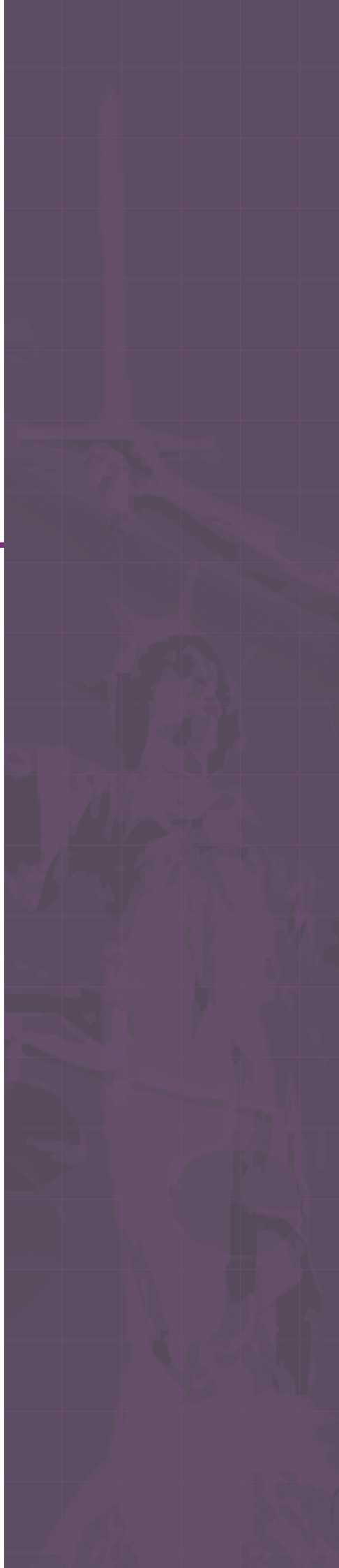
Introduction



Contents

Terms of reference

On 24 August 2004 the Commission received a reference from the Attorney General, the Honourable Jim McGinty MLA, to examine and report on problem-oriented courts and judicial case management. The terms of reference provide that:

> The Commission is to inquire into and report upon whether, and if so in what manner, the principles, practices and procedures pertaining to problem-oriented courts and judicial case management require reform, and in particular, and without detracting from the generality of this reference:
>
> (i) the extent to which, and the circumstances in which, persons are referred to problem-oriented courts and judicial case management;
>
> (ii) the extent to which problem-oriented courts and judicial case management fit within the traditional court model; and
>
> (iii) any related matter
>
> and to report on the adequacy thereof and on any desirable changes to the existing law, practices and administration in relation thereto.
>
> In carrying out this reference the Commission is to have regard to the development of problem-oriented courts and judicial case management, their philosophy and structures, as well as the jurisprudential, ethical and practical issues arising from their operation.

TERMINOLOGY

After conducting extensive research and undertaking preliminary consultations the Commission has reached the view that the terminology in this area is problematic. Most significantly, there are several terms—each capable of a slightly different interpretation—which are used in various contexts. These terms include 'problem-oriented courts',[1] 'problem-solving courts',[2] 'specialty courts'[3] and 'specialist courts'.[4] As a consequence, a considerable portion of the research and commentary in this area is directed to definitional issues. The Commission has decided to concentrate on the legal and practical concerns that arise from the development and operation of these new justice initiatives. Thus, and in order to ensure clarity, the Commission has not used any of these potentially confusing expressions.

Court intervention programs

The Commission has chosen to use the term 'court intervention programs' instead of the term 'problem-oriented courts'.[5] The Commission defines court intervention programs as programs that use the authority of the court in partnership with other agencies to address the underlying causes of offending behaviour and encourage rehabilitation. The distinguishing feature of court intervention programs is the involvement of the court in supervising offenders; a role traditionally performed by other justice agencies. In court intervention programs a judicial officer monitors the offender's progress on the program and, in some instances, is directly involved in managing the offender's treatment or rehabilitation regime. Thus, it is the court's involvement or intervention that provides the key to distinguishing court intervention programs from other programs operating in the criminal justice system.

1. 'Problem-solving courts' is the term most frequently used in the United States: 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, 98. Arie Freiberg has stated that he prefers the term 'problem-oriented courts' to 'problem-solving courts' because, arguably, it is more accurate. In other words, problem-oriented courts aim to address problems but they cannot necessarily claim to solve them: Freiberg A, 'Problem-Oriented Courts: Innovative solutions to intractable problems?' (2001) 11 *Journal of Judicial Administration* 8, 9. The term 'collaborative justice' is also used in California: Wolf R, *California's Collaborative Justice Court: Building a problem-solving judiciary* (New York: Center for Court Innovation, 2005) 2.
2. Problem-solving courts and problem-solving approaches are terms used by the Victorian Department of Justice: Courts and Programs Development Unit, Department of Justice Victoria, *Policy Framework to Consolidate and Extend Problem-Solving Courts and Approaches* (March 2006).
3. The Australian Institute of Criminology adopted the term 'specialty court' in a review of programs operating throughout Australia: Australian Institute of Criminology, *Specialty Courts in Australia: Report to the Criminology Research Council* (2005). See also Payne J, 'Specialty Courts: Current issues and future prosects' (2006) 137 *Australian Institute of Criminology Trends and Issues in Criminal Justice*. In Western Australia, the term 'speciality court' is used in the *Sentencing Act 1995* (WA): see ss 4, 33D & 33G–33I, 83 & 84A–84D; Pt 12, Div 4. Regulation 4A of the *Sentencing Regulations 1996* (WA) provides that for the purposes of the definition of a 'speciality court' in s 4 of the *Sentencing Act*, the Magistrates Court is prescribed, the Central Law Courts at Perth are prescribed and the class of offenders who abuse prohibited plants or drugs under the *Misuse of Drugs Act 1981* (WA) are prescribed. It is generally considered that this definition refers to the Perth Drug Court.
4. Specialist courts have been defined as courts with limited jurisdiction; they are restricted to a specific area of law or specific type of human behaviour: Moore M, 'The Role of Specialist Courts – An Australian Perspective' [2000/2001] *LAWASIA Journal* 139, 139. Examples of specialist courts include the Children's Court, the Coroner's Court, industrial courts and environmental courts. Specialist courts are not the same as court intervention programs: See Freiberg A, 'Problem-Oriented Courts: Innovative solutions to intractable problems?' (2001) 11 *Journal of Judicial Administration* 8, 12.
5. The Commission notes that the term 'intervention program' is being used in legislation in other jurisdictions. For example, Part 4 of the *Criminal Procedure Act 1986* (NSW) is headed 'Intervention Programs' and it provides a framework for the recognition and operation of intervention programs in that jurisdiction. Section 21B of the *Bail Act 1985* (SA) deals with 'intervention programs' and s 9(2)(o) of the *Penalties and Sentences Act 1992* (Qld) provides that a court sentencing an offender must have regard to the offender's successful completion of a rehabilitation, treatment or other intervention program.

Unlike the terms 'problem-oriented courts' and 'problem-solving courts', the term 'court intervention programs' is not restricted to programs that are commonly understood as 'courts'; that is, distinct 'courts' with specialist staff and dedicated judicial officers (eg, Aboriginal courts, drug courts and family violence courts).[6] Court intervention programs also encompass programs operating as separate lists within a general court (eg, the Intellectual Disability Diversion Program); and programs available to a number of general courts (eg, the Supervised Treatment Intervention Regime).

Different court intervention programs target different offenders and different problems. Some court intervention programs are only available to a particular group of offenders; for example, drug courts are only available to drug-dependent (and sometimes alcohol-dependent) offenders and Aboriginal[7] courts are only available to Aboriginal offenders. Some programs target specific problems such as drug dependency, family violence or mental health issues; these are referred to as 'specialist programs' in this Paper. Other court intervention programs target a wide range of underlying issues and the Commission has chosen the term 'general programs' to describe these initiatives. Further, while all court intervention programs aim to reduce crime, programs differ in their emphases. Some focus almost exclusively on offender rehabilitation, while others (such as family violence courts) emphasise the protection of victims while also aiming to prevent future violence or abuse. Although the objectives and operational features of programs vary, every court intervention program discussed in this Paper involves some degree of judicial monitoring.

Judicial monitoring

The expression 'judicial monitoring' is used by the Commission to describe the process of ongoing review by the court after an offender has been accepted as a participant in a specific program. Judicial monitoring is enabled by the offender appearing in court regularly during the program. For some court intervention programs, judicial monitoring is intensive with offenders required to appear in court weekly. In other programs, offenders may appear once a month or even less frequently for a review. Despite the different levels of monitoring, in all court intervention programs judicial officers endeavour to encourage and motivate compliance and, if necessary, provide appropriate condemnation for non-compliance. Regular judicial monitoring also enables the court to respond quickly and effectively to changes in the offender's circumstances.

