Court Intervention Programs

Final Report

Project No. 96

June 2009

Law Reform Commission of Western Australia

The Law Reform Commission of Western Australia

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Contents

Foreword v

Acknowledgements vii

Introduction 1

Chapter One: The Commission's Approach 3

The Definition of Court Intervention Programs 5

The Benefits of Court Intervention Programs 8

The Need for Reform 13

The Commission's Approach to Reform 15

Scope of the Reference 17

Chapter Two: Legal and Policy Issues 19

Introduction 21

Policy Framework 22

General Legislative Framework 25

Bail 34

Pre-Sentence Orders 37

Sentencing 42

Chapter Three: Drug and Alcohol Court Intervention Programs 47

Introduction 49

Drug Courts 51

Other Drug and Alcohol Court Intervention Programs 67

Chapter Four: Mental Impairment Court Intervention Programs 71

Introduction 73

Mental Impairment Court Intervention Programs 75

Responses and Recommendations 79

Chapter Five: Family Violence Court Intervention Programs 87

Introduction 89

Family Violence Court Intervention Programs 91

Responses and Recommendations 93

Chapter Six: **General Court Intervention Programs** 109
Introduction 111
General Court Intervention Programs 112
Responses and Recommendation 117

Appendices: A: List of Recommendations 125
B: Recommendations Requiring Legislative Amendment 141
C: List of Submissions and People Consulted 150
D: Abbreviations Used 152

Foreword

The Perth Drug Court was launched in December 2000. It was the first formal court intervention program in Western Australia. The key feature of drug courts is to divert drug-dependant offenders from imprisonment into drug treatment and rehabilitation under the supervision of the drug court magistrate. The Perth Drug Court initially began as a pilot program and was described as ground breaking and innovative. It represented a break from the traditional approach of courts in imposing a sentence and leaving the carrying out of the sentence to others.

A significant proportion of offenders in Western Australia have underlying problems that contribute to offending behaviour, be they substance abuse, mental health issues or family violence and abuse. With escalating prison numbers in Western Australia, court intervention programs provide a useful alternative to imprisonment for some offenders. In a recent speech to the 2009 Drug and Alcohol Conference Chief Justice Wayne Martin acknowledged the causal connection between criminal offending and substance abuse and its attendant cost to the Western Australian community.

Offenders end up before the courts on criminal charges. A therapeutic approach, as opposed to a punitive approach, can take that crisis point to encourage and facilitate rehabilitation. Studies have found that court intervention programs reduce reoffending and are more cost-effective than imprisonment. We have moved on from the early days of the Perth Drug Court. Court intervention programs should no longer be considered as an innovative anomaly: their ability to decrease recidivism deserves greater support.

During this reference I was fortunate enough to observe the Perth Drug Court and the Family Violence Court in Joondalup. Judicial officers, lawyers, court staff, community corrections officers, police and others worked together as a multi-disciplinary team to support and encourage offenders in their participation in programs designed to address their drug and violence issues. I was impressed with their commitment to the programs and dedication to promoting positive behavioural change in those appearing in the courts. The Commission has found that to date these programs have operated in an uncoordinated way without adequate legislative framework or necessary resourcing.

A Consultation Paper was released in June 2008 to seek the views of the public and in particular from those involved with court intervention programs in Western Australian. The Commission made 29 proposals for reform and posed 31 consultation questions on a range of issues to do with existing court intervention programs, such as the Drug Court, and possible future extensions of similar programs.

This Final Report contains 37 recommendations for reform. In making those recommendations the Commission has articulated a number of guiding principles for reform; namely, increasing access to court intervention programs (particularly in regional areas); ensuring protection of the rights of the offenders involved; adequate resources; and ongoing monitoring and evaluation.

The Commission has recommended a legislative and policy framework for existing and future court intervention programs in order for them to operate in a coordinated and effective manner. The Commission has also been conscious that if court intervention programs are to be consolidated and expanded then it is vital that this be done with appropriate resources.

This reference was commenced under the previous Chair of the Commission, Gillian Braddock SC, and Commissioner Ilse Peterson. I would like to formally acknowledge their tremendous contributions to the Commission and to this reference in particular. More recent Commissioners Rob Mitchell SC and Joe McGrath have also brought their experience and enthusiasm to the reference.

I would like to recognise the unwavering cooperation received from court personnel and others involved with the various court intervention programs within Western Australia and across the country. The Commission extends its gratitude to these individuals who voluntarily provided their time and expertise. We have also been fortunate to have a number of academic and student researchers who have provided their research acumen to ensure that the Consultation Paper and Final Report are documents of the highest calibre. I would also like to acknowledge and thank all who took time to make submissions, formal and informal, to the Commission.

Finally, my fellow Commissioners and I would like to particularly thank those who were most intimately involved in the writing of the Consultation Paper and the Final Report: Victoria Williams, Dr Tatum Hands and Danielle Davies. Their skill and patience seem boundless. The Executive Officer Heather Kay and Project Manager Sharne Cranston kept the project on foot and provided excellent support to the Commissioners. Technical Editor Cheryl MacFarlane also made sure that the reports were published at an excellent standard. We were fortunate to have such a talented and dedicated team working on this important reference.

Mary Anne Kenny
Chair

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Introduction

TERMS OF REFERENCE

On 24 August 2004 the Commission received a reference from the former 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.

ABOUT THE REFERENCE

This reference examines court intervention programs; that is, 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 key features of court intervention programs are summarised in Chapter One of this Report.[1]

As explained in the Consultation Paper, the Commission decided to use the term 'court intervention program' rather than any of the various alternative terms (such as problem-oriented courts, problem-solving courts, problem-solving approaches, specialist courts, specialty courts or speciality courts).[2] While there are many programs operating within the criminal justice system designed to address the causes of offending behaviour and encourage rehabilitation, it was determined that this reference should be restricted to those programs that *involve* the court. This view was based on the terms of reference – the use of the terms 'problem-oriented *courts*' and '*judicial* case management' suggested to the Commission that this reference should focus on programs that address underlying problems by using the authority and intervention of the court.

The Consultation Paper

The Commission published its Consultation Paper, *Court Intervention Programs*, in June 2008. In preparing the Consultation Paper, the Commission undertook research into a variety of court intervention programs in Western Australia and in other jurisdictions. In addition to this research, the Commission observed various programs in operation (in Western Australia, South Australia and Victoria) and consulted widely with relevant agencies (such as judicial officers, defence lawyers, prosecutors, program managers, program staff, government agencies and external service providers).

The Consultation Paper examined the development and characteristics of court intervention programs as well as describing specific types of court intervention programs (ie, drug and alcohol court intervention programs, mental impairment court intervention programs, family violence court intervention programs and general court intervention programs). The descriptions of various court intervention programs operating in Western Australia and elsewhere included information about the programs' operation, eligibility criteria, referral procedure, court processes, and outcomes. The Commission also examined legal and policy issues that are relevant to all court intervention programs. The Commission made 29 proposals for reform (including a significant number of proposals dealing with legislative reform). The Consultation Paper also included 31 consultation questions designed to encourage further information from those involved with Western Australian court intervention programs. The Commission invited interested parties to make submissions in response to the proposals for reform and consultation questions.

Twenty-two written submissions were received from a wide range of agencies and individuals (including judicial officers, the Office of the Director of Public Prosecutions, the Western Australia Police, Legal Aid WA, the Aboriginal Legal Service of Western Australia

1. See Chapter One: The definition of court intervention programs.
2. Law Reform Commission of Western Australia (LRCWA), *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 3.

(Inc), the Department of Corrective Services, the Department of the Attorney General, the Public Advocate and the Mental Health Law Centre). A list of submissions is contained in Appendix C of this report.

The Final Report

This Final Report is divided into six chapters. Chapter One explains the Commission's approach to reform, in particular, the need for legislative and policy reform to support the continued operation of court intervention programs and the Commission's guiding principles for reform. Chapter Two (which contains the majority of the Commission's recommendations) deals with the legal and policy issues that are relevant to all court intervention programs. Specific recommendations dealing with court intervention programs addressing drug and alcohol dependency are discussed in Chapter Three. Chapter Four considers recommendations in relation to mental impairment court intervention programs and Chapter Five considers recommendations in relation to family violence court intervention programs. Finally, recommendations in relation to general court intervention programs are contained in Chapter Six.

The Final Report is intended to be read in conjunction with the Commission's Consultation Paper, which describes how various court intervention programs operate and provides the research and analysis that support the Commission's final recommendations. In order to avoid unnecessary duplication, the Final Report sets out the Commission's conclusions and final recommendations without repeating all of the descriptive material in the Consultation Paper.

The Commission has made a total of 37 recommendations for reform in this Final Report. A list of recommendations is contained in Appendix A. For ease of reference, a list of recommendations that require legislative amendment is set out in Appendix B.

Chapter One

The Commission's Approach

Contents

The Definition of Court Intervention Programs 5

The Benefits of Court Intervention Programs 8

The evidence so far 8

The effectiveness of traditional sanctions 9

The advantages of court intervention programs 10

Reduced crime 10

Reduced overcrowding in prisons 10

Reduced cost of imprisonment 11

More appropriate placement of certain classes of offender 11

Health and wellbeing 11

More efficient and effective service provision 12

Cost savings in other areas 12

The Need for Reform 13

Problems with existing laws and policies 13

The Commission's Approach to Reform 15

Guiding principles 15

Principle One: Increasing access to court intervention programs 15

Principle Two: Protecting legal rights and ensuring fairness 15

Principle Three: Requiring accountability via ongoing independent evaluations 15

Principle Four: Adequate resources 16

Scope of the Reference 17

The definition of court intervention programs

Court intervention programs are programs that use the authority of the court in partnership with other agencies to address the underlying causes of offending behaviour and encourage rehabilitation. Court intervention programs have varying goals (such as increasing compliance with court orders, improving court attendance rates, protecting victims and increasing the community's participation in the justice system); however, the ultimate objective of all court intervention programs is to reduce crime and thereby protect the community.

As explained in the Consultation Paper, there are many different types of court intervention programs operating in Western Australia and elsewhere. Some operate as separately constituted courts,[1] while others function as formal or informal divisions in a general court.[2] A number of court intervention programs are commonly referred to as 'courts' but in fact operate as dedicated 'lists' in a general court.[3] Further, there are some court intervention programs that are available to a number of general courts.[4] Several court intervention programs can be described as specialist programs because they target specific problems. Others are general and aim to respond to a variety of different underlying issues. Also, different court intervention programs target different categories of offenders; some 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:

Judicial monitoring

In court intervention programs the offender[5] 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. The purpose of judicial monitoring is to encourage compliance with the court's orders and to enable swift and effective responses to non-compliance or changes in the offender's circumstances.

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. Further, the 'crisis' of arrest or potential imprisonment may demonstrate to an offender the need for change.

Team-based approach to offender management (collaboration)

In addition to the key role played by the judicial officer, the monitoring and management of offenders is undertaken by a team of agencies (both government and non-government). Although case management teams differ in various court intervention programs, they often include police, defence counsel, community corrections officers, program and court staff, victim support workers, and external service providers. While judicial officers are involved in monitoring program participants they are seldom directly involved in case management meetings.[6] 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. The involvement of different agencies in case management enables more effective problem-solving and better decision-making because each agency can offer its own special expertise, and duplication of services and resources can be avoided.

Direct participation by the offender

In court intervention programs judicial officers actively seek to engage offenders by asking questions; by requiring offenders to contribute to the process by setting goals and strategies; and by speaking directly with the offender. These practices

1. For example, the New South Wales Drug Court and the Northern Territory Alcohol Court: see *Drug Court Act 1998* (NSW) and *Alcohol Court Act 2006* (NT).
2. The Koori Courts in Victoria operate as separate divisions of the Magistrates Court, the County Court and the Children's Court.
3. 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 Perth Magistrates Court.
4. Such as the Supervised Treatment Intervention Regime which is available in a number of regional Magistrates Courts and the Perth Magistrates Court (through the Perth Drug Court).
5. The Commission explained in its Consultation Paper that it has used the term 'offender' rather than 'accused' because of the context in which court intervention programs operate (ie, addressing offending behaviour): see LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 4.
6. Drug courts are one example where judicial officers are part of the case management team.

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.

Less adversarial

Court intervention programs do not operate during the stage of the criminal justice process where criminal responsibility is determined. Instead they operate during a stage of the process (eg, while the offender is on bail or before sentencing) where legal or factual disputes are uncommon. Court intervention programs adopt a less adversarial approach because disputes have already been resolved and the focus is on facilitating treatment and rehabilitation. In some pre-court case management meetings the various agencies aim to reach decisions by consensus. However, court intervention programs do not abandon adversarial justice. If a dispute arises, the parties return to their traditional adversarial roles and the judicial officer ultimately determines the appropriate course of action.

Emphasis on achieving better outcomes

In order to properly address the causes of offending behaviour and reduce reoffending, court intervention programs take a broad approach to rehabilitation. Court intervention programs actively assist offenders in their rehabilitation efforts by targeting interventions to the individual needs of the offender and working together to solve the underlying problems.

Although some of these features are present in other criminal justice programs, the distinguishing feature of court intervention programs is the involvement of the court in monitoring offenders; a role traditionally performed by other justice agencies. It is necessary to ensure that laws and policies are appropriate bearing in mind the 'new' role for judicial officers (as well as for lawyers and prosecutors involved in court intervention programs).

There are other types of criminal justice programs that do not directly involve the court or other legal players. Nothing in this Report is intended to undermine the operation of these other programs. As stated by the Department of the Attorney General, court intervention programs are part of a range of criminal justice strategies designed to reduce offending behaviour.[7] Also, many other criminal justice programs are already subject to legislative provisions. For example, the *Young Offenders Act 1994* (WA) contains provisions dealing with diversionary programs for juvenile offenders (police cautions and juvenile justice teams).[8] Victim-offender mediation is dealt with under Division 5 of the *Sentencing Act 1995* (WA). Rehabilitation programs are incorporated into community-based sentences under the *Sentencing Act*[9] and into parole orders under the *Sentence Administration Act 2003* (WA).[10] The purpose of the Commission's reference is to ensure that there are adequate and appropriate laws and policies for court intervention programs.

7. Department of the Attorney General, Submission No. 21 (13 November 2008) 1.
8. *Young Offenders Act 1994* (WA) Part 5.
9. See eg, *Sentencing Act 1995* (WA) s 66.
10. See eg, *Sentence Administration Act 2003* (WA) s 30.

For ease of reference, the following table summarises different types of criminal justice programs:

Name	Description	Western Australian examples
Court intervention programs	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 key feature is the involvement of, or intervention by, the court.	• Perth Drug Court • Intellectual Disability Diversion Program • Supervised Treatment Intervention Regime • Family violence courts
Diversionary programs	Programs designed to divert an offender away from the criminal justice system or redirect offenders into less punitive outcomes. For example, some diversionary programs divert offenders away from formal criminal justice interventions (eg, cautioning) and others divert offenders away from prison. Some diversionary programs may also divert an offender into treatment but the treatment program is often administered separately from the court. All court intervention programs are diversionary but not all diversionary programs involve court intervention.	• Police cautions, • Juvenile justice teams • Pre-Sentence Opportunity Program • Indigenous Diversion Program • Supervised Treatment Intervention Regime • Perth Drug Court
Rehabilitation programs	Programs that aim to rehabilitate offenders by providing treatment and/or support for underlying problems. Some rehabilitation programs may be classified as court intervention programs and others may be diversionary programs. However, rehabilitation programs are also available in prison or as part of a standard community-based sentence.	• Supervised Treatment Intervention Regime • Perth Drug Court • Program requirements as part of a community-based sentence • Programs as part of a parole order • Prison programs
Restorative justice programs	Programs (such as victim-offender mediation and family group conferencing) that involve the offender and the victim (and others) coming together to resolve the harm caused by the offence and the underlying causes of the offending behaviour. Restorative justice programs may operate before the matter reaches the formal criminal justice system (eg, juvenile justice teams) and a primary objective is to improve victim satisfaction and increase victim involvement. Courts (including a court administering a court intervention program) may refer an offender to a restorative justice program but the judicial officer is not usually involved in administering the program. Restorative justice processes can operate in conjunction with court intervention programs.	• Victim-offender mediation • Juvenile justice teams

The benefits of court intervention programs

Underpinning the recommendations in this Report is the view that adequately resourced and properly supported court intervention programs are capable of producing discernible benefits for the community. Potential benefits include reduced crime; reduced drug and alcohol use; improvements in physical and mental health; increased employment; improved family relationships; and associated cost savings to the community. The Commission's view—that court intervention programs can be effective—is based on a number of positive evaluation results and the Commission's research into and observations of court intervention programs across Australia. Further, a number of submissions received by the Commission supported court intervention programs.[1] In particular, the Department of the Attorney General agreed that 'properly resourced and well thought-out court intervention programs are successful at reducing offending'.[2]

THE EVIDENCE SO FAR

The Commission referred throughout the Consultation Paper to positive evaluation results such as reduced reoffending for drug court participants in various jurisdictions, reduced post-program offending for participants of other court intervention programs, and studies that found that some court intervention programs were cost-effective.[3] The Chief Justice of Western Australia stated in his submission that:

> Intuitively one is inclined to the view that a problem-oriented court should be more successful than a conventional court because it is, after all, addressing the cause of the criminal conduct, rather then merely addressing the symptom. However, one of the greatest challenges in this area is to demonstrate that intuitive belief empirically.[4]

The Commission acknowledges that there have been methodological difficulties in some evaluations. There have been problems in relation to inadequate data collection and, in some cases, evaluators have been unable to contrast the performance of program participants with a suitable comparison group. Moreover, the Commission has not suggested that *all* court intervention programs achieve or will achieve positive outcomes. Some programs might fail because they have not been designed or implemented properly; others might fail due to inadequate support and resources.

Nonetheless there is, in the Commission's view, sufficient evidence to demonstrate that court intervention programs can be effective. For example, various studies referred to in the Consultation Paper have concluded that:

- the Perth Drug Court program reduced reoffending and the program was more cost-effective than prison and community corrections supervision. The cost of the Drug Court program per offender was estimated at $16,210 per year, higher than community corrections ($7,310) but substantially less than prison ($93,075);[5]
- post-program offending was reduced for 80 per cent of offenders who completed the South Australian Drug Court program;[6]
- the New South Wales Drug Court reduced reoffending rates for those offenders who completed the program;[7]
- the reoffending rates for participants who completed the Queensland Drug Court program were significantly less than the reoffending rates of participants who had been terminated from the program and for prisoner comparison groups;[8]
- if the Victorian Drug Court operated at 95 per cent capacity it would be more cost-effective than prison;[9]
- the Magistrates Court Diversion Program for offenders with a mental illness in South Australia reduced post-program offending;[10]
- the completion rate for the Geraldton Alternative Sentencing Regime was higher than for

1. Legal Aid WA, Submission No. 11 (30 September 2008) 4; Department of Corrective Services, Submission No. 19 (6 October 2008) 1; Aboriginal Legal Service of WA (Inc), Submission No. 20 (13 November 2008) 1; Department of the Attorney General, Submission No. 21 (13 November 2008) 1; Western Australia Police Prosecuting Division, Submission No. 22 (5 January 2009) 1.
2. Department of the Attorney General, Submission No. 21 (13 November 2008) 1.
3. See LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 53, 59–60, 99 & 158.
4. Chief Justice of Western Australia, Submission No. 15 (30 September 2008) 5.
5. LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 53 & 60. See also Department of the Attorney General, *Review of the Perth Drug Court* (2006) 3.
6. LRCWA, ibid 59.
7. Ibid.
8. Ibid.
9. Ibid 60.
10. Ibid 99.

traditional community-based sentences (a 70 per cent completion rate compared to a 53 per cent completion rate for Intensive Supervision Orders and a 62 per cent completion rate for Community Based Orders).[11] Other programs have also been found to have high compliance rates (eg, the Victorian Court Referral and Evaluation for Drug Intervention and Treatment program[12]); and

- the pilot New South Wales Magistrates Early Referral into Treatment Program reduced reoffending rates for those who completed the program and that the program was cost-effective (it was estimated that for every $1 spent on the program $2.41 was saved).[13]

Since the publication of the Consultation Paper, further evaluation results have been published. In September 2008, the New South Wales Bureau of Crime Statistics and Research published its findings from a re-evaluation of the New South Wales Drug Court.[14] This re-evaluation found that drug court participants (ie, both those who completed the program and those who were terminated from the program) were significantly less likely to reoffend than the comparison group.[15] The results were even more favourable for those offenders who successfully completed the drug court program.[16] A related study also concluded that the New South Wales program appeared to be cost-effective. The cost of the program was slightly less than the alternative of imprisonment; however, because program participants were less likely to reoffend it was stated that the program is 'cheaper and produces better outcomes than the alternative'.[17]

11. Ibid 158.
12. Ibid 80.
13. Ibid 82.
14. Weatherburn D et al, 'The NSW Drug Court: A re-evaluation of its effectiveness', *Crime and Justice Bulletin,* No. 121 (NSW Bureau of Crime Statistics and Research, 2008).
15. The drug court group was 17% less likely to be reconvicted of any offence; 30% less likely to be reconvicted of a violent offence; and 38% less likely to be reconvicted of a drug offence. There was, however, no difference in the relation to property offences.
16. The successful completers were 37% less likely to be reconvicted of any offence; 65% less likely to be reconvicted of a violent offence; 58% less likely to be convicted of a drug offence; and 35% less likely to be reconvicted of a property offence. This study acknowledged that it was impossible to say with complete certainty that the New South Wales Drug Court is more effective in reducing reoffending than traditional sanctions; however, the authors stressed that they had 'gone to considerable lengths to reduce the risk of selection bias'. While it may be possible that factors other than the drug court program impacted upon reoffending the re-evaluation strongly suggests that the New South Wales Drug Court is successful in terms of recidivism: Weatherburn D et al, 'The NSW Drug Court: A re-evaluation of its effectiveness', *Crime and Justice Bulletin*, No. 121 (NSW Bureau of Crime Statistics and Research, 2008) 9–13.
17. Centre for Health Economics Research and Evaluation, *The Costs of the NSW Drug Court: Final Report* (Sydney: NSW Bureau of Crime Statistics and Research, 2008) 8. The Commission notes that a recent evaluation of a drug court in the United States (the Queens Misdemeanour Treatment Court) also found that the level of post-program offending for drug court participants was substantially less than for the comparison group and that drug court participants who completed the program achieved even better results: Labriola M, *The Drug Court Model and Chronic Misdemeanants: Impact evaluation of the Queens Misdemeanour Treatment Court* (New York: Center for Court Innovation: 2009) iii.
18. Commonwealth Government Productivity Commission, *Report on Government Services* (2009) C.11.
19. Ibid C.10.
20. The Australian Bureau of Statistics found that 55% of prisoners in Australian prisons as at 30 June 2008 had previously served a sentence of imprisonment: Australian Bureau of Statistics, *Prisoners in Australia* (2008) 9.

