other drugs].

#### COMMENT

**This section prescribes the appropriate sanctions to be imposed upon a violation of any terms or conditions of a defendant's participation in a treatment program. For the criminal justice system to maintain credibility, all drug abusing and addicted offenders must be held accountable for their past and future actions. The failure to hold these persons fully accountable would be tantamount to "enabling," that is, the failure to take appropriate actions to discourage and condemn continued substance abuse.**

**Individuals ordered to undergo alcohol and other drug abuse treatment must be subject to careful monitoring, which should include but not be limited to periodic drug testing. These defendants must also be subject to realistic, escalating sanctions which would be imposed in the event of a substantiated violation of any term or condition of the treatment program. The consequences for violations should be both realistic and predictable, so as to deter such violations to the greatest extent possible.**

**This section does not discuss the specific procedures for prosecuting or adjudicating violations, or for ensuring due process. It is assumed that such enforcement actions would be conducted in accordance with established state laws and procedures governing pre-trial release, probation and parole revocation proceedings.**

**Subsection (a) authorizes appropriate judicial or administrative agencies to develop and publish a schedule of "presumptive" sanctions to be imposed upon a finding of a violation. Most if not all states have in place laws or "guidelines" which limit sentencing discretion and provide guidance to sentencing courts with respect to whether to impose a term of incarceration as opposed to a probationary or non-custodial sanction and with respect to the length of any custodial or probationary term. Many jurisdictions also prescribe certain bare minimum conditions of probation, such as a require-**

ment that the offender refrain from committing any new crime and that he or she periodically report to some [defendant management and monitoring agency]. Few states, however, have in place laws or entities akin to sentencing commissions to establish guidelines concerning the appropriate sanctions to impose upon a given violation of probation or parole. The benefits of predictability, uniformity and consistency apply not only to initial sentencing proceedings, but also to parole or probation violation hearings.

The schedule of presumptive sanctions should be designed to hold all defendants accountable and to ensure a proportionate, predictable and uniform response to all violations. The schedule of presumptive sanctions must account for the seriousness of the violation, the defendant's record of prior violations and his or her overall progress or lack of progress in the course of treatment, as determined by the treatment program's report. State judicial or administrative authorities should develop such a schedule according to local needs and resources. Also pursuant to Section 17(b), the [single state authority on alcohol and other drugs] should assist in the development and refinement of the schedule of presumptive sanctions.

Subsection (a) lists a number of authorized dispositions in the event of a finding of a violation, ranging from requiring the defendant to undergo more intensive monitoring to revocation of probation or parole and placement of the offender in prison. This list of authorized dispositions is not exhaustive and is not intended to limit the range of sanctions or options which might be available to courts or parole authorities under state law.

This subsection provides that the court or other appropriate authority enforcing the violation should defer to the determination of the treatment program with respect to the degree to which the defendant has satisfactorily engaged in the treatment process and has made progress in the course of treatment. In order for defendants to take drug treatment programs seriously, they must understand that the recommendations of treatment programs will strongly influence the decisions made by courts, parole authorities and [defendant management and monitoring agencies], and these agencies in turn will support treatment programs in holding defendants accountable.

Subsection (b) requires that all defendants ordered to undergo treatment pursuant to this [Act] must receive a copy of the schedule of presumptive sanctions. See also discussion of Section 9(d). This feature is designed to

promote the specific deterrence of persons ordered to undergo treatment. One of the principal objectives in developing a schedule of presumptive sanctions is to ensure predictability to encourage compliance to the greatest extent possible. Persons ordered to undergo treatment pursuant to this [Act] are admonished that they will be held accountable, and are entitled to know what will happen to them if they violate the terms and conditions of their participation in the treatment program.

Subsection (c) establishes the general rules that upon a finding of a violation, such as a positive urine test, the court must immediately impose the sanction (or combination of sanctions) as are prescribed in the schedule developed pursuant to subsection (a), unless the court is clearly convinced that the imposition of such sanction or sanctions would be inappropriate in the circumstances. The schedule developed pursuant to subsection (a) thus prescribes a "presumptive" sanction which the court or appropriate parole authority should ordinarily impose in the absence of special aggravating or mitigating circumstances not otherwise accounted for in the schedule.

It should be noted that the section expressly provides that the sanction be imposed "immediately" upon a finding of the violation. If the court or other appropriate authority were to suspend imposition or execution of the sanction, or otherwise hold the proceedings in abeyance, such decision would effectively constitute a "lesser sanction" than that prescribed in the schedule. Any such departure must be justified in accordance with the legal standards set forth in this section and discussed immediately below.