6. The Commission emphasises that Aboriginal courts, drug courts and family violence courts are not usually separately constituted courts with their own jurisdiction and court seal. They operate as part of the general magistrates' jurisdiction.
7. For the purpose of this Paper, reference to Aboriginal people includes references to Torres Strait Islander people; however, the Commission notes that, according to the 2001 Census, there are less than 900 Torres Strait Islander people currently residing in Western Australia.

Case management

The terms of reference for this project refer to 'judicial case management'. The Commission has decided not to use this term because it is open to different interpretations. The term 'judicial case management' is often used to describe the direct involvement of judicial officers in case processing. In this sense, judicial case management is relevant to all courts and all areas of law. However, in this reference the concept of 'case management' does not refer to how legal and procedural issues are managed; instead it is used to refer to how *offenders* are managed during the program.[8] In other words, what specific programs and requirements are needed for individual participants and how those program requirements should be adapted throughout the program to respond to the participant's individual risks and needs.

A common feature of court intervention programs is a collaborative, team approach to managing offenders; a wide variety of different agencies are involved. In some, but not all, court intervention programs judicial officers are also involved in the case management process. Therefore, the Commission uses the term 'case management' rather than 'judicial case management' and, where relevant, discusses the involvement of the judicial officer in case management.

Offenders

In this Paper the Commission uses the term 'offender' as distinct from accused or defendant. Although some court intervention programs operate before a plea of guilty has been entered, the majority do not. Moreover, court intervention programs aim to address offending behaviour and prevent future crime. Therefore, the Commission believes that the term 'offender' is more appropriate and directs the reader to the relevant context: offending behaviour. The Commission uses the term 'accused' if it is necessary to emphasise that the person has not yet been convicted. The term 'participant' is also used to refer to offenders who are participating in a specific court intervention program.

Further, the Commission acknowledges that justice agencies and service providers involved in court intervention programs use the term 'client', especially when talking directly to the offender.[9] By using the term 'offender' in this Paper the Commission does not intend to suggest that program staff should discontinue using the term 'client'.

8. It has been observed that the term 'judicial case management' is generally used to refer to processes that promote efficiency and timeliness: King M & Tatasciore CL, 'Promoting Healing in the Family: Taking a therapeutic jurisprudence based approach in care and protection applications' in King M & Auty K (eds) *The Therapeutic Role of Magistrates Courts* (2006) 1 *Murdoch University Electronic Journal Special Series* 82.
9. The Commission was informed by one program manager that program staff use positive language such as 'client' rather than 'offender' because this reinforces that staff are concerned about the person and for many of their clients this is the first time anyone in the justice system has shown compassion: meeting with Jo Beckett, Program Manager, Court Integrated Services Program, Victoria (7 December 2007).

The scope of the reference

This Paper examines court intervention programs operating in Western Australia and Australia with a particular focus on programs addressing drug and alcohol dependency, family and domestic violence, and mental impairment. General programs that address a wide range of different problems are also considered. There is reference to international court intervention programs by way of background only because different legal structures and rules make the direct comparison with overseas models difficult. The Commission emphasises that this Paper does not attempt to describe every court intervention program operating in Western Australia or Australia. To do so is unnecessary. Instead, the Commission has examined a cross-section of different programs in order to determine appropriate reforms. In the remainder of this section the Commission explains matters that have been excluded from or are beyond the scope of this reference.

MATTERS NOT DEALT WITH IN THIS PAPER

Aboriginal courts

Aboriginal court models vary; however, a key element is the involvement of Aboriginal Elders and other respected persons in the sentencing process. These Aboriginal community representatives sit with the judicial officer and provide advice about cultural issues. They also address the offender directly about his or her behaviour and its effect on the community. Even though Aboriginal community members are actively involved in the court process, Aboriginal courts have the same sentencing powers as any other court and the judicial officer makes the final decision as to the appropriate penalty.

There are two Aboriginal courts operating in Western Australia: the Norseman Community Court (which commenced in February 2006) and the Kalgoorlie-Boulder Community Court (which commenced in November 2006).[1] In these courts sentencing is deferred for some offenders to participate in rehabilitation programs and both the judicial officer and the Aboriginal community representatives are involved in monitoring the offender's compliance during this period.[2] In this sense, Aboriginal courts can be categorised as a court intervention program because they use the authority of the court (in conjunction with others) to encourage rehabilitation.[3]

The Commission has not devoted a separate chapter in this Paper to Aboriginal courts because it comprehensively examined various Aboriginal courts operating in Australia in its reference on Aboriginal customary laws.[4] In 2006 the Commission recommended that:

> The Western Australia government establish as a matter of priority Aboriginal courts for both adults and children in regional locations and in the metropolitan area.[5]

In response to this recommendation, and to the opening of the Kalgoorlie-Boulder Aboriginal Community Court, the Attorney General of Western Australia stated that the 'court will be evaluated after two years and if successful it may become permanent in Kalgoorlie and the model used to create similar courts elsewhere in the State'.[6]

1. These courts sit fortnightly and generally deal with about 7–15 offenders per day. In order to participate, offenders must plead guilty and accept responsibility for their offending behaviour. Certain offences involving family violence and sexual assault are excluded: see Department of the Attorney General, *Kalgoorlie Boulder Community Court Brochure* <http://www.justice.wa.gov.au/A/aboriginal_court.aspx> 28 May 2008. The Commission acknowledges that magistrates in regional Western Australia have developed informal Aboriginal court programs involving Aboriginal community representatives: see Heath S, 'Innovations in Western Australian Magistrates Courts' (Paper delivered to the Colloquium of the Judicial Conference of Australia, Sunshine Coast, 3 September 2005) 2.
2. These courts are not separately constituted courts but operate within the general magistrates court. Sentencing may be deferred for offenders to participate in the Supervised Treatment Intervention Regime (discussed in Chapter Two of this Paper) and some offenders may be placed on a Pre-Sentence Order (discussed in Chapter Six): Magistrate Auty; Magistrate Benn; Richard Stevenson, Regional Manager, Magistrates Courts Kalgoorlie; and Beverly Burns, Aboriginal Justice Officer, Kalgoorlie-Boulder Community Court, telephone consultation (10 March 2008).
3. Although Aboriginal courts aim to reduce reoffending, they also have broader aims. For example, Aboriginal courts aim to provide more culturally appropriate justice outcomes for Aboriginal offenders and to increase Aboriginal participation in the justice system. By involving Elders and other respected persons in the court process they also endeavour to strengthen the authority of Aboriginal communities: Marchetti E & Daly K, 'Indigenous Sentencing Courts: Towards a theoretical and jurisprudential model' (2007) 29 *Sydney Law Review* 415, 423 & 429.
4. LRCWA, *Aboriginal Customary Laws*, Discussion Paper, Project No. 94 (2005) 142–57. In its Discussion Paper the Commission questioned the link between Aboriginal courts and problem-oriented courts and stated that it 'has strong reservations about the categorisation of Aboriginal courts as problem-oriented courts or problem-solving courts. If there is a problem to be solved it is failure of the criminal justice system to accommodate the needs of Aboriginal people to ensure that they are fairly treated within that system': 146.
5. LRCWA, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report, Project No. 94 (2006) 136, Recommendation 24.
6. Attorney General of Western Australia, 'New Aboriginal Court Opens for Business', *Media Statement*, 21 November 2006.

The Commission notes that, apart from Aboriginal-specific programs, Aboriginal participation in court intervention programs is generally low; it has been suggested that programs should be established that address the specific needs of Aboriginal offenders.[7] Aboriginal courts, such as the Kalgoorlie-Boulder Aboriginal Community Court, are designed for Aboriginal offenders. So too is the Barndimalgu Court in Geraldton which targets Aboriginal family and domestic violence offenders.[8] There is also an Aboriginal-specific alcohol court intervention program available in Queensland.[9] Bearing in mind the continued unacceptable level of Aboriginal imprisonment in this state, the Commission strongly encourages the Western Australian government to invest in suitable court intervention programs for Aboriginal offenders. In particular, the Commission reiterates its support for Aboriginal courts in both regional and metropolitan areas.[10]

Homelessness

The recent Commonwealth Green Paper explains that homelessness is caused by personal factors (such as 'disability, mental illness, alcohol and drug abuse, family breakdown, poverty and violence') and social and economic factors (such as 'housing affordability, access to work, education and training, and entrenched disadvantage').[11] It was further observed that:

> There is a complex inter-relationship between homelessness and offending behaviour, with each contributing to increases in the other, compounded through social disadvantage.[12]

From the Commission's research it is clear that homelessness is a common problem for many offenders. Significantly, it often coexists with other problems such as drug and alcohol dependency and mental impairment. Also, family and domestic violence offenders may find themselves homeless as a consequence of court orders directing them not to contact the victim.[13] A study of police detainees (from 1999–2006) highlights the complexity of issues faced by homeless offenders: homeless detainees are more likely to have been admitted to a psychiatric hospital than non-homeless detainees; they are more likely to use or be dependent on illicit drugs/alcohol than non-homeless detainees; and they are more likely to obtain income from welfare payments or by illegal means than non-homeless detainees.[14]