The absence at this point in time of long-term outcomes-based evaluations showing that all court intervention programs reduce reoffending does not, in the Commission's opinion, mean that court intervention programs should not be supported or expanded. The evaluation results to date suggest that further and ongoing independent evaluations with sound methodologies must be undertaken. Evidence of failure should be used to improve programs and, if necessary, to disband an unsuccessful program. Evidence of success should be used to ensure that the most effective programs continue to be supported and expanded.

The effectiveness of traditional sanctions

When considering the evidence of the effectiveness of court intervention programs it is also important to take into account evidence of success of other criminal justice options. In 2009 the Australian Productivity Commission reported that in Western Australia 40 per cent of all offenders subject to a community corrections order (in the relevant period) returned to community corrections (to either prison or a further order) within two years. Western Australia had by far the highest community corrections return rate in Australia – the national figure was 27.9 per cent and the lowest rate was in Queensland (a return rate of 20 per cent).[18] In comparative terms, Western Australian prisoners fared better. Almost 45 per cent of Western Australian prisoners returned to either prison or community corrections within two years. This rate was close to the national figure of 44 per cent.[19] These figures only take into account those offenders who were subsequently sent to prison or placed on another community corrections order. Offenders who reoffended and were dealt with in a different manner (eg, fined) are not included. Therefore, the proportion of prisoners or offenders subject to community corrections orders who reoffend must be even higher. What is clear is that a large proportion of offenders subject to traditional sanctions, such as prison and community corrections orders, reoffend.[20]

The Commission does not suggest that court intervention programs should replace prison or community-based sentences across the board. Court intervention programs represent an alternative criminal justice tool for appropriate cases. Some offenders must be imprisoned and others may not require intensive intervention and monitoring by a team of agencies. Court intervention programs

target high-risk offenders who have difficult issues that need to be addressed.

The Commission is of the view that because court intervention programs have the potential to reduce reoffending rates among disadvantaged and vulnerable offenders they should be supported. In this regard, the Commission notes that the Victorian Attorney General released his second *Justice Statement* in October 2008 – this statement has a strong emphasis on supporting interventions designed to reduce offending among disadvantaged or vulnerable groups including drug and alcohol dependent offenders, Aboriginal offenders and offenders with mental health issues. The *Justice Statement* supports problem-solving approaches (which are described as approaches that focus on the causes of offending behaviour; that 'use the authority of the judicial officer to foster changed behaviour'; that involve a collaborative approach; and that adopt a less adversarial approach) and it is envisaged that a comprehensive and integrated approach to these types of initiatives will be developed.[21]

In the Western Australian context, the Commission stresses that unless and until court intervention programs are fully supported by government through proper reforms and adequate resources it will never be possible to accurately judge their effectiveness. Arguably, it is too early to assert conclusively that court intervention programs are cost-effective; however, it is equally too early to claim that they are not. The current research demonstrates that court intervention programs have the potential to be cost-effective – the issue for Western Australia is how best to support court intervention programs to ensure that they can operate at their full potential.

THE ADVANTAGES OF COURT INTERVENTION PROGRAMS

Reduced crime

The overriding objective of court intervention programs is to reduce crime (by addressing the underlying causes of offending behaviour). Not all offenders require treatment or support but there are a significant number who do. As the Commission explained in the Consultation Paper, a large proportion of prisoners and offenders have underlying issues such as drug dependency, mental health problems and homelessness.[22] For example, in January 2009 it was reported that the incidence of mental disorder among Australians who had been imprisoned was more than double the incidence among those Australians who had never been imprisoned.[23] In its submission for this reference the Office of the Public Advocate noted that 23 per cent of Western Australian prisoners had either a mental illness, intellectual disability or acquired brain injury.[24] An ongoing study by the Australian Institute of Criminology found that in 2007 well over 70 per cent of detainees tested at the East Perth lock-up returned a positive drug test.[25] These underlying problems increase the risk of future offending. As the Auditor General of Western Australia stated in June 2008, 'significant numbers of young people with high levels of offending have mental health or substance abuse problems'.[26]

In preparing this Report the Commission examined a selection of Western Australian sentencing cases (a total of 156 offenders) in the Supreme Court and District Court.[27] The Commission found that in approximately 90 per cent of these cases there was evidence of at least one of the following underlying problems: substance abuse, mental health, family violence, gambling and homelessness. In 71 per cent of the cases analysed substance abuse was involved in some way;[28] 28 per cent of offenders had a mental health problem; 19 per cent of offenders had both substance abuse and mental health problems; and in 14 per cent of cases either the offence involved family violence (or abuse) or the offender had previously been a victim of family violence or abuse. These results support the contention that a substantial number of offenders have underlying problems that contribute to offending behaviour. And, as discussed above, there is evidence to demonstrate that court intervention programs can reduce offending levels among these high-risk offenders.

Reduced overcrowding in prisons

Western Australia has the second highest rate of imprisonment in the nation (and the highest Aboriginal imprisonment rate).[29] Further, the number

21. Victorian Government, *Attorney General's Justice Statement 2* (October 2008) 31.
22. See LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 6, 42 & 97.
23. Australian Institute of Criminology, 'Mental Disorders and Incarceration History', *Crime Facts Info No. 184* (2009) 1.
24. Office of the Public Advocate of Western Australia, Submission No. 9 (30 September 2008) 4.
25. Adams K et al, *Drug Use Monitoring in Australia: 2007 Annual Report on drug use among police detainees*, Australian Institute of Criminology, Research and Public Policy Series No. 93 (2008) 71.
26. Office of Auditor General for Western Australia, *The Juvenile Justice System: Dealing with young people under the Young Offenders Act 1994*, Report No. 4 (2008) 7.
27. A total of 38 sentencing cases from the Supreme Court website in the months of March and April 2009 were examined. A total of 118 sentencing cases from the District Court were considered (March 2009 only). The Commission notes that the prevalence of some underlying problems may be even higher than reported here because some offenders may not have disclosed a particular problem or the sentencing judge may not have mentioned it in his or her sentencing remarks. Also, only superior court cases were examined because transcripts of sentencing decisions in magistrates courts are not easily accessible.
28. A total of 111 offenders had committed the offence under the influence of alcohol/drugs, had committee the offence to fund a drug habit or had a history of substance abuse.
29. Commonwealth Government Productivity Commission, *Report on Government Services* (2009) 8.6.

of prisoners in Western Australia is growing. In 2003 the prison population was less than 3000 but as at 19 March 2009 there were 4091 adults prisoners in Western Australia.[30] Western Australian prisons are currently overcrowded – on 31 March 2009 it was reported that the prison muster was 730 above capacity.[31] Prison numbers are expected to increase considerably over the next few years as a result of the repeal of so-called 'truth in sentencing' laws;[32] and other factors such as increases in police numbers and the rising population.[33] In order to address increasing prisoner numbers there are various proposals for new custodial facilities. It has been reported that a new prison at Derby is estimated to cost $150 million and that the government also plans to build a new juvenile facility and a new maximum-security prison.[34] In some instances, successful compliance with a court intervention program will mean that imprisonment can be avoided.

Reduced cost of imprisonment

In addition to the capital expenditure required for new prison facilities, the ongoing cost of imprisonment is enormous. In 2007–2008 the daily cost of imprisonment (ie, the daily cost for one adult prisoner) was $272.91.[35] That equates to almost $100,000 for each adult offender per year. If there are approximately 4000 adult prisoners at any one time, the annual cost is $400 million. Detaining juveniles is even more expensive. The daily cost of detention of a juvenile offender in 2007–2008 was $473.78 (or approximately $173,000 a year).[36] For a court intervention program participant who is not sent to prison, significant costs can be saved.

More appropriate placement of certain classes of offender

Enabling offenders who are drug- or alcohol-dependent, mentally ill, homeless, unemployed, or otherwise disadvantaged to engage in relevant treatment programs and receive support services under the close supervision of the court and other agencies is a useful alternative to imprisonment for less serious crimes.[37] Participation in a court intervention program enables the court to assess the offender's prospects for rehabilitation and provide an opportunity for the offender to engage in treatment programs to reduce the risk of reoffending. Because of close monitoring by the judicial officer (and various other agencies) those offenders who fail to take up the opportunity can be dealt with swiftly and, if necessary, imprisoned. Further, it has been observed that the ability of judicial officers to monitor offenders during a program gives judicial officers the confidence to direct offenders into appropriate treatment programs as an alternative to imprisonment.[38]

Health and wellbeing

Reduced crime is not the only potential beneficial outcome from properly resourced court intervention programs. As a consequence of individualised treatment and support, offenders participating in court intervention programs may also experience improvement in their health and wellbeing. For example, drug use among drug court participants has been significantly reduced.[39] The Western Australian Supervised Treatment Intervention Regime was one of a number of diversionary programs evaluated in 2007. The evaluation stated that the majority of the participants who had been interviewed for the evaluation experienced improved physical and mental health, and more than half reported improved relationships and better employment prospects.[40] An evaluation of the Geraldton Alternative Sentencing Regime found that 80 per cent of participants surveyed by the evaluators felt that their physical and mental well-being had improved after participating in the program.[41]

The possible flow-on effects from improved health and wellbeing should not be ignored when considering the merits of supporting court intervention programs. For example, successful participants may find employment; may no longer be dependent on welfare; may experience improved family relationships; and may become better parents.

30. Department of Corrective Services, *Weekly Offender Statistics* (19 March 2009).
31. Phillips Y, 'Early Jail Release Power Vetoed', *The West Australian*, 31 March 2009, 11.
32. The requirement for sentencing courts to automatically reduce a sentence of imprisonment by one-third has been abolished. The Attorney General stated during parliamentary debates that prison numbers were expected to increase as a result of the repeal of the 'truth-in-sentencing' legislation. It was estimated that in 2009–2010 an additional 244 prison beds would be required. By 2012–2013 the total incremental increase in prison beds as a consequence of the 2008 legislation was estimated at 604: Western Australia, *Parliamentary Debates,* Legislative Assembly, 3 December 2008, 883 (Attorney General, Mr Christian Porter).
33. Phillips Y, 'Early Jail Release Power Vetoed', *The West Australian*, 31 March 2009, 11.
34. Attorney General, *Prison Capacity Ignored by Previous Labor Government* (Media Statement, 12 February 2009).
35. Department of Corrective Services, *Annual Report 2007–2008*, 9.
36. Ibid.
37. For example, theft, fraud, receiving stolen property, driving licence offences, property damage, and offences involving the possession or use of illicit drugs (some offenders are imprisoned for these types offences: Loh N et al, *Crime and Justice Statistics for Western Australia: 2005* (Perth: UWA Crime Research Centre, 2007) 85.
38. See New Zealand Department of Justice, *Effective Interventions: Judicial Supervision of Offenders' Drug and Alcohol Treatment*, Cabinet Paper No. 18 (2006) [7] <http://justice.govt.nz/effective-interventions/cabinet_papers/judicial-supervision.asp> at 13 March 2009.
39. See for example, Victorian Department of Justice, *The Drug Court: An evaluation of the Victorian Pilot Program* (2006) 6–7; Freeman K, *New South Wales Drug Court Evaluation: Health, well-being and participant satisfaction (*Sydney: NSW Bureau of Crime Statistics and Research, 2002) vii.
40. UWA Crime Research Centre, *WA Diversion Program – Evaluation Framework (POP/STIR/IDP)*, Final Report for the Drug and Alcohol Office (2007) 121.
41. Cant R, Downie R & Henry D, *Report on the Evaluation of the Geraldton Alternative Sentencing Regime* (2004) 18.

More efficient and effective service provision

One of the most important features of court intervention programs is the collaborative approach used to address the underlying causes of offending behaviour and manage participants on the program. A number of agencies (both government and non-government) work together with the common goal of encouraging effective rehabilitation. Agencies involved might include government departments (such as Corrective Services, Health, Housing and Education). Non-government agencies such as drug and alcohol treatment providers, mental health practitioners, housing support, legal services and counsellors may also be involved.

When examining the juvenile justice system in Western Australia, the Auditor General observed that there is no lead agency or 'formal cross-agency structure' for identifying and case managing young offenders who have problems such as substance abuse and mental health issues.[42] It was recommended that:

> Government agencies that have contact with young people in the justice system (that is, Department for Child Protection, Department of Corrective Services, Department of Health and Western Australia Police) work together to ensure that young people who offend repeatedly are identified and case managed until the mental health, substance abuse and other problems that are associated with their offending are successfully managed. [43]

A lack of appropriate coordination between relevant agencies may result in ineffective service provision.[44] In Western Australia, a special project to improve interagency coordination and service delivery was developed for people with 'exceptionally complex needs'.[45] This project is designed to achieve better outcomes for mentally impaired adults who have difficult issues and for whom the existing system is not working. One problem identified by this project was the reluctance of agencies to take on the role of lead agency. Further, many agencies undertook multiple assessments to determine eligibility for services and/or to obtain funding. [46]

The issues raised in relation to agency collaboration from the People with Exceptionally Complex Needs Project are relevant to court intervention programs. Offenders with a multitude of underlying problems require coordinated service delivery and court intervention programs provide an opportunity for agencies to work together and pool resources and expertise. Further, because the focal point of the program is the court there is a 'lead agency' to drive effective program and service responses. The involvement of the court also promotes accountability because each agency involved in the program is required to inform the court about what is being done for the participant.

Cost savings in other areas

All of the benefits discussed above have the potential to save taxpayers' money. Reduced crime and improved health and wellbeing bring cost savings to the various government departments such as the Western Australia Police, the Department of Corrective Service, the Department of the Attorney General, the Department of Health and the Department for Child Protection.

The Commission acknowledges that court intervention programs are resource intensive and, to be effective, a substantial injection of funds is required. However, in the long-term resources can be saved. It is also important to note that many offenders participating in court intervention programs would at some stage require services to deal with problems in any event.

42. Office of the Auditor General (WA), *The Juvenile Justice System: Dealing with young people under the Young Offenders Act 1994*, Report No. 4 (2008) 25. Although it was noted that there are some regional strategies to integrate services for young offenders (such as the Regional Youth Justice Strategy).
43. Ibid 8.
44. Parliament of Victoria Drugs and Crime Prevention Committee, *Inquiry Into Strategies to Prevent High Volume Offending and Recidivism by Young People*, Discussion Paper (2008) 54.
45. Western Australia Department of the Premier and Cabinet, *People with Exceptionally Complex Needs Project*, Phase 1 Report (2007).
46. Ibid 23–24.

The need for reform

After examining the operation of existing court intervention programs, the Commission was faced with two clear alternatives: maintain the status quo or make recommendations for reform. The Commission received one submission suggesting that because court intervention programs were already operating in Western Australia there is no need for any legislative or other reforms.[1] The Commission does not share this view. The Commission's review of the programs that are presently operating in Western Australia showed that the current laws and policies that are applicable to court intervention programs are inadequate.[2] A number of submissions (including submissions from the Department of the Attorney General, the Department of Corrective Services and the Magistrates Court of Western Australia) were in favour of legislative reform to support the operation of court intervention programs.[3]

PROBLEMS WITH EXISTING LAWS AND POLICIES

Lack of appropriate legislative powers: The Commission has identified a number of areas where existing legislative provisions are inadequate. For example, the power to defer sentencing for up to six months is not long enough for some programs. Pre-Sentence Orders require more flexibility and there is no provision enabling magistrates to regularly monitor compliance on a program if the offender's charges have been committed to a higher court. There are other gaps in the legislation; for example, some program participants need legislative protection against self-incrimination to encourage honesty about drug use and thereby ensure appropriate treatment responses. Legislation is important to ensure effective information sharing between agencies.

Lack of uniformity: Currently, court intervention programs are only available in particular geographical locations and only available to certain groups of offenders. Further, participation in existing programs is somewhat dependent on the individual views of judicial officers, lawyers and prosecutors. For example, if a particular lawyer does not support the concept of court intervention or is not aware of how an available program operates that lawyer may not refer his or her client to the program. The recommendations for reform in this Report encourage broader participation in court intervention programs by providing for general programs available in more than one location; by facilitating participation in programs by offenders appearing in higher courts; and by ensuring that offenders can participate in programs at various stages of the criminal justice process. Various reforms recommended in this Report also promote consistency in application. For example, all sentencing courts will be required to take into account compliance with a program when determining the appropriate sentence and court/police records for all successful participants will document participation in the program when recording the sentencing outcome.

Lack of coordination: Western Australian court intervention programs operate independently from one another. The Commission believes that the efficiency and effectiveness of court intervention programs could be significantly enhanced by a coordinated policy approach to the development and expansion of court intervention programs in Western Australia. Coordination will promote the sharing of resources and expertise. As one example, homelessness is an issue that needs to be addressed by all court intervention programs. Instead of each court intervention program employing a housing support worker or independently accessing housing support services, one (or more) housing support workers could be employed by a court intervention programs unit to assist all programs. Another example is training – a coordinated approach would promote the sharing of knowledge and joint training programs.

Lack of support: Unlike the position in Victoria, where support is evident at the highest level, Western Australian court intervention programs operate on an ad hoc basis. In the absence of high-level government support via the provision of resources and appropriate reform, the long-term sustainability of court intervention programs is at risk. The Commission does not suggest that any particular court intervention program should be supported indefinitely. Ongoing support will obviously depend on regular evaluation outcomes. However, without clear support from government existing programs may

1. Confidential submission, Submission No. 8 (26 September 2008).
2. For further discussion of the reasons why legislative reform is required see LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 179–180.
3. Christine Anderton, Submission No. 1 (12 August 2008); Legal Aid WA, Submission No. 11 (30 September 2008; Magistrates Court of Western Australia, Submission No. 13 (30 September 2008); Department of Corrective Services, Submission No. 19 (6 October 2008); Aboriginal Legal Service of WA (Inc), Submission No. 20 (13 November 2008); Department of the Attorney General, Submission No. 21 (13 November 2008).

not reach their full potential and may be disbanded prematurely. By implementing reforms to support court intervention programs, the government also sends a message to the community and to agencies in the justice system that these initiatives are an important tool to reduce reoffending. Government support will also reduce misconceptions that court intervention programs are radical 'soft-on-crime' initiatives of individual judicial officers or agency staff.

