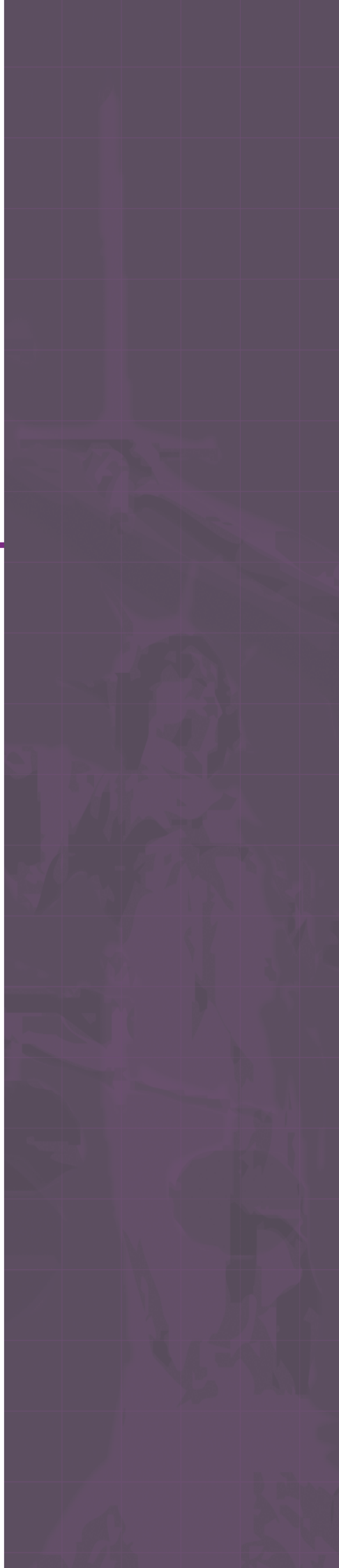
Chapter One

Intervention Programs – An Overview



Contents

The development of court intervention programs

Court intervention programs are a relatively recent development in the Australian justice system and they represent a significant change in the way that the criminal justice system responds to offenders. Traditionally, courts impose orders that are supervised by other justice agencies: police officers monitor compliance with bail conditions and community corrections officers monitor compliance with sentencing orders. In contrast, court intervention programs involve judicial officers in this process such that the court and various other agencies jointly supervise and manage offenders in order to promote rehabilitation and prevent reoffending.

There is considerable support and enthusiasm within the justice system for court intervention programs; however, some commentators have questioned the appropriateness of these new initiatives. A frequently expressed concern is that court intervention programs challenge the traditional adversarial system. In order to examine this concern, and consider the development and operation of court intervention programs, it is important to understand exactly where they are positioned within the criminal justice process. Court intervention programs operate in the context of bail and sentencing. They do not decide guilt or innocence and no trials are conducted.[1] The following outlines the operation and aims of the traditional approach to bail and sentencing, and introduces the alternative approach offered by court intervention programs.

THE TRADITIONAL COURT MODEL

Bail

As soon as a person is charged with a criminal offence, a decision is made by the police whether that person should be released on bail or remanded in custody.[2] Bail is a written promise or undertaking by the accused that he or she will attend court when required. If bail is not granted by the police, the accused will be brought before a court and the decision will be made by a judicial officer.[3] The main purpose of bail is to ensure that the accused attends court so that the charges are prosecuted and dealt with. However, because an accused is presumed innocent until proven guilty, an accused should not be deprived of his or her liberty without good reason.

Another important objective of bail is to prevent reoffending. Although the accused is presumed innocent, the justice system recognises that the community needs to be protected. For serious or repeat offenders it may not be appropriate to release the accused on bail at all, or it may not be appropriate to release the accused unconditionally. Therefore, bail conditions are commonly imposed not only to ensure that an accused attends court, but also to minimise the risk that further offences are committed.[4]

Typical bail conditions include a requirement to regularly report to a nominated police station; a curfew prohibiting the accused from leaving his or her place of residence during specified hours; and a condition prohibiting the accused from attending a particular location or contacting a particular person. While conditions requiring attendance at treatment or counselling programs can be imposed, the bail system has not traditionally sought to address the underlying causes of offending behaviour. Bail conditions are usually designed to control the accused's behaviour or restrict the accused's freedom, rather than to facilitate rehabilitation. This approach stems from the principle that the accused is presumed innocent but, in reality, many accused come before the courts with a history of offending and personal circumstances that clearly suggest a risk of future offending.

Once imposed, bail conditions are usually monitored by the police.[5] If an accused fails to comply with a condition of bail the police can arrest the accused

1. Although some Australian court intervention programs operate as part of a broader framework; for example, the Neighbourhood Justice Centre in Collingwood uses court intervention options for some offenders but it also conducts hearings for contested matters. Family violence courts in Western Australia may hear contested charges but again this is a separate function to the court intervention program.
2. The police do not have jurisdiction to decide bail for all offences (eg, murder) so in some instances the accused is kept in custody until a decision about bail is made by the relevant judicial officer.
3. In practice, defence counsel and prosecutors regularly discuss possible bail conditions before the court hearing. The prosecutor might advise defence counsel that there is no objection to bail so long as the accused is subject to certain conditions. Therefore, an agreed position may be presented to the court. In the event that there is no agreement between defence counsel and the prosecution, the court will hear submissions from both sides and determine whether the accused can be released on bail and, if so, on what conditions.
4. See further discussion under 'Bail', Chapter Six.
5. Community corrections officers may also be involved in monitoring bail conditions. For example, community corrections officers are required to monitor an accused's compliance with home detention conditions.

and bring the matter back before the court. However, failure to comply with a bail condition does not automatically result in arrest. If an accused offers an acceptable excuse, police may decide not to instigate breach of bail proceedings. Thus, the court is not aware of how the accused is performing on bail unless the accused is arrested and brought back before the court for breaching bail.

Sentencing

Sentencing is the stage of the criminal justice process where the judicial officer decides the appropriate penalty for an offence. In making this decision the judicial officer is required to take into account all relevant factors; the various sentencing purposes and principles; and any statutory requirements. The traditional purposes of sentencing are retribution (punishment), deterrence, incapacitation, denunciation and rehabilitation. These purposes are underpinned by the broader goal of community protection. Punishment is linked with deterrence; if offenders are punished severely enough it is assumed that they will not offend again and, further, that other 'would-be' offenders will be discouraged from committing offences. Denunciation aims to inform the offender and the community that certain behaviour is unacceptable. Incapacitation (eg, imprisonment) temporarily prevents an offender from committing further offences. Rehabilitation aims to reform an offender so that he or she no longer poses any threat to the community.[6] The dominant statutory principle in Western Australia is proportionality; although the various purposes of sentencing have to be considered, the sentence imposed must be 'commensurate with the seriousness of the offence'.[7]

At a sentencing hearing, the judicial officer is informed about the circumstances of the offence by the prosecution. This includes discussion of any aggravating factors and (if relevant) the offender's prior criminal record. A prosecutor may make submissions to the court about the appropriate penalty for the offence. Defence counsel explain any mitigating factors and make submissions about the appropriate disposition. Usually defence counsel seek the least punitive sentence possible, subject to the client's instructions. After weighing all relevant factors and relevant principles, the judicial officer imposes a sentence. The judicial officer's role ends once the sentence is imposed.

A variety of different sentencing options exist in Western Australia. Under s 39 of the *Sentencing Act 1995* (WA) there is a hierarchy of sentencing options; that is, no sentence, a Conditional Release Order (CRO), a fine, a Community Based Order (CBO), an Intensive Supervision Order (ISO), suspended imprisonment, Conditional Suspended Imprisonment (CSI) and imprisonment. It was expected that the introduction of improved non-custodial alternative sentencing options would reduce the rate of imprisonment in Western Australia; however, this expectation has not been fulfilled.[8]

Community-based sentences

Community-based sentences (CBOs, ISOs and CSI) include program conditions, supervision and community work.[9] A program condition is a requirement that the offender undergoes assessment (and treatment if necessary) in relation to drug or alcohol dependency; psychological and psychiatric needs; or medical problems.[10] Supervision involves regular appointments or contact with a community corrections officer: for a CBO the offender must report to a community corrections officer at least once every eight weeks; and for an ISO and CSI supervision must take place at least once every 28 days.[11]

The precise requirements of the order are generally determined by the community corrections officer.[12] For instance, if a judicial officer imposes a program requirement upon a drug-dependent offender as part of a CBO, the community corrections officer determines the nature and extent of any drug treatment. Under the case management model employed by Community Justice Services, offenders are classified according to their risk (eg, high-risk or low-risk) and services and programs are targeted to respond to the offender's level of risk and individual needs.[13]

In monitoring the offender's progress, the community corrections officer has some discretion about how to respond to the offender's compliance with the order. If the offender misses a counselling session, he or she might be given a warning or, alternatively, formal breach proceedings might be instigated. A review of community-based sentences in Western Australia observed that community corrections officers

> have to balance their roles of engaging with offenders who often lead chaotic and dysfunctional lives and

6. For further discussion of the purpose of sentencing, see 'Sentencing', Chapter Six.
7. *Sentencing Act 1995* (WA) s 6(1).
8. Auditor General of Western Australia, *Implementing and Managing Community Based Sentences*, Report No. 3 (2001) 5. See discussion below under 'Imprisonment Rates'.
9. For a CBO the court must impose at least one of three primary requirements: a supervision requirement, a program requirement or community work: *Sentencing Act 1995* (WA) s 64. Supervision is mandatory with an ISO, and the court must impose at least one additional requirement (ie, a program requirement, community work or a curfew): *Sentencing Act 1995* (WA) s 72. For CSI, the court must impose at least one of the following requirements: a supervision requirement, a program requirement or a curfew requirement: *Sentencing Act 1995* (WA) s 84B.
10. *Sentencing Act 1995* (WA) s 66.
11. *Sentencing Act 1995* (WA) ss 65(4), 71 & 84B.
12. Offenders who receive community-based sentences are managed and supervised by community corrections officers, who work in the Community Justice Services division of the Department of Corrective Services.
13. Auditor General of Western Australia, *Implementing and Managing Community Based Sentences*, Report No. 3 (2001) 4.

enforcing the orders issued by courts. Judgement must be exercised in deciding, for example, whether an offender 'no show' has a valid excuse or is a violation of an order.[14]

In 2001 this review found that there was 'considerable inconsistency in case management'.[15] By 2005, it was reported that case management practices had improved. A change in policy required community corrections officers to 'report an offender to the branch manager or senior community corrections officer after three omissions, or earlier if considered appropriate'.[16] However, the potential for inconsistency remains; there is still a degree of latitude for individual managers and community corrections officers to adopt their own practices. Notably, there can be considerable delay between the breach of an order and the court's response to the breach. Once breach proceedings are considered necessary, formal documentation must be lodged with the court and then the offender must be brought before the court. [17] This process can take some time.[18]

Therefore, compliance with community-based sentences is achieved by meeting the formal requirements of the order, not resolving any problems that may have led to the offence. For instance, a drug-dependent homeless offender who is placed on a CBO with a program requirement may be ordered by Community Justice Services to attend a number of drug counselling sessions and report to a community corrections officer once a week for six months. If those requirements are met (and there has been no further offending) the order is successfully completed. Thus, successful completion of the order does not mean that the offender has addressed the underlying causes of offending behaviour – if the offender is still dependent on drugs and is still homeless, the risk of reoffending may be just as high as it was at the time the order was made.[19]

THE CRIMINAL JUSTICE SYSTEM

The functions of the criminal justice system include the prevention, detection and investigation of crime; the determination of criminal responsibility; the imposition of appropriate sanctions; the protection of individual rights; the provision of secure and effective custodial facilities; and the provision of effective interventions to prevent reoffending.[20] Overall, the most important objective of the justice system is to protect the community from crime.[21]