A departure from the schedule of presumptive sanctions would only be authorized where the court is clearly convinced not only that the prescribed sanction is inappropriate, but also that the need to depart from the schedule of presumptive sanctions "clearly overrides the need to deter the defendant and others from committing future violations." This feature recognizes that the strict enforcement of the published schedule serves a vital systemic function, that is, to further the goal often referred to in the context of substantive criminal law as "general deterrence." Under this approach, the court or appropriate parole authority must consider the effect of the departure from the published schedule not only on the defendant at bar, but also on all other persons who have been ordered into treatment and who might view a more liberal departure policy as some form of license to violate the terms and conditions of participation in the treatment program.

To emphasize this point, this subsection provides that where the court intends to make what is in essence a “downward” departure from the schedule of presumptive sanctions (i.e., to impose a lesser sanction than that prescribed in the schedule), the court must also find the existence of compelling and extraordinary circumstances “except upon the recommendation of the treatment program.” It is expected that any such finding of extraordinary and compelling circumstances would only rarely be made.

If the treatment program does recommend a “lesser sanction” than the one prescribed in the published schedule of presumptive sanctions, the court or appropriate parole authority will still be required to find that the presumptive sanction is both inappropriate in the circumstances and that the need to depart from the presumptive sanction clearly overrides the need to deter the defendant and others from committing future violations. While this represents a substantial burden, it is nonetheless a far lesser standard than the finding of “compelling and extraordinary circumstances” which the court would be required to make in the absence of the affirmative recommendation of the treatment program to impose any such lesser sanction.

This section is silent with respect to the right of a prosecutor to appeal the imposition of a lesser sanction. It is thought that such matters are best left to existing state law and procedures.

### ***Section 12. Drug Testing or Assessment Fees.***

(a) Except as provided in subsection (c), the court, or the [parole board or other appropriate authority] in the case of an inmate, shall impose upon a person reasonable fees to cover the cost of:

- (1) any drug test of the person required or ordered under this [Act]; and
- (2) any assessment of the person required or ordered under this [Act].

The fees shall not be less than the administrative costs of a drug test or assessment and shall not exceed [     ]. The fees may be deducted from any income an inmate has received as a result of labor performed at the correctional institution or any type of work release program.

(b) Upon a finding of indigence, the court, or the [parole board or other appropriate authority] in the case of an inmate, shall require the person to pay as

much of the fee as is consistent with the person’s ability to pay.

(c) The person shall not be required to pay any fee if:

- (1) the drug test results are negative for the presence or use of alcohol or a controlled substance;
- (2) the person is acquitted of the present charge or charges; or
- (3) the present charge or charges are dismissed for any reason other than the granting of a conditional discharge.

(d) All fees collected pursuant to (a)(1) shall be forwarded to the [defendant management and monitoring agency] for payment of costs associated with the agency’s pretrial drug testing program.

(e) All fees collected pursuant to (a)(2) shall be forwarded to the assessment program for payment of costs associated with the provision of assessments.

#### COMMENT

This [Act] generally does not detail the procedures for collecting the fees ordered to be assessed pursuant to the section. Rather, such procedures and available remedies in the event of a failure to pay are left to existing laws and rules governing the collection of fines, fees and penalties in criminal actions.

### ***Section 13. Credit for Time Served in Residential Treatment.***

A person ordered by a court pursuant to this [Act] to participate in substance abuse treatment on a residential, inpatient basis while awaiting trial or other disposition of pending charges shall be entitled to credit for time served for each day during which he or she has been committed to such residential treatment, provided that the person has made satisfactory progress in the substance abuse treatment program as determined by the treatment program’s report. No such credit shall be earned except upon the recommendation of the treatment program, certifying that the person has satisfactorily complied with court-imposed terms and conditions and that he or she has satisfactorily engaged the treatment process.

#### COMMENT

The right to “credit for time served” would only apply in the case of a person who has been committed pursuant to this [Act] to a residential, inpatient drug rehabilitation program, that is, one where the person is not free to

leave the residential facility or grounds without specific permission or authorization. See also Section 14 concerning the applicability of the criminal offense of escape. The person need not be placed in a government owned or operated facility. A person may be entitled to credit for time served pursuant to this section where he or she has been placed in a privately owned or operated drug rehabilitation program or facility which has, for example, entered into a contract with an appropriate criminal justice agency to provide residential treatment services to persons referred pursuant to this [Act].