Victorian Deputy Chief Magistrate, Jelena Popovic, has observed that homelessness is the 'root cause of much of the offending before the courts' and that offending behaviour cannot be realistically addressed unless the offender is 'living in appropriate accommodation'.[15] The Commission agrees that for homeless offenders, rehabilitation will be very difficult if the offender does not have suitable accommodation. Therefore, the Commission believes that sufficient resources must be provided to enable every court intervention program to access homelessness support. Homeless participants should be assisted in finding suitable accommodation and, if necessary, temporary accommodation should be provided to enable participation in the program to commence as soon as possible.[16]

As far as the Commission is aware, there is only one Australian specialist court intervention program targeting homeless offenders: the Homeless Persons Court Diversion Program in Queensland. This program is mainly designed for minor offending and it is closely linked with a specialist mental impairment program. This program is discussed in Chapter Three.[17]

The Commission has decided not to examine homelessness court intervention programs separately because it is of the view that all court intervention programs should address the problem of homelessness. It is unlikely that a homeless offender will appear before the court without any other underlying issues. Even if a homeless offender does not meet the eligibility criteria for specialist programs (such as drug courts, family violence courts, Aboriginal courts and mental impairment programs) such an offender could participate in a general court intervention program (as proposed in Chapter Five). With the establishment of a general program, homeless offenders will be able to participate in appropriate individually tailored court intervention;[18] the Commission does not believe that

7. Pritchard E et al, *Compulsory Treatment in Australia* (Canberra: Australian National Council on Drugs, 2007) xviii–xix.
8. See discussion under 'Geraldton Magistrates Court', Chapter Four.
9. See discussion under 'Queensland Indigenous Alcohol Diversion Program', Chapter Two.
10. The Commission notes that the Chief Justice of Western Australia has stated that 'there is a need to extend Aboriginal community courts around the state': The Hon Wayne Martin Chief Justice of Western Australia (Address to Rotary District 9450 Conference, *Protecting the Future: Youth and the justice system*, Perth, 31 March 2007) 22.
11. Commonwealth Government, *Which Way Home: A new approach to homelessness* (2008) 13.
12. Ibid 24.
13. Family and domestic violence court intervention programs also need to consider homelessness from the point of view of the victim who may have left the family home to escape violence.
14. Australian Institute of Criminology, 'Homelessness, Drug Use and Offending' (2008) 168 *Crime Facts Info* 1.
15. Popovic J, 'Homelessness and the Law: A view from the bench' (Paper presented to PILCH and Sir Zelman Cowen Centre for Legal Education, Melbourne, 15 October 2002) 1.
16. In Chapter Six the Commission has proposed the establishment of a separate unit within the Department of the Attorney General to oversee the operation of all court intervention programs. The Commission suggests that representatives from the Department of Housing could be available for all court intervention programs to assist participants with housing and homelessness issues: see discussion under 'Separate court intervention programs unit', Chapter Six.
17. See discussion under 'Queensland – Special Circumstances List (Homeless Persons Court Diversion program)', Chapter Three.
18. The Commission's proposal for a general court intervention program is based upon the Court Integrated Services Program (CISP) in Victoria. It has been estimated that half of all CISP participants are affected by homelessness. In response, the CISP has access to priority services from the Department of

a separate homelessness court intervention program would be cost-effective or necessary.

Therapeutic jurisprudence

A considerable amount of the literature and commentary on court intervention programs refers to the concept of therapeutic jurisprudence. The concept is not separately examined in this Paper, but the Commission believes—given the growing popularity of therapeutic jurisprudence—that it is important for the Commission to explain why briefly.

What is therapeutic jurisprudence?

Therapeutic jurisprudence is not so much a legal theory but a 'way of looking at the law'.[19] It was first developed in the late 1980s and early 1990s in the United States by David Wexler and Bruce Winick. Although it originated in the context of mental health law, therapeutic jurisprudence has since been expanded to other areas of the law including tort, contract, family law, criminal law and international law.[20]

Therapeutic jurisprudence has been described as the 'study of the role of law as a therapeutic agent'.[21] Legal rules, legal processes and legal actors (such as judicial officers and lawyers) can produce therapeutic or anti-therapeutic consequences. The meaning of therapeutic and anti-therapeutic is not entirely clear. As Christopher Slobogin observed, it might be assumed that 'therapeutic' means 'beneficial' and 'anti-therapeutic' means 'harmful'; however, this wide interpretation of the concept has been dismissed by some proponents of therapeutic jurisprudence. It is argued that if therapeutic jurisprudence is given such a broad interpretation, it 'would merely be another name for figuring out what is best'.[22] Slobogin defines therapeutic jurisprudence as 'the use of social science to study the extent to which a legal rule or practice promotes the *psychological* and *physical well-being* of the people it affects'.[23]

Examples of legal rules or processes designed to promote psychological or physical wellbeing include:

- providing a distressed witness with a short adjournment;[24]
- using affidavits in interim violence restraining order applications so that the applicant does not have to give evidence in court;[25]
- interacting effectively with offenders to ensure that sentencing orders are understood;[26] and
- treating offenders with respect by enabling offenders to set their own goals as part of a rehabilitation program so that motivation and compliance is enhanced.[27]

Because of its focus on psychological wellbeing, therapeutic jurisprudence draws on the behavioural sciences. For example, Wexler explains that successful practices in the medical arena can be borrowed and adapted to legal processes. It has been found that patients are more likely to follow medical advice if they sign a 'behavioural contract', and even more likely to comply if they make a public commitment to do so. Compliance is even further increased by patients making this commitment in the presence of family members. Thus, offenders can be encouraged to enter into an agreement with the court, particularly if they are given the opportunity to provide input into the appropriate conditions of any court order. The public nature of court proceedings, coupled with the presence of family members or other significant people, may strengthen the offender's resolve to comply with that agreement.[28]

Despite significant and growing support for therapeutic jurisprudence,[29] it is not without its critics.[30] Commentators and others have cautioned

Human Services Housing Service including specialist staff employed by the program: Courts and Programs Development Unit, Department of Justice Victoria, *Service Delivery Model for the Court Integrated Services Program* (2006) 12.

19. King M & Auty K, 'Therapeutic Jurisprudence: An emerging trend in courts of summary jurisdiction' (2005) 30 *Alternative Law Journal* 69, 73.
20. See King M & Wager J, 'Therapeutic Jurisprudence and Problem-Solving Judicial Case Management' (2005) 15 *Journal of Judicial Administration* 28, 28; Slobogin C, 'Therapeutic Jurisprudence: Five dilemmas to ponder' (1995) 1 *Psychology, Public Policy, and Law* 193, 193. The Australian Institute of Judicial Administration (a research and educational institute which conducts research about judicial administration and develops judicial educational programs) sponsors the Australasian Therapeutic Jurisprudence Clearinghouse.
21. Wexler D, 'Reflections on the Scope of Therapeutic Jurisprudence' (1995) 1 *Psychology, Public Policy, and the Law* 220, 220.
22. Slobogin C, 'Therapeutic Jurisprudence: Five dilemmas to ponder' (1995) 1 *Psychology, Public Policy, and Law* 193, 196.
23. Ibid (emphasis added). Wexler has expressed his support for this definition and agrees that therapeutic jurisprudence should not be interpreted as 'synonymous with simply achieving intended or desirable outcomes. Therapeutic jurisprudence deserves to retain its distinctiveness as a discipline relating to mental health and psychological aspects of health': Wexler D, 'Reflections on the Scope of Therapeutic Jurisprudence' (1995) 1 *Psychology, Public Policy, and the Law* 220, 223–24.
24. See Australian Institute of Judicial Administration, 'The Concept of Therapeutic Jurisprudence' <http://www.aija.org.au/index.php?option=com_content&task=view&id=415&Itemid=134> accessed 29 May 2008.
25. King M & Wilson S, 'Country Magistrates' Resolution on Therapeutic Jurisprudence' (2005) 35(2) *Brief* 23, 23.
26. Wexler D, 'Therapeutic Jurisprudence: An overview' available at <http://www.law.arizona.edu/depts/upr-intj/intj-o.html> accessed 28 May 2008.
27. See Slobogin C, 'Therapeutic Jurisprudence: Five dilemmas to ponder' (1995) 1 *Psychology, Public Policy, and Law* 193, 194.
28. Wexler D, 'Robes and Rehabilitation: How judges can help offenders "make good"' [2001] *Court Review* 18, 19.
29. In November 2004 all Western Australian regional magistrates unanimously adopted a resolution to apply therapeutic jurisprudence principles in their courts: King M & Wilson S, 'Country Magistrates' Resolution on Therapeutic Jurisprudence' (2005) 35(2) *Brief* 23, 23. A survey of magistrates in New South Wales found that '[n]early all respondents supported the concept of therapeutic jurisprudence to some degree': Barnes L & Poletti P, *MERIT: A survey of magistrates* (Sydney: Judicial Commission of New South Wales, 2004) vii.
30. See eg Hoffman M, 'Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The last dangerous

against the use of the term 'therapeutic jurisprudence' (especially in public discourse) because of its potentially confusing and negative connotations. It has been observed that the term 'therapeutic jurisprudence' is viewed by some as 'pop-culture psycho-babble'.[31] Chief Justice Wayne Martin states that those working in the criminal justice system should be