There is a perception in the community that crime rates are increasing and that courts contribute to escalating crime rates by imposing lenient sentences.[22] This perception is based on misinformation: many people overestimate the level of crime in the community; believe that imprisonment deters and reduces crime;[23] and are not aware of the effectiveness of alternative approaches.[24] This misinformation is fuelled by the media's coverage of crime and the criminal justice system. The media tend to report only controversial sentencing outcomes. As the Chief Justice of Western Australia has stated, 'fair and reasonable' sentences do not reach the news.[25] Perceived leniency is also based upon incomplete information presented in the media. A number of research studies have found that once members of the public are informed about the full circumstances of a case, they usually suggest a more lenient penalty than the actual sentence imposed by the judicial officer.[26]

Crime rates

Measuring the level of crime in the community is problematic: many crimes are not detected or reported so the 'full extent of crime will never be completely

14. Auditor General of Western Australia, *Implementing and Managing Community Based Sentences*, Report No. 2 (2005) 8.
15. Auditor General of Western Australia, *Implementing and Managing Community Based Sentences*, Report No. 3 (2001) 6.
16. Auditor General of Western Australia, *Implementing and Managing Community Based Sentences*, Report No. 2 (2005) 7.
17. See Auditor General of Western Australia, *Implementing and Managing Community Based Sentences*, Report No. 3 (2001) 29.
18. In 2001 it was noted that magistrates were concerned that there were delays in instigating breach proceedings: ibid 19.
19. Mahoney D, *Inquiry into the Management of Offenders in Custody and the Community* (Perth: Western Australian Government, 2005) [6.52].
20. Australian Government, Productivity Commission, *Report on Government Services 2008* (2008) C.2.
21. The Hon Wayne Martin, Chief Justice of Western Australia (Address to the Rotary District 9450 Conference, *Protecting the Future: Youth and the justice system*, Perth, 31 March 2007) 2. On 23 November 2006 the Minister for Corrective Services stated that 'government's overriding priorities were community safety and reducing reoffending': Western Australia, Parliamentary Debates, Legislative Assembly, 23 November 2006, 8769 (Margaret Quirk, Minister for Corrective Services).
22. See the Hon Wayne Martin, Chief Justice of Western Australia, 'The State of Justice: The truth about crime and sentencing' (Opening address to Law Week, Perth, 5 May 2008) 4; Debelle B, 'Sentencing: Legislation or Judicial Discretion?' (Paper presented at the *Sentencing Conference*, Canberra, 8-10 February 2008) 4–8.
23. It has been observed that 'increased penalties imposed by the courts have often no discernible impact on crime rates': Steytler C, 'Sentencing in the Criminal Justice System' [2008] *Vista Public Lecture Series* 17. Justice Steytler also observed that deterrence is ineffective for offenders with mental illness; offenders addicted to drugs and offenders 'who no longer [have] anything to lose': 20.
24. See Indermaur D, 'Public Attitudes, the Media and the Politics of Sentencing Reform' (Paper presented at the *Sentencing: Principles, Perspectives & Possibilities* conference, Canberra, 10–12 February 2006) 4. Justice Steytler has commented that there is 'community reluctance to spend money' on diversionary and rehabilitation programs because of a lack of awareness of what these types of programs can achieve: Steytler C, 'Sentencing in the Criminal Justice System' [2008] *Vista Public Lecture Series* 24.
25. The Hon Wayne Martin, Chief Justice of Western Australia, 'The State of Justice: The truth about crime and sentencing' (Opening address to Law Week, Perth, 5 May 2008) 5. The Chief Justice emphasised that Western Australian courts impose approximately 80,000 sentences per year and the media only concentrate on about 50–100 of these: 5.
26. Debelle B, 'Sentencing: Legislation or Judicial Discretion?' (Paper presented at the *Sentencing Conference*, Canberra, 8-10 February 2008) 8.

known'.[27] Despite the perception that crime rates are increasing, for many types of offences the available data suggests the opposite.[28] Other than offences against the person (such as assault and sexual assault), the rate of reported crime has generally fallen over the last decade or so.[29] Reported crime is a reasonably accurate measure of actual crime rates for certain types of offending. For example, the rate of burglary and motor vehicle theft in the community can be gauged from reported crime rates because these crimes must be reported in order to lodge insurance claims.[30] The rate of reported burglary and motor vehicle theft in 2005 was considerably less than it was almost a decade earlier.[31] Similarly, the rate of reported robbery offences has decreased over time.[32]

There have been notable increases in the level of reported crimes against the person, such as assault and sexual assault. But, as the Office of Crime Prevention stresses, increases in the reporting rate for these types of offences do not necessarily equate to actual increases in the level of these crimes in the community. Assaults and sexual assaults are notoriously underreported crimes and increases in the reporting of these offences can be caused by factors other than increases in the actual number of offences occurring. For example, changes in police practices and new strategies to address family and domestic violence impact reporting rates.[33] Thus, it is impossible to estimate the true level of these crimes or know if violent crimes are in fact increasing, decreasing or remaining static.

Imprisonment rates

Western Australia has the second highest imprisonment rate in the country and the highest rate of Aboriginal imprisonment.[34]

> In 1987, the imprisonment rate in Western Australia was 110 per 100,000 of population. 20 years later, in 2007, the rate had more than doubled to 241 per 100,000. Over the last decade alone, the average minimum sentence to be served before eligibility for parole imposed by the higher courts of this State increased by one quarter. Over the same period, the average time actually served increased by one-third, suggesting a reduction in the rate of grant of parole.[35]

Western Australia's imprisonment rate is also markedly higher than most other jurisdictions. In 2005, the rate of imprisonment in Western Australia was 35% higher than in New South Wales and Queensland; 50% higher than in Tasmania; 180% higher than in South Australia; and 250% higher than in Victoria.[36] The Commission is aware of difficulties in comparing data from different jurisdictions; however, it has been reported that Victoria has the lowest recorded rate of overall crime in Australia.[37] This is interesting, given that Victoria also has the lowest rate of imprisonment. Further, it is apparent from the Commission's research that the approach to court intervention programs in Victoria is sophisticated, well funded and wide-ranging.[38]

For many years there has been a disproportionate level of Aboriginal imprisonment in Western Australia. In 1998 (on census night) 34% of the adult prison population were Aboriginal.[39] In 2006–2007 Aboriginal prisoners constituted 41% of the total Western Australian prisoner population.[40] In May 2008 Aboriginal prisoners still constituted 41% of the adult prison population. Disturbingly, Aboriginal children constitute over 75% of juveniles in custody.[41] The Minister for Corrective Services, Margaret Quirk, has stated that this 'state of affairs,

27. Office of Crime Prevention, *Turning the Corner 2007: Recent crime trends in Western Australia* (2007) 3.
28. Ibid 5; The Hon Wayne Martin, Chief Justice of Western Australia, 'The State of Justice: The truth about crime and sentencing' (Opening address to Law Week, Perth, 5 May 2008) 6.
29. The rate of reported offences against the person increased from 1,089 per 100,000 persons in 1996 to 1,286 per 100,000 in 2005: Loh N et al, *Crime and Justice Statistics for Western Australia* (Perth: Crime Research Centre, 2007) 13.
30. Office of Crime Prevention, *Turning the Corner 2007: Recent crime trends in Western Australia* (2007) 3.
31. In 1996 the rate of burglary (dwelling) was 2,221 per 100,000 persons and by 2005 that rate had fallen to 1,277 per 100,000 persons. The rate of motor vehicle theft (and attempted motor vehicle theft) decreased from 921 per 100,000 persons in 1996 to 409 per 100,000 in 2005: Loh N et al, *Crime and Justice Statistics for Western Australia* (Perth: Crime Research Centre, 2007) 13.
32. In 1996 the rate of robbery offences was 95.6 per 100,000 persons and by 2005 it was 79.7 per 100,000 persons: Loh et al, ibid. The Commission notes that there were slight increases in the rates of reported burglary, motor vehicle theft and robbery from 2005 to 2006 but figures for 2007 suggest that these rates are again declining or at the very least stabilising: see Office of Crime Prevention, *Turning the Corner 2007: Recent crime trends in Western Australia* (2007) 6, 8, 9, & 11.
33. Office of Crime Prevention, ibid 3–4.
34. Western Australian Department of Corrective Services, 'Report on the Effects on Rates of Imprisonment Following the Sentencing Legislation Reforms 2003' (2008) 1 *Research & Evaluation Bulletin* 1.
35. The Hon Wayne Martin, Chief Justice of Western Australia, 'The State of Justice: The truth about crime and sentencing' (Opening address to Law Week, Perth, 5 May 2008) 11.
36. Steytler C, 'Sentencing in the Criminal Justice System' [2008] *Vista Public Lecture Series* 18.
37. Victorian Council of Social Service, *Crime & Imprisonment: Data report* (2006) 1.
38. Victoria has a number of legislatively supported programs (ie, the Koori Court, Drug Court, Neighbourhood Justice Centre, and Family Violence Divisions of the Magistrates Court) and other programs such as the CISP and CREDIT operating in the general magistrates courts. The Victorian Attorney-General's *Justice Statement 2004–2014* refers to, among other things, the need to address the underlying causes of offending behaviour: Attorney-General (Vic), *Justice Statement: Summary* (2004) 11. A policy framework for all 'problem-solving' initiatives was published in 2006: Courts and Programs Development Unit, Department of Justice Victoria, *Policy Framework to Consolidate and Extend Problem-Solving Courts and Approaches* (March 2006). The aim of this policy framework is to 'consolidate and extend problem solving courts and approaches in the court system': 3. In Chapter Five the Commission refers to the funding arrangements for two Victorian programs: Neighbourhood Justice Centre and Court Integrated Services Program.
39. Ferrante A et al, *Crime and Justice Statistics for Western Australia* (Perth: Crime Research Centre, 1999) vii.
40. Australian Government, Productivity Commission, *Report on Government Services 2008* (2008) 8.33.
41. Department of Corrective Services, *Weekly Offenders Statistics*, 22 May 2008 <http://www.correctiveservices.wa.gov.au/_files/Prison%20Count/cnt080522.pdf> accessed 30 May 2008.

while challenging, is unacceptable and shameful and needs urgent attention across government'.[42]

Recidivism

The effectiveness of criminal justice strategies can be judged in part by reference to reoffending rates. Australian Productivity Commission statistics indicate that for the period 2004–2005, 38% of all Western Australian prisoners returned to prison within two years of release. Further, 47% of prisoners returned to either prison or to an order supervised by community corrections within the two years following release.[43] Based on the Australian Productivity Commission data, Western Australia had the third highest return to prison rate in the nation and the second highest rate of return to either prison or community corrections. It has also been observed that 63% of prisoners released on parole and 68% of prisoners released unconditionally in Western Australia were rearrested within three years.[44]

For those offenders subject to an order supervised by community corrections, Western Australia recorded the highest rate of return to either prison or a community corrections order in Australia – 41% of offenders subject to an order supervised by community corrections returned either to prison or to a new community corrections order within two years.[45] In 2006–2007 Western Australia also had the lowest completion rate for community corrections supervision orders – approximately 59% of orders were completed compared to the national completion rate of 71%.

From these statistics one can confidently say that the majority of Western Australian prisoners reoffend upon release. The effectiveness of imprisonment in reducing reoffending and protecting the community is therefore questionable. Further, a significant proportion of offenders subject to community-based sentences subsequently reoffend. Information provided to the Mahoney Inquiry in 2005 estimated that 48% of offenders subject to an ISO and 38% of offenders subject to a CBO subsequently reoffend.[46] These statistics indicate that more consideration needs to be given to effective ways of dealing with offenders in the community.

Protecting the community

It has been stated that a justice system

> seeks to do three things: to prevent crime being committed; to deal with those who have committed crime; and to prevent them from committing crime again.[47]

In this reference the Commission examines the way in which courts respond to those who have committed crime and the way that court-supervised programs can be used to prevent offenders from reoffending. By the very nature of the criminal justice system, courts can only respond to those who have already committed crime – 'primary' crime prevention (stopping crime before it happens) is the function of other agencies.[48]

The Commission recognises that the courts have an important role to play in reducing the level of crime in the community by adopting strategies designed to reduce reoffending. It has been asserted that repeat offenders 'are likely to account for a significant proportion of reported and unreported crime, and initiatives aimed at reducing their offending have the potential to deliver sustainable reductions in crime rates across Australia'.[49] It is into this space that court intervention programs have developed.