This provision represents an important innovation — the concept of contingent credit, that is, credit subject to a condition. This feature provides a powerful, tangible incentive for defendants who are awaiting trial to cooperate with and engage in the treatment process, thus advancing the goal of providing meaningful treatment incentives and opportunities at the earliest possible point in the criminal justice process. Compare Section 15, which also rewards defendants who make satisfactory pretrial progress in treatment by establishing an express mitigating factor to be considered at the sentencing proceeding.

The [Act] is silent with regard to the right of a defendant to challenge in court the determination by the treatment program that he or she has not satisfactorily engaged the treatment process. Nor does the [Act] set out the standard by which the court would review any such determination made by the treatment program. As noted in the discussion of Section 11, the specific procedures for adjudicating alleged violations and for providing due process of law are left to other statutes and court rules of general applicability.

All determinations and recommendations by the licensed treatment program should be made by reference to clinical therapeutic standards and criteria accepted within the profession or expressly designated or adopted by the [single state authority on alcohol and other drugs]. See Section 18. Furthermore, it is intended that very wide latitude would be granted in the administration of such a program and that recommendations by the program concerning whether the defendant has engaged the treatment process are presumed to be reasonable and soundly based.

In many jurisdictions, other statutes or court rules determine whether a defendant is entitled to credit for time served where he or she has been placed in a state operated hospital or other medical facility while awaiting trial. This section is designed to supersede any other less specific state statute or rule.

In most jurisdictions, the determination of earned credits is made by reference to statute and does not involve a constitutional question. In some jurisdictions, however, a question may arise under the state constitution whether a person who has been confined to a residential treatment facility may be denied or, in this case, “divested” of credit for time served. The resolution of this issue may depend upon whether the person was “confined” or was in “official detention,” as opposed to being placed in a medical or therapeutic facility in lieu of detention. Pursuant to Section 14, a defendant who has been ordered to participate in a residential, inpatient drug treatment program is deemed to be subject to “official detention” for the purposes of prosecution for the crime of escape. This provision is designed to deter defendants from unilaterally disengaging the treatment process. It is not intended to equate residential treatment with traditional confinement or detention for all purposes.

Finally, with respect to any constitutional question, the effect of this provision is to re-affirm that the defendant has an affirmative duty to comply with the court order to engage in the treatment process. The defendant must truly earn credit for time served by complying with the court order, which in this context is not achieved merely by the fact that the defendant has not “escaped.” (It goes without saying that under the laws in every jurisdiction, a defendant would not be entitled to credit for “time served” during any period during which he or she has absconded from custody). Rather, the defendant must also actively engage in the treatment process.

#### ***Section 14. Escape from Residential Treatment Facility.***

A person placed into a residential treatment facility or program pursuant to this [Act] shall be deemed to be subject to official detention for the purposes of a criminal prosecution for violation of [criminal law defining the crime of escape].

#### COMMENT

This section is designed not only to ensure public protection, but also to underscore the point that a defendant must at all times comply with the terms and conditions ordered by the court, as well as the rules and regulations established by the treatment program, including rules and regulations which would prohibit the person from leaving the grounds of the facility without proper prior authorization.

The phrase “official detention” is taken from the Model Penal Code definition of the crime of escape. Jurisdictions which do not follow the Model Penal Code formulation should revise this section to account for the exact language used in the state law definition of the crime of escape, absconding or similar offense.

It is not necessary under this section that the residential treatment facility be owned or operated by the government. This section would thus also include unauthorized absconding from a privately run or operated facility, provided that the defendant had been ordered to undergo residential, in-patient treatment in that facility pursuant to this [Act].

Nothing in this section is intended to preclude prosecution for criminal or civil contempt or a proceeding for a violation of a term or condition of pre-trial release, probation, conditional discharge or parole. This section is designed to enlarge, not to limit, prosecutorial and enforcement options in the event that a defendant ordered into residential treatment pursuant to this [Act] leaves the facility or grounds without prior authorization.

If the treatment program in its discretion pursuant to Section 8(c) expels or discharges a defendant, such defendant would not be guilty of the crime of escape. However, in that event, it would be the responsibility of the treatment program promptly to notify the [defendant management and monitoring agency], court or other appropriate authority regarding its decision to expel or discharge the defendant.

### ***Section 15. Satisfactory Progress in Treatment as Mitigating Factor.***

A person's satisfactory progress in a substance abuse treatment program as determined by the treatment program's report shall be considered a mitigating factor and evidence of the person's amenability to treatment for purposes of sentencing, terms and conditions of probation, or parole or other release from a correctional facility.