The Commission's recommendations for legislative and policy reform will improve the effectiveness and efficiency of court intervention programs by:

- promoting equality of access to programs;
- ensuring that programs operate consistently and fairly;
- increasing awareness of court intervention programs throughout the criminal justice system;
- providing for appropriate sharing of resources and knowledge between various programs;
- encouraging participation in programs by offering 'incentives' for successful compliance; and
- promoting long-term sustainability by providing a mechanism to ensure proper allocation of resources, ongoing evaluations, parliamentary oversight and accountability.

The Commission's approach to reform

Having concluded that legislative and policy reform is required, four main principles have guided the Commission in the determination of its final recommendations.

GUIDING PRINCIPLES

1 Increasing access to court intervention programs

The Commission is of the view that court intervention programs should be available to as many offenders as possible. Restricted availability is inevitable due to limited resources and geographical circumstances. However, broader access can be achieved by ensuring that there are different types of court intervention programs (eg, specialist and general); that programs are available at various stages of the criminal justice process (eg, pre-plea and post-plea); and that programs are available in different jurisdictions (eg, Magistrates Court, District Court and Children's Court).

2 Protecting legal rights and ensuring fairness

Court intervention programs generally use processes that promote procedural justice such as actively engaging with the offender to ensure that the proceedings and requirements of the program are fully understood. However, in some instances fundamental legal and procedural safeguards may be diminished. For example, some programs use case management meetings that are held in the presence of the judicial officer but the absence of the offender. This does not necessarily mean that such meetings should be prohibited but rather sufficient protections must be provided to ensure that the offender has a right to be heard before any final decision is made. Other questionable practices include the imposition of unnecessary bail conditions and the imposition of 'custody sanctions' without any right of review or appeal. 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 review/appeal decisions resulting in the loss of liberty.[1]

1. In its submission Legal Aid WA agreed that legal rights must be protected: Legal Aid WA, Submission No. 11 (30 September 2008) 5.

Further, because court intervention programs involve onerous conditions and intensive interventions there is the potential for net-widening. As Legal Aid WA stated in its submission:

> It is important that greater use of problem-solving courts does not have the effect of net-widening whereby offenders are subject to a more severe penalty or greater restriction on their liberty than would otherwise be the case if they had not participated in a problem-solving court program.[2]

The Commission has endeavoured to reduce the potential for net-widening by making recommendations to ensure that only offenders who are facing imprisonment are subject to the programs that might involve the loss of liberty and that offenders are offered incentives (reduced penalties) for successful compliance. 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.

3 Requiring accountability via ongoing independent evaluations

Even though the Commission has concluded that court intervention programs are capable of producing benefits for the community, it is recognised that not all programs will achieve positive outcomes. All court intervention programs must be subject to regular independent evaluations to ensure that resources are allocated to successful programs and to identify problems so that policy-makers can adapt and improve programs. In this regard, it is insufficient to simply evaluate a program after its initial 'pilot' stage; long-term evaluations must be undertaken. Many court intervention programs have been established without adequate data collection methods. Court intervention programs must be provided with funds to enable data collection and, where possible, evaluators should be involved in the planning stage of any new program to ensure best practice in regard to the collection and recording of relevant information and statistics.

2. Legal Aid WA, Submission No. 11 (30 September 2008) 5. The Department of Corrective Services also agreed that legal and procedural safeguards are required and net-widening should be avoided: Department of Corrective Services, Submission No. 19 (6 October 2008) 1.

4 Adequate resources

No amount of legislative or policy reform will guarantee the success of court intervention programs. To be effective court intervention programs must also be properly resourced to ensure that there are adequate treatment programs and support services available to participants[3]; to enable judicial monitoring; and to facilitate involvement by a wide variety of agencies including non-government agencies. The Commission received numerous submissions emphasising the need for adequate resources.[4] In particular, the Department of Corrective Services stressed that it would be unable to 'absorb the additional costs that would be incurred if the Commission's recommendations were implemented'.[5] The Commission understands that the Department of Corrective Services would be required to assess and supervise offenders participating in court intervention programs and maintain necessary administrative and policy support for this role. As the Department acknowledges there is the potential for significant long-term cost savings, but in the initial stages of developing and establishing new court intervention programs, extra funds will be required.

The Commission has also concluded that court intervention programs should be provided with dedicated additional funding to cover the administration of the program as well as services provided by external agencies. Existing resources should not simply be reallocated otherwise members of the community who are not involved in the criminal justice system may be precluded from participating in treatment programs or accessing support services.[6]

Also programs should ideally have some degree of budget control over resources so that program managers can purchase external services as needed; this reduces bureaucratic processes, such as funding applications and assessments, each time a program participant needs access to services provided by an external agency.

The Commission understands that there may be some reluctance to invest in court intervention programs bearing in mind the current global economic crisis and moves by the government of Western Australian to reduce spending by government departments. However, the Commission emphasises that court intervention programs can result in considerable cost savings in the longer-term. Further, the current economic crisis and rising unemployment may increase the need for better-resourced court intervention programs. Loss of employment and financial pressures may lead to increased drug and alcohol use, family dysfunction, family violence, gambling and homelessness, and for some, the commission of crimes.

The Commission has identified the areas most in need of new programs: a program for mentally impaired offenders, a general program to enable broader participation in programs (particularly in regional areas) and a program for alcohol-dependent offenders. Obviously, given resourcing constraints the expansion of court intervention programs will naturally occur on a gradual basis; however, existing programs should be provided with sufficient resources and the development of these recommended new programs should commence straight away.

3. In particular, the Commission notes that a number of submissions emphasised the need for adequate residential facilities for offenders participating in court intervention programs. The need for residential facilities for drug- and alcohol-dependent offenders was referred to by the Drug and Alcohol Office: Drug and Alcohol Office, Submission No. 5 (22 September 2008) 2–3. Legal Aid WA highlighted the lack of residential facilities and bail hostels for young offenders: Legal Aid WA, Submission No. 11 (30 September 2008) 31–34. The Magistrates Court noted that more residential facilities in more locations are need for family violence court participants (in particular, for Aboriginal participants): Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 20. In addition, as the Commission observed in its Consultation Paper, all court intervention programs should be provided with adequate resources to ensure that homeless offenders are assisted with accommodation issues: LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 6–7.
4. Drug and Alcohol Office, Submission No. 5 (22 September 2008) 2–3; Confidential Submission, Submission No. 8 (26 September 2008) 12; Office of the Public Advocate, Submission No. 9 (30 September 2008) 6 & 8; Legal Aid WA, Submission No. 11 (30 September 2008) 5; Chief Justice of Western Australia, Submission No. 15 (30 September 2008) 3; Department of Corrective Services, Submission No. 19 (6 October 2008) 1; Aboriginal Legal Service of WA (Inc), Submission No. 20 (13 November 2008) 3; Department of the Attorney General, Submission No. 21 (13 November 2008) 1.
5. Department of Corrective Services, Submission No. 19 (6 October 2008) 1.
6. The Commission notes that the Drug and Alcohol Office cautioned against increasing residential treatment placements for court intervention program participants without corresponding increases in places for non-justice clients: Drug and Alcohol Office, Submission No. 5 (22 September 2008) 2–3.

Scope of the Reference

Because the Commission decided that the reference should be restricted to court intervention programs it was determined that a number of matters were beyond the scope of the reference, namely, other rehabilitation and diversionary programs; restorative justice programs; specialist family violence courts; and sexual offences courts.[1] While the vast majority of submissions addressed the operation of court intervention programs and the Commission's proposals for reform, a few submissions made comments about matters that had been determined to be beyond the scope of the reference.

In its submission, the Western Australia Drug and Alcohol Office noted that the Commission had not discussed a number of diversionary programs operating in Western Australia.[2] However, most of the programs referred to by the Drug and Alcohol Office are not court intervention programs; they are diversionary programs available to a court but the court is not actively involved in the operation of the program. The only program mentioned by the Drug and Alcohol Office that fits within the definition of a court intervention program is the Supervised Treatment Intervention Regime (STIR), which was discussed in the Commission's Consultation Paper.[3]

The exclusion of other rehabilitation, diversionary and restorative justice programs from the scope of the reference was also referred to by others. In his submission, the Chief Justice of Western Australia suggested that restorative justice initiatives could have been considered by the Commission as part of the reference.[4] Unlike court intervention programs, restorative justice programs generally operate externally from the court. They allow affected parties to come together to deal with a problem in the absence of judicial officers and lawyers. Although a court might refer an offender to a restorative justice program (such as victim-offender mediation or family group conferencing) the court is not involved in the actual process.[5] The Chief Justice supported consideration of restorative justice initiatives as a means of addressing victim issues.

The Commission agrees that addressing victim dissatisfaction with the criminal justice process is important to the proper functioning of the system; however, it is the Commission's opinion that such issues should be examined holistically to ensure an appropriately informed response. Victim issues extend beyond restorative justice programs; for example, other potential problems relate to victim support services; the way in which victims are informed about criminal justice proceedings and outcomes; the way in which victims are dealt with during a trial; and the applicability of criminal injuries compensation. The Commission notes that the Attorney General is currently considering reforms to improve services for victims of crime and restorative justice initiatives could be examined as part of that process.[6]

Nonetheless, the Commission has not disregarded victim issues in this reference. Some court intervention programs such as family violence programs (discussed in Chapter Five) actively seek to protect victims at the same time as addressing offending behaviour. The programs examined in this reference are focused on preventing reoffending by using the authority of the court (and other agencies)

1. The Commission also determined that it was unnecessary to consider Aboriginal courts separately because the Commission had considered Aboriginal courts in detail in its reference on Aboriginal customary laws: see LRCWA, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report, Project No. 94 (2006) 124. Further, in the Consultation Paper the Commission did not separately examine homelessness court intervention programs because it was of the view that homelessness should be considered by all court intervention programs and the Commission's proposal for the establishment of a general court intervention program would be an appropriate vehicle to address homelessness issues in those cases where an offender was ineligible for a specialist court intervention program: LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 7–8.
2. For example, the Pre-Sentence Opportunity Program, the Indigenous Diversion Program, the Young Persons' Opportunity Program and the Supervised Treatment Intervention Regime: see Western Australia Drug and Alcohol Office, Submission No. 5 (22 September 2008) 1.
3. LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 53 & 79–80. The Commission also notes that various drug diversion programs were mentioned in Chapter Two of the Consultation Paper: see 46–47.
4. Chief Justice of Western Australia, Wayne Martin, Submission No. 15 (30 September 2008) 3–4.
5. The Victorian Parliament Law Reform Committee observed that some problem-solving courts involve 'restorative elements' but are not themselves restorative justice programs and that the key difference between therapeutic and restorative justice approaches is that in the latter the judicial officer is not involved in the process: Victorian Parliament Law Reform Committee, *Inquiry into Alternative Dispute Resolution and Restorative Justice*, Final Report (2009) 198–199.
6. On 13 March 2009 it was reported that the Attorney General was considering 'ways to improve the treatment of WA's victims of crime based on the South Australian model, which has a Commissioner for Victims' Rights': Strutt J, 'Crime Victims May Get Advocate', *The West Australian*, 13 March 2009, 7. Further, on 24 March 2009 the Attorney General launched a new Victims of Crime website as part of a 'new initiative to provide greater resources to victims of crime': Attorney General of Western Australia, *New Website Supports Victims* (Media Release, 24 March 2009).

to motivate rehabilitation thereby reducing the number of future victims of crime.

In its submission, the Office of the Director of Public Prosecutions (DPP) was critical of the Commission's decision to exclude the examination of specialist sexual offences courts and other alternative approaches dealing with sexual offence trials.[7] This issue was discussed in the Commission's Consultation Paper and a proposal was made for an inquiry into whether a specialist division or court dealing with sexual offences should be established. The Commission's view remains that the nature of such an inquiry is beyond the scope of the present reference. The Commission notes that the DPP is currently in consultation with the Chief Judge of the District Court and the Chief Magistrate to establish specialist sexual offences lists in those jurisdictions. The Commission supports the DPP's investigation into alternative ways to deal with sexual offences in collaboration with the courts, Western Australia Police and the Department of the Attorney General.[8]

7. Office of the Director of Public Prosecutions, Submission No. 12 (1 October 2008) 5–10.
8. The Commission notes that the National Council to Reduce Violence against Women and their Children recently recommended the establishment of specialist courts or proceedings for sexual offences: National Council to Reduce Violence against Women and their Children, Time for Action: *The National Council's Plan for Australia to Reduce Violence Against Women and their Children* (Canberra: Department of Families, Housing, Community Services and Indigenous Affairs, 2009) 115–117, Recommendations 4.3.5, 4.3.6.

Chapter Two

Legal and Policy Issues

Contents

Introduction 21

Policy Framework 22

Court intervention programs unit 22
- Training 23

General Legislative Framework 25

Defining court intervention programs 25
- Prescribing court intervention programs for young offenders 26

The operation of court intervention programs 27
- Pre-sentence 27
- Pre-plea and post-plea 27
- Jurisdictions 28
- Pathways to participation 28
- Procedural and operational issues for individual programs 29
- Information sharing 30
- Determining treatment and program needs 31

Bail 34

Conditional bail 34
- Bail before conviction 34
- Bail after conviction 35

Superior court matters 35

Pre-Sentence Orders 37

Court intervention programs and Pre-Sentence Orders 37

The operation of Pre-Sentence Orders 38
- Excluded offences 38
- Enforcing and encouraging compliance 38
  - Amending a Pre-Sentence Order 38
  - Breaching a Pre-Sentence Order 40
- Sentencing day 40
- Pre-Sentence Orders imposed by superior courts 41

Sentencing 42

Sentencing principles 42
- The purposes of sentencing 42
- Relevant sentencing factors 43

Deferral of sentencing 44

Sentencing outcomes 44
- Recording of sentencing outcome 44
- No sentence 45
- Spent convictions 45
- Conditional Suspended Imprisonment 46

Introduction

In the preceding chapter the Commission explained its approach to this reference, in particular, that court intervention programs should be supported by appropriate legislative and policy reform in order that they can operate as effectively as possible. This chapter deals with the Commission's general legislative and policy recommendations, that is, general reforms that will impact upon all existing (and any future) court intervention programs. Recommendations that are specific to particular programs are dealt with in subsequent chapters.

At this point in time, Western Australian court intervention programs operate in an ad hoc manner – there is no authority with responsibility for policy and administrative issues and there is no legislative framework to support the operation of court intervention programs. Western Australia lags behind many other Australian jurisdictions in terms of legislative and policy support for innovative court programs. In Victoria, specific legislation has been enacted for a number of court intervention strategies. Separate court divisions have been created for the Koori Courts, the Drug Court, the Neighbourhood Justice Centre and Family Violence Courts.[1] Further, a designated unit within the Victorian Department of Justice is responsible for these programs (and other programs) designed to reduce the rate of reoffending among disadvantaged offenders.[2] The Victorian Attorney General's *Justice Statement 2* (released in October 2008) discusses plans to expand upon existing initiatives and develop 'an integrated and comprehensive model' to respond to marginalised and disadvantaged offenders.[3]

In New South Wales the Criminal Justice Interventions Unit was established to oversee the implementation of legislation for 'intervention programs'.[4] The South Australian sentencing and bail legislation also contains provisions dealing with intervention programs.[5] Further, staff associated with a number of programs (eg, the Drug Court, and the Magistrates Court Diversion Program) are located in the one building. In Queensland, the Courts Innovation Program coordinates and monitors a number of different programs including the Murri Courts, the Drug Court, the Queensland Magistrates Early Referral into Treatment Program, the Queensland Indigenous Alcohol Diversion Program, and the Special Circumstances Court List.[6] The approaches in these jurisdictions differ but each includes legislative and policy support for programs. Several submissions received by the Commission in response to its Consultation Paper clearly supported the need for appropriate legislative and policy reform.[7]

The general legislative and policy reforms in this chapter will ensure that courts have access to appropriate legislative powers to enable effective participation in court intervention programs and will promote a coordinated, fair and consistent approach to court intervention programs in Western Australia. Many of the recommendations in this chapter are designed to encourage broader and more effective participation in programs while at the same time ensuring fundamental legal rights are protected.

1. *Magistrates Court Act 1989* (Vic) ss 4A–4Q; *County Court Act 1958* (Vic) *ss4A–4G; Children Youth and Families Act 2005* (Vic) ss 517 & 520A–520E.
2. This unit is called the 'Programs and Strategy, Courts and Tribunals Unit'.
3. Victorian Government, *Attorney General's Justice Statement 2* (October 2008) 31.
4. Part 4 of Chapter 7 of the *Criminal Procedure Act 1986* (NSW) deals with 'intervention programs'. There are associated regulations in relation to various intervention programs as well as relevant provisions under the *Crimes (Sentencing Procedure) Act 1990* (NSW) and the *Bail Act 1978* (NSW). New South Wales also has separate legislation for the Drug Court.
5. *Criminal Law (Sentencing) Act 1988* (SA) ss 19B & 19C; *Bail Act 1985* (SA) s 21B.
6. See Queensland Courts, *Courts Innovatin Programs* (2007) <http://www.courts.qld.gov.au/1581.htm> at 7 April 2009. Some of these programs are 'prescribed programs' for the purposes of the *Bail Act 1980* (Qld): *Bail (Prescribed Programs) Regulation 2006* (Qld).
7. Christine Anderton, Submission No. 1 (12 August 2008); Legal Aid WA, Submission No. 11 (30 September 2008); Magistrates Court of Western Australia, Submission No. 13 (30 September 2008); Department of Corrective Services, Submission No. 19 (6 October 2008); Aboriginal Legal Service of WA (Inc), Submission No. 20 (13 November 2008); Department of the Attorney General, Submission No. 21 (13 November 2008).

Policy framework

Currently, Western Australian court intervention programs operate independently from one another and programs have different 'lead agencies'.[1] Thus there is no authority responsible for policy and administrative issues affecting all court intervention programs.[2] The Commission believes that court intervention programs would benefit from an integrated administrative approach because such an approach promotes the sharing of resources and expertise; the improvement of existing programs; and the development of appropriate new programs.

COURT INTERVENTION PROGRAMS UNIT

In its Consultation Paper the Commission proposed the establishment of a court intervention programs unit.[3] The benefits to be gained by establishing such a unit include:

- improving coordination between government and non-government agencies;
- sharing of resources and expertise;
- delivering coordinated and effective training;
- enabling cross-referrals between programs; and
- facilitating efficient access to services.

It was proposed that the unit (to be established within the Department of the Attorney General) would be staffed by representatives from various government and non-government agencies and that staff would be co-located in a central office to facilitate collaboration and effective service provision. Three submissions responded specifically to this proposal, each supportive of the concept of a court intervention programs unit.[4]

1. See LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 183.
2. As discussed above, there are separate policy units in other jurisdictions. For example, in Victoria the Programs and Strategy, Courts and Tribunals Unit is responsible for overseeing a number of programs (eg, Koori Courts, Drug Court, Family Violence Courts and the Court Integrated Services Program). This unit also explores new approaches to court programs, implements policies and procedures and works with other agencies to ensure 'best practice': see Department of Justice (Vic), 'Programs and Strategy: Courts and Tribunals Unit' <http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Find/Business+Areas/> at 7 April 2009.
3. LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) Proposal 6.2.
4. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 9; Department of Corrective Services, Submission No.19 (6 October 2008) 3; Department of the Attorney General, Submission No. 21 (13 November 2008) 17.

The Department of Corrective Services supported the proposal for a unit within the Department of the Attorney General but argued that the Commission had only considered the need for direct policy and administrative support to courts. The submission emphasised that if court intervention programs are expanded the Department of Corrective Services would require substantial additional resources and policy support.[5] The Commission agrees that additional resources will be required by the Department of Corrective Services to enable court intervention programs to expand and develop. However, the purpose of a central unit is to provide policy support to *all* agencies involved in court intervention programs; the Commission did not intend for the unit to provide support only to courts. The purpose of one unit is to avoid duplication and encourage collaboration: it is unnecessary for every agency involved in court intervention programs to establish its own new policy unit.

In its submission, the Department of the Attorney General acknowledged that existing Western Australian programs are 'often working in isolation'. It was explained that a lack of integration limits the opportunities for offenders to be cross-referred to more relevant programs and this results in ineffective sharing of resources and expertise.[6] The Department of the Attorney General supported the Commission's proposal for a court intervention programs unit but noted that other models for a 'dedicated management structure' should be considered. However, no alternative models were put forward by that Department.