> cautious about adopting the jargon of sociology and psychology in *public* debate about the criminal justice system, because of the real risk that the public might misconstrue, or the media distort the message into 'soft on crime and sympathetic to the causes of the crime'.[32]

The Commission agrees that the term 'therapeutic jurisprudence' is liable to misinterpretation. Further, therapeutic jurisprudence may be construed as acting only in the best interests of offenders. But it is relevant to *all* aspects of the law and can potentially be applied by any court in relation to a variety of court participants including plaintiffs, respondents, offenders, victims, jurors and witnesses. Moreover, proponents of therapeutic jurisprudence have stressed that the concept does not demand that therapeutic aims override other important principles, such as due process or the protection of the community.[33]

What is the relevance of therapeutic jurisprudence to court intervention programs?

Therapeutic jurisprudence developed around the same time as the development of court intervention programs such as drug courts; however, they developed independently of one another.[34] Therapeutic jurisprudence and court intervention programs are not the same. As noted above, therapeutic jurisprudence is not limited to offender rehabilitation. Nevertheless, court intervention programs do adopt processes and procedures grounded in therapeutic jurisprudence. Therapeutic jurisprudence is clearly relevant to court intervention programs because court intervention programs aim to improve participants' wellbeing by addressing underlying problems. Court intervention programs employ therapeutic jurisprudence techniques to enhance the effectiveness of judicial supervision and encourage compliance with court orders.

Yet, it must be recognised that court intervention programs are principally designed to protect the community: improving offender wellbeing may be crucial to achieve this goal, but is not necessarily an end in itself. While it is appropriate for judicial officers, lawyers and others to adjust their practices in order to promote participants' wellbeing, the merits of court intervention programs cannot be measured by reference to the wellbeing of the participants. These new court processes cannot be justified unless they can achieve outcomes that are beneficial for the whole community.

The Commission acknowledges the relevance and importance of therapeutic jurisprudence, especially to those working in various court intervention programs. However, the Commission does not believe that this reference will be enhanced by a critique of therapeutic jurisprudence.[35] Commonsense dictates that if judicial officers and others involved in the criminal justice system can work together to encourage, motivate and assist offenders to address the causes of offending behaviour, the community will benefit. Frequent and unnecessary references to therapeutic jurisprudence are liable to distort the true message: the purpose of court intervention programs is to reduce crime.

MATTERS BEYOND THE SCOPE OF THE REFERENCE

Other rehabilitation and diversionary programs

There are a range of programs operating in the criminal justice system designed to reduce offending and rehabilitate offenders. Diversionary programs are designed to divert offenders away from the formal justice system or redirect offenders into less punitive outcomes.[36] Historically, the concept of diversion was 'derived from an idea that the

branch becomes most dangerous' (2002) *29 Fordham Urban Law Journal* 2063, 2063–66.

31. King J et al, 'Process Evaluation and Policy & Legislative Review' (Health Outcomes International and Turning Point Alcohol and Drug Centre, 2004) 132.
32. The Hon Wayne Martin, Chief Justice of Western Australia (Address to the 3rd International Conference on Therapeutic Jurisprudence, Perth, 7 June 2006) 6 (emphasis in original). See also Berman G & Feinblatt J, *Good Courts: The case for problem-solving justice* (New York: The New Press, 2005) 51–52, where it is mentioned that therapeutic jurisprudence may be a 'political liability'.
33. Wexler D, 'Therapeutic Jurisprudence: An overview' <http://www.law.arizona.edu/depts/upr-intj/intj-o.html> accessed 28 May 2008.
34. Hora P et al, 'Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the criminal justice system's response to drug abuse and crime in America' (1999) 74 *Notre Dame Law Review* 439; 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* 9.
35. The Commission notes that a recent report by the Community Development and Justice Standing Committee recommended that the Office of the Director of Public Prosecutions, in collaboration with the Department of the Attorney General, investigate and report on the merits of therapeutic jurisprudence: Community Development and Justice Standing Committee of the Western Australian Parliament, *Inquiry Into the Prosecution of Assaults and Sexual Offences*, Report No. 6 in the 37th Parliament (Perth: State Law Publisher, 2008) 126, Recommendation 19. For a further discussion of therapeutic jurisprudence and other relevant theories such as restorative justice, see Blagg H, *Problem-Oriented Courts*, LRCWA, Background Paper, Project No. 96 (2008).
36. Wundersitz J, *Criminal Justice Responses to Drug and Drug-Related Offending: Are they working?* Australian Institute of

mainstream criminal justice system is potentially destructive'.[37] Diversionary options now tend to divert offenders into some type of treatment or assistance to ensure future offending is minimised. While court intervention programs are a form of diversion (eg, offenders who successfully comply with programs may avoid imprisonment) all diversionary programs are not the same. Many direct offenders away from the courts and other justice agencies into external treatment or education. However, as explained above, the distinguishing feature of court intervention programs is the involvement of the court in supervising and monitoring the offender's progress on the program. Hence, court intervention programs do not divert offenders away from the formal criminal justice system.

Court intervention programs are also not the same as the rehabilitation programs available in prison, or as part of community-based sentences or parole orders. The supervision of offenders in these instances is undertaken by community corrections officers and prison authorities. Accordingly, other rehabilitation and diversionary programs operating in Western Australia are not discussed in this Paper, unless it is necessary for background or comparative purposes.

Restorative justice

There is no clear definition of restorative justice; however, it 'can be described as an approach to crime that focuses on repairing the harm caused by criminal activity and addressing the underlying causes of criminal behaviour'.[38] Restorative justice has also been defined as a 'process whereby parties with a stake in a specific offence resolve collectively how to deal with the aftermath of the offence and its implications for the future'.[39] Restorative justice initiatives include a number of different practices at various stages in the criminal justice process.[40] For example, conferencing schemes[41] and victim-offender mediation are based upon restorative justice.

Like court intervention programs, restorative justice initiatives aim, among other things, to reduce crime but they do so in a different way. Restorative justice processes address criminal behaviour and the underlying causes of crime by bringing together the offender, the victim and (sometimes) other members of the community.[42] The court and other justice agencies are not key players in the process.[43] Although a judicial officer may refer an offender to a restorative justice program, the judicial officer plays no role in administering or supervising the program. This is one of the main differences between court intervention programs and restorative justice. The judicial officer and criminal justice agencies (such as police, defence lawyers and community corrections) are central to the operation of court intervention programs.[44]

For this reason, restorative justice is not examined in this Paper. Nevertheless, it is important to note that some restorative justice processes operate in conjunction with court intervention programs.[45] The Neighbourhood Justice Centre in Collingwood, Victoria has developed a restorative justice conferencing project and it also uses different court intervention strategies such as problem-solving meetings and judicial monitoring of offenders.[46] Some participants in the Geraldton Alternative Sentencing Regime and the Perth Drug Court have been referred to victim-offender mediation.[47] It should be recognised that some offenders may not be in a position to engage in restorative justice processes until they have received some assistance with their underlying problems.[48]

Criminology, Technical and Background Paper No. 25 (2007) 31.