#### COMMENT

**This [Act] prescribes an effective combination of rewards and punishments to motivate defendants to overcome denial and to participate fully in treatment. Compare Section 13, which authorizes credit for time served in residential treatment while awaiting trial dependent upon the defendant's satisfactory participation in the treatment program.**

In most jurisdictions, penal statutes or sentencing codes list the aggravating and mitigating factors which a court may consider in imposing an appropriate sentence upon conviction. This section is designed to supplement existing sentencing law, and establishes the policy that a defendant's progress in treatment is a mitigating circumstance and persuasive evidence that the defendant can continue to make progress in court-ordered treatment imposed as part of the sentencing process.

This section is not intended to preempt or supersede laws which otherwise govern the sentencing process or which prescribe a given sentencing outcome. Thus, this section is not intended to create an exemption to any mandatory minimum term which may be required to be imposed by law.

It is the responsibility and authority of the treatment program in its report to determine whether and to what extent the defendant has made “satisfactory progress” in treatment. This feature is designed to enhance the credibility and authority of drug treatment programs by making certain that defendants understand that the recommendations of treatment programs will strongly influence the decisions to be made by the court.

Ultimately, however, the sentencing court must determine the weight to be accorded this mitigating factor in balancing the aggravating and mitigating circumstances within the statutory sentencing scheme.

Nothing in this section should be construed to preclude the court from considering other pieces of information or evidence concerning the defendant's participation in the treatment program in addition to the report and conclusions of the treatment program. Thus, the court would be permitted to consider any record of infractions, violations and sanctions imposed upon the defendant during his or her participation in the treatment program.

### ***Section 16. Reporting and Implementation.***

- (a) Every substance abuse diagnostic assessment program, treatment program, court, pretrial services agency, probation department, correctional facility and parole agency which provides services pursuant to this [Act] or which otherwise supervises or issues an order pursuant to this [Act] shall keep such case-specific records and aggregate data and statistics as may be required by the [single state authority on alcohol and other drugs], and shall provide to such agency on a

monthly basis a report of activities and required information on forms to be developed and prescribed by the [single state authority on alcohol and other drugs].

The [single state authority on alcohol and other drugs], in conjunction with corrections officials and addiction treatment programs, shall identify data to be collected, mechanisms for data collection, and funding sources to support data collection.

(b) The [single state authority on alcohol and other drugs, or other appropriate agency(ies)] shall report on an annual basis to the legislature and to the governor its findings concerning the need for and implementation of the various provisions of this [Act], which report shall include a synopsis of such information or data necessary to determine the impact, utility and cost-benefits of the provisions of this [Act].

(c) The [single state authority on alcohol and other drugs] shall establish an advisory board which shall be comprised of judges, prosecutors, defense attorneys, probation officials, parole officials, correctional officials, substance abuse diagnostic assessment programs, substance abuse treatment programs and individuals working in licensed alcohol and other drug treatment facilities who are past consumers of treatment services. The advisory board shall meet periodically to discuss the provisions, implementation, and evaluation of this [Act] and to make recommendations to the [single state authority on alcohol and other drugs].

(d) Within two years of the adoption of this [Act], the [single state authority on alcohol and other drugs] shall convene a conference of judges, prosecutors, defense attorneys, probation officials, parole officials, correctional officials, substance abuse diagnostic assessment programs and treatment programs, and individuals working in alcohol and other drug treatment facilities who are past consumers of treatment services, concerning the implementation and evaluation of this [Act]. The conference shall make recommendations to the legislature and to the governor concerning ways to improve and enhance the provisions and implementation of this [Act] and the availability and quality of services, remedies and sanctions for substance abusing offenders. Nothing herein shall be construed in any way to prevent or preclude the [single state authority on alcohol and other drugs] or any other public or private agency from at any time convening a meeting, conference seminar or training session concerning any provision of this [Act] or its implementation or evaluation.

(e) All data, information or records kept or compiled pursuant to this section shall be deemed to be public records for the purposes of [insert citation to appropriate public information or right-to-know law], provided however that any record, document or information which identifies a specific defendant or juvenile shall be kept confidential in accordance with the provisions of 42 U.S.C. §290dd-3 and shall not be disclosed except as may be authorized by law.