The purpose of the proposed court intervention programs unit is to enable collaboration between agencies involved in court intervention programs and ensure effective service delivery. The proposed model put forward by the Commission incorporates representatives from all relevant government and non-government agencies. Further, it is envisaged that individual program coordinators will be part of the unit. This enables one program coordinator to liaise with other program coordinators in relation to cross-referrals, access to services and specialist skills. Not all government and non-government agencies will be directly involved in the actual delivery of programs but the presence of key agency representatives will facilitate interagency collaboration in the delivery

5. Department of Corrective Services, Submission No.19 (6 October 2008) 3.
6. Department of the Attorney General, Submission No. 21 (13 November 2008) 16.

of programs and services. As just one example, the court intervention programs unit might employ one or more representatives from the Salvation Army. Because each court intervention program coordinator will work in the unit, every program will have potential access to support services available through the Salvation Army. This is more cost-effective and efficient than every program employing a Salvation Army worker or trying to contact that agency every time a need arises. The same observation applies to government agencies; for example, a representative from the Department of Education and Training could provide expert advice and assist with access to appropriate education and training programs for offenders participating in all court intervention programs.

A 2002 research study into integrated governance[7] made a number of key findings about effective collaboration. Not all of the findings are relevant for the purposes of this reference, but a number of the findings are informative. In regard to program management it was observed that integration will be aided by the 'pooling of resources' and the 'articulation of shared vision and purpose'.[8] This is pertinent to court intervention programs because they all share the goal of crime reduction by addressing the causes of offending behaviour. Further, it was stated that integration can be facilitated by 'co-located services'. Importantly, the study observed that in order to ensure that an integrated approach is successful it is preferable to nominate a 'lead agency' rather than operating under committee structures.[9] The Commission agrees and strongly advises against the establishment of interagency committees or reference groups to provide policy support for court intervention programs.

Because court intervention programs are administered by the courts the Commission maintains its view that the Department of the Attorney General should be the 'lead agency'. The Commission recommends the establishment of a court intervention programs unit within the Courts and Tribunals Services Division of the Department of the Attorney General and emphasises that this unit should be an operational unit with senior representatives from relevant agencies. The unit should have responsibility for providing policy and administrative support to all court intervention programs; coordinating evaluations and data collection; ensuring that resources and skills are shared; coordinating training; improving existing programs; and developing new programs.

7. The term 'integrated governance' was defined to include collaboration across governments, between government departments, and between government departments and non-government agencies
8. Institute of Public Administration Australia & Success Works, *Working Together: Integrated governance* (2002) xii.
9. Ibid 102.

Training

The need for appropriate training for all agencies involved in court intervention programs was identified in a number of submissions.[10] In particular, the importance of regular judicial training was emphasised by the Magistrates Court of Western Australia and it was noted that attendance at relevant training is difficult due to cost and time constraints.[11] The Chief Justice of Western Australia observed that judicial officers may require specialised training because of their role in monitoring the performance of court intervention program participants.[12]

The Department of the Attorney General submitted that existing training opportunities are inadequate and that most individuals involved in court intervention programs receive 'on the job' training or organise their own relevant professional training. Further, the department argued that all agencies involved in court intervention programs should be provided with appropriate training about how court intervention programs differ from traditional court processes; about the treatment options available for the specific program; and about general treatment and support services.[13]

Because court intervention programs address a number of underlying problems, different agencies should be involved in developing and presenting appropriate training programs. In its submission the Western Australian Drug and Alcohol Office explained that it had been involved in the provision of training to magistrates, community correction officers, prosecutors and lawyers.[14] Likewise, judicial officers, lawyers, prosecutors and others involved in court intervention programs may require training about mental health issues, homelessness, family violence and other social problems. All agencies involved in court intervention programs, including judicial officers, need ongoing training about the most effective intervention strategies so programs can be adjusted and improved.

10. Western Australian Drug and Alcohol Office, Submission No. 5 (22 September 2008) 4; Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 22; Dr Andrew Cannon, Deputy Chief Magistrate of South Australia, Submission No. 17 (13 October 2008) 2; Aboriginal Legal Service of WA (Inc), Submission No. 20 (13 November 2008) 3; Department of the Attorney General, Submission No. 21 (13 November 2008) 14. In the Consultation Paper, the Commission invited submissions about the type of training that would be required for various agencies involved in court intervention programs and about which agencies or individuals should be involved in delivering this training: Consultation question 5.1.
11. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 22. It was also suggested that the establishment of a Judicial Commission could facilitate appropriate training for judicial officers.
12. Chief Justice of Western Australia, Wayne Martin, Submission No. 15 (30 September 2008) 2.
13. Department of the Attorney General, Submission No. 21 (13 November 2008) 14.
14. Western Australian Drug and Alcohol Office, Submission No. 5 (22 September 2008) 4.

In its Consultation Paper the Commission highlighted that a court intervention programs unit would be ideally placed to coordinate training for all programs. In particular, specialist program coordinators should be involved in training about specific problems and services available.[15] In the absence of any opposition to this proposal, the Commission maintains its view that training should be coordinated by the court intervention programs unit.

RECOMMENDATION 1

Court Intervention Programs Unit

1. That a Court Intervention Programs Unit be established within the Court and Tribunal Services Division of the Department of the Attorney General and that this unit have responsibility for providing policy and administrative support to all court intervention programs.

2. That a Director be appointed with overall responsibility for the Court Intervention Programs Unit.

3. That the Court Intervention Programs Unit be comprised of individual court intervention program coordinators (or where applicable a coordinator of a number of similar court intervention programs[16]) and representatives from government and non-government agencies.

4. That staff from relevant government departments and agencies (eg, the Department of Corrective Services, the Department of Health, the Department of Housing and Works, the Department for Indigenous Affairs, the Department for Child Protection, the Department for Communities, the Department of Education and Training, the Disability Services Commission, the Alcohol and Drug Office, the Office of Crime Prevention, the Western Australia Police, the Office of the Director of Public Prosecutions) be seconded to the Court Intervention Programs Unit.

5. That the Court Intervention Programs Unit be allocated funding to secure seconded positions from relevant non-government agencies.

6. That the Court Intervention Programs Unit allocate specific funding to Legal Aid WA, the Aboriginal Legal Service of WA and other community legal services to ensure that offenders participating in court intervention programs have appropriate legal assistance.

7. That staff seconded to the Court Intervention Programs Unit be co-located in one central office to facilitate collaboration and effective service provision.

8. That staff seconded to the Court Intervention Programs Unit be required to provide their services and be available to individual court intervention program staff who are not located in the same office.

9. That the program coordinators of specialist programs (eg, Family Violence Court Programs, Aboriginal Court Programs, and the Perth Drug Court) provide training and other assistance to program staff working in other court intervention programs including a general court intervention program as recommended by the Commission.[17]

15. LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 183.
16. For example, it might be appropriate for a single coordinator to be appointed for all family violence court programs.
17. Recommendation 37.

General legislative framework

As the Commission has explained, legislative reform is required to ensure that court intervention programs operate in a fair and consistent manner; to ensure that courts administering intervention programs have appropriate powers; and to promote broader access to programs throughout the justice system.[1] In formulating the appropriate legislative framework the Commission has been mindful of the need for flexibility in order to encourage access to a variety of court intervention programs and to ensure that program development is not stifled by overly prescriptive legislation.[2]

In determining the most appropriate legislative framework, the Commission has examined relevant legislative schemes in other jurisdictions. For example, Victorian legislation creates separate divisions for a number of court intervention programs[3] but legislative support is restricted to programs that operate as separate 'courts'. The Commission is strongly of the view that programs that do not operate in a distinct list or separate court such as the Supervised Treatment Intervention Regime (WA) (and the Commission's recommended general court intervention program[4]) should have access to the same legislative provisions as programs operating through a dedicated list or court. In contrast to Victoria, intervention programs in New South Wales are recognised in the *Criminal Procedure Act 1986* (NSW) and specific programs are declared under regulations. The Commission prefers this approach because it enables programs to be easily added or removed from the regulations depending on evidence of success and therefore promotes accountability. Furthermore, recognising programs[5] as distinct from courts or divisions provides legislative support for a wider variety of intervention strategies.

Consequently, the Commission has concluded that the legislative framework for court intervention programs should cover broad issues such as the designation of court intervention programs and the various pathways for participation in programs. Details concerning the operation of individual programs should be dealt with under regulations or court rules so that programs can adapt as required.

In its Consultation Paper the Commission proposed that the general legislative framework should be contained in the *Criminal Procedure Act 2004* (WA).[6] This legislation applies to all adults (and to young people in so far as it is not inconsistent with the *Young Offenders Act 1994* (WA)) who are being dealt with in the criminal justice system irrespective of the stage of the proceedings or the jurisdiction in which the matter is being determined. The Commission received significant support for this proposal[7] and maintains its view that the *Criminal Procedure Act* is the most appropriate vehicle for a general legislative framework for court intervention programs. The legislative framework is intended to provide an outline of what court intervention programs are, and how and when they can operate. However, it is important to note that in order to provide courts with the appropriate powers to facilitate effective participation in programs and to guarantee certain legal safeguards for program participants, reform to bail and sentencing legislation is also required.

DEFINING COURT INTERVENTION PROGRAMS

The Commission's proposal for a new Division under the *Criminal Procedure Act,* to provide a framework for the recognition and operation of court intervention programs, provided that different programs would be prescribed as court intervention programs under the *Criminal Procedure Regulations 2005*. The primary reason for prescribing programs

1. See above 'Introduction' and Chapter One: The need for reform.
2. Legal Aid WA submitted that flexibility was important: Legal Aid WA, Submission No. 11 (30 September 2008) 6.
3. In Victoria there are Koori Court divisions of the Magistrates Court, County Court and Children's Court; Neighbourhood Justice Divisions in the Magistrates Court and the Children's Court; a family violence division of the Magistrates Court; and a Drug Court division of the Magistrates Court.
4. See Recommendation 37.
5. In its Consultation Paper the Commission listed a number of existing programs that should be prescribed under the regulations. Some of these programs were referred to by their common name such as the Perth Drug Court or the Joondalup Family Violence Court even though these programs are not separately constituted courts. The Magistrates Court of Western Australia and others correctly pointed out that the list of prescribed court intervention programs should all be renamed as 'programs' rather than 'courts': Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 9; Department of the Attorney General, Submission No. 21 (13 November 2008) 17. Accordingly, in its recommendation below the Commission has changed the name of a number of programs.
6. Proposal 6.1.
7. Christine Anderton, Submission No. 1 (12 August 2008) 1; Legal Aid WA, Submission No. 11 (30 September 2008) 6; Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 9; Department of Corrective Services, Submission No. 19 (6 October 2008) 2; Aboriginal Legal Service of WA (Inc), Submission No. 20 (13 November 2008) 3; Department of the Attorney General, Submission No. 21 (13 November 2008) 15. The Commission received only one submission questioning the need for legislative reform: Confidential Submission, Submission No. 8 (26 September 2008) 2.

is to provide a point of reference for other legislative provisions. If a provision under the *Bail Act 1982* (WA) or *Sentencing Act 1995* (WA) refers to a court intervention program prescribed under the *Criminal Procedure Regulations*, a court is then able to identify the programs by reference to the regulations.

The Department of the Attorney General and others submitted that other programs should be included in the list of programs to be prescribed under the regulations.[8] Since the publication of the Consultation Paper, the Armadale Family Violence Court and the Perth Family Violence Court have commenced and the Commission has added these two programs to the list in its recommendation below. The Commission emphasises that the list of prescribed programs is not static – new programs can be added and obsolete programs removed if necessary.[9]

Prescribing court intervention programs for young offenders

It was also submitted by the Department of the Attorney General that the Children's Court Drug Court program and the Youth Supervised Treatment Intervention Regime should be prescribed as court intervention programs under the *Criminal Procedure Regulations*.[10] In its Consultation Paper the Commission questioned the need for legislative reform in relation to young offenders noting there are already wide powers to defer sentencing under the *Young Offenders Act* and there are a number of different sentencing options available to the Children's Court in the event that a young offender successfully completes a pre-sentence court intervention program (including the power to impose no further punishment).[11] Moreover, it was emphasised that the juvenile justice system currently focuses on providing support to young offenders to address underlying problems and achieve rehabilitation. Nonetheless, the Commission sought submissions about whether the proposed legislative framework under the *Criminal Procedure Act* should be replicated under the *Young Offenders Act* in order to provide a broad legislative framework for court intervention programs for young offenders.[12]

Two submissions specifically responded to this issue, both contending that general legislative reform for young offenders was unnecessary.[13] The Department of the Attorney General and Legal Aid WA submitted that the *Young Offenders Act* is sufficient to enable effective participation in court intervention programs. Even so, as mentioned above, the Department of the Attorney General submitted that two court intervention programs for young offenders should be prescribed under the proposed legislative framework under the *Criminal Procedure Act*.

That manner of dealing with young offenders is primarily governed by the *Young Offenders Act* (it applies to young people who have committed or allegedly committed an offence before turning 18 years of age)[14] but other criminal justice legislation is still relevant to young offenders. In certain circumstances provisions of the *Sentencing Act*, the *Bail Act* and the *Criminal Procedure Act* may apply to young offenders. However, s 5 of the *Young Offenders Act* provides that to the extent that the *Criminal Procedure Act* is inconsistent with the provisions of the *Young Offenders Act* the latter prevails.

The Commission can see no purpose in duplicating (under the *Young Offenders Act*) the legislative framework that it has proposed under the *Criminal Procedure Act* because the vast majority of what is proposed is consistent with the provisions of the *Young Offenders Act*. Where there is an inconsistency, the provisions of the *Young Offenders Act* will, appropriately, prevail.[15] The benefit of prescribing court intervention programs for young offenders is that general provisions (such as the requirement for informed consent and the power to make regulations in relation to operational issues) will apply equally to programs for young offenders. Accordingly, the Commission has included the two current programs for young offenders in the list of programs to be prescribed under the regulations.

The Commission also emphasises that nothing in its recommendation alters the principles of juvenile justice or the emphasis on diversion *from* the criminal

8. Legal Aid WA, Submission No. 11 (30 September 2008) 24; Department of the Attorney General, Submission No. 21 (13 November 2008) 17. The Department of the Attorney General submitted that the Pre-Sentence Opportunity Program and the Indigenous Diversion Program should be added to the list of prescribed programs. However, neither of these programs currently involves any judicial monitoring and therefore they do not fit within the definition of a court intervention program. Also the Commission received a suggestion that a 'Traffic Offender Program' should be included in the list of prescribed programs: email correspondence with Roy Langrish (in his private capacity and not as an employee of the Department of Corrective Services), 13 November 2008. The Commission notes that traffic offender programs in other jurisdictions are not court intervention programs but diversion programs with no direct involvement by the judicial officer. That does not mean that a traffic offender court intervention program could not be developed if considered appropriate.
9. At this stage the Geraldton Alternative Sentencing Regime has been retained in the list of programs to be prescribed; however, the Commission understands that this program is no longer used in practice. It is suggested that the merits of this program should be reviewed to determine if it should be prescribed under the Commission's recommendation.
10. Department of the Attorney General, Submission No. 21 (13 November 2008) 17. The Youth Supervised Treatment Intervention Regime commenced as a pilot program in the Perth Children's Court in October 2008.
11. LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 209.
12. Ibid Consultation Question 6.6.
13. Department of the Attorney General, Submission No. 21 (13 November 2008) 18; Legal Aid WA, Submission No. 11 (30 September 2008) 24.
14. *Young Offenders Act 1994* (WA) s 4.
15. For example, the Commission's recommendation below sets out the various pathways to participation in court intervention programs (eg, as a condition of bail, during deferral of sentencing, as a condition of a Pre-Sentence Order or a Drug Treatment Order). Not all of these options are applicable to all young offenders.

justice system under the juvenile justice legislation.[16] As stated in the Consultation Paper, the Commission believes that court intervention programs for young offenders should primarily be directed to more serious offenders who are facing custodial sentences.[17] It is essential that court intervention programs do not cause net-widening by operating as alternatives to less severe options such as referrals to juvenile justice teams. As the Department of Corrective Services stated in its submission, the 'focus for less serious offenders should remain on diversion through cautioning or juvenile justice teams and shorter rehabilitative orders'.[18]

THE OPERATION OF COURT INTERVENTION PROGRAMS

Pre-sentence

In the Consultation Paper, the Commission indicated its preference for court intervention programs to operate before sentencing takes place rather than as part of a post-sentencing order.[19] Pre-sentence court intervention strategies provide a greater incentive for offenders to participate and meaningfully engage in treatment and support programs. Once a sentence is imposed there is a risk that an offender will do the least amount possible to avoid breaching the order. Further, pre-sentence options provide sentencing courts with better information and enable a more realistic assessment to be made about an offender's prospects for rehabilitation because pre-sentence options provide 'the offender with an opportunity to establish with the court his or her rehabilitative potential in real terms, rather than relying entirely on reports, which can only ever provide an educated guess about an offender's likely future behaviour'.[20]

Nevertheless, the Commission sought submissions about the viability of post-sentence judicial monitoring.[21] Submissions expressed significant opposition to this concept.[22] One argument raised by the Department of the Attorney General against post-sentence judicial monitoring was that:

> [The c]ompletion of a court intervention program is a milestone that should be acknowledged and any post-sentence obligations to the sentencing court may diminish the significance of achieving that milestone of completion.[23]

The Commission agrees post-sentence judicial monitoring may undermine the effectiveness of pre-sentence participation and would further strain limited resources with little additional benefit. Accordingly, the Commission has concluded that all court intervention programs should operate before sentencing takes place. Nonetheless, if a court intervention program participant requires further supervision and treatment after the completion of the program it is essential that there is an appropriate handover from program staff to community corrections officers. Offenders should not be required to undergo a series of further assessments or complete unnecessary treatment programs. Therefore, program staff should ensure that relevant information is provided to ensure that post-sentence supervision by community corrections only addresses the offender's outstanding problems and needs.[24]

Pre-plea and post-plea

The Commission expressed its view in the Consultation Paper that court intervention programs should be able to operate before a plea of guilty is entered (as well as after a plea has been entered). Many programs require a plea of guilty or at least an indication of an intention to plead guilty but there are some that allow an offender to participate before conviction. Pre-plea participation encourages early access into treatment programs and therefore addresses the risk of reoffending at the earliest possible stage of the formal court process. In this regard, the Commission highlights that some accused may have legitimate reasons for not pleading guilty straight away (eg, the need to obtain legal advice or resolve factual disputes) but nevertheless have underlying problems that could usefully be addressed via court intervention. The Court Integrated Services Program in Victoria recognises this by enabling pre-plea participation. To be eligible a person must have a history of offending or pattern of current offending that suggests the person is likely to reoffend.[25]

On the other hand, the Commission understands there may be valid reasons for requiring a plea of guilty to be entered before commencing participation in a court intervention program. The Drug and Alcohol Office explained in its submission that in order to access funding through the Commonwealth *Illicit Drug Diversion Initiative*, participants in the

16. Legal Aid WA stressed the need for diversion away from formal criminal justice interventions in its submission: Legal Aid WA, Submission No. 11 (30 September 2008) 29.
17. LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 209.
18. Department of Corrective Services, Submission No. 19 (6 October 2008) 4.
19. LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 197.
20. Sentencing Advisory Council of Victoria, *Suspended Sentences and Intermediate Sentencing Orders* (2008) 274.
21. Consultation Question 6.5.
22. The Commission received three submissions expressly stating opposition to post-sentence judicial monitoring: Legal WA, Submission No. 11 (30 September 2008) 24; Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 18 & 24; Department of the Attorney General, Submission No. 21 (13 November 2008) 18. Only one submission expressed interest in the concept of post-sentence judicial monitoring: Dr Andrew Cannon, Deputy Chief Magistrate of South Australia, Submission No. 17 (13 October 2008) 3.
23. Department of the Attorney General, Submission No. 21 (13 November 2008) 18.
24. The Commission's recommendation below that regulations can be made in relation to the exchange of information should facilitate in this regard.
25. LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 162.

Supervised Treatment Intervention Regime must enter a plea of guilty.[26] Submissions expressed conflicting views about the appropriateness of requiring a plea of guilty. The Western Australia Police Prosecuting Division submitted that court intervention programs addressing drug dependency should only be available to offenders who have entered a plea of guilty to ensure that there is 'connection between the alleged offending and the underlying drug addiction'.[27] In regard to family violence court intervention programs, Legal Aid WA suggested that participation should be allowed in the absence of a plea of guilty or full admission of the facts so long as the person accepted responsibility for the offending behaviour.[28] On the other hand, the Magistrates Court submitted that a plea of guilty and full admission of the statement of material facts is essential for family violence court intervention programs.[29] The Department of the Attorney General expressed support for the concept of pre-plea participation in court intervention programs but noted that for programs with limited capacity this approach may redirect placements to less motivated offenders.[30]

Overall, the Commission maintains its view that pre-plea participation in court intervention programs is appropriate provided that it does not impact upon the effectiveness or availability of an individual program. For this reason the Commission has concluded that the recommended legislative framework should *enable* pre-plea participation but not require it. Whether a particular program allows pre-plea participation should be determined by the court having regard to the views of program managers, coordinators or staff.