DEVELOPMENT OF COURT INTERVENTION PROGRAMS

Court intervention programs were initially developed by judicial officers in the United States who were frustrated with many aspects of the traditional justice system. Following the United States' lead, many court intervention programs in Australia have been established (some with legislative and policy support). The problems with the traditional approach of the justice system to offenders that led to the development of court intervention programs both overseas and in Australia are discussed below.

The 'revolving-door' syndrome: A frequent criticism of the criminal justice system is that courts 'recycle offenders through the system' rather than 'solving the problems that bring people to court'.[50] A

42. Western Australia, *Parliamentary Debates*, Legislative Assembly, 23 November 2006, 8769 (Margaret Quirk, Minister for Corrective Services).
43. Australian Government, Productivity Commission, *Report on Government Services* (2008) C.10. These figures do not include reoffending where other penalties (such as fines) were imposed.
44. Mahoney D, *Inquiry into the Management of Offenders in Custody and the Community* (Perth: Western Australian Government, 2005) [4.7].
45. Australian Government, Productivity Commission, *Report on Government Services* (2008) C.10.
46. Mahoney D, *Inquiry into the Management of Offenders in Custody and the Community* (Perth: Western Australian Government, 2005) [4.18].
47. Ibid [4.5].
48. Western Australian Office of Crime Prevention, *Preventing Crime: State community safety and crime prevention strategy* (2004) 48–49. Secondary crime prevention involves measures designed to target potential offenders and tertiary crime prevention involves the apprehension, prosecution and sentencing of offenders.
49. Payne J, 'Recidivism in Australia: Findings and future research' (2007) 80 *Australian Institute of Criminology Research and Public Policy Series* 3. See also Weatherburn D, 'What Causes Crime?' (2001) 54 *New South Wales Bureau of Crime Statistics and Research, Crime and Justice Bulletin* 3. In 2004 it was estimated that that '20% of offenders commit 80% of crimes': Western Australian Office of Crime Prevention, *Preventing Crime: State community safety and crime prevention strategy* (2004) 15.
50. Berman G & Feinblatt J, *Good Courts: The case for problem-solving justice* (New York: The New Press, 2005) 3.

United States judge has observed that the traditional approach

> yields unsatisfying results. The addict arrested for drug dealing is adjudicated, does time, then goes right back to dealing on the street. The battered wife obtains a protective order, goes home and is beaten again.[51]

Court intervention programs have developed in order to break the cycle of continual offending and punishment. The futility of repeatedly punishing offenders without addressing their underlying problems is now well recognised. Court intervention programs actively seek to solve underlying problems so that offenders do not continue to pose a risk to the community.

Overcrowded prisons: Court intervention programs developed in the United States partly in response to overcrowded prisons.[52] It has been observed that overcrowded prisons are 'very high-cost "parking-lots" for people who generally, when released, [return] to jail'.[53] While some may believe that offenders can be rehabilitated in prison, overcrowding makes this extremely difficult. Imprisonment rates in Western Australia have continued to rise – as at 30 June 2007 there were 3847 adult prisoners in Western Australia, but the state's prisons only have capacity for 3261 prisoners.[54] The Office of the Inspector of Custodial Services recently observed that the availability of offender programs in prison is 'far below that required to meet demand'.[55] This shortfall can be explained, to some extent, by a lack of resources; however, further increases in the prison population will only exacerbate the problem.

The ineffectiveness of 'assembly-line' justice: In traditional courts, due to high caseloads, sentencing proceedings are invariably conducted quickly. After surveying a number of Australian magistrates it has been found that the median time spent on a sentencing matter in a general magistrates court is less than five and a half minutes.[56] It has been observed that court intervention programs developed in the United States as a response to 'assembly-line' justice or what has been described as 'McJustice'.[57] Time constraints in busy magistrates courts make it difficult to encourage offenders to contribute to the proceedings and uncover the real issues faced by offenders.[58]

'New' social problems: Court intervention programs address a variety of issues such as drug and alcohol dependency; mental impairment; homelessness; and family and domestic violence. It is now accepted that these problems are major issues facing the community. It has been suggested that court intervention programs evolved because of 'a breakdown in traditional social and community institutions [eg, the church, family and local community] which have supported individuals in the past'.[59] In fact, some court intervention programs seek to reinvigorate the ability of these social institutions to provide support and respond to social problems: community courts aim to involve the local community in crime prevention and most court intervention programs work in conjunction with non-government community organisations.

New criminal justice system theories: The development of court intervention programs has also been linked to the wider development of theories such as therapeutic jurisprudence, restorative justice and community justice.[60] These new concepts lend support to criminal justice interventions that produce better outcomes for offenders, victims and communities.[61]

Loss of public confidence in the criminal justice system: It is clear that there is a lack of public confidence in the criminal justice system. As mentioned above, much of the public's frustration stems from the belief that courts are not responding appropriately to increasing crime levels. Judicial officers are all too aware that increasing imprisonment will not solve the problem, but sections of the community continue to call for harsher sentencing. Court intervention programs represent a solution to this impasse; they provide rigorous and strictly monitored programs that are arguably far more onerous than many traditional sentencing options.

51. Kaye J, 'Making the Case for Hands-On Courts', *Newsweek*, 11 October 1999, 13 as cited in Berman G & Feinblatt J, 'Problem-Solving Courts: A brief primer' (2001) 23(2) *Law & Policy* 125, 129.
52. Freiberg A, 'Problem-oriented Courts: Innovative solutions to Intractable Problems?' (2001) 11 *Journal of Judicial Administration* 8, 9. See also Berman & Feinblatt, ibid 128.
53. Phelan A, 'Solving Human Problems or Deciding Cases? Judicial Innovation in New York and Its Relevance to Australia: Part 1 (2003) 13 *Journal of Judicial Administration* 98, 105.
54. Department of Corrective Services, *Annual Report 2006–2007*, 30.
55. Office of the Inspector of Custodial Services, *Review of Assessment and Classification within the Department of Corrective Services*, Report No. 51 (2008) iv.
56. Gray I, 'Sentencing in Magistrates' and Local Courts in Australia' (Paper presented at the *Sentencing Conference*, Canberra, 8-10 February 2008) 6.
57. Freiberg A, 'Problem-oriented Courts: Innovative solutions to Intractable Problems?' (2001) 11 *Journal of Judicial Administration* 8, 9. See also Berman G & Feinblatt J, 'Problem-Solving Courts: A brief primer' (2001) 23(2) *Law & Policy* 125, 128. See also Phelan A, 'Solving Human Problems or Deciding Cases? Judicial Innovation in New York and Its Relevance to Australia: Part 1 (2003) 13 *Journal of Judicial Administration* 98, 104.
58. See Harris M, 'The Koori Court and the Promise of Therapeutic Jurisprudence' in King M & Auty K (eds) *The Therapeutic Role of Magistrates Courts* (2006) 1 *Murdoch University Electronic Journal Special Series* 131.
59. Freiberg A, 'Problem-oriented Courts: Innovative solutions to Intractable Problems?' (2001) 11 *Journal of Judicial Administration* 8, 9. See also Berman G & Feinblatt J, 'Problem-Solving Courts: A brief primer' (2001) 23(2) *Law & Policy* 125, 128.
60. See Freiberg, ibid 9. See also Phelan A, 'Solving Human Problems or Deciding Cases? Judicial Innovation in New York and Its Relevance to Australia: Part 1' (2003) 13 *Journal of Judicial Administration* 98, 109.
61. The Commission discusses therapeutic jurisprudence and restorative justice in the Introduction to this Paper. In relation to community justice, see discussion under 'The Neighbourhood Justice Centre: Background', Chapter Five. See also Blagg H, *Problem-Oriented Courts*, Background Paper, LRCWA Project No. 96 (2008) 8–14.

The ineffectiveness of traditional sentencing options: Many traditional sentencing options such as fines, conditional release orders (good behaviour bonds), suspended imprisonment and imprisonment are not generally considered to be effective in achieving rehabilitation. Fines are the most common penalty imposed in the magistrates courts.[62] It is obvious that imposing financial penalties on disadvantaged and marginalised members of the community is not a solution to offending behaviour. Community-based sentences are designed, in theory, to rehabilitate offenders but arguably they are not as effective as court intervention programs.[63] There are a number of features of court intervention programs which potentially enable more effective outcomes than community-based sentences: closer monitoring and swifter responses to non-compliance;[64] earlier intervention and access to treatment;[65] a more individualised approach;[66] better understanding of court processes and program requirements by offenders;[67] and increased motivation to comply with court orders.[68]

62. In 2005, 72% of sanctions imposed by the Magistrates Court in Western Australia were fines: Loh NSN et al, *Crime and Justice Statistics for Western Australia for 2005* (Crime Research Centre, 2007) 81. In 2005/2006 over 50% of sentences imposed by the Victorian Magistrates Court were fines: Gray I, 'Sentencing in Magistrates' and Local Courts in Australia' (Paper presented at the *Sentencing Conference*, Canberra, 8-10 February 2008) 21.
63. In 2005 it was found that about 40% of CBOs and 50% of ISOs were not completed in Western Australia. Completion rates do not take into account possible reoffending – it only indicates that the requirements of the order were met and the order was not formally breached: Auditor General, *Follow-up Performance Evaluation: Implementing and managing community based sentences*, Report No. 2 (2005) 3–5. Although it is obviously difficult to compare programs in different jurisdictions, an evaluation of the CREDIT program in Victoria found that 80% of participants successfully completed the program: Alberti S et al, *Court Diversion Program Evaluation*, Volume One – An Overview Report (2004) 12. An evaluation of the Perth Drug Court in 2006 found that there was strong evidence that the Drug Court was more effective at reducing reoffending than imprisonment or community-based sentences: Department of Attorney General, *A Review of the Perth Drug Court* (2006) 25.
64. King M, 'Challenges Facing Australian Court Drug Diversion Initiatives' (Keynote address presented to the Court Drug Diversion Initiatives Conference, Brisbane, 25–26 May 2006) 9. See also Sentencing Advisory Council of Victoria, *Suspended Sentences and Intermediate Sentencing Orders* (2008) xxxii.
65. Crime Research Centre, *WA Diversion Program – Evaluation Framework (POP/STIR/IDP)* Final Report for the Drug and Alcohol Office (2007) 139. Because most court intervention programs operate pre-sentence treatment can commence earlier.
66. The Victorian Department of Justice noted that under the traditional approach to sentencing, courts do not attempt to address the underlying causes of offending behaviour: Courts and Programs Development Unit, Department of Justice Victoria, *Policy Framework to Consolidate and Extend Problem-Solving Courts and Approaches* (March 2006) 2. The Commission notes that in many traditional sentencing proceedings the focus is often on the direct cause of the current offences rather than broader factors that may also contribute to offending behaviour. For example, an offence may be directly caused by the need to obtain funds to pay for drugs, but other factors (such as homelessness, unemployment and depression) may have contributed to the offender's drug-dependency.
67. Judicial officers actively and directly engage with offenders in order to ensure that offenders understand the obligations of the program, and to ensure that offenders respect and comply with the orders of the court.
68. Most court intervention programs 'offer' incentives for compliance – the expectation is that a less severe sentence will be imposed. Further, the authority of the judicial officer is arguably more effective than the authority of a community corrections officer.

Characteristics of court intervention programs

There are a variety of court intervention programs operating in Australia. Some operate as separately constituted courts, while others function as formal or informal divisions within a general magistrates court.[1] A number of court intervention programs are referred to as 'courts' but in fact operate as dedicated 'lists' in a general court.[2] Many court intervention programs are supported by specific legislation, while others operate without legislative support.[3] Several court intervention programs can be described as specialist programs because they target specific problems. Others are general and aim to respond to variety of different underlying issues.[4] Also, different court intervention programs target different categories of offenders; many operate as alternatives to imprisonment for high-risk offenders, while others provide intervention strategies for less serious offenders.