#### COMMENT

**The provisions of this [Act] are designed to make certain not only that individual offenders are carefully monitored and held fully accountable for their actions, but also to ensure that treatment programs and [defendant management and monitoring agencies] are held accountable and are subject to rigorous empirical evaluation. Such objective monitoring and evaluation is necessary to maintain the credibility of the entire system and to educate the public that treatment works with respect to the offender population. Such thorough evaluations, however, are not possible unless treatment programs and defendant management and monitoring agencies are required to maintain accurate data and statistics.**

**Accordingly, this section carefully defines the responsibilities of diagnostic assessment programs, treatment programs, courts, pre-trial services agencies, probation departments, correctional facilities and parole agencies to maintain appropriate records and statistics.**

**It is thought that it would inappropriate for model legislation to list specifically all of the types of data and statistics which should be kept in order to ensure an appropriate evaluation and monitoring of the implementation of this [Act]. Accordingly, the [single state authority]for Drug and Alcohol Abuse or other appropriate designated agency is authorized and required to identify the specific types of information and data which must be kept and transmitted to the [single state authority]or other appropriate authority. See Section 18.**

**In developing an appropriate research methodology, it is imperative that evaluators use sufficiently sophisticated and sensitive measures of short and long term impact, such as the number of substance-free and crime-free days while under supervision, relative decreases in the amount of substances abused, the relative time to re-arrest, the number of days engaged in gainful employment, vocational or educational programs, and other information concerning the long-term effect of court-ordered interventions. See Section 2(l). Ultimate-**

ly, it is the responsibility of the [single state authority] to compile and study data and statistics so as to ensure the most appropriate use of the limited diagnostic assessment and treatment resources available throughout the state.

The purpose of the conference in subsection (d) would be to make recommendations to the legislature and to the governor concerning ways to improve and enhance the provisions and implementations of the [Act] and to enhance the availability and quality of the services, remedies and sanctions for dealing with substance abusing offenders. See also proposed community mobilization legislation concerning the need to enlist community support and to provide opportunities for a wide range of interests and constituencies to provide information and advice to the [single state authority on alcohol and other drugs] or other appropriate coordinating agencies.

Subsection (e) ensures that public monies spent on substance abuse diagnostic and treatment programs are well spent and that all programs are carefully and objectively evaluated. This subsection makes clear, however, that any record, document or information which identifies a specific defendant or juvenile must be kept confidential in accordance with the provisions of applicable federal confidentiality laws.

### ***Section 17. Training for Criminal Justice and Juvenile Justice Professionals.***

(a) The [single state authority on alcohol and other drugs] shall establish and maintain, in cooperation with the attorney general, local prosecutors, municipal and county police, state police, sheriffs, the courts, the department of corrections, the state bar association, licensed substance abuse diagnostic programs, licensed treatment programs, individuals working in alcohol and other drug treatment facilities who are past consumers of treatment services, and other appropriate public and private agencies, a program for the education of police officers, prosecuting agencies, court personnel, judges, probation and parole officers, public and private attorneys who represent adults and juveniles charged with crimes, correctional personnel, and other law enforcement personnel, with respect to the causes, effects, indications, treatment and monitoring of drug use, drug dependency and alcoholism. The program of education shall identify the different methods and modalities for assessing and treating drug and alcohol abuse, for identifying court-involved juveniles

and adults who are alcohol or drug abusers, and shall also discuss those public and private resources and programs which are available within the state. The program of education shall stress the need for prompt assessment, early intervention and referrals for substance abuse and addiction diagnosis.

(b) The [single state authority on alcohol and other drugs] shall serve in a consulting capacity to such public and private agencies as described in subsection (a) and shall foster and coordinate a full range of services and programs which will be available for assessment, treatment and monitoring of drug and alcohol abuse and dependency. The [single state authority on alcohol and other drugs] shall assist such public and private agencies in developing rules, regulations, directives, guidelines, policies, programs or procedures for implementing and enforcing the provisions of this [Act] and for achieving the benefits, goals and objectives set forth herein.

#### COMMENT

In many jurisdictions, the individuals working in the criminal justice system complain, usually with justification, that there are inadequate resources dedicated to provide substance abuse diagnostic, intervention and treatment services. These individuals may not be aware of all that they can do to take full advantage of those limited resources which do exist. Accordingly, this section establishes a training program for courts, probation and parole departments, prosecutors, defense attorneys and others working within the traditional criminal justice system so that these individuals have at least a rudimentary understanding of the different methods and modalities for assessing and treating alcohol and other drug abuse and so that they will be able to take full advantage of those public and private resources and programs which are available within the jurisdiction.