37. Cappa C, 'The Social, Political and Theoretical Context of Drug Courts' (2006) 32 *Monash University Law Review* 145, 159.
38. Australian Law Reform Commission (ALRC), *Same Crime, Same Time: Sentencing of federal offenders*, Report No. 103 (2006) [4.20]. Berman and Feinblatt have observed that restorative justice emerged out of the victims' movement which started in the 1960s. This movement responded to the lack of input by victims into the criminal justice system: Berman G & Feinblatt J, *Good Courts: The Case for Problem-Solving Justice* (New York: The New Press, 2005) 44.
39. Marshall T, 'Restorative Justice: An overview' in Johnstone G (ed), *A Restorative Justice Reader: Texts, sources, context* (2003) 28, as cited in Marchetti E & Daly K, 'Indigenous Sentencing Courts: Towards a theoretical and jurisprudential model' (2007) 29 *Sydney Law Review* 415, 425.
40. Marchetti & Daly, ibid 424.
41. The Western Australian juvenile justice teams are a form of conferencing; they involve the young person, the victim, a police officer, a juvenile justice team coordinator, and supporters of both the victim and the offender. The Department of Corrective Services provides a voluntary victim-offender mediation service: see <http://www.correctiveservices.wa.gov.au/O/offendermediation.aspx> accessed 27 May 2008.
42. ALRC, *Same Crime, Same Time: Sentencing of federal offenders*, Report No. 103 (2006) [4.20].
43. Ministry of Justice New Zealand, *Restorative Justice in New Zealand: Best practice* (2004) 12.
44. Cappa states that although there are some similarities between restorative justice and drug court programs, the involvement of the state (via the court) and the absence of the victim in drug court processes prevents drawing a 'direct parallel' between the two: Cappa C, 'The Social, Political and Theoretical Context of Drug Courts' (2006) 32 *Monash University Law Review* 145, 166.
45. It has been argued that restorative justice processes should operate in conjunction with court intervention programs because such processes enable offenders to understand the consequences of their criminal behaviour: see Cannon A, 'Smoke and Mirrors or Meaningful Change: The way forward for therapeutic jurisprudence' (2008) 17 *Journal of Judicial Administration* 217, 220.
46. See discussion under 'The Neighbourhood Justice Centre', Chapter Five.
47. See King M, ''Afterword' in King M & Auty K (eds), *The Therapeutic Role of Magistrates Courts* (2006) 1 *Murdoch University Electronic Journal Special Series* 162. Some drug court participants have also made restitution payments during the drug court program: Airey M & Wiese J, 'How the WA Pilot Drug Court is Progressing: A lawyer's perspective' (2001) 28(10) *Brief* 12.
48. South Australian Deputy Chief Magistrate, Andrew Cannon has reported that a drug court participant was involved in an adult restorative justice process during the second phase of the program. He stated that this process had 'so great an effect on the defendant that he relapsed into drug use to manage the personal shock. Although this outcome was not what we intended, it tells me that the process was effective and should be used, with appropriate management in place

The Commission acknowledges the potential benefits of restorative justice processes, especially for victims. However, it has not examined existing restorative justice programs in Australia and is unable to comment on their effectiveness. Whether laws, practices and procedures in Western Australia require reform to facilitate restorative justice processes is beyond the scope of this reference. However, there is nothing proposed in this Paper that would undermine existing or planned restorative justice programs.

Specialist family violence jurisdiction

In Chapter Four of this Paper the Commission discusses the prevalence and impact of family and domestic violence and the inadequacies of the justice system's response to this type of offending. The Commission recognises that courts around the world are developing alternative ways of dealing with family and domestic violence; these alternative specialist family violence jurisdictions do not necessarily fit within the definition of a court intervention program.[49] Although they have the same overriding objective as court intervention programs in this area—the prevention of crime through improved victim safety and offender accountability—the way that these emerging specialist family violence jurisdictions achieve this objective is 'marked by differences in philosophy and practice'.[50] These jurisdictions deal with *all* matters involving family violence in the court system: criminal trials and sentencing, civil protection orders and, in some instances, child contact, residence and maintenance orders.

Specialist family violence jurisdictions include some aspects of court intervention programs: in particular, the use of judicially supervised rehabilitation programs for offenders.[51] However, rehabilitation and perpetrator accountability is approached quite differently. In some court intervention programs (such as drug courts and mental impairment programs) it is believed that with appropriate intervention the underlying causes of offending behaviour can be treated. However, in family violence matters it is argued that: 'there is no known cure'.[52] Therefore, the monitoring of offenders may facilitate rehabilitation, but most importantly it is a means of monitoring victim safety and preventing crime by closely supervising perpetrators in the community.[53] Perpetrator accountability in these specialist court jurisdictions is also attempted through measures designed to increase conviction rates in contested matters and reduce the number of matters withdrawn or dismissed for lack of evidence.

Dealing with victims and perpetrators of family and domestic violence is complex. Many victims are reluctant to give evidence, but maintain the truth of their statements that were given to police at the time of the incident. Others become unfavourable witnesses, recanting the version of events given at the time of the incident.[54] There are numerous, complicated reasons why victims may not wish to cooperate in a prosecution or pursue an application for a violence restraining order.[55] Magistrate Newman from South Australia has commented that:

> We know that men who engage in abusive and violent behaviour use strategies to persuade women to drop charges. These involve threats, promises of change, family pressure and blame.[56]

There is a need to balance the interests of the individual victim of the offence with the broader interest in prosecuting family violence matters. There has been recognition that, in the past, too much reliance has been placed on the victim's wishes to proceed with and/or withdraw a matter, rather than on whether a crime has been committed.[57] Thus the principal aim of these specialist jurisdictions is to address the fact that there is a lack of confidence in the justice system's response to family and domestic violence. This lack of confidence leads to particular problems in family and domestic violence matters: the under-reporting of domestic violence incidents,

to deal with the impact it may have': Cannon A, 'Therapeutic Jurisprudence in the Magistrates Court: Some issues of practice and principle' in Reinhardt G & Cannon A (eds), *Transforming Legal Processes in Court and Beyond* (Melbourne: Australian Institute of Judicial Administration, 2007) 135.

49. The differences between domestic violence courts and problem-solving courts have been discussed by the Center for Court Innovation: 'How Do Domestic Violence Courts Compare to Other Problem Solving Courts?' (New York, 2003) <http://www.courtinnovation.org> accessed 3 June 2008.
50. Ibid.
51. There is some debate about the effectiveness of domestic violence perpetrator programs. See eg Office of the Victims of Crime Coordinator, *Criminal Justice Intervention in Family Violence in the ACT: The Family Violence Intervention Program 1998–2006* (Canberra, 2006) 49; Herman K, Associate Director, Domestic Violence Programs, Center for Court Innovation, New York (Speech delivered to the *Just Partners* conference, Canberra, 22–23 May 2008).
52. Ibid.
53. Programs are also imposed as a form of punishment; in some jurisdictions perpetrator programs are available as a sentencing option, not a pre-sentence option. See eg Office of the Victims of Crime Coordinator, *Criminal Justice Intervention in Family Violence in the ACT: The Family Violence Intervention program* 1998–2006 (Canberra: 2006) 10; Rodwell L & Smith N, *An Evaluation of the NSW Domestic Violence Intervention Court Model* (Sydney: NSW Bureau of Crime Statistics and Research, 2008) 4.
54. In the evaluation of the Joondalup pilot family violence court it was found that charges were not laid in 61% of matters where police were called to respond to family violence; in 52% of these cases the reason for not pursuing the matter was the victim's decision not to aid the investigation: Department of Justice and West Australian Police Service, *Joondalup Family Violence Court*, Final Report (February 2002) 31. A senior prosecutor from the Australian Capital Territory has stated that it is not unknown for a victim to go to a bail hearing and give a version of events that tends to exculpate the offender: Jones M, Senior Family Violence Prosecutor, ACT Office of the Director of Public Prosecutions (Speech delivered to the *Just Partners* conference, Canberra, 22–23 May 2008).
55. Meeting with Magistrate G Lawrence (18 March 2008).
56. Newman T, 'Adelaide Family Violence Court and Central Violence Intervention program' (Paper delivered to *At the Cutting Edge: Therapeutic Jurisprudence in Magistrates Courts* conference, Perth, 6 May 2005) 5.
57. Rodwell L & Smith N, *An Evaluation of the NSW Domestic Violence Intervention Court Model* (Sydney: NSW Bureau of Crime Statistics and Research, 2008) 2.

retractions and lack of cooperation by victims, repeat victimisation and recidivism.

Common features of specialist family violence jurisdictions

Specialist family violence jurisdictions have some common features:

Measures designed to reduce delay: In many specialist family violence jurisdictions there is strict timetabling in order to reduce the delay between arrest and final disposition. Case tracking or monitoring is used to ensure that material is provided in a timely manner and that matters proceed expeditiously.[58] This has been found to increase the likelihood of victims remaining supportive of the process.[59]

Use of evidence other than the victim's statement: There is a focus on improved policing so that better prosecution briefs are provided, leading to a reduction in not guilty pleas and the possibility of continuing a prosecution even if a victim decides not to cooperate or give evidence, or where unfavourable evidence has been given.[60]

Use of specialists: In many such jurisdictions there are specialist magistrates, prosecutors and policing units.[61] In some jurisdictions particular prosecutors are assigned files from the moment they enter the system and those prosecutors stay with the files to the finalisation of the matters.[62]

Support and assistance for victims: There is also a strong focus on support and assistance for the victim. Measures such as separate waiting rooms, support people, information about the court process and information about the specific case are also designed to increase the confidence of victims in the justice system.[63]

A less fragmented response: Some court jurisdictions are effectively 'one-stop shops' so that parties do not have to go to different courts to have different aspects of the same problem dealt with.[64] The integrated domestic violence courts in the United States enable a single judge to deal with all civil, family and criminal law matters associated with an individual family. It has been reported that these courts deal with an average of seven different legal matters per family.[65]

Interagency collaboration: Like court intervention programs, these specialist jurisdictions involve cooperation between relevant agencies, both at an operational and strategic level (eg, steering committees) and a case-by-case level (eg, case tracking or case management meetings).[66]