Notwithstanding the diversity of court intervention programs they have a number of common features; in particular, they all use the authority of the court in partnership with other agencies to address the causes of offending behaviour and reduce reoffending. As stated above, reducing crime is the primary objective of court intervention programs. However, court intervention programs have many other important aims including: improving compliance with court orders; reducing imprisonment; improving the wellbeing of participants; protecting victims and the community; and increasing public confidence in the criminal justice system. Ultimately, all of these aims seek to achieve the overall objective of crime reduction.

KEY FEATURES

Judicial monitoring

The key feature that distinguishes court intervention programs from other diversionary or rehabilitation programs is judicial monitoring. Under the traditional court model, once a judicial officer has imposed a bail or sentencing order, he or she has no further involvement with the offender unless the offender is brought back to court for breaching the requirements of the order. In contrast, in court intervention programs the offender is required to periodically appear in court so that the judicial officer can monitor and review the offender's compliance with, and progress on, the program.[5] The degree and frequency of judicial monitoring varies: in some court intervention programs participants are required to appear in court weekly or fortnightly for review;[6] in others, judicial monitoring may only occur once or twice during the life of the program.[7]

The purpose of judicial monitoring is to encourage compliance with the court's orders. It has been suggested that, because of the status of judicial officers,[8] regular court appearances will improve an offender's motivation to comply with the requirements of the program.[9] Judicial officers can encourage compliance by appropriate warnings and condemnation, but also by offering praise and rewards.[10] It has been observed that the support and praise offered by magistrates is a critical component of drug courts[11] and other court intervention

1. For example, the New South Wales Drug Court and the Northern Territory Alcohol Court are separately constituted courts: see *Drug Court Act 1998* (NSW) and *Alcohol Court Act 2006* (NT).
2. For example, the family violence courts in Western Australia sit one day per week. Other programs also operate as lists such as the Intellectual Disability Diversion Program in the Central Law Courts.
3. See further discussion of legislative issues under 'Legislative Framework', Chapter Six.
4. Specialist programs include family violence courts, drug courts, the Intellectual Disability Diversion Program and Aboriginal courts. For further discussion about the differences between specialist and general court intervention programs, see Chapter Five.
5. As explained by Berman and Feinblatt, judicial officers remain involved in the case rather than 'passing off' cases to community corrections and program providers: Berman G & Feinblatt J, 'Problem-Solving Courts: A brief primer' (2001) 23(2) *Law & Policy* 125, 131
6. For example, drug courts, the Geraldton Alternative Sentencing Regime, the Barndimalgu Court in Geraldton and the Queensland Indigenous Alcohol Diversion Program.
7. For example, the Supervised Treatment Intervention Regime (WA) and the Court Referral and Evaluation for Drug Intervention and Treatment program (Victoria).
8. Aboriginal courts use the authority and status of Aboriginal Elders and other respected persons in conjunction with the judicial officer. This approach recognises that, due to historical reasons, many Aboriginal people distrust and do not respect the criminal justice system. It has been stated that appearing before Elders or respected community members encourages compliance with court orders: See Auty K, 'We Teach All Hearts to Break – But Can We Mend Them? Therapeutic Jurisprudence and Aboriginal Sentencing Courts' in King M & Auty K (eds), *The Therapeutic Role of Magistrates Courts* (2006) 1 *Murdoch University Electronic Journal Special Series* 122.
9. Freiberg A, 'Therapeutic Jurisprudence in Australia: Paradigm shift or pragmatic Incrementalism' (2002) 20 *Law in Context* 6, 12.
10. It has been observed that a judicial officer in a drug court 'assumes the roles of confessor, taskmaster, cheerleader and mentor. They exhort, threaten, encourage and congratulate participants for their progress or lack thereof': Makkai T, 'Drug Courts: Issues and prospects' (1998) 95 *Australian Institute of Criminology Trends and Issues* 3.
11. Payne J, *Final Report on the North Queensland Drug Court*, Australian Institute of Criminology, Technical and Background Paper Series No. 17 (2005) 73.

programs.[12] A Queensland Drug Court magistrate has stated that:

> the treatment of participants as individuals (and calling them 'participants' instead of defendants), with courtesy, praise, rewards and encouragement when earned, with swift but fair sanctions and polite rebukes or admonishment when deserved, all help to build or rebuild trust and respect for authority.[13]

Another benefit of regular judicial monitoring is the ability to respond quickly and effectively to non-compliance or changes in the offender's circumstances. Freiberg has stated that judicial officers can act more 'quickly, decisively [and] conclusively' than community corrections officers and other justice agencies.[14] With frequent judicial monitoring, the court and other agencies will become aware, reasonably quickly, of any non-compliance with the requirements of the program.[15] Importantly, the offender will know that non-compliance will be noted and, if necessary, actioned without delay.

Involving judicial officers in the monitoring of offenders' progress on programs arguably also enhances transparency and consistency: decisions are made more openly and with a greater level of legal protection than when court orders are monitored solely by police or community corrections officers. For example, offenders do not have the right to be heard or have access to legal representation when dealing with a community corrections officer. Further, judicial monitoring may improve the overall accountability of various agencies involved. When discussing problem-solving courts in the United States, Berman and Fleinblatt argued that judicial monitoring 'sends a message to the rest of the system (police, probation, prosecutors, social-service providers, and others) and to the public at large that the courts mean business'.[16]

Maximising the opportunity of a 'crisis point'

Court intervention programs take advantage of the opportunity presented when an offender is at a 'crisis point'. Contact with the justice system enables offenders to be offered 'incentives' – the possibility of a reduced penalty or release from custody is a strong motivating factor for participation in treatment and rehabilitation programs. Not all court intervention programs explicitly acknowledge this;[17] however, it is clear from the Commission's research that successful compliance with court intervention programs provides mitigation in sentencing. Depending on the extent of the 'crisis' different considerations will apply. For example, drug court participants are usually facing the 'crisis' of imprisonment; judicial officers in drug courts tend to provide an indication of what sentence will be imposed if the program is terminated so that participants know exactly where they stand. In other programs, participants are simply aware that successful compliance will be taken into account.

This approach carries with it a risk of net-widening (ie, where intervention is disproportionate to the circumstances of the case) because it might be attractive to inflate the likely penalty in order to capture more willing participants. Net-widening can be avoided by carefully targeting interventions to appropriate categories of offenders. The most intensive programs are usually drug court programs and these are mainly reserved for high-risk offenders facing imprisonment. Other, less rigorous, programs can target offenders who are facing non-custodial sentences by offering different incentives (eg, a less severe penalty, a spent conviction order, or no further punishment).

Although offenders have a choice whether to participate in court intervention programs, the existence of legal incentives means that, to some extent, consent to participate is coerced. However, a sense of choice is fostered by allowing offenders to have input into the decision about the types of rehabilitation programs to be used and by having offenders set goals or enter into 'behavioural contracts' with the court.[18]

12. Linden J, *Magistrates Early Referral into Treatment Program (MERIT)* (Judicial Commission of New South Wales, 2003); see also discussion under 'Consultation Issues: Improving Outcomes', Chapter Three.
13. Costanzo J, *Final Report of the South-East Queensland Drug Court Pilot (*July 2003) 58. In order to undertake their role in court intervention programs effectively, it has been suggested that judicial officers need to 'be more active, collaborative, less formal, more attuned to direct communication with litigants, more attuned to the personal circumstances of individuals who appear before them and more positive in their interactions with them': Popovic J, 'Judicial Officers: Complementing conventional law and changing the culture of the judiciary' (2003) 20 *Law in Context* 121, 128. See also Wager J, 'The Drug Court: Can a relationship between health and justice really work?' (Paper presented at the inaugural Alcohol and Other Drugs Symposium, Fremantle, 20–21 August 2002) 10.
14. Freiberg A, 'Therapeutic Jurisprudence in Australia: Paradigm shift or pragmatic Incrementalism' (2002) 20 *Law in Context* 6, 12.
15. Berman G & Feinblatt J, *Good Courts: The case for problem-solving justice* (New York: The New Press, 2005) 108.
16. Ibid 6.
17. But many court intervention programs do explicitly acknowledge that incentives are offered. For example, in relation to the Geraldton Alternative Sentencing Regime, it has been stated that participants are 'offered the incentive of a lesser sentence': King M, 'Innovation in Court Practice: Using therapeutic jurisprudence in a multi-jurisdictional regional magistrates court' (Paper presented at the 21st Annual Conference of the Australian Institute of Judicial Administration, *New Challenges, Fresh Solutions*, Fremantle, 20 September 2003) 2.
18. King M & Wager J, 'Therapeutic Jurisprudence and Problem-Solving Judicial Case Management' (2005) 15 *Journal of Judicial Administration* 28, 31.

Team-based approach to offender management: collaboration

Although the role of the judicial officer is vital, it is essential to recognise that the monitoring and management of offenders is undertaken by a team of agencies (often both government and non-government agencies).[19] While the exact membership of case management teams differs in various court intervention programs, they can include the judicial officer, police, defence counsel, community corrections officers, program and court staff, victim support workers, and external service providers. Although judicial monitoring is common to all court intervention programs, judicial officers are not always involved in case management.[20] Case management teams review the offender's progress during the program by meeting regularly to discuss the offender's degree of compliance and whether any changes to the program requirements are needed.

Various agencies involved in court intervention programs work together to address the underlying problems that cause offending behaviour. Each agency representative can offer constructive suggestions about the best way to solve the problem by reference to his or her 'unique institutional perspective and expertise'.[21] This commonsense approach facilitates better information sharing, more effective problem-solving, and better decision-making because various individuals involved with the offender directly contribute to the process.

However, it is important to recognise that this team approach involves potential problems for different agencies. A senior judge of the New South Wales Drug Court stated that 'the concept of the Judge being part of a multi-disciplined team of professionals is unusual in judicial life'.[22] The same observation can be made about others, especially defence counsel and prosecutors. The same judge observed that initially in the New South Wales Drug Court 'attempts to collaborate were met with suspicion, a fear of loss of autonomy, and perhaps some resentment' but after a number of years the different agencies involved have 'learned the real meaning of the word "collaborate", and the value of the unique collaboration of institutions that enables the Drug Court process to work in the community'.[23]

Cooperation between the prosecution and defence presents its own challenges. The prosecutor's role in court intervention programs is generally to promote community protection. This is achieved by supporting the rehabilitative aims of the program but it is also necessary for prosecutors to ensure that participants are complying with bail conditions and program requirements.[24] In some instances, the rehabilitative aims may conflict with the goal of community protection. For example, in order to maximise long-term rehabilitation it may be considered preferable for an offender to continue with treatment even though he or she has breached certain requirements of the program. However, prosecutors need to ensure that community members are not at risk from serious offenders. Non-compliance may justify termination from a program or, alternatively, changes in the program requirements. Prosecutors in court intervention programs need to be mindful of the long-term aims of the program, but their overriding duty is to act in the best interests of the community – where these goals clash the latter should prevail.