Jurisdictions

As the Commission observed in the Consultation Paper, court intervention programs tend to develop and operate in lower courts.[31] In many cases, superior court offences are so serious that participation in court intervention programs is precluded. However, there are some superior court matters for which court intervention strategies are appropriate. The Commission highlights that the Perth Drug Court currently accepts referrals for matters that must be dealt with by a superior court and monitors offenders during the program. The Commission is of the view that, as a general principle, court intervention programs should be available to offenders appearing in all jurisdictions. Specific offences might need to be excluded from the operation of a particular program and this should be determined at the policy level and by program staff.[32]

In practical terms, regular judicial monitoring is best undertaken by magistrates. The number of potential participants with superior court matters is relatively small and it would be inefficient for a court intervention program to be separately established in a superior court. Instead, offenders who are being dealt with in a superior court should be able to return to a Magistrates Court to continue participation in the program. Because court intervention programs often operate as 'lists' on specific days it will be more efficient for the offender to return to that court where all relevant agencies are present than to require everyone to 'move' to the superior court for one matter. Accordingly, the Commission makes a number of recommendations in this chapter to facilitate participation in court intervention programs by offenders who are facing charges that must be dealt with in a superior court.[33]

Pathways to participation

The recommended legislative framework for court intervention programs at the end of this section sets out the various pathways to participation in court intervention programs. These pathways reflect the different categories of offenders who may benefit from court intervention strategies. All court intervention programs target offenders who are likely to reoffend but not all necessarily target serious offenders. In order to minimise the risk of net-widening (ie, that interventions are disproportionate to the severity of the offending) it is important to provide different mechanisms for participation. For example, not all court intervention program participants should be placed on a Pre-Sentence Order because not all participants are facing imprisonment.

The Commission has concluded that participation in a court intervention program should be able to occur in the following ways:

Unconditional (pre-plea): As the Commission explained above, the majority of court intervention programs operate post-plea. However, subject to individual program rules, pre-plea participation should be permitted. For the vast majority of accused it will be appropriate to impose a bail condition that the accused must comply with the requirements of the program because the presence of underlying problems such as substance abuse, mental health issues or homelessness will mean that the accused poses a significant risk of failing to appear in court or

26. Western Australia Drug and Alcohol Office, Submission No. 5 (22 September 2008) 3.
27. Western Australia Police Prosecuting Division, Submission No. 22 (5 January 2009) 3.
28. Legal Aid WA, Submission No. 11 (30 September 2008) 11–12.
29. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 15.
30. Department of the Attorney General, Submission No. 21 (13 November 2008) 7.
31. LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 37.
32. In its Consultation Paper the Commission explained that some programs exclude violent and sexual offending; however, the Commission cautioned against blanket exclusions, especially in relation to violent offences noting that in some instances strict rules may exclude appropriate cases. Ibid 185–186.
33. See Recommendations 2(1)(g), 4 & 10.

committing further offences. However, there may be some accused who pose a negligible risk of absconding or reoffending and therefore it would be unfair for a court to impose unnecessary bail conditions (because failure to comply with a condition of bail may have negative consequences). The Commission therefore recommends that an accused (either an adult or young person) be permitted, in appropriate circumstances, to participate in a court intervention program on a purely voluntary basis.[34]

Condition of bail (pre-plea or post-plea): Bail conditions to comply with the requirements of a particular program are invariably imposed in order to ensure that the risk of reoffending is minimised. If a program participant fails to comply with the program then he or she can be brought back to court. In some cases, the participant will be given another chance or bail conditions may be altered. For others, failure to comply with the bail conditions will result in termination from the program and possibly the revocation of bail. Post-plea participation in court intervention programs is subject to the power to defer sentencing. Currently, sentencing can be deferred for a maximum of six months. Under the Commission's recommendations the maximum period for deferral for an adult will be increased to 12 months.[35] There is no statutory limit for young offenders.

Condition of a Pre-Sentence Order (post-plea): Under the *Sentencing Act* a court can impose a Pre-Sentence Order (PSO) for up to two years if the offence(s) warrants a term of immediate imprisonment. Young offenders (ie, under 18 years at the time of the commission of the offence) can also be subject to a PSO if they are over 18 years of age at the time of sentencing.[36] The Commission recommends a number of changes to the legislative provisions dealing with PSOs to enable more effective participation in court intervention programs for those more serious offenders who are facing imprisonment.[37]

Condition of a Drug Treatment Order (post-plea): In this Report (and consistent with the proposals in the Consultation Paper) the Commission recommends that the *Sentencing Act* be amended to include a pre-sentence Drug Treatment Order (DTO). The Commission's reasons for this recommendation are fully explained in Chapter Three. In order to ensure appropriate and fair participation in drug court programs by both adult and young offenders, the Commission recommends that the DTO be available as an option in the Children's Court.[38]

34. See Recommendation 2(1)(d).
35. See Recommendations 2(1)(d)(iii) & 13.
36. *Young Offenders Act 1994* (WA) s 50B. It appears that since PSOs were introduced only three PSOs have been imposed by the Children's Court: email correspondence with Bruce Mohan, Court and Tribunal Services, Department of the Attorney General (7 May 2009).
37. See Recommendations 5–10.
38. See Recommendation 20(2).

The following table summarises the possible options for participation in a prescribed court intervention program.

	Pre-plea	Post-plea
Adult offender	Unconditional bail Conditional bail	Conditional bail (up to max 12 months) PSO (up to max 2 yrs) DTO (up to max 2 yrs)
Young offender	Unconditional bail Conditional bail	Conditional bail (unlimited time) PSO (up to max 2 yrs) DTO (up to max 2 yrs)

Procedural and operational issues for individual programs

In order to ensure that its recommended legislative reform package does not impede the development of court intervention programs, the Commission is of the view that operational and procedural issues are best dealt with in regulations or court rules. As Dr Andrew Cannon submitted, this approach provides flexibility at the same time as enabling parliamentary oversight.[39] The types of issues that could be dealt with in subsidiary legislation include program eligibility criteria; any offences that are excluded from particular programs; assessment and referral processes; program length; exchange of information; the provision of reports; and the determination of treatment and program needs. In the recommended legislative framework below the Commission has included a provision permitting regulations and court rules to be made in relation to various procedural and operational issues concerning court intervention programs.[40] Some matters are more appropriately made by court rules (because court rules are made by judicial officers[41]) and others by regulations (because regulations must be approved by the relevant Minister and are drafted in conjunction with the relevant government department).[42]

39. Dr Andrew Cannon, Deputy Chief Magistrate of South Australia, Submission No. 17 (13 October 2008) 2. Regulations and rules must be tabled in Parliament and are scrutinised by the Joint Standing Committee on Delegated Legislation. They can also be disallowed by either House of Parliament.
40. Section 186 of the *Criminal Procedure Act 2004* (WA) currently provides that regulations may be made in relation to any matters that are required to be prescribed under the Act and other provisions give specific courts rule-making power in certain circumstances (ss 124 & 137(6)).
41. Under s 39 of the *Magistrates Court Act 2004* (WA) court rules are to be made by the Chief Magistrate and at least three other magistrates (including the Deputy Chief Magistrate if one has been appointed); under s 167 of the *Supreme Court Act 1935* (WA) and s 88 of the *District Court Act 1969* court rules are made by majority of judges in the relevant jurisdiction.
42. Parliamentary Counsel's Office, *Getting Legislation Drafted and Enacted: Guidelines and procedures* (2008) 15.

Information sharing

In its Consultation Paper, the Commission highlighted the importance of information sharing between the various agencies and individuals involved in court intervention programs.[43] The exchange of relevant information is necessary to ensure that program staff and service providers can effectively respond to the needs of participants and to provide appropriate progress information to the court. However, appropriate exchange of information is complicated by various legislative and professional requirements and, further, individuals may be uncertain about their obligations regarding the sharing of information.[44] In this regard, the Auditor General for Western Australia observed when reporting on the juvenile justice system:

> Several agencies advised that privacy and confidentiality restrictions impact their capacity to share information and therefore to coordinate services for young people with multiple problems.[45]

In the context of court intervention programs, Western Australian legislation enables the exchange of certain information between the Department of Corrective Services and other public and private organisations; and also provides protection from civil, criminal or professional disciplinary proceedings for individuals who disclose the information in accordance with the applicable provisions.[46] However, this legislation does not apply to the exchange of information between the other government and non-government agencies and between non-government agencies.[47]

The Commission invited submissions about whether any legislative reform is required in relation to the disclosure of information between the various agencies and individuals involved in court intervention programs.[48] Submissions were overwhelmingly in favour of legislative reform to provide clarity in relation to the sharing of information between relevant agencies.[49] The Department of the Attorney General submitted that the current Western Australian legislation (referred to above) does

> not address appropriate provision of information from and across other agencies typically involve in the collaborative model of court intervention programs. The sharing and disclosing of information has to date typically been addressed through the establishment of protocols and memoranda of understanding. This process has inherent difficulties and risks that may be more appropriately addressed through legislative reforms.[50]

On the other hand, submissions were not forthcoming in regard to the extent or nature of information sharing that should be dealt with in legislation. Having examined legislative schemes in other jurisdictions the Commission is of the view that there are a number of key principles that should underpin the exchange of information between agencies and individuals involved in court intervention programs:

- Generally, information should only be exchanged for the purposes of the court intervention program; that is, to assess and determine eligibility; to determine the participant's treatment and support needs; to monitor the participant's performance on the program; to impose the final sentence at the completion of the program (or if terminated before completion); and, if necessary, to provide information to an agency post-sentence to facilitate continuation of treatment or to avoid duplication of treatment and assessments.
- Participation in court intervention programs is voluntary (in the sense that the participant must provide informed consent[51]). The requirement for informed consent should include consent to the disclosure of information between various agencies. Before assessment takes place the potential participant should be informed about what type of information will be disclosed and to whom the information will be provided.[52]

43. LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 29.
44. Also, some agencies or individuals may not be willing to disclosure information if the disclosure would constitute a breach of ethical or professional obligations. Even if legislative protection (against civil, criminal or disciplinary proceedings) is provided, some agencies or individuals may still be reluctant to disclose information because the disclosure may undermine the relationship with their client. In its submission, the Department of the Attorney General noted that the Aboriginal Dispute Resolution Service did not want to be required to disclose information because it would breach client confidentiality: Department of the Attorney General, Submission No. 21 (13 November 2008) 1.
45. Officer of the Auditor General (WA), *The Juvenile Justice System: Dealing with young people under the Young Offenders Act 1994*, Report No. 4 (2008) 26.
46. *Sentence Administration Act 2003* (WA) s 97B(2); *Young Offenders Act 1994* (WA) s 16; *Prisons Act 1981* (WA) s 113.
47. See also Department of the Attorney General, Submission No. 21 (13 November 2008) 1. The Commission notes that private service providers are bound by the National Privacy Principles under the *Privacy Act 1988* (Cth) but this legislation does not apply to state government agencies. The *Information Privacy Bill 2007* (WA) was introduced by the previous government but has since lapsed with the change of government. This bill deals with information sharing by Western Australian government agencies. It has been observed that the enactment of this bill would 'increase the extent of information sharing permitted in appropriate circumstances': Officer of the Auditor General (WA), *The Juvenile Justice System: Dealing with young people under the Young Offenders Act 1994*, Report No. 4 (2008) 27.
48. Consultation Question 1.1.
49. Legal Aid WA, Submission No. 11 (30 September 2008) 8; Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 11; Dr Andrew Cannon, Deputy Chief Magistrate of South Australia, Submission No. 17 (13 October 2008) 2; Western Australia Police, Submission No. 18 (14 October 2008) 1; Department of the Attorney General, Submission No. 21 (13 November 2008) 1.
50. Department of the Attorney General, Submission No. 21 (13 November 2008) 1.
51. The Commission explained in its Consultation Paper, that consent to participate in court intervention programs is usually 'coerced' because the offender has a choice to participate or be dealt with in the conventional manner. For some offenders it is a constrained choice between imprisonment or participation in the program: LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 47.
52. The Magistrates Court Diversion Program (SA) has a written consent form that deals with consent to assessment and participation in the program and consent to the sharing of information between treatment and service providers. The signed consent form covers consent for assessment; consent

- It should be possible to exchange information (even without the offender's consent) if disclosure is reasonably necessary to lessen or prevent a serious threat to the health, safety or welfare of any person.
- There should be a distinction between information that must be disclosed (eg, compliance information) and information that may be disclosed (eg, information that may be relevant to the nature of the participant's treatment program).
- Any legislative provision requiring the disclosure of information should protect agencies from criminal, civil, professional disciplinary proceedings (ie, on the basis that the participant has signed a consent form to the disclosure of information for the purpose of the program).
- Shared information may be recorded and potentially used against the program participant in other legal proceedings (eg, if subpoenaed). Depending on the nature of the court intervention program and the type of information obtained about the participant it may be appropriate to provide that certain information is inadmissible in any other unrelated legal proceedings.

The Commission has concluded that legislative provisions dealing with the specific requirements of information sharing should be contained in regulations. This will promote flexibility and enable individual programs to develop the most appropriate rules in consultation with the agencies involved in the program. The recommended legislative framework below includes the power to make regulations in regard to information sharing and reflects the principles discussed above.

Determining treatment and program needs

In court intervention programs judicial officers may be directly involved in determining the treatment and program needs of participants. In the Consultation Paper it was observed that court intervention programs have been criticised because judicial officers may not be sufficiently trained or have the appropriate skills to accurately determine an offender's treatment and program needs. However, the Commission also emphasised that decisions about treatment and program needs are not made by judicial officers in isolation; a team of agencies and individuals are involved in the decision-making process. Nonetheless, the Commission invited submissions about whether it should be provided in legislation that a particular type of treatment can only be ordered if that treatment has first been recommended by a qualified person.[53]

The Commission received four submissions in response to this consultation question. In its submission, Legal Aid WA stated that it is appropriate to require a qualified person to assess an offender's treatment needs.[54] The Department of the Attorney General explained that at present courts would generally only order specific treatment if that treatment had been recommended by a qualified person and submitted that 'incorporating this requirement into legislation for [court intervention programs] would ensure best practice'.[55] However, the Magistrates Court noted that it may be difficult to define what is meant by a 'qualified person' and further queried whether it is appropriate for courts to be bound by the recommendation of a qualified person. It was noted that there may be cases where participation in a specific treatment program would be appropriate even though participation had not been recommended by a qualified person.[56] Similarly, Dr Andrew Cannon cautioned that a legislative requirement for treatment to be recommended by a qualified person may operate as a 'barrier to treatment'. He also suggested that the issue of determining treatment and programs needs is a matter that could be dealt with under court rules.[57]

The Commission understands that it may be counterproductive to always require a prior recommendation from a qualified person before allowing an offender to participate in a particular treatment program, especially if the offender is willing to participate and a space on the program is available. However, it may be inappropriate for offenders to be required to undergo particular types of treatment programs in the absence of an assessment and recommendation by a qualified person (such as a psychiatrist, psychologist or counsellor). Bearing in mind the vast array of possible treatment programs available through court intervention programs, the Commission is of the view that the *Criminal Procedure Act* should enable regulations to be made in relation to this issue.

to obtain relevant information from past service providers; consent to the exchange of information between program staff and service providers; consent to the exchange of information for evaluation purposes; and consent for reports to be given to the Department for Correctional Services if the participant is placed on a continuing order. The consent form lists the relevant agencies and individuals for whom consent to exchange information is given. The consent form also provides that the consent is valid for the duration of the program assessment process, the duration of any participation in the program, and post-sentence for the purpose of providing reports to the Department for Correctional Services and also for program evaluation: Magistrates Court Diversion Program (SA), *Procedure Manual* (2008) 2, 6 & Appendix J.

53. LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 32, Consultation Question 1.2. In this regard it is noted that s 33 of the *Sentencing Act 1995* (WA) provides that a 'speciality court or a CCO must not order an offender [who is subject to a PSO] to undergo treatment of any sort unless a person qualified to recommend or administer the treatment has recommended that the offender undergo such treatment'. Similar provisions exist in relation to Community Based Orders, Intensive Supervision Orders and Conditional Suspended Imprisonment.
54. Legal Aid WA, Submission No. 11 (30 September 2008) 8.
55. Department of the Attorney General, Submission No. 21 (13 November 2008) 2.
56. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 11.
57. Dr Andrew Cannon, Deputy Chief Magistrate of South Australia, Submission No. 17 (13 October 2008) 2.

RECOMMENDATION 2

General legislative framework for court intervention programs

1. That a new division headed 'Court Intervention Programs' be inserted into Part 5 of the *Criminal Procedure Act 2004* (WA). This division should:

   (a) Set out that the object of the Division is to provide a framework for the recognition and operation of court intervention programs.

   (b) Define a 'court intervention program' as a program:

      (i) that provides to persons charged with offences, prior to their sentence, treatment or support services designed to address the underlying causes of offending behaviour and encourage and assist rehabilitation;

      (ii) in which the person's participation in the program is monitored, supervised or managed by a court, and is taken into account when sentencing the offender; and

      (iii) that is prescribed to be a court intervention program under the *Criminal Procedure Regulations 2005* (WA).

   (c) Provide that nothing in this Division affects or limits the operation of other diversionary, rehabilitation or treatment programs.

   (d) Provide that participation in a court intervention program prescribed under the regulations can occur at various stages of the criminal justice process. Specifically:

      (i) An accused may be eligible to voluntarily participate on an unconditional basis in a prescribed court intervention program before conviction.

      (ii) An accused may be eligible to participate in a prescribed court intervention program before conviction as a condition of bail.[58]

      (iii) An offender may be eligible to participate in a prescribed court intervention program before sentencing for up to 12 months as a condition of bail.[59]

      (iv) An offender may be eligible to participate in a prescribed court intervention program as part of a Pre-Sentence Order.[60]

      (v) An offender may be eligible to participate in the Perth Drug Court Program as a condition of a Drug Treatment Order.[61]

   (e) Provide that for the purpose of determining an offender's eligibility and suitability for participation in a prescribed court intervention program and for the purpose of determining whether the offender is complying with or has complied with the requirements of a prescribed court intervention program, a judicial officer may order that the offender reappear in court at a particular time and place.

   (f) Provide that assessment for and participation in any prescribed court intervention program can only be undertaken with the offender's informed written consent (including consent to the necessary exchange of information between agencies involved in the program).

   (g) Provide that in relation to an accused who has been committed to the District Court or the Supreme Court, a magistrate may order that the offender reappear in the Magistrates Court before the first appearance in the District Court or the Supreme Court for the purpose of determining if the offender is complying with a prescribed court intervention program.[62]

   (h) Provide that regulations under the *Criminal Procedure Regulations 2005* may be made in relation to the following matters:

      (i) the exchange of information between various agencies or individuals involved in one or more prescribed court intervention programs and that the regulations may provide:

         (a) that compliance information (ie, information about whether the offender or the accused is complying with the requirements of the program) *must* be disclosed and that other relevant information *may* be disclosed;

58. See Recommendation 3.
59. See Recommendation 13.
60. See Recommendation 5.
61. As recommended by the Commission in Chapter 3, see Recommendation 20.
62. See Recommendation 4.

(b) that relevant information is information that is required for the purposes of assessment; determining eligibility; considering the treatment and support needs for a participant; monitoring a participant's performance during the program; providing a report to the court about the participant's performance during the program and/or for sentencing, and facilitating continuity of treatment and support post-sentence or following termination from the program;

(c) that information that is subject to legal professional privilege is not to be disclosed;

(d) that information may be disclosed (even without the consent of the offender) if disclosure is reasonably necessary to lessen or prevent a serious threat to the health, safety or welfare of any person;

(e) the agencies, organisations and individuals that are required or entitled to disclose information in relation to a particular prescribed court intervention program;

(f) to whom the information is or may be disclosed;

(g) how information is to be recorded and stored;

(h) for the protection of an agency, organisation or individual from civil or criminal liability or disciplinary proceedings resulting from the provision of information in accordance with the regulations;

(i) for the admissibility of information in other legal proceedings.