An integrated family violence court for Western Australia

After a comprehensive review of existing family and domestic violence courts and programs in Australia and elsewhere, Stewart suggested that:

> [T]here would be great value in the establishment of appropriately resourced specialist domestic violence courts which could hear and finalise criminal charges, make orders for protection of victims and resolve family law issues by making orders for contact and residence, as well as enforcement of child support orders, breaches of bail, protection orders and probation and parole orders.[67]

58. See eg, Magistrates Court of the ACT, *Family Violence List,* Practice Direction No. 2 of 2005; New South Wales Local Court, *Procedures to be Adopted for Domestic Violence Court Intervention Model at Campbelltown and Wagga Wagga Local Courts*, Practice Note No. 1, of 2006. In South Australia trial dates for the family violence court list are organised so that it is always possible for a matter to go to trial within eight weeks: Dr Andrew Cannon, Deputy Chief Magistrate of South Australia, telephone consultation (2 April 2008). See also the Front End Project in Manitoba, Canada <http://www.manitobacourts.mb.ca/front_end_project.html> accessed 3 June 2008.
59. Johnson R, 'The Evolution of Family Violence Criminal Courts in New Zealand' (Paper delivered to a police executive conference, Nelson, New Zealand, 8 November 2005). In the Waitakere Family Violence Court in New Zealand it was found that fast-tracking trials resulted in a dramatic increase in guilty pleas (from 15% to 65%).
60. For example, family violence investigator kits, which include a digital camera and a video recorder have been used in the Australian Capital Territory and New South Wales: see Urbis Keys Young, *Evaluation of the ACT Family Violence Intervention program Phase II* (Canberra: Department of Justice and Community Safety, 2001) 6; Rodwell L & Smith N, *An Evaluation of the NSW Domestic Violence Intervention Court Model* (Sydney: NSW Bureau of Crime Statistics and Research, 2008) 4. In the United Kingdom there has been an increasing reliance on emergency telephone call tapes (000 recordings), photographs and forensic exhibits: Baird V, Solicitor-General for the United Kingdom (Speech delivered to the *Just Partners* conference, Canberra, 22–23 May 2008).
61. In Manitoba, Canada the courts do not have specialised judges – all 41 judges of the District Court are educated about the social context in which family violence occurs. However, there is a team of 17 specialist family violence prosecutors (the province has a population of one million): Wyant RE, Chief Judge of the Provincial Court of Manitoba (Speech delivered to the *Just Partners* conference, Canberra, 22–23 May 2008).
62. This procedure is followed in Manitoba. Further, if the same offender comes before the courts again, the same prosecutor is assigned: Malaviya R, Acting Supervising Senior Crown Attorney, Domestic Violence Unit, Manitoba, Canada, (Speech delivered to the *Just Partners* conference, Canberra, 22 May 2008).
63. In some jurisdictions this role is carried out by non-government organisations. In New Zealand, as soon as a family violence matter comes to the attention of the police, the police contact Viviana (a non-government organisation). Viviana provides support and advocacy to victims including representation in court, safety planning information, and assistance with housing and income support issues.
64. The pilot family violence division of the Victorian Magistrates Court deals with the following matters if they arise in circumstances of family violence: violence restraining orders; civil proceedings for personal injury; criminal charges; compensation applications; and child support, contact and residence: see <http://www.magistratescourt.vic.gov.au>. In South Australia the family violence courts deal with all violence restraining order matters and criminal charges arising out of family violence: see <http://www.courts.sa.gov.au/courts/magistrates/index_cvip.html> accessed 1 June 2008.
65. Herman K, Associate Director of Domestic Violence Programs, Center for Court Innovation, New York (Speech delivered to the *Just Partners* conference, Canberra, 22–23 May 2008).
66. Rodwell L & Smith N, *An Evaluation of the NSW Domestic Violence Intervention Court Model* (Sydney: NSW Bureau of Crime Statistics and Research, 2008) 5.
67. Stewart J, *Specialist Domestic/Family Violence Courts within the Australian Context*, Australian Domestic and Family Violence Clearinghouse, Issues Paper 10 (2005) 34.

At present, the family violence courts operating in Western Australia (discussed in detail in Chapter Four) have a more limited jurisdiction than Stewart suggests. In Western Australia all of the programs operate within the general magistrates court and have the same powers and jurisdiction that are available in any other magistrates court. Specifically, there is no jurisdiction to hear family law matters, and only some (rather than all) criminal matters and violence restraining orders are heard in these courts.[68]

One of the main arguments in favour of separate family violence jurisdiction is the benefit of having specialist personnel: magistrates, prosecutors, lawyers and community corrections officers. Although, it has been noted that, given the amount of family and domestic violence *all* magistrates deal with, every magistrate in Western Australia might be considered to have some expertise in this area.[69] Critics of specialisation have suggested that it 'ghettoises' family and domestic violence; that if such specialist divisions are created, the problem of family and domestic violence will become hidden and the criminality of the behaviour reduced by taking it out of the general criminal courts. Further, victims of domestic violence may perceive stigmatisation if they are not dealt with in mainstream courts.[70]

These jurisdictions are an emerging phenomenon. Although many specialist, multi-jurisdictional courts are becoming established in the United States;[71] in Australia, such specialist family violence jurisdictions are still at the pilot stage.[72] The most longstanding (and evaluated) integrated response in Australia—the Australian Capital Territory Family Violence Intervention Program—is not a 'one-stop shop' model. While the Commission can see merit in including all family and domestic violence cases (including criminal, civil and family law matters) within a separate specialist jurisdiction, this would constitute a major change to the Western Australian justice system.

Because specialist family violence courts involve broader issues outside the Commission's terms of reference, the Commission has not examined the viability of establishing a separate specialist jurisdiction in Western Australia. However, the Commission believes the option of a specialist integrated family violence court deserves further investigation.

PROPOSAL 1.1

Inquiry into a family violence division of the Magistrates Court of Western Australia

That the Attorney General of Western Australia conduct an inquiry into whether Western Australia should establish a specialist family violence division of the magistrates court to deal with all matters related to family violence in the court system.

Sexual offences courts

The Commission has also determined that an examination of sexual offences courts is beyond the scope of this reference. Sexual offences courts are specialist courts that have been developed in response to various problems associated with dealing with sexual offences in the criminal justice system. The concept is not well developed; the expression 'sexual offences court' has been used to describe a range of measures, from case tracking of sexual offence cases to specialist jurisdictions employing unique procedures. Despite the lack of a clear definition, it is apparent that these courts are not similar to court intervention programs: they do not use the authority of the court to encourage the rehabilitation of the offender.[73] Moreover, sexual offences courts (unlike court intervention programs) are for all sexual offence cases, whether the accused pleads guilty or not guilty.

The perceived need for a specialist jurisdiction to deal with sexual offences has arisen due to a combination of factors. These factors include matters specific to offenders and victims of sexual offences, and the way that these sexual offences have historically been investigated by the police and dealt with by the courts. Factors specific to offenders include high recidivism rates; that sex offenders often have more than one victim; that the seriousness of offending by an individual typically increases over time;[74] and

68. In the pilot Joondalup Family Violence Court all violence restraining order hearings were included in the court's jurisdiction. The Commission has been told that the pilot court was based on a model in which everyone involved in the court (including the judicial officer and the prosecutors) had expertise in the area of family violence. Therefore, it was considered that the family violence court was best equipped to deal with violence restraining order matters: Rebecca West, Western Australia Police, telephone consultation (7 April 2008).
69. Meeting with Magistrate G Lawrence (18 March 2008).
70. Stewart J, *Specialist Domestic/Family Violence Courts within the Australian Context*, Australian Domestic and Family Violence Clearinghouse, Issues Paper 10 (2005) 18.
71. Herman K, Associate Director of Domestic Violence Programs, Center for Court Innovation, New York (Speech delivered to the *Just Partners* conference, Canberra, 22–23 May 2008).
72. The New South Wales pilot courts were recently evaluated. The Commission is not aware if the New South Wales government intends to continue with the courts or expand the program: Rodwell L & Smith N, *An Evaluation of the NSW Domestic Violence Intervention Court Model* (Sydney: NSW Bureau of Crime Statistics and Research, 2008) 5. In Victoria, the pilot program has recently been extended for two more years: Magistrate Toohey, Melbourne Magistrates Court, telephone consultation (8 April 2008).
73. However, rehabilitation programs may be used by such courts in setting bail conditions or in sentencing.
74. Cossins, A 'The National Child Sexual Assault Reform Committee' (Paper presented at the *Child Sexual Abuse: Justice Response or Alternative Resolution* conference, Adelaide, 1–2 May 2003) 2.

that the majority of offenders are either related or known to their victims.[75] Factors specific to victims of sexual offences include the low rate of reporting to police[76] and the infrequent use of crisis, legal or financial services.[77] A recent report by the Community Development and Justice Standing Committee found that there is a significant rate of attrition between reporting and trial because victims are 're-victimised' in the court process.[78]

In respect of the way that sexual offences are investigated, the standing committee found that less than 15% of the sexual offences reported to the police reached the Office of the Director of Public Prosecutions (DPP). Further, there is a relatively low conviction rate in trials of sexual offences.[79] Of the matters that reached the DPP, 59% resulted in convictions; that is, less than 9% of reported cases.[80]

Other factors that have contributed to the perceived need for a specialist court response to sexual offences reflect the wider impact of sexual offences in the community. First, there are wide-ranging social costs to victims, their families and the community. Second, the community believes that the legal system treats victims of sexual offences badly.[81] This lack of faith in the justice system in turn contributes to the extremely low rate of reporting for these offences.