Subject to a lawyer's duty to the court (in particular, the duty not to mislead or deceive the court), a lawyer is ethically and professionally required to act in the interests of his or her client.[25] Cooperating with the prosecution may potentially conflict with this duty. It has been asserted that defence counsel working in court intervention programs need to relinquish their traditional role of seeking the maximum number of acquittals and the most lenient penalties possible and, instead, promote rehabilitation and treatment.[26] Defence counsel face a dilemma: encourage their client to participate in an onerous court intervention program or seek a less punitive (but less effective) sentencing option. It has been argued that:

> The resolution of this dilemma is dealt with, however, in treating the decision of the offender as one of informed consent. So long as the lawyer apprises the offender of the possible consequences of their choice then it remains the decision of the offender.[27]

19. Phelan A, 'Solving Human Problems or Deciding Cases? Judicial Innovation in New York and Its Relevance to Australia: Part III (2004) 13 *Journal of Judicial Administration* 244, 247; Berman G & Feinblatt J, 'Problem-Solving Courts: A brief primer' (2001) 23(2) *Law & Policy* 125, 131.
20. Judicial officers are included in the case management team in drug courts: see discussion under 'Case Reviews: A non-adversarial approach', Chapter Two.
21. Goldberg S, *Judging for the 21st Century: A problem-solving approach* (Ottawa: National Judicial Institute, 2005) 26.
22. Senior Judge Neil Milson, 'Lessons from the First Five Years' (Address at the ceremonial sitting of the Drug Court of New South Wales on the 5th anniversary of the court, Sydney, 5 February 2004) <http://www.lawlink.nsw.gov.au/Lawlink/drug_court/ll_drugcourt.nsf/pages/adrgcrt_news>. See also Costanzo J, *Final Report of the South-East Queensland Drug Court Pilot (*July 2003) 40.
23. Milson, ibid (emphasis omitted).
24. Foster J, 'The Drug Court: A police perspective' in Reinhardt G & Cannon A (eds), *Transforming Legal Processes in Court and Beyond* (Melbourne: Australian Institute of Judicial Administration, 2007) 108. See also Geraldton Magistrates Court, *Alternative Sentencing Regime Manual* (2005) 16.
25. The Law Society of Western Australia, *Professional Conduct Rules 2005*, Rule 7.1.
26. Freiberg A, 'Australian Drug Courts' (2000) 24 *Criminal Law Journal* 213, 231; Potter D, 'Lawyer, Social Worker, Psychologist and More: The role of the defence lawyer in therapeutic jurisprudence' in King M & Auty K (eds), *The Therapeutic Role of Magistrates Courts* (2006) 1 *Murdoch University Electronic Journal Special Series* 95–100.
27. See Harris M, 'The Koori Court and the Promise of Therapeutic Jurisprudence' in King M & Auty K (eds), *The Therapeutic Role of Magistrates Courts* (2006) 1 *Murdoch University Electronic Journal Special Series* 135.

The Commission agrees with this view. Lawyers are bound to act according to their client's instructions. The crucial issues are the need to encourage lawyers to look more broadly at the client's circumstances and the need to ensure that outcomes are proportionate and fair.[28] Defence lawyers should advise clients of the possible benefits of participating in court intervention programs – both legal benefits (such as a reduced sentence) and social benefits. There is nothing unprofessional about a lawyer strongly suggesting to his or her client that drug treatment would be a better long-term option than defending a criminal charge on a technical point. However, it is the client's choice: once that choice is made, the lawyer must continue to act according to the client's instructions and a lawyer must ensure that he or she does not act against the client's interests.

It has also been suggested that community corrections officers and treatment providers may experience adjustments to their roles when working in court intervention programs. Community corrections officers traditionally monitor compliance with orders and respond to non-compliance by instigating formal breach proceedings. In a number of court intervention programs (in particular, drug courts) a flexible approach to non-compliance is taken.[29] It is recognised that for some offenders effective rehabilitation takes time and that it is important to maximise the time spent participating in the program. Terminating offenders for one 'slip-up' will not enable the long-term goals of the program to be reached.

Some external treatment providers and counsellors may also be placed in a quandary: they are familiar with assisting people with problems on a voluntary basis rather than dealing with offenders who are coerced into treatment.[30] In particular, treatment providers involved in court intervention programs may be required to disclose information that is usually considered confidential and this may impact on their relationship with their client.[31]

The sharing of information between agencies is a difficult issue. First and foremost, the Commission is of the view that all agencies involved in court intervention programs should be made fully aware of the various legal, professional and ethical obligations of each agency. In order to protect the legal rights of participants the Commission does not consider that the professional or ethical obligations of lawyers should be altered (either by legislation or by policy). If lawyers were allowed to disclose privileged information or act contrary to client's instructions it would compromise the operation of the legal system.

A degree of information sharing must take place so that the collaborative process is not undermined.[32] A certain amount of information must be given to the court and the various agencies involved so that appropriate intervention strategies can be determined. In some jurisdictions, legislative provisions make it clear that treatment providers must disclose certain information about the participant's compliance and that the disclosure of such information does not constitute a breach of their professional obligations.[33] The Commission is of the preliminary view that this approach is appealing because it provides protection for treatment providers, but also enables necessary information to be shared. However, it is vital that participants in court intervention programs are fully aware of the disclosure arrangements. They must be able to decide if they wish to proceed knowing that certain information will be shared and they must be able to decide what personal information they disclose to counsellors and others. The Commission has not made any proposals in this regard because it recognises that there are many practical considerations involved. Accordingly, the Commission invites submissions from the various agencies involved in court intervention programs across Western Australia about the best way to approach this issue.

CONSULTATION QUESTION 1.1

Information sharing

The Commission invites submissions about whether any legislative reform is required in relation to the sharing or disclosure of information between the various agencies and individuals (other than legal practitioners) involved in court intervention programs.

28. See Wolf R, *Breaking with Tradition: Introducing problem solving in conventional courts* (New York: Center for Court Innovation, 2007) 5. See also Berman G & Feinblatt J, *Good Courts: The case for problem-solving justice* (New York: The New Press, 2005) 176.
29. In relation to one Western Australian program, it has been observed that there 'is a conflict sometimes between the process-driven philosophy of ensuring basic monitoring of offenders and the more therapeutic approach towards helping and changing the offender': Crime Research Centre, *WA Diversion Program – Evaluation Framework (POP/STIR/IDP)*, Final Report for the Drug and Alcohol Office (2007) 64.
30. See Pritchard E et al, *Compulsory Treatment in Australia* (Canberra: Australian National Council on Drugs, 2007) 26. See also Hall W, 'The Role of Legal Coercion in the Treatment of Offenders with Alcohol and Heroin Problems' (1997) 30 *Australian and New Zealand Journal of Criminology* 103, 108.
31. Pritchard et al, ibid.
32. Foster J, 'The Drug Court: A police perspective' in Reinhardt G & Cannon A (eds), *Transforming Legal Processes in Court and Beyond* (Melbourne: Australian Institute of Judicial Administration, 2007) 112.
33. See eg *Drug Court Act 2000* (Qld) s 39(1); *Children (Criminal Proceedings) Act 1987* (NSW) s 50B; *Drug Court Act 1998* (NSW) s 31.

Direct participation by the offender

In traditional court proceedings, bail and sentencing decisions are typically made after the court has been informed about the circumstances of the case by the prosecutor and defence counsel. In some matters additional information is provided via pre-sentence reports, psychological/psychiatric reports and other sources. Rarely does the offender directly communicate with the judicial officer. However, in court intervention programs judicial officers actively seek to engage offenders by asking questions; requiring offenders to contribute to the process by setting goals and strategies; and by speaking directly with the offender. These practices are designed to improve the offender's understanding of the proceedings and increase his or her respect for the authority of the court and the requirements of the program.[34]

Less adversarial

A common observation about court intervention programs is that they operate in a non-adversarial manner. In order to properly consider this claim it is necessary to understand what is meant by adversarial justice. The classic example of adversarial justice is the jury trial. In a jury trial the judge has a very limited role in determining the issues before the court; these are defined and argued by the prosecution and the defence.[35] In general, an adversarial approach applies whenever there is a legal or factual dispute between the parties and the judicial officer (or jury) resolves the dispute. However, the criminal justice system does not operate in a truly adversarial framework for the majority of cases: jury trials are uncommon[36] and many criminal charges are resolved by the offender entering a plea of guilty. While there may be issues in dispute in bail and sentencing proceedings, such proceedings may be decided on the basis of an agreed position between the defence and the prosecution. As Freiberg has stated, the 'modern reality [is] that justice is more often than not negotiated rather than litigated. Plea-, charge- or fact-bargaining are common practices in Australia'.[37]

Therefore, it is not a fair comparison to juxtapose the operation of court intervention programs with the traditional adversarial approach used in criminal trials. Court intervention programs operate at a stage of the criminal justice process where legal or factual disputes are not common.[38] Court intervention programs do adopt a less adversarial approach because disputes have already been resolved and the focus is on facilitating treatment and rehabilitation.[39] However, court intervention programs do not abandon adversarial justice. If a dispute arises, the parties return to their traditional adversarial roles. For example, defence counsel and prosecution will make submissions and argue their position at various stages of the process, including during the determination of eligibility; during the determination of appropriate bail and program requirements; when termination from a program is being considered; and at final sentencing.[40]

A separate issue is the practice of pre-court case management meetings. In some programs, various agencies involved meet before court to discuss treatment issues and the participant's progress. Where these meetings involve the judicial officer, the defence and the prosecution, an adversarial approach is strongly discouraged and the aim is to reach decisions by consensus. However, in the event that an agreed position is not reached the judicial officer ultimately determines the appropriate course of action.[41]

An emphasis on achieving better outcomes

In order to properly address the causes of offending behaviour and reduce reoffending, court intervention programs take a broader approach to rehabilitation. While the absence of offending is the ultimate criterion for judging the success of court intervention programs, those working in these programs understand that the temporary absence of offending is not enough. The broader approach is explained by

34. Popovic J, 'Court Process and Therapeutic Jurisprudence: Have we thrown the baby out with the bathwater' in King M & Auty K (eds), *The Therapeutic Role of Magistrates Courts* (2006) *Murdoch University Electronic Journal Special Series* 61. See also Popovic J, 'Judicial Officers: Complementing Conventional Law and Changing the Culture of the Judiciary' (2003) 20 *Law in Context* 121, 128; Freiberg A, 'Therapeutic Jurisprudence in Australia: Paradigm shift or pragmatic incrementalism?' (2002) 20(2) *Law in Context* 6, 16; Freiberg A, 'Non-Adversarial Approaches to Criminal Justice' (Paper presented at the 10th International Criminal Law Congress, Perth, 21 October 2006) 8.
35. See Freiberg, ibid 1–2.
36. In 2003–2004 jury trials constituted about 0.3% of all criminal proceedings in Australia: Freiberg, ibid 2. Similarly, in the United States in 1998 only 6% of felony cases were resolved by trial: Berman G & Feinblatt J, *Good Courts: The case for problem-solving justice* (New York: The New Press, 2005) 18.
37. Freiberg, ibid.
38. Court intervention programs do not operate in the stage of proceedings where criminal responsibility is determined: see further Cannon A, 'Smoke and Mirrors or Meaningful Change: The way forward for therapeutic jurisprudence' (2008) 17 *Journal of Judicial Administration* 217, 219.
39. Popovic J, 'Judicial Officers: Complementing conventional law and changing the culture of the judiciary' (2003) 20 *Law in Context* 121, 128.
40. In some court intervention programs the policy or rules explicitly provide that parties should return to an adversarial approach if it is likely that an offender will be sent to prison or terminated from the program (eg, drug courts).
41. For example, the manual for the Geraldton Alternative Sentencing Regime provides that the court management team 'shall endeavour to reach decisions by consensus. If a consensus cannot be reached then the matter shall be referred to court for determination': Geraldton Magistrates Court, *Alternative Sentencing Regime Manual* (2005) 41. The Perth Drug Court manual provides that the judicial officer is responsible for making the final determination about issues concerning eligibility, termination, treatment and sentencing: *Perth Drug Court Manual* (2007) 44. In Chapter Two, the Commission questions and seeks submissions about the appropriateness of case management meetings conducted in the absence of the offender: Consultation Question 2.1.

the following extract from the Geraldton Alternative Sentencing Regime's practice direction:

> Rehabilitation is more than the absence of offending; it is also the ability to function in society, the ability to deal with life challenges in a constructive manner and without abusing alcohol or illicit drugs…The end result of rehabilitation should be the person's empowerment to lead a productive, harmonious and fulfilling life in the community.[42]

Instead of imposing orders for the purpose of rehabilitation, court intervention programs actively assist offenders in their rehabilitation efforts. This is facilitated in part by ensuring better access to treatment programs and services; some court intervention programs have a variety of on-site services and others have access to a wide range of staff and program providers. It is also achieved by assessing eligible offenders quickly and ensuring that interventions are targeted to the individual needs of the offender. It has been observed that a 'production line' mindset exists in the justice system: once offenders are referred to agencies the 'responsibility [of the referrers] ends when their step in the process is completed, rather than when a solution is reached'.[43] The mindset in court intervention programs is quite different: agencies work together to solve the offender's problems.