(ii) a requirement for a qualified person to assess and/or recommend a particular type of treatment program for an offender participating in a prescribed court intervention program; and

(iii) any other relevant matter.

(i) Provide that any court may make rules in relation to the following matters (and that the rules are to be made in the same manner as court rules are required to be made under either the *Magistrates Court Act 2004*; *District Court Act 1969* or *Supreme Court Act 1935*):

(i) the requirements and conditions of a particular prescribed court intervention program;

(ii) the provision of reports to a court administering a prescribed court intervention program including who is entitled to access reports and how access is to be granted;

(iii) the eligibility criteria of a particular prescribed court intervention program;

(iv) any offences that are excluded from a particular prescribed court intervention program;

(v) the length of a particular prescribed court intervention program; and

(vi) any other relevant matter.

2. That under the *Criminal Procedure Regulations 2005* the following existing court intervention programs be prescribed:

Perth Drug Court Program;
Children's Court Drug Court Program;
Joondalup Family Violence Court Program;
Rockingham Family Violence Court Program;
Fremantle Family Violence Court Program;
Midland Family Violence Court Program;
Armadale Family Violence Court Program;
Perth Family Violence Court Program;
Barndimalgu Court Program;
Kalgoorlie-Boulder Community Court Program;
Norseman Community Court Program;
Geraldton Alternative Sentencing Regime;
Supervised Treatment Intervention Regime (STIR);
Youth Supervised Treatment Intervention Regime (YSTIR); and
Intellectual Disability Diversion Program (IDDP). [63]

63. Other court intervention programs, such as any pilot program recommended in this Report, should be prescribed before the program commences operation.

Bail

The Commission's recommended general legislative framework (Recommendation 2) sets out the different ways in which an offender may be entitled to participate in a court intervention program. Requiring an offender to comply with the requirements of a court intervention program as a condition of bail is one of the Commission's recommended pathways. For court intervention program participants, bail conditions could be specific (eg, an offender may be ordered not to consume alcohol/drugs or to attend counselling on specified days and times) or the bail conditions could be general (eg, to comply with the lawful directions of the Intellectual Disability Diversion Program Coordinator).

In simple terms, the main objectives of bail are to ensure that an accused attends court when required and does not reoffend whilst on bail. Different forms of bail and various types of bail conditions can be imposed to meet these objectives.[1] As the Commission discussed in the Consultation Paper, a bail condition requiring an accused to comply with the requirements of a prescribed court intervention program could legitimately be imposed to address underlying problems (such as drug-dependency, mental illness or homelessness) in order to reduce the risk of reoffending or the risk of failing to appear in court. In such cases failure to comply with the condition of bail enables the offender to be brought back to court and for the court to reconsider whether the offender should remain in the community (and, if so, under what conditions) or be remanded in custody.

CONDITIONAL BAIL

After examining the *Bail Act 1982* (WA) and statutory schemes in other jurisdictions, the Commission proposed in its Consultation Paper that the *Bail Act* be amended to provide that a judicial officer may impose a condition that an accused comply with the requirements of a prescribed court intervention program provided that the condition is necessary to ensure that the accused appears in court, does not commit any further offences on bail or does not endanger the safety, welfare or property of any person.[2] Four out of five of the submissions specifically responding to this proposal were supportive.[3] Although the *Bail Act* arguably already gives courts the power to impose such a condition, for the sake of clarity the Commission has concluded that it is appropriate to amend the *Bail Act* as originally proposed.[4]

RECOMMENDATION 3

Bail Conditions

That Schedule 1, Part D, clause 2 of the *Bail Act 1982* (WA) be amended to provide that a judicial officer may impose a condition upon an accused that he or she comply with any requirements of a court intervention program that has been prescribed under the *Criminal Procedure Regulations 2005* (WA) (including a condition that the accused comply with any requirements necessary to enable an assessment to be made in relation to the accused's suitability to participate in the prescribed court intervention program) provided that such a condition is desirable to ensure that the accused appears in court in accordance with his or her bail undertaking; does not, while on bail, commit an offence; or does not endanger the safety, welfare or property of any person.

Bail before conviction

In its Consultation Paper the Commission observed that the position before conviction is more complicated because an accused is presumed innocent and, therefore, it is important that unconvicted accused are not required to comply with unnecessary or overly punitive bail conditions. In order to reduce the potential for this to occur the Commission proposed that a bail condition to comply with the requirements of a prescribed court intervention program should not be imposed before conviction if the accused has

1. LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 187.
2. Proposal 6.3.
3. Christine Anderton, Submission No. 1 (12 September 2008) 1; Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 9; Department of Corrective Services, Submission No. 19 (6 October 2008) 1; Department of the Attorney General, Submission No. 21 (13 November 2008) 17. The Commission received one submission questioning the appropriateness of this proposal. It was noted that it should be clarified what is meant by a court intervention program in the proposed legislative provision: Confidential Submission No. 8 (30 September 2008) 9. In the proposal the Commission referred to a 'prescribed court intervention program'. In Recommendation 3 below, the Commission refers to a court intervention program prescribed under the *Criminal Procedure Regulations*.
4. See *Bail Act 1982* (WA) Cl 2, Pt D, Sch 1. See LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 190–191.

already been released on unconditional bail by a court or if a court has already determined that bail could be dispensed with.[5] If a court has already determined that bail can be dispensed with under s 7A of the *Bail Act* or if an accused has already been released on an unconditional bail undertaking,[6] it would be unfair to subsequently impose a bail condition *solely* for the purpose of facilitating participation in a court intervention program.

This proposal was not supported by the Magistrates Court of Western Australia; it was highlighted that in order to enable a non-complying program participant to be brought back to court 'without delay' (via arrest) it is necessary to impose a bail condition. It was also suggested that the requirement for informed consent (ie, that the participant agrees to the bail condition) reduces the potential for unfairness.[7] The Department of the Attorney General also submitted that bail conditions are necessary in order to enable the offender to be arrested and bought back to court.[8] The Commission does not agree that the requirement for informed consent overcomes the potential for unfairness and net-widening. An accused may consent due to self-motivation or because of the possibility of a reduced penalty; however, the existence of consent does not alter the appropriateness or otherwise of the conditions that have been imposed. Either the bail conditions are necessary to achieve the objectives of bail or they are not.

The Commission notes that the number of potential program participants who will be suitable to be released unconditionally will be very small. The vast majority of program participants will have a significant risk of reoffending due to the presence of underlying factors such as substance abuse, mental health problems, homelessness and other behavioural or social problems. Therefore, for most program participants it will be entirely appropriate to set as a condition of bail that the participant complies with the requirements of the court intervention program. However, an accused with a negligible risk of reoffending or absconding should be entitled to participate unconditionally provided that the accused is eligible and suitable for the program. If a court has already determined that bail can be dispensed with or that the accused is suitable to be released on unconditional bail, it would be inappropriate to alter that decision simply to enable program participants to be returned to court quickly. In these circumstances, non-complying participants can be terminated from the program and dealt with in the usual manner.[9]

5. LRCWA, ibid 187–189 & Proposal 6.3.
6. An unconditional bail undertaking is an undertaking to appear in court at a specified time and place without any further obligations, requirements or restrictions.
7. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 9.
8. Department of the Attorney General, Submission No. 21 (13 November 2008) 17.
9. Further, if a police officer or prosecutor reasonably believes that an accused who is subject to unconditional bail (or for whom bail has dispensed with) is unlikely to *appear in court* when required, the accused can be arrested or summons: *Bail Act 1982* (WA) ss 55 & 59A.
10. See Consultation Question 6.2.
11. Patrick J, 'Pre Plea Therapeutic Interventions by the Courts' (Paper presented at the 3rd International Conference on Therapeutic Jurisprudence, Perth, 7–9 June 2006) 2–3; LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 191.
12. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 23; Department of the Attorney General, Submission No. 21 (13 November 2008) 17.

Having said this, the Commission recognises that the way in which its proposal was originally framed may be unduly restrictive. The proposal meant that if bail had already been dispensed with or if unconditional bail had been imposed, a court could not subsequently impose a bail condition to comply with the requirements of a court intervention program. New information may come to light or circumstances may have changed after the initial decision to impose unconditional bail (or dispense with bail) was made. In these circumstances it may be appropriate to set specific bail conditions. Accordingly, the Commission has concluded that Recommendation 3 (above) is sufficient to ensure that only appropriate bail conditions are imposed upon court intervention program participants.

Bail after conviction

In the Consultation Paper, the Commission also sought submissions about whether any further amendments to the *Bail Act* are required to facilitate post-conviction participation in court intervention programs.[10] It was noted that post-conviction participation is different to participation before conviction because there 'is no question that courts have the authority legally and ethically to implement such interventions when sentencing'.[11]

Before 1 March 2009 bail could only be granted following conviction if there was an exceptional reason or if there was a strong likelihood of a non-custodial sentence being imposed. Clause 4, Part C, Schedule 1 of the *Bail Act* has now been amended and judicial officers have much wider discretion in regard to post-conviction bail. Accordingly, and consistent with submissions received in response to this question,[12] the Commission does not consider that any further amendments to the *Bail Act* are required in relation to post-conviction participation in court intervention programs.

SUPERIOR COURT MATTERS

As explained above, under the Commission's recommended legislative framework, the operation of court intervention programs is not restricted to lower courts because court intervention strategies may be appropriate for some superior court matters. However, it is important to consider the most efficient way to enable participation by offenders facing superior court matters. Generally,

it would be impractical to establish separate court intervention programs in superior courts. Because all criminal charges commence in the lower courts, offenders who are facing superior court matters should be permitted (in appropriate circumstances) to commence participation in a court intervention program while the charge is still being dealt with in the Magistrates Court and continue to participate in the program after the matter has been committed to the superior court.

Once an offender has been committed for sentence to a superior court, the magistrate will set bail for that appearance and the offender will be required under the bail undertaking to appear in the superior court on a particular day and at a specified time. In order to facilitate continued participation in a court intervention program, the magistrate could also set as a *condition* of bail that the offender must reappear in the Magistrates Court for the purpose of determining if the offender is complying with a court intervention program. However, a failure to appear in the Magistrates Court would not constitute an offence of breaching bail under the *Bail Act* because it would amount to a breach of a condition rather than a breach of a bail undertaking. The threat of being charged with an offence of breaching bail is one tool used to encourage compliance and attendance at court during a court intervention program, especially for more serious offenders facing imprisonment. For that reason, the Commission proposed in its Consultation Paper that the *Bail Act* be amended to provide that when committing an offender for sentence to a superior court a magistrate may order that the offender reappear in the Magistrates Court for the purpose of considering if the offender is complying with a prescribed court intervention program at any time before the offender's first appearance in the superior court.[13] Both the Magistrates Court of Western Australia and the Department of the Attorney General supported this proposal.[14] The Commission has therefore concluded that it is appropriate to make a recommendation that a magistrate can order an offender to reappear in the Magistrates Court after the charge has been committed to a superior court.

RECOMMENDATION 4

Committal for sentence to a superior court

That the *Bail Act 1982* (WA) be amended to provide that:

1. when committing an offender for sentence to a superior court a magistrate may order that an offender reappear before a Magistrates Court at a specified time and place in order to ascertain if the offender is complying with a court intervention program prescribed under the *Criminal Procedure Regulations 2005* (WA) during any period before the offender's first appearance in the superior court; and

2. at any reappearance ordered under (1) above, a magistrate may again order that the offender reappear before a Magistrates Court at a specified time and place in order to ascertain if the offender is complying with the court intervention program during any period before the offender's first appearance in the superior court.

It was also argued in another submission that if a superior court was considering the question of bail for a potential court intervention program participant, the superior court would not necessarily be aware of the precise requirements of the program and would therefore not be in a position to set the specific bail conditions that should be imposed.[15] In practice, most offenders would commence participating in a court intervention program prior to appearing in the superior court. Once the offender appears in the superior court for sentencing a judge could impose a Pre-Sentence Order to enable the offender to complete the program.[16] If it were necessary for a superior court judge to determine the question of bail for a court intervention program participant, relevant information about program requirements could be provided to the judge by the prosecutor, defence counsel and/or a community corrections officer.

13. See Proposal 6.4
14. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 9; Department of the Attorney General, Submission No. 21 (13 November 2008) 17.
15. Confidential Submission No. 8 (30 September 2008) 10.
16. A Pre-Sentence Order can be imposed if the offence warrants a term of immediate imprisonment and this is likely to be the case with the vast majority of superior court matters. The Commission makes recommendations in relation to Pre-Sentence Orders below: see Recommendations 5–10.

Pre-sentence orders

Pre-Sentence Orders (PSOs) were introduced in Western Australia in 2003. A PSO can be imposed by any court for up to two years for the purpose of enabling an offender who is facing a term of immediate imprisonment to address the causes of his or her offending behaviour and demonstrate—by successfully complying with the order—that a non-custodial disposition may be appropriate.[1] The relevant provisions of the *Sentencing Act 1995* (WA) recognise the concept of judicial monitoring by enabling a judicial officer to order that the offender reappear in court at regular intervals to determine if the offender is complying with the requirements of the order.

In its Consultation Paper the Commission identified a number of problems with the current statutory scheme for PSOs and made a series of proposals to ensure that PSOs could effectively be used for eligible offenders participating in any court intervention program.[2] Accordingly, it was envisaged that PSOs would be the primary method of participation in court intervention programs for more serious offenders (except for offenders participating in drug court programs). For drug court programs, the Commission recommends a separate pre-sentence Drug Treatment Order. The reasons for this recommendation are explained in Chapter Three of this Report.

COURT INTERVENTION PROGRAMS AND PRE-SENTENCE ORDERS

At present, PSOs are available to any court; however, a prescribed 'speciality court' has additional powers in relation to these orders. A speciality court can impose requirements in regard to the assessment of offenders; treatment programs; educational and vocational programs; and residential and curfew conditions.[3] For all other courts, these requirements are determined by a community corrections officer. In court intervention programs these types of decisions tend to be made by the court in conjunction with and after receiving advice from the team of agencies involved.

The Perth Drug Court is currently the only prescribed speciality court. In order to ensure that these additional powers are available to any court in respect to an offender who is participating in a court intervention program, the Commission proposed that all the references to 'speciality court' in Part 3A of the *Sentencing Act* be deleted and replaced with the phrase 'a court administering a prescribed court intervention program'.[4] For example, s 33G of the *Sentencing Act* now provides that if a 'program requirement' is ordered as part of a PSO the offender must obey the orders of a 'speciality court' or community corrections officer in relation to various treatment options. Under the Commission's proposal, the imposition of a program requirement would mean that the offender must obey the orders of a court administering a court intervention program.

An alternative option suggested to broaden the availability of these additional powers is to prescribe further speciality courts.[5] However, as the Commission has already emphasised, not all court intervention programs operate as dedicated courts or even as dedicated lists in a particular court. Both the Magistrates Court of Western Australia and Department of the Attorney General supported the Commission's proposal and the Magistrates Court highlighted that the proposal was appropriate because not all programs operate as dedicated 'courts'.[6] Accordingly, the Commission makes a recommendation in similar terms to its original proposal.

RECOMMENDATION 5

Court intervention programs and Pre-Sentence Orders

That all references to a 'speciality court' in Part 3A of the *Sentencing Act 1995* (WA) be deleted and replaced with the phrase 'a court administering a court intervention program that has been prescribed under the *Criminal Procedure Regulations 2005* (WA)'.

1. *Sentencing Act 1995* (WA) s 33A(3).
2. LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 199–202 (Proposals 6.9–6.14).
3. *Sentencing Act 1995* (WA) ss 33G & 33H.
4. Proposal 6.9.
5. Confidential Submission No. 8 (30 September 2008) 11.
6. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 10.

THE OPERATION OF PRE-SENTENCE ORDERS

Excluded offences

Currently, PSOs are not available if the current offence(s) was committed during an early release order, during a period of suspended imprisonment or if the penalty for the offence is mandatory imprisonment.[7] In the Consultation Paper, the Commission proposed that eligibility for a PSO be expanded to include offenders who have committed an offence while subject to a period of suspended imprisonment because such offenders should not be *automatically* excluded from the operation of a court intervention program.[8] The Commission also invited submissions as to whether any other changes should be made in regard to the current statutory eligibility criteria for PSOs.[9]

The Commission received one submission questioning the appropriateness of its proposal because an offender who breaches a term of suspended imprisonment is likely to be sent to prison.[10] The Commission is aware that if an offender breaches a term of suspended imprisonment he or she will be ordered to serve the period of imprisonment unless it 'would be unjust to do so in view of all the circumstances that have arisen, or have become known, since the suspended imprisonment was imposed'.[11] Nonetheless, there may be cases where participation in a court intervention program is appropriate even though a suspended sentence has been breached. The Commission is not suggesting that all offenders who breach a suspended sentence should be permitted to participate in a court intervention program. However, the Commission has concluded that such offenders should not be automatically excluded from PSOs bearing in mind that PSOs are actually designed for offenders who are potentially facing a term of immediate imprisonment. The Commission's view is supported by the Magistrates Court of Western Australia,[12] the Department of the Attorney General,[13] and the Department of Corrective Services.[14] There was no support for any further extensions to the eligibility criteria for PSOs[15] and accordingly the Commission recommends that offenders who were subject to a suspended term of imprisonment at the time of the current offence(s) should be eligible for a PSO.

7. *Sentencing Act 1995* (WA) s 33A.
8. Proposal 6.13.
9. Consultation Question 6.4.
10. Confidential Submission No. 8 (30 September 2008) 11.
11. *Sentencing Act 1995* (WA) s 80.
12. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 10 & 24.
13. Department of the Attorney General, Submission No. 21 (13 November 2008) 18.
14. Department of Corrective Services, Submission No. 19 (6 October 2008) 1.
15. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 24.

RECOMMENDATION 6

Eligibility for Pre-Sentence Orders

That s 33A(2a)(b) of the *Sentencing Act 1995* (WA) be repealed so that an offender who was subject to a suspended sentence of imprisonment at the time of committing the current offence(s) is not automatically ineligible for a Pre-Sentence Order.

Enforcing and encouraging compliance

Amending a Pre-Sentence Order

Court-supervised programs potentially enable more effective and rapid responses to changes in an offender's circumstances than traditional community corrections supervision. In particular, a court might alter the requirements of a program as a reward for compliance or impose additional or different obligations to encourage improved performance in the future. In general terms, community-based orders (supervised by community corrections officers) can only be amended after a formal written application has been made by either the offender or a community corrections officer. The application cannot be heard for at least seven days after the application has been lodged with the relevant court.[16] Therefore, the ability of a court to change the requirements of an order is dependent upon an application being made (or proceedings being instituted for a breach of an order).

Similar, although not identical, provisions apply in respect of PSOs.[17] In addition to the power to amend a PSO after an application has been made by the offender or a community corrections officer in the approved form, a court can amend a PSO at any subsequent court appearance that has been ordered for the purpose of determining if the offender has been complying with the requirements of the order.[18] Regular court appearances for the purpose of monitoring compliance are common to all court intervention programs but the frequency of these court appearances varies between programs. Some programs require re-attendance at court on a weekly basis while others may only require subsequent court appearances once or twice during the program. In the absence of a pre-determined court date[19] to

16. *Sentencing Act 1995* (WA) s 126 (1)(b); *Sentencing Regulations 1996* (WA) Reg 10. An application by a community corrections officer can only be made with approval of the CEO (Corrections).
17. *Sentencing Act 1995* (WA) s 33M.
18. *Sentencing Act 1995* (WA) s 33N.
19. The pre-determined court date may be set at a previous court date or the offender can be summonsed to appear in court at a particular time and place: *Sentencing Act 1995* (WA) s 33C.

monitor compliance, the power to amend a PSO is still limited – there must be a formal application by the offender or community corrections officer and a waiting period of at least seven days before the application can be heard.

Further, the requirements of a PSO can only be amended if the court is satisfied that the circumstances of the offender were 'wrongly or inaccurately presented to the court' at the time the order was made or 'have so altered since the court made the PSO that the offender will not be able to comply with the requirements of the PSO'.[20] The Commission is of the view that the provisions in regard to amending a PSO are restrictive. In the absence of a pre-determined court appearance the requirements for a formal written notice and a seven-day waiting period may prevent the court (and the team of agencies involved in a court intervention program) from responding effectively to the offender's circumstances. Also, the legislative provisions do not appear to enable a court to amend the requirements of the order as a reward for compliance or to ensure that the most appropriate treatment programs are being administered.