Thus, the aims of a sexual offences court would be to reduce the incidence and risk of sexual offences in the community; reduce the re-victimisation of complainants in the criminal justice system;[82] increase the reporting, prosecution and conviction rates of sexual offences; develop a coordinated approach to the management of sexual offences by all agencies involved in the criminal justice system; and rehabilitate offenders (and thereby reduce recidivism).[83]

The Community Development and Justice Standing Committee noted particular problems with cases in which children are victims. It found that 'the adversarial legal system does not adequately deal with the uniqueness of child sexual offences'.[84] In relation to child sexual abuse cases, the chairman of the National Child Sexual Assault Reform Committee[85] (who has reviewed overseas specialist courts dealing with sexual offences) advised the Commission that a 'model' sexual offences court would have exclusive jurisdiction over child sexual abuse cases, so that an accused could not elect to have the matter tried in another court. The court would have specialist judges and prosecutors trained in child development issues; judge-only trials; court appointed and trained intermediaries to conduct cross examination (in age-appropriate language) on behalf of the accused;[86] legal representation for child complainants during the trial; victimless prosecution in cases where the child is too young or otherwise incapable of giving evidence; remote rooms located outside the court precinct and equipped with CCTV; a waiting room and a play area; and mandatory use of CCTV for the complainant's evidence in chief and cross examination, unless the complainant chooses to give evidence in court. Some of these suggestions are also reflected in the recommendations of the recent standing committee.

Sexual offences courts were first introduced in South Africa in 1993. Since then, many more specialised sexual offences courts have been established[87] and it is government policy that such a court be established in each regional court in South Africa.[88]

75. Cossins A, 'Prosecuting Child Sexual Assault Cases: To specialise or not, that is the question' (2006) 18 *Current Issues in Criminal Justice* 318, 320.
76. In Western Australia the Community Development and Justice Standing Committee recently estimated that only 1% of alleged sexual offences (both unreported and reported) result in a conviction: The Community Development and Justice Standing Committee of the Western Australian Parliament, *Inquiry into the Prosecution of Assaults and Sexual Offences*, Report No. 6 in the 37th Parliament (Perth: State Law Publisher, 2008) 54, Finding 3.
77. Keating N, *The Role of the Criminal Justice System,* Criminal Justice System Working Group for the Sexual Assault Interdepartmental Committee of Cabinet (April 2002) 62.
78. Community Development and Justice Standing Committee of the Western Australian Parliament, *Inquiry into the Prosecution of Assaults and Sexual Offences*, Report No. 6 in the 37th Parliament (Perth: State Law Publisher, 2008) 66, Finding 4.
79. Ibid 57–59.
80. Ibid xvii.
81. Keating N, *The Role of the Criminal Justice System* (a working paper drafted following the meetings of the Criminal Justice System Working Group for the Sexual Assault Interdepartmental Committee, 2002–2003) 62.
82. Cossins notes that the first two objectives are consistent with the United Nations *Convention on the Rights of the Child*. She quotes Moult who observes that although the state is not responsible for the 'acts or omissions of private individuals not acting on the state's behalf, international obligations impose on the state the obligation to establish and maintain the necessary legal and other institutions and remedies through which the rights can be guaranteed': Cossins, A 'The National Child Sexual Assault Reform Committee' (Paper presented at the *Child Sexual Abuse: Justice Response or Alternative Resolution* conference, Adelaide, 1-2 May 2003) 2; Moult K, *The Court Doors May be Open, But What Lies Behind Those Doors? An Observation of the Workings of the Wynberg Sexual Offences Court* (Thesis, Institute of Criminology, University of Capetown, 2002) 15.
83. Ibid.
84. Community Development and Justice Standing Committee of the Western Australian Parliament, *Inquiry into the Prosecution of Assaults and Sexual Offences*, Report No. 6 in the 37th Parliament (Perth: State Law Publisher, 2008) 103, Finding 18.
85. This committee is in the process of reviewing the operation of all criminal courts in Australia in relation to child sexual offences and intends to publish a discussion paper (including proposals for reform) in the future. The Western Australian members of the committee are Robert Cock QC, Director of Public Prosecutions, and Judge Deane of District Court of Western Australia: Annie Cossins, Chairman of the National Child Sexual Assault Reform Committee, telephone consultation (30 November 2007).
86. This feature is based on the model in s 29 of the *Youth Justice and Criminal Evidence Act* 1999 (UK).
87. It is important to note that the rate of sexual assault is higher in South Africa than in Australia: Criminal Justice and Sexual Offences Taskforce, Responding to Sexual Assault: The way forward (2006); Cossins A, 'Prosecuting Child Sexual Assault Cases: To specialise or not, that is the question' (2006) 18 *Current Issues in Criminal Justice* 318, 322.
88. Criminal Justice and Sexual Offences Taskforce, ibid.

The South African courts focus on the protection of female and child victims of sexual offences. Features of the courts include the consideration of the needs of victims (for example, the use of remote rooms, CCTV and designated waiting areas); specially trained and experienced prosecutors who are assigned to the case from the time the matter is reported to police until the trial; trial by judge alone;[89] social workers to provide pre- and post-court counselling; and an intermediary to assist children in giving evidence.[90] There are five specialist sexual offences courts in the United States.[91] These courts are presently being evaluated; however, the Commission has been advised that interim findings show that from January 2006 to May 2007, the courts handled 105 cases, none of which were dismissed.[92] These courts aim to keep victims informed, schedule cases promptly and supervise offenders in the community.[93] The courts have dedicated and trained judges and court staff who work closely with service providers and other agencies.[94]

There are no sexual offences courts in Australia with the level of specialty that exists in these overseas models. Victoria has developed a specialist approach to sexual offences; this initiative is more accurately described as a 'list' rather than a specialist court. The Sexual Offences List in the Melbourne Magistrates' Court was established by legislation in 2005;[95] it is a case-tracking device aimed at reducing the delay in sexual offences cases and ensuring that appropriate facilities are utilised to 'minimise the ordeal for victims'.[96] There is also a specialist list in the Melbourne County Court.[97] In New South Wales in 2003 a pilot program established a specialist child sexual assault court.[98] This pilot jurisdiction focused on improved witness facilities and case management; however, there is no indication that this pilot court will be continued.[99] It should be noted that all of the features of this specialist jurisdiction are already available in Western Australia, and as noted in the evaluation of the pilot: '[m]any of the features of [the pilot] have been in operation in Western Australia for more than a decade'.[100]

Indeed, Western Australia has been at the forefront of reforms to sexual offences trials in Australia.[101] For example, the evidence in chief of the complainant is usually comprised of a visually recorded interview between the complainant and a specially trained police officer; cross examination of the complainant can take place at a pre-recording (usually within 12–15 months of the accused being charged); the complainant can give evidence via CCTV from a remote room;[102] and the complainant can have a support person in the remote room (and may be provided with assistance by an appropriately qualified person in giving his or her evidence).[103] Other measures intended to increase the conviction rate in sexual offence cases include a warning (by the judge to the jury) that the absence of complaint about the offence does not necessarily indicate that