In addition to reducing the risk of reoffending, court intervention programs also aim to provide better outcomes for victims and communities.[44] Individual victims may be directly supported and assisted (eg, family and domestic violence court intervention programs) and some court intervention programs increase offender accountability by requiring offenders to repair the harm done to local communities (eg, programs operating in community courts).

MISCONCEPTIONS ABOUT COURT INTERVENTION PROGRAMS

In this section the Commission considers the most frequently raised concerns expressed about court intervention programs. Some of these concerns are based on a lack of awareness about the benefits and operation of court intervention programs; others, although valid, can be addressed by appropriate reform.

42. King M & Ford S, 'Exploring the Concept of Wellbeing in Therapeutic Jurisprudence: The example of the Geraldton alternative sentencing regime' in King M & Auty K (eds), *The Therapeutic Role of Magistrates Courts* (2006) 1 *Murdoch University Electronic Journal Special Series* 17.
43. Phelan A, 'Solving Human Problems or Deciding Cases? Judicial Innovation in New York and Its Relevance to Australia: Part III (2004) 13 *Journal of Judicial Administration* 244, 257.
44. Berman G & Feinblatt J, 'Problem-Solving Courts: A brief primer' (2001) 23(2) *Law & Policy* 125, 131; Phelan, ibid 246.

Soft on crime

Because court intervention programs are designed to 'help' offenders some people perceive these programs as 'soft on crime'. It has been observed in the United States that this is the typical community reaction to 'problem-solving' courts.[45] Generally, those members of the community who call for harsher sentencing believe that initiatives designed to promote rehabilitation are a 'soft option'.[46]

There are two responses to this 'soft on crime' argument. First, court intervention programs involve intensive and onerous requirements and in many cases are far more onerous than traditional sentencing options such as fines and community-based sentences. Even for those offenders who would otherwise be imprisoned, compliance with an intensive program may be considered more difficult than serving a shorter period of custody.[47] Second, the 'soft-on-crime' argument 'ignores the possible impact of rehabilitation programs on potential victims of crime: rehabilitation programs, when successful, reduce the number of *future* victims of crime'.[48] While harsh sentencing (in the form of imprisonment) provides short-term community protection, the only way to ensure long-term community protection is to provide effective rehabilitation strategies.

Judicial officers do not have the skills to supervise or manage offenders

It has been suggested that judicial officers should not be involved in treatment and rehabilitation. A strong critic of United States drug courts has stated that:

> I cannot imagine a more dangerous branch than an unrestrained judiciary full of amateur psychiatrists poised to 'do good' rather than to apply the law.[49]

However, taking a 'problem-solving' approach does not mean that judicial officers are acting as 'social workers'.[50] Although therapeutic aims are

45. Berman G & Feinblatt J, *Good Courts: The case for problem-solving justice* (New York: The New Press, 2005) 107. See also Harris M, 'The Koori Court and the Promise of Therapeutic Jurisprudence' in King M & Auty K (eds), *The Therapeutic Role of Magistrates Courts* (2006) 1 *Murdoch University Electronic Journal Special Series* 130.
46. King M , 'Challenges Facing Australian Court Drug Diversion Initiatives' (Keynote address presented to the Court Drug Diversion Initiatives Conference, Brisbane, 25–26 May 2006) 9.
47. The Commission notes that some drug courts impose custody sanctions (for up to 14 days) for offenders who fail to comply with the requirements of the program. It has been observed that the imposition of custody does not support the soft on crime argument: see Costanzo J, *Final Report of the South-East Queensland Drug Court Pilot (*July 2003) 31.
48. King M, 'Afterword' in King M & Auty K (eds), *The Therapeutic Role of Magistrates Courts* (2006) 1 *Murdoch University Electronic Journal Special Series* 162 (emphasis in original).
49. Hoffman M, 'The Drug Court Scandal' (2000) 78 *North Carolina Law Review* 1437, 1479.
50. Wolf R, 'Law as Therapy: What impact do drug courts have on judges? An interview with Judge Peggy Fulton Hora' (2008) 1 *Journal of Court Innovation* 159, 164.

encouraged, judicial officers in court intervention programs continue to perform judicial functions – they remain bound to apply the law and ensure that the legal rights of participants are protected.[51] It has also been observed that judicial officers in these types of court programs are not expected to 'cure mental illness or addiction, to counsel court participants, or to single-handedly solve systemic social problems'.[52] Instead the approach used in court intervention programs requires judicial officers to be aware of and understand these problems.[53] For instance, a judicial officer in a drug court should have an understanding of the nature of drug addiction and the recovery process and therefore appreciate that relapses may occur.[54]

It is important to emphasise that decisions about a participant's treatment needs are not made by a judicial officer in isolation. A team of different agencies (including strong input from treatment professionals) discusses the most appropriate treatment regime. Former Perth Drug Court magistrate Julie Wager stated that judicial officers and others (eg, lawyers) do not need special qualifications because the case management process involves input from the Court Assessment and Treatment Service officers, treatment providers and psychologists.[55]

The Commission notes that in relation to a program requirement under the *Sentencing Act 1995* (WA) a community corrections officer cannot order that an offender 'undergo treatment of any sort unless a person qualified to recommend or administer the treatment has recommended that the offender undergo such treatment'.[56] Further, a 'speciality court' (ie, the Perth Drug Court) is subject to the same restriction when imposing a program requirement for a Pre-Sentence Order or Conditional Suspended Imprisonment.[57] The Commission is of the preliminary view that this legislative requirement should apply to all court intervention programs because it guarantees that the type of treatment required by an offender is primarily determined by an appropriate expert. However, the Commission invites submissions from those working in court intervention programs to consider what problems might arise from applying a similar legislative requirement to all court intervention programs.

51. Ibid 164–65.
52. Goldberg S, *Judging for the 21st Century: A problem-solving approach* (Ottawa: National Judicial Institute, 2005) 3.
53. Ibid.
54. Ibid.
55. Wager J, 'The Drug Court: Can a relationship between health and justice really work?' (Paper presented at inaugural Alcohol and Other Drugs Symposium, Fremantle, 20–21 August 2002) 12.
56. This rule applies to Pre-Sentence Orders, Community Based Orders, Intensive Supervision Orders and Conditional Suspended Imprisonment: *Sentencing Act 1995* (WA) ss 33G(3), 66(3), 73(3) & 84A(3).
57. *Sentencing Act 1995* (WA) ss 33G(3) & 84A(3).

CONSULTATION QUESTION 1.2

Determining treatment and program needs

The Commission invites submissions as to whether legislation should provide that an offender participating in a court intervention program can only be ordered to undergo a particular treatment if a qualified person has recommended that the offender undergo such treatment.

Lack of traditional legal and procedural safeguards

A common criticism of court intervention programs is that they fail to protect the legal rights of participants. For example, it has been suggested that court intervention programs may lead to net-widening by imposing unduly onerous conditions; that unnecessary or punitive bail conditions may be imposed; that drug court participants are remanded in custody for non-compliance without any right of appeal; and that cases are discussed and possibly decided in the absence of the offender. The Commission discusses these issues throughout this Paper; at this stage it is sufficient to note that the Commission has made a number of proposals to ensure that the legal rights of participants are protected. In other words, the Commission agrees that there is the potential for some aspects of court intervention programs to impinge upon the rights of participants; however, this does not mean that court intervention programs should be abandoned. Rather, legal rights and safeguards should not be prejudiced in order to achieve the goals of court intervention programs.[58]

Equality before the law

It is a fundamental principle that all people should be treated equally by the law. Court intervention programs are not currently available equally to all offenders. Some programs are restricted to a specific type of offender (on the basis of eligibility criteria) and others are restricted by residential status. For example, only drug-dependant offenders living in Perth have access to the Perth Drug Court.

Victorian Chief Magistrate Ian Gray said that:

> [T]he challenge now is to 'mainstream' the successful initiatives to ensure that there is equal access to justice across a given city, region or state. If this does not happen, there is a risk that some may argue on human rights grounds, that the unavailability

58. See further discussion below under 'The Commission's Approach'. The Commission notes that this approach is consistent with the concept of therapeutic jurisprudence; proponents of therapeutic jurisprudence do not suggest that therapeutic aims should trump legal rights or other important goals.

> of a particular sentencing option in one part of a major city, when it is available in another part, is a denial of their right to equal justice. The public will ultimately demand no less than equality of access to these improved justice 'services'.[59]

Arguably it is unfair that only certain offenders have access to court intervention programs: these offenders have the opportunity to avoid imprisonment or receive a less severe penalty – others do not. The Commission discusses ways to extend the availability of appropriate court intervention programs throughout this Paper.[60] Most importantly, the Commission has proposed the establishment of a general court intervention program.[61] Such a program could, subject to successful evaluation, be extended across the state. The Commission makes this proposal because it would be too expensive and unnecessary to establish a variety of specialist court intervention programs in every court location. The Commission believes that the establishment of a general court intervention program that can address a variety of different problems is the best way to increase the opportunity for all offenders to participate in court intervention programs.

Constitutional issues: judicial independence

Because the administration of court intervention programs involves courts in the exercise of functions which might be regarded as non-judicial (ie, supervising and managing offenders) it has been suggested that court intervention programs could be challenged on the basis of the doctrine of separation of powers.[62] Although this issue has been raised, it has not been resolved. In reality, offenders 'volunteer' to participate in court intervention programs and it is extremely unlikely that any participant would challenge the constitutional validity of the program.

In simple terms, the Australian Constitution prohibits federal courts from exercising non-judicial power.[63] In that manner the Constitution provides for the separation of the judicial power of the Commonwealth from legislative and executive power. While the doctrine of separation of powers does not apply as such at the state level,[64] Chapter III of the Australian Constitution provides for rights of appeal from the supreme courts of the states[65] and for the vesting of federal jurisdiction in state courts, including state supreme courts.[66] The High Court has recognised that, because Chapter III of the Constitution requires that there be a body fitting the description 'the Supreme Court of a State', it is beyond the legislative power of a state to alter the constitution or character of its supreme court so that it ceases to meet the constitutional description.[67] An important element in the defining characteristics of such a court is that it must 'be and appear to be an independent and impartial tribunal'.[68]

The principle identified above concerns the status of the Supreme Court of a state. However, the requirement of actual and apparent independence and impartiality has been recognised as extending to any court capable of exercising federal jurisdiction.[69] The District Court and Magistrates Court of Western Australia fall into this category because they have federal jurisdiction both in relation to federal criminal offences[70] and civil matters.[71]

The application of the '*Kable* principle' – that state courts cannot be vested with functions that are incompatible with or repugnant to federal judicial power,[72] remains contentious.[73] The application of the principle to state courts other than supreme courts remains unclear. Despite a number of challenges to the validity of state legislation on the basis of the *Kable* principle, it appears that such challenges have only been successful on two occasions,[74] both