In its Consultation Paper the Commission proposed more flexible provisions dealing with the power to amend a PSO. Specifically, it was envisaged that a court should be entitled to amend a PSO at any time (rather than waiting seven days after an application has been lodged) so long as all parties have been given an opportunity to be heard. Further, it was proposed that a court be entitled to amend a PSO if the amendment is necessary for the effective rehabilitation of the offender or to reduce the risk that the offender reoffends during his or her participation in the prescribed court intervention program.[21] The Commission received a number of submissions in support of this proposal.[22]

Consistent with its original intention, the Commission recommends that an application to amend a PSO that has been imposed by a court administering a prescribed court intervention program should be able to be made by the offender, a community corrections officer, the prosecutor or any other party who is involved in providing programs or services to the offender in connection with the court intervention program. Further, the court should have the power to waive the requirement that the application must be made in accordance with the regulations provided that all parties have been given reasonable notice of the application and an opportunity to be heard. Because of the collaborative approach adopted in court intervention programs there will be cases where all parties agree with the proposed amendment and it is important that the amendment can be made as soon as possible without unnecessary administrative requirements. In addition, the Commission recommends that the power to amend the requirements of a PSO imposed by a court administering a prescribed court intervention program be expanded as suggested in the Commission's original proposal. The Commission notes that any changes to an offender's treatment regime will be subject to the overriding condition that a person cannot administer treatment (ie, medical, psychiatric, psychological and other assessments; assessment and treatment for substance abuse, educational, vocational or personal development programs; and residential conditions) to an offender without his or her informed consent.[23]

RECOMMENDATION 7

Amending a PSO

1. That s 33M of the *Sentencing Act 1995* (WA) be amended to provide that:
   (a) if a Pre-Sentence Order includes a requirement to obey the orders of a court administering a court intervention program prescribed under the *Criminal Procedure Regulations 2005* (WA), an application to amend the requirements of the Pre-Sentence Order can be made by the offender, a community corrections officer, a prosecutor or any person involved in providing treatment or support services to the offender as part of the prescribed court intervention program;
   (b) a court administering a prescribed court intervention program can waive the requirement under s 33M(3) that the application must be made in accordance with the regulations provided that all parties have been given reasonable notice and an opportunity to be heard.
2. That s 33N(1) of the *Sentencing Act 1995* (WA) be amended to provide that a court administering a court intervention program prescribed under the *Criminal Procedure Regulations 2005* (WA) can amend the requirements of a Pre-Sentence Order if satisfied that the amendment is necessary for the effective rehabilitation of the offender or to reduce the risk that the offender reoffends during his or her participation in the prescribed court intervention program.

20. Section 33N states that a court can amend or cancel a PSO if the court is satisfied that the circumstances of the offender have altered so that it is no longer appropriate for the offender to be subject to a PSO. This would apply to cancelling the order because if it was no longer appropriate for the offender to be subject to a PSO the order would be cancelled not amended.
21. Proposal 6.10.
22. Christine Anderton, Submission No. 2 (12 August 2008) 1; Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 10; Department of Corrective Services, Submission No. 19 (6 October 2008) 1; Department of the Attorney General, Submission No. 21 (13 November 2008) 18.
23. *Sentencing Act 1995* (WA) s 33G(4).

Breaching a Pre-Sentence Order

Similarly, it is important for a court administering a court intervention program to be able to respond quickly to breaches or alleged breaches of the requirements of the PSO. Because of the disadvantages and underlying problems experienced by court intervention program participants a certain level of non-compliance may be excused; however, the response to non-compliance must be effective so that further breaches are discouraged. Of course, some breaches will be serious enough to warrant termination from the program and cancellation of the PSO.

Currently, the power to respond to a breach of the requirements of a PSO is dependent upon a warrant being issued by the CEO (Corrections). The CEO may issue a warrant to bring the offender before a court if he or she has reasonable grounds to believe that the offender has been, is, or is likely to be, in breach of any requirement of the PSO. Once the offender is brought before the court, the court can amend, cancel or confirm the PSO if satisfied that the offender has been, is, or is likely to be, in breach of any requirement of the PSO.[24] In the context of a court intervention program, the requirement for a warrant to be issued before the court can deal with a breach of the requirements of the order may be unduly restrictive. Due to the presence of a variety of agencies in court, a judicial officer may be satisfied that the offender has breached the order but will be unable to respond to the breach until the warrant has been issued. The Commission proposed that a court administering a prescribed court intervention program be entitled to respond to a breach at any time provided that the court is satisfied that the offender has been, is, or is likely to be in breach of any requirement of the PSO.[25] Overall, submissions received in response to this proposal were supportive.[26]

24. *Sentencing Act 1995* (WA) s 33P.
25. Proposal 6.11.
26. Christine Anderton, Submission No. 1 (12 August 2008) 1; Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 10; Department of Corrective Services, Submission No. 19 (6 October 2008) 1; Department of the Attorney General, Submission No. 21 (13 November 2008) 18. One submission noted an inconsistency between this proposal and the Commission's proposal for a Drug Treatment Order (Confidential Submission No. 8 (30 September 2008) 11). The Commission notes that under its recommended Drug Treatment Order (DTO) the Perth Drug Court will be able to amend the DTO but the order can only be cancelled by the court that imposed the DTO. The recommended DTO is different to a PSO. If a PSO is imposed, it may be a condition of the order that the offender has to obey the orders of a court administering a prescribed court intervention program. While this condition (and other conditions of the order) can only be amended by the court that imposed the PSO, a court administering a court intervention program will be able to vary program requirements. However, in contrast, all offenders subject to a DTO will be monitored by the drug court and the requirements of the drug court program will generally be specified as conditions of the actual DTO.

RECOMMENDATION 8

Breaching a Pre-Sentence Order

That s 33O of the *Sentencing Act 1995* (WA) be amended by inserting a new subsection 3A and that this subsection provide that if a court administering a court intervention program prescribed under the *Criminal Procedure Regulations 2005* (WA) has made a Pre-Sentence Order, that court can amend, cancel or confirm the Pre-Sentence Order at any time if the court is satisfied that the offender has been, is, or is likely to be, in breach of any requirement of the Pre-Sentence Order even though a warrant under subsection (1) has not been issued.

Sentencing day

Section 33K(1) of the *Sentencing Act* provides that when sentencing an offender who has been subject to a PSO the court 'must take into account the offender's behaviour while subject to the PSO'. In its Consultation Paper the Commission explained that this provision may work against effective participation in court intervention programs by penalising offenders for trying, albeit unsuccessfully, to address the causes of their offending behaviour and proposed that s 33K(1) be amended because it requires a court to take into account both 'good' and 'bad' behaviour.[27]

In regard to all court intervention programs, the Commission has concluded that failure to comply with a court intervention program should not be regarded as an aggravating factor. In other words, unsuccessful offenders should not be sentenced more severely than they would have been if they had never participated in the program. The Magistrates Court of Western Australia[28] and the Department of the Attorney General[29] agreed with the Commission's proposal to amend s 33K(1). Accordingly, the Commission recommends that s 33K(1) be amended to provide that failure to comply with the requirements of a PSO is not an aggravating factor. This recommendation ensures that unsuccessful offenders who have participated in a court intervention program while subject to a PSO are not treated more severely than other unsuccessful court intervention program participants.

27. Proposal 6.14.
28. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 10.
29. Department of the Attorney General, Submission No. 21 (13 November 2008) 18.

RECOMMENDATION 9

Non-compliance with a Pre-Sentence Order is not an aggravating sentencing factor

That s 33K(1) of the *Sentencing Act 1995* (WA) be amended so it provides that a court sentencing an offender who has been subject to a Pre-Sentence Order must take into account the offender's behaviour while subject to the Pre-Sentence Order; however, failure to comply with the requirements of the Pre-Sentence Order is not to be regarded as an aggravating factor.

Pre-Sentence Orders imposed by superior courts

In some instances, a superior court may impose a PSO upon an offender with the intention that the offender participates in a court intervention program that is administered by a Magistrates Court. This will be particularly relevant if the offender has already commenced participation in the program before appearing in the superior court. Currently, s 33C of the *Sentencing Act* enables the court that imposes the PSO to order subsequent court appearances for the purposes of monitoring the offender's compliance with the order. In the Consultation Paper, the Commission proposed that this section be amended so that if a superior court imposes a PSO it may also order that the offender reappears in a Magistrates Court at a particular time and place.[30]

Further, the Commission noted that if an offender breaches a PSO imposed by a superior court by reoffending the provisions of the *Sentencing Act* empower a court to commit the offender to the relevant superior court to deal with the breach of the order. However, if the offender breaches the PSO by failing to comply with the requirements of the order (other than by reoffending) the matter can only be bought before the superior court if the CEO (Corrections) issues a warrant to that effect.[31] The Commission proposed that a court administering a prescribed court intervention program be permitted to commit an offender to the superior court if satisfied that the offender has been, is, or is likely to be in breach of any requirement of the PSO.[32] The Commission received support for these proposals in submissions.[33]

RECOMMENDATION 10

Pre-Sentence Orders imposed by superior courts

1. That s 33C of the *Sentencing Act 1995* (WA) be amended to provide that if a superior court imposes a Pre-Sentence Order on an offender who has been, is, or will be participating in a court intervention program prescribed under the *Criminal Procedure Regulations 2005* (WA), the superior court may order that the offender reappear in the Magistrates Court that is administering the court intervention program for the purpose of ascertaining whether the offender is complying with the order.

2. That s 33P of the *Sentencing Act 1995* (WA) be amended to provide that a court administering a court intervention program prescribed under the *Criminal Procedure Regulations 2005* (WA) may commit an offender to the superior court that imposed the Pre-Sentence Order if satisfied that the offender has been, is, or is likely to be in breach of any requirement of the order.

30. Proposal 6.12.
31. *Sentencing Act 1995* (WA) ss 33O & 33P.
32. Proposal 6.12.
33. Christine Anderton, Submission No. 1 (12 August 2008) 1; Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 10; Department of Corrective Services, Submission No. 19 (6 October 2008) 1; Department of the Attorney General, Submission No. 21 (13 November 2008) 18.

Sentencing

Under the Commission's recommended framework for court intervention programs in Western Australia, participation in court intervention programs will occur before sentencing. Because court intervention programs are often as, if not more, onerous as traditional community-based sentences, it is important to make sure that there are incentives to encourage participation in programs and to reduce the potential for disproportionate sentencing outcomes at the completion of the program. A number of recommendations are made in this section to achieve these objectives.

SENTENCING PRINCIPLES

The purposes of sentencing

There is no single rationale for sentencing; instead sentences are imposed for various purposes such as punishment, deterrence, rehabilitation, denouncement and the protection of the community. Participation in court intervention programs is consistent with the objectives of rehabilitating offenders and protecting the community. In contrast to every other Australian jurisdiction, the purposes of sentencing are not expressly provided for in the *Sentencing Act 1995* (WA).[1] In the Consultation Paper, the Commission proposed that the *Sentencing Act* list the various purposes of sentencing to make it clear to the community that courts are required in appropriate cases to impose orders for the purpose of rehabilitation and/or to protect the community from future crime.[2] In making this proposal the Commission followed the New South Wales model because it accurately reflects contemporary sentencing purposes (including purposes that complement court intervention programs and other initiatives such as restorative justice).

The Commission received mixed responses to this proposal. The Department of the Attorney General supported the proposal[3] while the Magistrates Court of Western Australia declined to express a view.[4] Another submission argued that such a list is unnecessary because courts are already aware of the purposes of sentencing.[5] The Commission recognises that generally there are divergent views on this issue. A recent report on sentencing by the Tasmanian Law Reform Institute considered this question and recommended that the current Tasmanian legislative provisions dealing with sentencing purposes be amended, in particular, because they were not expressed as directions to courts but as objectives of the legislation. Further, it was emphasised that the purposes of punishment (retribution) and restoration should be included.[6] In making this recommendation it was acknowledged that the 'educative value' of a legislated list of sentencing purposes was doubtful because members of the public are unlikely to access legislation. Nonetheless, it was determined that there was no disadvantage in listing the purposes of sentencing and it was important to rectify the omission of certain sentencing purposes from the current legislation.

Overall, the Commission agrees with the view expressed by the Australian Law Reform Commission that including the purposes of sentencing in legislation 'would promote transparency in the sentencing processes' and better inform the community.[7] It is not suggested that members of the community would necessarily examine the legislation; however, it has been argued that a legislative list of sentencing purposes would encourage judicial officers to explain in their reasons the link between sentencing purposes and the actual sentence imposed. Further, because the recommendations in this Report are designed to improve the effectiveness of court intervention programs, it is important for all involved in the criminal justice system and for the wider community to appreciate that participation in court intervention programs is consistent with the goal of rehabilitation. The omission of rehabilitation as a legislative sentencing purpose under Western Australian legislation may impact upon the community's understanding of and confidence in the sentencing process.

1. The *Sentencing Act 1995* (WA) recognises certain sentencing principles; eg, proportionality (that the sentence must be commensurate with the seriousness of the offence) and that imprisonment is not to be imposed unless the protection of the community requires it (s 6).
2. Proposal 6.5.
3. Department of the Attorney General, Submission No. 21 (13 November 2008) 17.
4. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 9.
5. Confidential Submission No. 8 (30 September 2008) 10.
6. Tasmanian Law Reform Institute, *Sentencing*, Final Report No. 11 (2008) [7.1.35]–[7.1.36].
7. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of federal offenders,* Report No. 103 (2006) [4.33[.

RECOMMENDATION 11

The purposes of sentencing

1. That the *Sentencing Act 1995* (WA) be amended to provide that the purposes for which a court may impose a sentence on an offender are as follows:
   (a) to ensure that the offender is adequately punished for the offence;
   (b) to prevent crime by deterring the offender and other persons from committing similar offences;
   (c) to protect the community from the offender;
   (d) to promote the rehabilitation of the offender;
   (e) to make the offender accountable for his or her actions;
   (f) to denounce the conduct of the offender; and
   (g) to recognise the harm done to the victim of the crime and the community.
2. That the *Sentencing Act 1995* (WA) provide that the order in which these purposes are listed does not indicate that one purpose is more or less important than another and that a court may impose a sentence for one or more of the abovementioned purposes.

Relevant sentencing factors

In addition to listing the purposes of sentencing, legislation in many jurisdictions contains a list of relevant sentencing factors. In Western Australia, the *Sentencing Act* provides that the seriousness of the offence is determined by taking into account the statutory penalty; the circumstances of the commission of the offence, including the vulnerability of any victim of the offence; any aggravating factors; and any mitigating factors.[8] Not all aggravating or mitigating factors are specified in the legislation. In contrast to other jurisdictions, the Western Australian legislation has little direction on what is relevant for sentencing. In the Consultation Paper, the Commission proposed that the *Sentencing Act* be amended to provide for a non-exhaustive list of relevant sentencing factors and, further, that successful compliance with a court intervention program be included in that list. It was also proposed that the legislation should specify that failure to comply with a court intervention program is not a relevant sentencing factor.[9]

8. *Sentencing Act 1995* (WA) s 6.
9. Proposal 6.6.

After considering submissions the Commission has changed its view in relation to the inclusion of a general list of sentencing factors in the legislation.[10] One issue arising from the proposal that non-compliance with a court intervention program is not to be regarded as a relevant sentencing factor is that such a legislative direction may have unintended consequences. It might mean that a sentencing court is not entitled to be informed that an offender has failed to comply with the program and is not entitled to take that non-compliance into account when determining what type of disposition is appropriate.

Further, the Commission notes the difficulty in determining exactly what matters should be included in a general list of relevant sentencing factors because of the wide variety of factors that might be relevant to sentencing in any given case. The danger of listing some but not all factors is that significant factors might be overlooked in sentencing because they are not considered as important as the legislative factors.[11] And, as has been submitted to the Commission, simply including factors as relevant or not relevant may not actually assist the sentencing process. It is often more important to know how a particular factor is to be taken into account.

The primary purpose of the Commission's proposal was to ensure that unsuccessful court intervention program participants are not penalised for attempting to address their underlying problems and that there is a clear incentive for offenders to participate in relevant programs. The Commission now believes that this can be achieved more simply by recommending that failure to comply with a program is not an aggravating factor and that compliance with a court intervention program is a mitigating factor.

RECOMMENDATION 12

Relevance of participation in a court intervention program to sentence

1. That s 7(2) of the *Sentencing Act 1995* (WA) be amended by adding that an offence is not aggravated by the fact that an offender has failed to comply with or failed to agree to participate in a court intervention program prescribed under the *Criminal Procedure Regulations 2005* (WA).

10. One submission observed that a lengthy list of relevant sentencing factors may 'complicate and prolong the sentencing process: Confidential Submission No. 8 (30 September 2008) 10. The Magistrates Court of Western Australia agreed with the Commission's proposal in regard to the relevance of participation in a court intervention program but expressed no view on the proposal for a general list of relevant sentencing factors: Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 9. The Department of the Attorney General supported the proposal in its entirety: Department of the Attorney General, Submission No. 21 (13 November 2008) 17.
11. See generally, Tasmanian Law Reform Institute, *Sentencing*, Final Report No. 11 (2008) [7.1.44].

2. That s 8 of the *Sentencing Act 1995* (WA) be amended by adding that compliance with the requirements of a court intervention program prescribed under the *Criminal Procedure Regulations 2005* (WA), is a mitigating factor and the greater the level of compliance the greater the mitigation.

DEFERRAL OF SENTENCING

As observed by the Commission in its Consultation Paper, pre-sentence participation in court intervention programs will only be effective if sentencing is deferred for a sufficient period of time.[12] Currently, unless a PSO is appropriate, sentencing can only be deferred for a maximum of six months.[13] In its consultations with various agencies before the publication of its Consultation Paper, the Commission received overwhelming support for this period to be extended. Consequently, it was proposed that s 16(2) of the *Sentencing Act* be amended to enable sentencing to be deferred for up to 12 months and further submissions were sought about whether a period of 12 months was sufficient for the operation of court intervention programs. It was also proposed that s 16(1) be amended to provide that a court may adjourn sentencing to allow an offender to be assessed for and participate in a prescribed court intervention program.[14] The Magistrates Court of Western Australia, the Department of the Attorney General and the Department of Corrective Services agreed with the proposal to extend the deferral period to a maximum of 12 months (there was no support for any period longer than 12 months).[15]

One submission noted that the power to defer sentencing beyond six months (to a maximum of 12 months) should be restricted to offenders participating in court intervention programs.[16] Although this reference has not examined other criminal justice programs (eg, restorative justice and diversionary programs) the Commission has been mindful when making recommendations not to undermine the operation of other programs. Other programs may well benefit from an extended deferral period and accordingly the Commission sees no reason to limit the extended deferral period to offenders participating in a court intervention program.

12. LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 198.
13. *Sentencing Act 1995* (WA) s 16.
14. Proposal 6.8. Section 16(2) currently lists the reasons a number of reasons for deferring sentencing.
15. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 10; Department of Corrective Services, Submission No. 19 (6 October 2008) 1; Department of the Attorney General, Submission No. 21 (13 November 2008) 17. See also Christine Anderton, Submission No. 1 (12 August 2008) who supported all proposals in the Consultation Paper.
16. Confidential Submission No. 8 (26 September 2008) 11.

RECOMMENDATION 13

Deferral of sentencing

1. That s 16(1) of the *Sentencing Act 1995* (WA) be amended to provide that a court may adjourn sentencing of an offender to allow an offender to be assessed for and participate in a court intervention program prescribed under the *Criminal Procedure Regulations 2005* (WA).

2. That s 16(2) of the *Sentencing Act 1995* (WA) be amended to provide that the sentencing of an offender must not be adjourned for more than 12 months after the offender is convicted.

SENTENCING OUTCOMES

Different court intervention programs target different categories of offenders. Some court intervention program participants are offenders who have committed relatively minor offences but nevertheless can potentially benefit from court intervention to reduce the risk of future offending. Others are serious high-risk offenders facing imprisonment. Therefore, the sentencing outcomes for court intervention program participants will vary and include the full range of sentencing dispositions. Under the Commission's recommendations successful participants will receive a sentencing reduction because compliance with a court intervention program is a mitigating factor.

Recording of sentencing outcome

In its Consultation Paper the Commission observed that if a court sentences a successful participant to a more lenient penalty than would have been imposed if the offender had not participated in the program, the final recorded sentencing outcome may appear skewed.[17] For example, a serious offender who was facing imprisonment might be sentenced to a short Community Based Order after completing an intensive year-long drug court program. In order to ensure that the sentencing outcome properly reflects the circumstances of the offence the Commission proposed that when a court sentences an offender who has successfully completed a court intervention program the court should record the name and length of the program.[18] For example, if an intellectually disabled offender successfully complies with the Intellectual Disability Diversion Program for six months in relation to minor public nuisance offending and is given no sentence at the completion

17. LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 197.
18. Proposal 6.7.

of the program the sentencing outcome should be recorded as '*No sentence imposed (completed IDDP six months)*'.