89. Ibid.
90. There is limited evaluative research on these courts. What is available indicates that they are successful – the conviction rate has been noted to be approximately 62%. However, there are reported difficulties in funding the courts and maintaining staffing levels in the courts (and among prosecutors) because of the stressful nature of the work: Brigitte Mabandla MP, Minister for Justice and Development (Speech delivered to the South African National Assembly, 20 May 2005).
91. A sexual offences court was established in 2005 in New York in conjunction with the Center for Court Innovation (see <http://www.courts.state.ny.us/press/pr2006_05.shtml> accessed 1 December 2007). It is planned that more will be established in the future <http://www.courtinnovation.org/index> accessed 1 December 2007.
92. Amy Muslim, Centre for Court Innovation, email communication (5 February 2008).
93. It is important to note that, unlike in Western Australia, the majority of convicted sex offenders in the United States are sentenced to probation or other community orders rather than imprisonment: Center for Court Innovation 'Establishing a Model Court: A Case Study of the Oswego Sex Offense Court' <http://www.communityjustice.org/_uploads/documents/a_case_study2.pdf> accessed 15 December 2007.
94. Ibid.
95. *Magistrates Court Act 1989* (Vic) s 4R(1).
96. Department of Justice (Victoria), *Annual Report 2006-07*, 14. The Commission observed the list in December 2007 and noted that once the case is set for a contested committal or for trial, the matter is no longer included within the Sexual Offences List; the committal or trial can be heard by any magistrate in a general magistrates court. See also Magistrates' Court of Victoria Practice Direction No. 2 of 2007, *Sexual Offences List Melbourne Magistrates' Court* (commencing 1 July 2007)
97. This list has a dedicated judge and all sexual offences that must be dealt with in the County Court will pass through the Sexual Offences List. This list is also essentially a case-tracking device, with the additional aim of ensuring that children and cognitively impaired complainants have protective facilities available. In addition, a specialist sex offences unit was established in the Victorian Office of Public Prosecutions in 2007, with specially trained crown prosecutors, solicitors and a witness assistance service: Williams M, Head of the Specialist Sex Offences Unit, Office of Public Prosecutions, Victoria (Speech delivered to the *Just Partners* conference, Canberra, 22–23 May 2008).
98. Johns R, *Child Sexual Offences: An Update on initiatives in the criminal justice system,* Briefing Paper (NSW Parliament, November 2003) [5.3].
99. Annie Cossins, Chairman of the National Child Sexual Assault Reform Committee, telephone consultation (30 November 2007).
100. Cashmore J & Trimboli L, *An Evaluation of the NSW Child Sexual Assault Specialist Jurisdiction Pilot (*New South Wales Bureau of Crime Statistics and Research, 2005) 83.
101. Many of these reforms were recommended by the Commission in 1991: see LRCWA, *Evidence of Children and Other Vulnerable Witnesses*, Project No 87 (1991): almost all of the recommendations from this report have been implemented.
102. Complainants give evidence from a room in the court building so they do not come into contact with the accused. Closed circuit television is used so that those in court (counsel, the accused and the judge) can see and hear the complainant. A split screen is used so that the complainants can see counsel and the judge when they ask questions.
103. Other measures designed to protect complainants in Western Australia include that the names of complainants are not published; complainants are notified and consulted about bail conditions; assistance is provided to complainants by the Child Witness Service and the Victim Support Service; limitations are placed on the manner of cross examination; a protected witness cannot be cross examined by an accused in person; questions about the sexual reputation or disposition of the complainant are not permitted; questions about the sexual experience of the complainant are only permitted if they are about the *res gestae* of the case and with the leave of the court; and information provided to counsellors by complainants is privileged and cannot be produced on subpoena. It is also important to note that there are no committal hearings in Western Australia, so complainants are only required to give evidence once.

the allegation is false;[104] joint trials where there is more than one complainant;[105] and the admission of similar fact, tendency or propensity evidence in certain circumstances.

Although many changes have been made to the way that sexual offences cases are tried in Western Australia, there is a strong argument that more, or different, reforms are required. It has been asserted that the rate of under-reporting of sexual assault is evidence that, despite reforms, the criminal justice system is failing in this area.[106]

Because such a small percentage of sex offenders ever come into contact with the criminal justice system, reforms that focus solely on the protection of the complainant while giving evidence are unlikely to prevent the incidence of sexual assault in the community. Thus, many of the measures introduced in the last 20 years in Western Australia may reduce the re-victimisation of the complainant, but they do not necessarily improve conviction rates, increase reporting or reduce the delays in bringing matters to trial.

The Commission notes that the Community Development and Justice Standing Committee made a number of recommendations that might fit well within a specialist court model; for example, for more specialists to be employed in this area, for more interagency collaboration and coordination, for better witness and victim assistance, and for a reduction in delay in bringing matters to trial.[107] The Commission proposes that the Attorney General of Western Australia give further consideration to these recommendations and to whether a specialist division or court should be established to deal with sexual offences. The Commission notes that any examination of this nature would necessarily involve the evaluation and examination of the reforms carried out to date and their impact, if any, on the rates of reporting of sexual offences, the rates of conviction for sexual offences and the incidence of such crimes in the community.

PROPOSAL 1.2

Inquiry into sexual offences in the Western Australian court system

That the Attorney General of Western Australia conduct an inquiry into the way that courts in Western Australia deal with sexual offences, including whether a specialist division or court should be established.

Day-to-day administrative issues

In this reference, the Commission is required to consider the principles, practices and procedures of court intervention programs and determine whether any legal, practical or administrative changes are required. The Commission considers administrative and policy issues throughout this Paper – it is impossible to divorce technical legal issues from the broader context. However, the Commission does not address clearly administrative issues because it is not appropriate or necessary to do so. Further, the Commission has not carried out an evaluation of the existing programs. Day-to-day decisions can only be made by those working in the courts and by those involved in the various court intervention programs currently operating in Western Australia. Thus, it would be inappropriate for the Commission to comment on matters such as the arrangements made for the collection of Drug Court participants' urine samples; the number of counsellors required for a particular program; listing arrangements; the type of appropriate treatment for participants; the scheduling of inter-agency meetings; or the rostering of judicial officers. Rather, in this reference the Commission's focus is on developing appropriate legislative and policy reforms to ensure that court intervention programs can operate effectively and fairly within the criminal justice system.

104. *Evidence Act 1906* (WA) s 36BD.
105. *Criminal Procedure Act 2004* (WA) s 133.
106. Keating N, *The Role of the Criminal Justice System* (a working paper drafted following the meetings of the Criminal Justice System Working Group for the Sexual Assault Interdepartmental Committee, 2002–2003) 61.
107. The Commission also notes that the Women's Council for Domestic and Family Violence Services has previously recommended that a court model should be developed to address sexual assault crimes 'so that perpetrators can be dealt with appropriately and in a timely manner': The Women's Council for Domestic and Family Violence Services, Recommendations from roundtable discussion at Parliament (24 March 2006), as described in 'A call for a National Women's Safety Plan to Address Domestic and Family Violence', Checklist Series 7 (2006) 3.

Methodology

In preparing this Paper the Commission has undertaken research into court intervention programs operating in Western Australia, Australia and internationally. Further, the Commission has attended a number of different courts to observe the way that court intervention programs operate in practice. In Western Australia, the Commission has observed the Perth Drug Court; the Children's Court Drug Court; the Intellectual Disability Diversion Program; and the Family Violence Courts at Joondalup, Midland, and Rockingham. The Commission also observed the Magistrates Court Diversion Program in Port Adelaide, South Australia, and the Neighbourhood Justice Centre in Collingwood, Victoria.

In addition the Commission has consulted widely with a number of different agencies involved in court intervention programs to ensure that the Commission is fully aware of how these programs function. Those consulted include judicial officers, defence lawyers, prosecutors, program managers, program staff, government agencies and external service providers. A list of people consulted appears in Appendix C.

ABOUT THIS PAPER

This Paper is divided into six chapters. Chapter One contains an overview of the development and characteristics of court intervention programs. Court intervention programs addressing drug and alcohol dependency are dealt with in Chapter Two. Chapter Three considers mental impairment court intervention programs, and Chapter Four considers family and domestic violence court intervention programs. General court intervention programs (ie, programs addressing a number of different problems) are discussed in Chapter Five. Chapter Six deals with legal and policy issues for all court intervention programs and it contains the majority of the Commission's proposals for legislative reform.

THE PURPOSE OF THIS PAPER

After researching various court intervention programs and undertaking preliminary consultations, the Commission has made proposals for legislative and policy reform in Western Australia, as well as proposals for the establishment and operation of specific programs. In order to further assist the Commission in formulating its final recommendations a number of consultation questions are included throughout this Paper.

Each substantive chapter contains a description of relevant programs followed by a section headed 'Consultation Issues'; these sections distil what the Commission believes to be the most important legal, policy and procedural issues. The Commission strongly encourages relevant agencies and individuals to read the entire Paper; however, it acknowledges that only specific chapters may be relevant to some agencies and individuals. In those circumstances, the Commission recommends that the overview of court intervention programs and the Commission's approach (set out in Chapter One) and the general legislative and policy reforms for all court intervention programs (set out in Chapter Six) must be read with the individual chapters dealing with drugs/alcohol, family violence and mental impairment. The Commission appreciates that many agencies and individuals working in this area have considerable practical experience; therefore, it invites submissions about any issue within the scope of this reference that may assist the Commission in making its final recommendations.

The Commission will take into account submissions made in writing, by telephone, by fax, or by email. Those who wish to request a meeting with the Commission may telephone for an appointment.

Law Reform Commission of Western Australia
Address: Level 3, BGC Centre
28 The Esplanade, Perth WA 6000
Telephone: (08) 9321 4833
Facsimile: (08) 9321 5833
Email: lrcwa@justice.wa.gov.au

Submissions received by **1 October 2008** will be considered by the Commission in the preparation of its Final Report.