59. Gray I, 'Sentencing in Magistrates' and Local Courts in Australia' (Paper presented at the *Sentencing Conference*, Canberra, 8-10 February 2008) 9.
60. For example, in Chapter Two the Commission has sought submissions about increasing the availability of court intervention programs for alcohol-dependent offenders: Consultation Question 2.6). In Chapter Three the Commission has proposed the establishment of a mental impairment court intervention program and has proposed that the Intellectual Disability Diversion Program be expanded: Proposals 3.1 & 3.2. In Chapter Four the Commission has sought submissions about the best way to facilitate family and domestic violence court intervention in regional areas: Consultation Question 4.15.
61. See Proposal 5.1.
62. See eg Freiberg A, 'Problem-oriented Courts: Innovative solutions to Intractable Problems?' (2001) 11 *Journal of Judicial Administration* 8, 23; Popovic J, 'Mainstreaming Therapeutic Jurisprudence in Victoria: Feelin' groovy?' in Reinhardt G & Cannon A (eds), *Transforming Legal Processes in Court and Beyond* (Melbourne: Australian Institute of Judicial Administration, 2006) 195; Hoffman M, 'The Drug Court Scandal' (2000) 78 *North Carolina Law Review* 1437, 1526–527.
63. *R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Re Wakim; ex Parte McNally* (1999) 198 CLR 511; [1999] HCA 27.
64. *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2007) 33 WAR 245; [2007] WASCA 49 [79] (Steytler P).
65. Australian Constitution s 73(ii).
66. Australian Constitution s 77(iii).
67. *Forge v ASIC* (2006) 228 CLR 45; [2006] HCA 44 at [41] (Gleeson CJ, Callinan J concurring), [63] (Gummow, Hayne and Crennan JJ).
68. *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146; [2004] HCA 31, [29], as cited in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 82 ALJR 454; [2008] HCA 4, [8] (Gummow, Hayne, Heydon & Kiefel JJ).
69. Ibid.
70. Conferred by s 68(2) of the *Judiciary Act 1903* (Cth).
71. Conferred by s 39(2) of the *Judiciary Act 1903* (Cth).
72. For further discussion of this principle, see *Kable* (1996) 189 CLR 51, 98 (Toohey J); 106 (Gaudron J); 109 (McHugh J); 134 (Gummow J).
73. The use of the language 'repugnant to the judicial process' was criticised by McHugh J in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [41]-[42].
74. *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* [2007] WASCA 49 [77] (Steytler P); *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* [2008] HCA 4, [63] & [83] (Kirby J). In *Grinter* [2004] WASCA 79, state legislation was held invalid but only one judge (Malcolm CJ) decided the issue on the basis of the *Kable* principle.

of which concerned the conferral of functions on a supreme court.[75]

In theory, it might be argued that the involvement of judicial officers in the supervision and management of offenders during court intervention programs is so closely connected to the role of the executive that judicial independence is undermined. Although judicial officers in court intervention programs work together with executive agencies, judicial officers are not directed by executive agencies – decisions about whether offenders are eligible to participate in programs, the appropriate program requirements, and whether offenders should be terminated from the program are determined by the judicial officer if a consensus cannot be reached between the parties. Thus, judicial officers maintain their traditional function of determining disputes and exercising discretion. The Commission highlights below the importance of court intervention programs operating in a manner which ensures adequate legal and procedural safeguards for participants.[76]

Further, the Commission proposes in this Paper that court intervention programs in Western Australia should operate before sentencing. There are a number of important reasons for the Commission's preference for pre-sentence options;[77] however, the Commission also believes that pre-sentence options will be less likely to attract criticism based on a perceived breach of the *Kable* incompatibility principle and nor will they interfere with judicial independence. The assessment of an offender's prospects of rehabilitation and the determination of the appropriate penalty for an offence involve the exercise of judicial discretion and are within the traditional functions of the judiciary.[78]

In addition, this Paper recognises that, at least ordinarily, the supervisory function will be performed by a magistrate rather than a judge of a superior court, even if the offender is referred for supervision by the District Court or Supreme Court. Vesting functions in magistrates is less likely to infringe the constitutional limitations noted above than vesting functions in the Supreme Court.

The above discussion relates to the limitations which may be imposed by Chapter III of the Constitution in relation to the exercise of non-federal jurisdiction by state courts. In addition to considering whether state provisions may be applied in relation to state offences, it is also necessary to consider the potential application of those provisions to persons charged with offences against Commonwealth law. In those cases the state courts are exercising federal jurisdiction.[79] State provisions will only apply to the extent that they are accepted and applied by Commonwealth law.[80] It may also be implicit in the federal structure of the Constitution, and its provision for separation of the judicial power of the Commonwealth from other powers, that federal jurisdiction be exercised only in accordance with the essential requirements of the judicial process, including the rules of procedural fairness.[81]

Whether state provisions for court intervention programs can be (and are to be) accepted and applied to federal offenders is a question for the Commonwealth. However, it is desirable that state provisions are capable of being applied by federal law to state courts exercising federal jurisdiction. That again counts towards an approach which ensures adequate legal and procedural safeguards for offenders and, at least generally, confines the operation of court intervention programs to a point in time prior to the sentence. Taking such an approach ought to improve the prospects of the state provisions being capable of being applied to persons charged with federal offences, and to other matters in federal jurisdiction.

75. *Kable* itself and *Re Criminal Proceeds Confiscation Act 2002 (Qld)* [2004] 1 QdR 40.
76. See 'Statement Four: Legal and procedural safeguards', Introduction.
77. See further discussion under 'Pre-Sentence Options', Chapter Six; 'Pre-Sentence vs Post-Sentence', Chapter Two.
78. In Chapter Six, the Commission notes that judicial monitoring (as distinct to judicial involvement in case management) may be beneficial post-sentence but because of the constitutional issue, the Commission seeks submissions about the viability of post-sentence judicial monitoring of offenders: see Consultation Question 6.5.
79. Conferred by ss 76(ii) and 77(iii) of the Constitution and s 68(2) of the *Judiciary Act 1903* (Cth). The Commission notes that some proceedings for state offences may also involve the exercise of federal jurisdiction. For example, where a resident of another state is charged with offences against Western Australian law: s 75(iv) of the Constitution and section 39(2) of the *Judiciary Act 1903* (Cth).
80. See *Judiciary Act 1903* (Cth) ss 68 & 79.
81. *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at [56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Ebner v Official Trustee* (2000) 205 CLR 337, [80] (Gaudron J) & [115] (Kirby J).

The Commission's approach

The Commission has examined a number of different court intervention programs throughout Australia and internationally, and has determined that appropriate court intervention programs should be encouraged and supported via appropriate law reform. The Commission's research shows that properly resourced and well thought-out court intervention programs are successful at reducing offending.[1] However, it is important to provide the appropriate legislative and policy framework for these programs to ensure that they are given the best possible chance of success. The Commission has formulated five guiding statements to explain its approach to this reference and the basis for its proposals in the following chapters.

GUIDING STATEMENTS

Statement One: Legislative and policy support

Court intervention programs should be supported by appropriate legislative and policy reforms. The Commission is of the view that court intervention programs should be supported in order to reduce crime and its impact on the community. While support through adequate resourcing is clearly essential (as stated below), in order to ensure that court intervention programs are valued and understood in the criminal justice system and by the wider community, legislative and policy support is necessary. The Commission notes that many similar programs in other Australian jurisdictions are established or supported by legislation. It was stated during Parliamentary Debates in New South Wales that a legislative framework for 'intervention programs' will 'promote consistency, accountability and confidence that programs are being conducted appropriately and for the right type of offenders'.[2] The Commission has also determined that the current criminal justice legislation in Western Australia is not sufficient to accommodate the requirements of court intervention programs.

Further, because court intervention programs involve a number of different agencies, a coordinated policy at the highest level should be encouraged. An important underlying philosophy of court intervention programs is collaboration between agencies; while individual cooperation is essential, high-level collaboration is also necessary to ensure consistency and effective sharing of resources and knowledge. The Commission's proposals in relation to appropriate legislative and policy reform are contained in Chapter Six.

Statement Two: Adequate resources

In order to be effective court intervention programs must be adequately resourced. The Commission recognises that the primary concern of most people involved in court intervention programs is the adequacy of resources – concern was frequently expressed about the need for resources during the Commission's preliminary consultations. It is clear that court intervention programs are expensive to operate: there are more court appearances to enable judicial monitoring and each case takes longer in order to adequately address the offender's underlying problems.[3] Further, significant resources are required to ensure that there are sufficient treatment programs and services available to support offenders and to ensure that a variety of agencies can be involved in the process. Without adequate staff, treatment programs and access to services, court intervention programs cannot possibly achieve their goals. Also, there must be sufficient resources to ensure that representatives from relevant agencies are involved and have a presence in court intervention programs.[4]

However, it is not appropriate to simply reallocate existing resources. The allocation of resources to court intervention programs could potentially reduce

1. For example, the evaluation of the Koori Courts in Victoria found that the courts have reduced reoffending, reduced breach of bail rates, and increased compliance with community-based sentences: see Auty K, 'We Teach All Hearts to Break – But Can We Mend Them? Therapeutic Jurisprudence and Aboriginal Sentencing Courts' in King M & Auty K (eds), *The Therapeutic Role of Magistrates Courts* (2006) 1 *Murdoch University Electronic Journal Special Series* 115. In Chapter Two, the Commission observes that drug courts have been found to reduce reoffending both in Australia and internationally: see discussion under 'Addressing Drug-related Offending Behaviour', Chapter Two. See also Cannon A, 'Smoke and Mirrors or Meaningful Change: The way forward for therapeutic jurisprudence' (2008) 17 *Journal of Judicial Administration* 217, 218.
2. New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 November 2002, 6555 (Mr Stewart, Parliamentary Secretary).
3. Gray I, 'Sentencing in Magistrates' and Local Courts in Australia' (Paper presented at the *Sentencing Conference*, Canberra, 8-10 February 2008) 8. More frequent court appearances not only impacts upon judicial resources but also on justice agencies, such as the Office of the Director of Public Prosecution, Western Australia Police, Legal Aid, Aboriginal Legal Service and other justice agencies.
4. The Commission is aware that some agencies do not participate in case conferences or generally in the operation of court intervention programs because they are not resourced to do so. For example, the police and representatives from the Department of Child Protection do not always attend case conferences in the family violence court: Evan King-Macskasy, Family Violence Service Coordinator, Department of the Attorney General, email communication (9 June 2008). Members of the Drug Court Team in the Children's expressed concern that the Department of Child Protection was not usually directly involved in cases before the Children's Court Drug Court.

the availability of treatment programs and other services in the community for people who are not involved in the criminal justice system.[5] It has even been suggested that some people might undertake criminal activity or plead guilty to offences just to access the treatment services available through court programs.[6] The Commission believes that court intervention programs should be provided with additional and separate funding; that is, funding over and above what is already available to the community for drug/alcohol treatment; mental health treatment and other social services.

In some Australian jurisdictions, specific court intervention programs have been allocated very large budgets. For example, the Queensland government provided $36 million over four years to develop and establish the pilot Queensland Indigenous Alcohol Diversion Program.[7] In Victoria, over $17 million was allocated over four years for the development and implementation of the Court Integrated Services Program.[8] The Victorian Department of Justice has stated that:

> Sufficient, sustained and dedicated funding is critical for the success of problem solving approaches and programs. Funding allocations should cover all activities from planning and implementation to review and evaluation.[9]

Further, program managers in some court intervention programs have control over these budgets. For the Court Integrated Services Program in Victoria, all costs associated with the program are paid from allocated funding (eg, the salaries of case managers and the contracted services of outside agencies). Similarly, the budget for the Neighbourhood Justice Centre in Victoria covers the cost of various on-site and off-site services.[10] Budget control enables better access to services and avoids the need for time consuming funding applications – the necessary services can be 'purchased' or 'contracted' in advance or directly when needed.

The level of resources required to adequately support court intervention programs may dampen support for new or existing programs. In Western Australia there is already a perceived 'crisis' within the Department of Corrective Services. In April 2008 it was reported that approximately 1,700 offenders subject to parole or other community-based sentences did not have a case manager.[11] In March 2008 it was reported that Children's Court magistrate Stephen Vose

> was frustrated that a community and justice services representative said he could not guarantee the 16-year-old burglar—who the magistrate was bound to place on a court order—would be supervised by community and justice services.[12]

The government has suggested that the lack of staff is a direct result of a general labour shortage in Western Australia.[13] Although, it has been subsequently reported new staff are being recruited and trained.[14] Irrespective of whether these problems are caused by a labour shortage or a lack of funding, it is clear that expanding court intervention programs will impact on the already overstretched resources of the Community Justice Services division of the Department of Corrective Services.

However, the Commission emphasises that court intervention programs can result in considerable cost savings in the longer-term. If participants are assisted and rehabilitation is underway before sentencing takes place, less resources will be required post-sentencing. More importantly, court intervention programs are generally considered more cost-effective than imprisonment. South Australian Deputy Chief Magistrate, Andrew Cannon has stated that the

> economics are a no-brainer. The most expensive is the Drug Court where we strictly supervise defendants, who would otherwise be in prison, for one year. If they fail we return them to prison … It costs us $36,000 per year to manage them and if we were not managing them, they would be in prison at a recurrent cost of $67,000 per year. This is an immediate saving of about $30,000 while we are managing them.[15]

In Western Australia it has been found that the Perth Drug Court is even more cost-effective than community-based sentences. Moreover, successful court intervention programs will result in cost savings to other areas; for example, savings to the health system from reductions in drug/alcohol use and mental health problems, and savings to the welfare system because of increased employment.