This section sets forth the legislative policy that courts, prosecutors, police departments, probation and parole agencies and correctional agencies should cooperate and consult with the [single state authority] with respect to the development, revision and implementation of all policies, procedures, rules and regulations which relate to providing substance abuse diagnosis, intervention and treatment services.

### ***Section 18. Rules and Regulations.***

The [single state authority on alcohol and other drugs, and other appropriate agency (ies)] shall within 120 days

of the adoption of this [Act] promulgate in accordance with [state administrative procedures act] such rules and regulations, and shall develop and periodically review and revise such guidelines, directives, standards and protocols, and shall take such other actions as are necessary and appropriate to implement the provisions of this [Act].

### **Section 19. Licensure and Standards.**

All programs providing alcohol and other drug treatment or diagnostic assessment services pursuant to any provision of this [Act] shall:

- (a) be licensed by the [single state authority on alcohol and other drugs]; and
- (b) be designated by the [single state authority on alcohol and other drugs] as having special skills in providing treatment and assessment services to persons involved in or referred from the criminal or juvenile justice systems.

The [single state authority on alcohol and other drugs] is further directed to develop program standards to ensure the provision of the full continuum of care for persons ordered to undergo treatment pursuant to this [Act]. Such standards shall address but not be limited to the following: defining the continuum of care; matching persons to appropriate treatment programs and facilities including voluntary and involuntary referrals and the use of minimum security facilities; recruiting and hiring practices representative of the population to be treated including individuals in recovery from alcohol and other drug abuse and addiction; and addressing issues of conflict of interest.

#### COMMENT

**This section is somewhat more specific than the provisions of Section 18, which in general terms authorizes the [single state authority] and other appropriate agencies to promulgate rules and regulations and to develop and periodically review and revise guidelines, directives, standards and protocols which may be necessary and appropriate to implement the provisions of this [Act].**

### **Section 20. Funding Sources.**

- (a) In order to support and augment the diagnostic assessment and treatment services provided pursuant to this [Act], the [single state authority on alcohol and other drugs] shall aggressively pursue all federal funding and matching funds available through Medicaid, the Early

and Periodic Screening, Diagnosis, and Treatment Services program, SSI, and other federal sources and programs. In addition, the [single state authority on alcohol and other drugs] shall pursue all available federal matching funds through Medicaid for non-hospital residential alcohol and other drug treatment services from the Health Care Financing Administration (HCFA).

- (b) Where the person to whom alcohol and other drug diagnostic assessment or treatment services are provided pursuant to this [Act] is a member of a health maintenance organization or is otherwise covered by any contract or program for health insurance, every reasonable effort shall be made to ensure that the cost of diagnostic assessment and treatment services are defrayed by the health maintenance organization or insurer. Notwithstanding any other provision of law, where the health maintenance organization, insurer or managed care contractor disputes the treatment recommendation accepted by the court [or other appropriate authority] pursuant to this [Act], such recommendation shall prevail and shall be deemed to be reasonable and appropriate.

#### COMMENT

**This section is designed to ensure that all possible funding sources are made available to support the alcohol and other drug diagnostic and treatment services to be provided pursuant to this [Act].**

### **Section 21. Immunity from Liability.**

- (a) Any licensed alcohol and other drug diagnostic assessment program and treatment program which, in good faith, provides services pursuant to this [Act] shall not be liable in any civil action for damages as a result of any acts or omissions in providing such services, provided the skill and care given is that ordinarily required and exercised by others in the profession. The grant of immunity provided for in this subsection shall also extend to all employees and administrative personnel of the licensed program.
- (b) Any qualified person who withdraws or otherwise obtains, in a medically accepted manner, a specimen of breath, blood, urine, or other bodily substance pursuant to any provision of this [Act] shall not be liable in any civil action for damages for so acting, provided the skill and care exercised is that ordinarily required and exercised by similar programs or others in the profession.

***Section 22. Statutory Construction.***

The provisions of this [Act] shall be liberally construed to effectuate its remedial and rehabilitative purposes.

COMMENT

**This section makes clear that the provisions of this [Act] are to be liberally construed to effectuate the [Act]'s remedial and rehabilitative purposes. In identifying those purposes, courts and administrative agencies should review the declaration of legislative findings and policy set forth in Section 2.**

***Section 23. Severability.***

If any provision of this [Act] or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

***Section 24. Effective Date.***

This [Act] shall be effective on [reference to normal state method of determination of the effective date][reference to specific date] document

# Appendix G

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