5. Hall W, 'The Role of Legal Coercion in the Treatment of Offenders with Alcohol and Heroin Problems' (1997) 30 *Australian and New Zealand Journal of Criminology* 103, 115. Although it has also been suggested that providing priority access to treatment for offenders in the criminal justice system is a form of 'affirmative action' because this group has been unable to access existing services and are otherwise generally disadvantaged: Crime Research Centre, *WA Diversion Program – Evaluation Framework (POP/STIR/IDP)*, Final Report for the Drug and Alcohol Office (2007) 31.
6. Pritchard E et al, *Compulsory Treatment in Australia* (Canberra: Australian National Council on Drugs, 2007) 24.
7. See further discussion under 'Queensland Indigenous Alcohol Diversion Program', Chapter Two.
8. See further discussion under 'Victoria – Court Integrated Services Program', Chapter Five.
9. Courts and Programs Development Unit, Department of Justice Victoria, *Policy Framework to Consolidate and Extend Problem-Solving Courts and Approaches* (March 2006) 19.
10. See further discussion under 'Victoria – Court Integrated Services Program' and 'The Neighbourhood Justice Centre', Chapter Five.
11. MacDonald K, 'No Staff to Counsel Rapists on Parole', *The West Australian*, 11 April 2008, 1.
12. Jones C, 'Magistrate Blasts Lack of Resources', *The West Australian*, 5 March 2008, 9; see also Jones C & Hodge K, 'Courts are in Crisis: Magistrate', *The West Australian*, 10 April 2008.
13. MacDonald K, 'No Staff to Counsel Rapists on Parole', *The West Australian*, 11 April 2008, 1.
14. See eg McDonald K, 'Knifing "Shows Danger" in Staff Crisis', *The West Australian,* 24 April 2008, 12.
15. Cannon A, 'Smoke and Mirrors or Meaningful Change: The way forward for therapeutic jurisprudence' (2008) 17 *Journal of Judicial Administration* 217, 218–19.

Statement Three: Broad access to court intervention programs

In order to ensure equality of access there should be a variety of court intervention programs available across the state, available at various stages of the criminal justice process and available to different jurisdictions. In order to ensure that the establishment of court intervention programs in Western Australia does not infringe the principle of equal justice the Commission has approached this reference with a view to increasing the availability of programs across the state. In Chapter Five the Commission explains why specialist programs (which are necessarily limited to specific categories of offenders) are required. However, the Commission also proposes that a general court intervention program—which is more widely available—be established.

Subject to the condition that court intervention programs should operate before sentencing, the Commission considers that court intervention programs should operate both pre-plea and post-plea. The Commission understands that some programs require the participant to enter a formal plea of guilty while others require an indication that the participant intends to plead guilty.[16] Because court intervention programs are designed to address the causes of *offending* behaviour it is logical to require that the criminal charges against the participant are proven. However, this approach fails to recognise that many accused are past 'offenders' and have underlying issues that put them at risk of future offending. The adjudication of the current offence is not necessarily relevant to the need to address these problems and the importance of protecting the public from future crime. Pre-plea court intervention programs enable earlier intervention and earlier access to appropriate treatment. Of course, eligibility criteria and program requirements may vary depending upon the stage of the criminal justice process that court intervention is offered.[17]

Another important way of increasing access to court intervention is to enable access to programs in all court jurisdictions. Chief Magistrate Steven Heath has explained that court intervention programs tend to develop and operate in magistrates courts because proceedings are less formal than proceedings in higher courts: magistrates courts have a high volume of cases; magistrates in regional courts have autonomy to develop their own practices; and a high proportion of superior court matters are so serious that only immediate imprisonment can be justified.[18] It has also been observed that magistrates courts are the appropriate place for court intervention programs because they are the first point of contact with the criminal justice system and they are less expensive to run than superior courts.[19]

However, court intervention programs may be suitable for some offenders who must ultimately be dealt with by a superior court (eg, robbery and aggravated burglary).[20] The Commission appreciates that operating court intervention programs in superior court jurisdictions may be cost-prohibitive and difficult; however, there is no reason that offenders facing superior court matters cannot participate in programs that are administered in the magistrates court. This currently occurs in the Perth Drug Court. In Chapter Six the Commission proposes that legislation provide that magistrates can monitor offenders who have already been committed to a superior court.[21]

In regard to the Children's Court, the Commission has taken a different approach. Because the Children's Court already has a strong focus on addressing the underlying causes of offending behaviour and because it is generally preferable for young offenders to be diverted away from the formal criminal justice system, the Commission's preliminary view is that court intervention programs should be restricted to young offenders facing substantial custodial sentences. If limited in this way, the number of potential participants would be small. Accordingly, the Commission questions whether it would be preferable to establish one general program available in the Children's Court rather than a series of specialist programs.[22]

Statement Four: Legal and procedural safeguards

Court intervention programs must ensure adequate legal and procedural safeguards for participants. Because court intervention programs operate separately from the adjudication stage of the criminal justice process, all legal rights and protections associated with the adversarial trial system are preserved. However, there are aspects of some court intervention programs that challenge other fundamental legal and procedural safeguards. For example, case management meetings are held in the absence of the offender in drug courts, family violence courts and some other programs; the imposition of 'custody sanctions' in drug courts is not usually subject to an appeal and unnecessary bail conditions are sometimes imposed to facilitate participation in programs. It has been argued that

16. There are different justifications depending on the particular program. Drug court programs invariably require a formal plea of guilty because of the intensive nature of the program and the need for participants to be open and accountable. In contrast, some mental impairment programs do not require a formal plea of guilty but instead require an indication that the objective facts of the offence are not in dispute. This enables participants to subsequently rely on the defence of insanity in appropriate circumstances.
17. For example, a pre-plea court intervention programs may not be able to address behaviour directly related to the current offences.
18. Heath S, 'Innovations in Western Australian Magistrates Courts' (Paper delivered to the Colloquium of the Judicial Conference of Australia, 3 September 2005) 5.
19. Costanzo J, *Final Report of the South-East Queensland Drug Court Pilot* (July 2003) 6.
20. In this regard, the Commission notes that the magistrates courts' jurisdiction in some other Australian jurisdictions is broader than it is in Western Australia.
21. See Proposals 6.4 & 6.12.
22. See discussion under 'Young Offenders', Chapter Six.

'attention must be paid to basic principles of justice to ensure the rights of court participants are not eroded'.[23]

The Commission has approached this reference with the view that certain legal protections must be maintained, such as open and accountable justice, the right to be heard and the right to appeal decisions resulting in the loss of liberty. Further, the Commission has endeavoured to reduce the potential for net-widening by making proposals to ensure that offenders are not subject to overly punitive bail conditions or that they are required to comply with programs that are disproportionate to the circumstances of the offence. Further, the Commission maintains that participation in court intervention programs must be voluntary and consent must be fully informed. Participants are entitled to know in advance the precise requirements of the program and the consequences of non-compliance.

The Commission highlights that the processes used in court intervention programs generally promote, rather than diminish, procedural justice. Freiberg has stated that:

> Procedural (or natural justice) refers to the ways in which decisions are made and their fairness. More than the legal aspects of the rights to notice, to be heard, to have a tribunal free of bias and the like, for participants and the public, procedural justice consists of four main elements, neutrality, respect, participation and trustworthiness. In the court itself, these translate to processes that are courteous, to dialogues which are meaningful and to court officers who manifest an ethic of care.[24]

Judicial officers involved in court intervention programs often invoke processes (such as speaking directly with the offender) to enhance the offender's understanding of the proceedings and increase the offender's opportunity to be heard.[25] It has been stated that a 'sense of procedural fairness is more likely when litigants believe that they are treated with respect'.[26] In these types of programs, offenders are given an opportunity to be heard and be listened to and to listen to others.[27] Even so, participants in court intervention programs have the same avenues for judicial review as any other court participant if procedural fairness is ignored.[28]

Statement Five: Independent evaluations

Court intervention programs must be subject to independent evaluations. Bearing in mind the significant costs associated with court intervention programs it is necessary for programs to be regularly and independently evaluated to ensure that resources are properly allocated.[29] Evaluations can measure outcomes and identify problems so that policy-makers can adapt and improve programs.

However, evaluations are ineffective without adequate data. Evaluations of some existing court intervention programs have pointed to the lack of available data and the consequential inability to properly assess cost-effectiveness and outcomes.[30] Appropriate data collection methods should be implemented at the start of any new court intervention program and for existing programs data collection must be improved. For example, the evaluators of the Geraldton Alternative Sentencing Regime did not have access to an appropriate comparison group of offenders and this impacted upon their analysis of reoffending rates for the program participants.[31] The Commission also notes that there is no separate crime of family violence in Western Australia and there is no systematic recording of family and domestic violence matters. Therefore, it is difficult to identify family and domestic violence matters that are dealt with in general courts and thereby compare outcomes in family violence courts with the outcomes for similar matters in general courts.

Funding is needed to enable appropriate data collection.[32] It has been suggested that independent evaluators should be engaged during the planning phase for any new program.[33] If this is done, the evaluators can identify the required data and ensure that this data is recorded properly from the outset. While many programs are subject to independent evaluations at the end of the pilot stage, few have been subject to rigorous long-term evaluations. In order to maintain public confidence in any new initiatives, it will be necessary to demonstrate long-term success. Long-term evaluations are also essential to enable the most effective court intervention programs to be identified and expanded.

23. Popovic J, 'Court Process and Therapeutic Jurisprudence: Have we thrown the baby out with the bathwater' in King M & Auty K (eds),*The Therapeutic Role of Magistrates Courts* (2006) 1 *Murdoch University Electronic Journal Special Series* 61.
24. Freiberg A, 'Non-Adversarial Approaches to Criminal Justice' (Paper presented at the 10th International Criminal Law Congress, Perth, 21 October 2006) 8.
25. Popovic J, 'Court Process and Therapeutic Jurisprudence: Have we thrown the baby out with the bathwater' in King M & Auty K (eds), *The Therapeutic Role of Magistrates Courts* (2006) 1 *Murdoch University Electronic Journal Special Series* 61.
26. Popovic J, 'Judicial Officers: Complementing conventional law and changing the culture of the judiciary' (2003) 20 *Law in Context* 121, 128.
27. See Freiberg A, 'Therapeutic Jurisprudence in Australia: Paradigm shift or pragmatic incrementalism?' (2002) 20(2) *Law in Context* 6, 16.
28. In *Crockford v Adelaide Magistrates Court* [2008] SASC 62 the applicant successfully applied for judicial review of the decision to terminate him from the South Australian Drug Court program. It was argued that there was a failure to provide the applicant with procedural fairness. The applicant was terminated from the program without listing a termination hearing or providing the applicant with the opportunity to be heard.
29. Many commentators have emphasised the need for independent evaluations: see eg Pritchard E et al, *Compulsory Treatment in Australia* (Canberra: Australian National Council on Drugs, 2007) xvii; Cannon A, 'Smoke and Mirrors or Meaningful Change: The way forward for therapeutic jurisprudence' (2008) 17 *Journal of Judicial Administration* 217, 221.
30. The lack of sufficient data collection has been identified as the problem for many Australian drug courts: Indermaur D & Roberts L, 'Drug Courts in Australia: The first generation' (2003) 15 *Current Issues in Criminal Justice* 136, 145.
31. Cant R et al, *Report on the Evaluation of the Geraldton Alternative Sentencing Regime* (2004) 38 & 39.
32. Courts and Programs Development Unit, Department of Justice Victoria, *Policy Framework to Consolidate and Extend Problem-Solving Courts and Approaches* (March 2006) 19.
33. Ibid 17.