Submissions received by the Commission supported this proposal.[19] In its submission the Magistrates Court of Western Australia added that the relevant particulars of the program should also be recorded as part of any criminal record subsequently presented to the court.[20] The Commission agrees with this suggestion because if an offender subsequently appears in court any successful participation in the program will be relevant to future bail and sentencing decisions.

RECOMMENDATION 14

Recording of sentencing outcome

1. That the Department of the Attorney General develop procedures to ensure that when an offender who has successfully complied with a court intervention program prescribed under the *Criminal Procedure Regulations 2005* (WA) is sentenced the court records as part of the sentencing outcome the name and length of the specific program.

2. That when a sentencing outcome is recorded to include reference to a specific court intervention program (as set out above) the Western Australia Police also record the name and length of the court intervention program on the official criminal record of convictions.

No sentence

As canvassed briefly above, imposing no further punishment may be an appropriate outcome for some successful court intervention program participants. In this regard, it is important to emphasise that some pre-sentence programs are as (if not more) intensive and onerous as certain traditional sentencing dispositions. Currently, the option of imposing 'no sentence' under s 46 of the *Sentencing Act* is not available in every case – the circumstances of the offence must be trivial or technical before this option can be considered. For some participants it may be unfair or disproportionate to impose future obligations or a further penalty at the completion of the program. Accordingly, the Commission proposed in its Consultation Paper that s 46 of the *Sentencing Act* should be amended to widen the power to impose no sentence.[21] Overall, submissions agreed with this proposal.[22] However, it was argued in one submission that it might be difficult to define what is meant by 'successful completion' of a court intervention program. The Commission does not consider that the meaning of 'successful completion' should be defined. Under the Commission's proposal, a court can impose no sentence if, among other things, it considers that the offender has successfully completed a court intervention program. The Commission is of the view that it is important for sentencing courts to have discretion to determine if the offender has successfully completed the program. Generally, successful completion will mean that the offender has complied with the requirements of the program.

RECOMMENDATION 15

No sentence

That s 46 of the *Sentencing Act 1995* (WA) be amended to expand the criteria to impose the option of 'no sentence' so that a court sentencing an offender *may* impose no sentence if it considers that the offender has successfully completed a court intervention program prescribed under the *Criminal Procedure Regulations 2005* (WA) and, after considering the offender's character; antecedents; age; health, and mental condition; and any other relevant matter it considers that it is not just to impose any other sentencing option.

Spent convictions

The Commission acknowledges that spent conviction orders will not be appropriate for many court intervention program participants. However, for less serious offending, the possibility of obtaining a spent conviction order may provide an additional incentive for an offender to participate in and comply with the program. For this reason the Commission proposed that the criteria for imposing a spent conviction be expanded.[23] In particular, the Commission noted that the current criteria may inhibit spent conviction orders for successful participants. Successful participants may well be able to establish that they will not commit similar offences in the future but it may be more difficult to establish previous good character or that the offence was trivial.[24] Again

19. Christine Anderton, Submission No. 1 (12 August 2008) 1; Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 10; Department of the Attorney General, Submission No. 21 (13 November 2008) 17.
20. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 10
21. Proposal 6.15.
22. Christine Anderton, Submission No. 1 (12 August 2008) 1; Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 10; Department of the Attorney General, Submission No. 21 (13 November 2008) 17.
23. Proposal 6.17.
24. The Commission notes that in *SA v McKinnon* [2009] WASC 7 the appellant successfully appealed against the decision of the sentencing magistrate not to make a spent conviction order. In that case, it was accepted by both parties that the offender had previous good character because he only had minor traffic

submissions were supportive of this proposal[25] and the Commission recommends that the criteria for obtaining a spent conviction order be amended to enable a court to take into account successful completion of a court intervention program.

RECOMMENDATION 16

Spent Convictions

That s 45(1) of the *Sentencing Act 1995* (WA) be amended to expand the criteria for making a spent conviction order under s 39(2) so that a court *may* make a spent conviction order if it considers that the offender is unlikely to commit such an offence again; and having regard to the fact that the offender has successfully completed a court intervention program prescribed under the *Criminal Procedure Act 2004* (WA) it considers that the offender should be relieved immediately of the adverse effect that the conviction might have on the offender.

Conditional Suspended Imprisonment

In the Consultation Paper, the Commission examined the sentencing option of Conditional Suspended Imprisonment (CSI), a term of imprisonment suspended for a set period of time with specific conditions (such as a program requirement). CSI is a relatively new sentencing option having become available only in 2006. It was intended that the option of an order of CSI would be the main option used by the Perth Drug Court. The *Sentencing Act* gives a speciality court (presently only the Perth Drug Court) additional powers in respect to an order of CSI. A speciality court can make specific orders that would ordinarily only be made by the offender's community corrections officer and can order that the offender reappear in court to determine if the offender is complying with the order.[26] Because the Perth Drug Court rarely imposes CSI and because the Commission concluded that it is necessary to introduce a pre-sentence Drug Treatment Order for drug court participants, it was proposed that all references to 'speciality court' in the sentencing provisions dealing with CSI be repealed.[27] The Commission emphasises that CSI orders are only used for drug court participants if a PSO is excluded under the legislation because the current offence(s) was committed while the offender was subject to a period of suspended imprisonment (or an early release order). In this Report, the Commission has recommended that PSOs be available for offenders who were subject to a period of suspended imprisonment at the time of the current offence. Therefore it is unlikely that the Perth Drug Court would use a CSI order in preference to a PSO, especially bearing in mind the views expressed to the Commission that CSI orders are too inflexible for the drug court program.[28] The effect of the Commission's recommendation is that CSI orders will still be available as a sentencing option for superior courts and the Children's Court (as is the position now) but will not be used by the Perth Drug Court. With support from both the Magistrates Court of Western Australia and the Department of the Attorney General,[29] the Commission has concluded that it is appropriate to recommend that all references to a 'speciality court' be removed in relation to the statutory provisions that govern CSI orders.

RECOMMENDATION 17

Conditional Suspended Imprisonment

That all references to a 'speciality court' in Part 12 of the *Sentencing Act 1995* (WA) be repealed.

convictions. However, the offence was not regarded as trivial (indecent assault). The issue was whether the offender had established that he was unlikely to commit such an offence again. The offender had successfully completed the IDDP and, on appeal, a spent conviction was ordered.

25. Christine Anderton, Submission No. 1 (12 August 2008) 1; Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 10; Department of the Attorney General, Submission No. 21 (13 November 2008) 17.
26. LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 205.
27. Proposal 6.16.
28. For further discussion, see LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 54.
29. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 10; Department of the Attorney General, Submission No. 21 (13 November 2008) 17.

Chapter Three

Drug and Alcohol Court Intervention Programs

Contents

Introduction 49

What is the link between substance abuse and crime? 49

Drugs 49

Alcohol 50

Legally coerced drug and alcohol treatment 50

Drug Courts 51

What are drug courts? 51

Benefits of drug courts 51

Reducing offending 51

Improving health and wellbeing 52

Reducing imprisonment 52

Western Australian drug court programs 52

Policy issues 52

Coordinator 53

Custodial detoxification 53

The Commission's proposed Drug Treatment Order 55

Target group 56

Excluded offences 57

Availability of a Drug Treatment Order 58

Duration of a Drug Treatment Order 59

Indicated sentences and final sentencing 59

Bail conditions and conditions of Drug Treatment Order 60

Rewards and sanctions 60

Right of review 61

Protection against self-incrimination 61

Case reviews and the roles of team members 62

Operational issues 63

Other Drug and Alcohol Court Intervention Programs 67

Addressing drug-related offending 67

Addressing alcohol-related offending 68

Addressing alcohol related offending in regional areas and for young offenders 70

Introduction

It is well established that the prevalence of substance use in the offending population is very high.[1] In particular, the level of illicit drug use by offenders is considerably disproportionate to the level of use in the general community.[2] Because of the high level of substance abuse among offenders it is widely accepted that there is an association between substance abuse and offending behaviour. As the Chief Justice of Western Australia recently stated it 'is impossible to overstate the impact of substance abuse upon the criminal justice system of Western Australia'. He further stated that:

> [A] very large proportion of the offending behaviour which results in offenders being brought before our courts is the consequence of illicit drug use and alcohol misuse. Unless and until something is done to change the patterns of substance abuse which have contributed to this offending behaviour, it is highly likely and perhaps inevitable that this offending behaviour will continue.[3]

These observations are supported by the Commission's analysis of a selection of superior court sentencing cases in Western Australia – in 71 per cent of these cases, drugs and/or alcohol had impacted in some way on the commission of the offence or on the offender.[4] Significantly, in approximately 47 per cent of these cases the offence was committed under the influence of drugs and/or alcohol or was committed in order to fund the offender's drug habit.

1. For example, a study of adult detainees at the East Perth Lock Up in 2006 found that 77% of those who participated in the study returned a positive drug test. Further, 51% of adult detainees reported drinking prior to their arrest: Mouzos J et al, *Drug Use Monitoring in Australia: 2006 annual report on drug use among police detainees*, Australian Institute of Criminology, Research and Public Policy Series No. 75 (2007) 18 & 68. Another study of sentenced prisoners in 2000–2001 found that over 80% of prisoners reported that they had used drugs at some time and 62% reported that they were regular illicit drug users: Makkai T & Payne J, 'Key Findings from the Drug Use Careers of Offenders (DUCO) Study' (2003) 267 *Australian Institute of Criminology Trends and Issues* 4.
2. For example, in 2004 approximately 17% of Western Australians surveyed reported that they had used an illicit drug (or used a legal drug for non-medical purposes) in the previous 12 months: Australian Institute of Health and Welfare, *2004 National Drug Strategy Household Survey: State and territory supplement* (2005) 7 (the level of drug use among detainees and prisoners, as mentioned above, is substantially higher).
3. The Hon Wayne Martin, Chief Justice of Western Australia, 'Drugs, Pipe Dreams and Hard Realities: Addressing substance abuse through the justice system' (Address to the Making it Happen: 2009 Western Australian Drug and Alcohol Conference, Fremantle, 13 May 2009) 2 & 25.
4. The Commission examined all publicly available sentencing cases in the Supreme Court for March and April 2009 (38 cases) and 118 sentencing cases in the District Court in March 2009. In the 156 cases examined 111 offenders were either under the influence of drugs/alcohol at the time of committing the offence, committed the offence(s) in order to fund a drug habit or had a history of substance abuse: see further Chapter One: Reduced Crime.

WHAT IS THE LINK BETWEEN SUBSTANCE ABUSE AND CRIME?

Despite the obvious association between substance abuse and crime, the precise causal relationship between substance use and crime is less clear. Just because a large number of offenders have used or regularly use drugs and alcohol does not mean that the use of these substances is a cause of their criminal behaviour or that, conversely, involvement in crime leads to substance use. Obviously, not all drug and alcohol users are offenders and not all offenders use drugs and alcohol.

Drugs

Research demonstrates that some offenders commence offending before using drugs; that some commence using drugs before becoming involved in criminal behaviour[5]; and that others become involved in drugs and crime at the same time. Moreover, it is generally accepted that once an offender is dependent on drugs their offending behaviour (in particular involvement in property crimes) will escalate.[6]

Drug-dependency increases the risk of committing income-generating crimes because many drug users do not have sufficient funds to support their drug habit.

> The effect of drug use on property crime is hardly surprising. Most illicit drugs are fairly expensive and drug consumption levels, particularly among dependent drug users, are often very high… Since most drug users are far from wealthy, most are forced to rely on crime to fund their drug consumption.[7]

In addition, illicit drug use is itself a crime and some drug users may also become involved in the supply and manufacture of illicit drugs to fund drug purchases.[8] It has also been noted that involvement

5. In particular, it has been found that female offenders were more likely than male offenders to have commenced using drugs before offending: Loxley W & Adams K, *Women, Drug Use and Crime: Findings from the Drug Use Monitoring in Australia program*, Australian Institute of Criminology, Research and Public Policy Series No. 99 (2009) iii.
6. Weatherburn D et al, *Drug Crime Prevention and Mitigation: A literature review and research agenda* (Sydney: NSW Bureau of Crime Statistics and Research, 2000) 6–7; Loxley & Adams, ibid 17; Urbis Keys Young, *The Relationship Between Drugs and Crime* (Commonwealth Attorney-General's Department, 2004) 37; Makkai T & Payne J, 'Key Findings from the Drug Use Careers of Offenders (DUCO) Study' (2003) 267 *Australian Institute of Criminology Trends and Issues* 1.
7. Weatherburn et al, ibid 7; Urbis Keys Young, ibid 6.
8. In its examination of superior court sentencing cases the Commission found that in 44% of cases involving the sale, supply or manufacture of illicit drugs (in the District Court in March 2009) offenders committed the offences in order to finance their own drug habit or pay for past debts.

in the illicit drug market may lead to involvement in offences involving violence and intimidation.[9] Further, some offenders commit offences while under the influence of drugs. In particular, the excessive use of anabolic steroids and amphetamines has been linked to increases in violent offending.[10]

It has been estimated that the cost associated with drug-related crimes in Australia is $3.7 billion per year.[11] While it is difficult to accurately estimate the cost of crime, this figure 'suggests that the economic costs of crimes connected to drug use may be very considerable'.[12] Further, it has been observed that 'treatment programs which reduce drug consumption also generally reduce crime'.[13] The link between illicit drug use and offending (in particular, that drug-dependant offenders commit a disproportionate amount of crime[14]) coupled with the cost of drug-related crime provides the necessary mandate for programs that target drug-dependent offenders.

Alcohol

Alcohol is in a different category to drugs because alcohol use by adults is not illegal, although there are alcohol-specific crimes such as driving under the influence of alcohol. It has been argued that alcohol use is associated with a number of crimes such as violent offences, property damage, public disorder offences and dangerous driving.[15] In contrast to illicit drugs (which are more closely linked to property offences) alcohol use is generally associated with violent crimes.[16] In particular, alcohol dependency has been found to increase the risk of violent offending in both men and women (but more so in men).[17]

9. Weatherburn D et al, *Drug Crime Prevention and Mitigation: A literature review and research agenda* (Sydney: NSW Bureau of Crime Statistics and Research, 2000) 7.
10. Rajaratnam S et al, 'Intoxication and Criminal Behaviour' (2000) 7 *Psychiatry, Psychology and the Law* 59, 62–65.
11. Mayhew P, 'Counting the Costs of Crime in Australia' (2003) Australian Institute of Criminology, *Trends and Issues in Crime and Criminal Justice* 6. Also, it has been estimated that the costs associated with drug-related crime in Western Australia are $220 million per year: Department of Corrective Services, *Managing Drugs in Prisons* <http://www.correctiveservices.wa.gov.au/_files/Drugs_in_prisons.pdf> at 1 May 2008.
12. Urbis Keys Young, *The Relationship Between Drugs and Crime* (Commonwealth Attorney-General's Department, 2004) 56.
13. Weatherburn D et al, *Drug Crime Prevention and Mitigation: A literature review and research agenda* (Sydney: NSW Bureau of Crime Statistics and Research, 2000) 7
14. Urbis Keys Young, *The Relationship Between Drugs and Crime* (Commonwealth Attorney-General's Department, 2004) 54.
15. Donnelly et al, *Estimating the Short-Term Cost of Police Time Spent Dealing with Alcohol-Related Crime in NSW* (Hobart: National Drug Law Enforcement Research Fund, 2007) 3.
16. Loxley W & Adams K, *Women, Drug Use and Crime: Findings from the Drug Use Monitoring in Australia program*, Australian Institute of Criminology, Research and Public Policy Series No. 99 (2009) 35; Weatherburn D et al, 'The Economic and Social Factors Underpinning Indigenous Contact with the Justice System: Results from the 2002 NATSISS survey', *Crime and Justice Bulletin*, No. 104 (NSW Bureau of Crime Statistics and Research, 2006) 3; Urbis Keys Young, *The Relationship Between Drugs and Crime* (Commonwealth Attorney-General's Department, 2004) 37; Rajaratnam S et al, 'Intoxication and Criminal Behaviour' (2000) 7 *Psychiatry, Psychology and the Law* 59, 62.
17. Loxley & Adams, ibid x.

LEGALLY COERCED DRUG AND ALCOHOL TREATMENT

As the Commission observed in its Consultation Paper, since the mid-1990s the national drug policy has focused on 'harm minimisation' and incorporated diversion strategies to encourage drug-dependent offenders into treatment.[18] Similarly, Western Australia's *Drug and Alcohol Strategy 2005–2009* aims, among other things, to provide links to 'treatment by maximising the number of offenders with alcohol and other drug problems engaged in diversion programs at each stage of the criminal justice system' in order to reduce drug use and drug-related offending.[19]

Underpinning the diversionary approach is the belief that 'legally coerced' treatment for drug-dependency is effective.[20] Participation is said to be legally coerced because offenders have a constrained choice: participate in the program and receive a less severe penalty (or possibly avoid a criminal conviction) or choose not to participate and be dealt with in the usual manner. The Chief Justice recognised the benefits of legal coercion when he asserted that the 'threat of penal sanctions provides an incentive for offenders to participate in diversionary programmes, or … problem-solving courts'.[21] The Commission observed in its Consultation Paper that legally coerced treatment is at least as effective as voluntary treatment and that the criminal justice system is able to offer 'incentives' to target offenders who may not otherwise engage in treatment.[22] Although early intervention outside the criminal justice system may lessen the incidence of drug and alcohol dependency in the general community, intervention through the criminal justice system enables drug- and alcohol-dependent offenders to be targeted for treatment.

Currently, there are various diversionary strategies in the criminal justice system to respond to offenders with drug and alcohol problems. At one end of the spectrum is the diversion by police of first offenders or low-level offenders (into education or treatment). At the other end, is the diversion of repeat drug-dependent offenders facing imprisonment into intensive drug court programs. In this chapter the Commission deals with those initiatives within the drug diversion continuum that are classified as court intervention programs; that is, programs involving court-supervised drug and alcohol treatment.

18. LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 45.
19. Western Australian Drug and Alcohol Office, *Western Australian Drug and Alcohol Strategy 2005*–2009 (2005) 10.
20. Lawrence R & Freeman K, 'Design and Implementation of Australia's First Drug Court' (2002) 35 *Australian and New Zealand Journal of Criminology* 63, 64.
21. The Hon Wayne Martin, Chief Justice of Western Australia, 'Drugs, Pipe Dreams and Hard Realities: Addressing substance abuse through the justice system' (Address to Making it Happen: 2009 Western Australian Drug and Alcohol Conference, Fremantle, 13 May 2009) 26.
22. LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 47.

Drug courts

Drug courts emerged in the United States in the late 1980s and have since been established in numerous international jurisdictions. Specialised drug courts for adults exist in five Australian states: Western Australia, South Australia, New South Wales, Victoria and Queensland. Western Australia and New South Wales also have separate drug court programs for young offenders. While the adult drug court in New South Wales is a separately constituted court, all other drug courts operate as part of the general magistrates court.

WHAT ARE DRUG COURTS?

The key feature of Australian drug courts is the diversion of drug-dependent (and sometimes alcohol-dependent) offenders from imprisonment into 'judicially supervised drug treatment and rehabilitation'.[1] The primary goal of drug courts is to reduce drug use and drug-related offending. Drug court programs are intensive, often requiring weekly court attendances, frequent urinalysis, regular counselling and supervision (usually for up to a year). Lengthy stays at residential drug treatment facilities are also required for detoxification. The participant's level of compliance with the program is routinely monitored by a court-based team (which is led by the judicial officer). This team regularly meets to review the participant's progress before court and during this review the team members endeavour to work collaboratively to achieve the objectives of the program. Failure to comply with the requirements of the program leads to a series of graduated sanctions, although serious non-compliance or significant reoffending may result in immediate termination. Those participants who are doing well are 'rewarded' by the judicial officer and other members of the drug court team.[2]

As the Commission observed in its Consultation Paper, there are some significant operational differences between the various drug courts operating in Australia. The New South Wales Drug Court has access to dedicated prison units for detoxification or for participants who are serving custodial sanctions imposed for non-compliance with the program. The eligibility criteria for most drug courts require the existence of an illicit drug problem; however, the Victorian Drug Court explicitly targets alcohol-dependent offenders.[3] Some drug courts target drug-related offending by requiring a nexus between the drug dependency and the relevant offences;[4] but others, such as the Perth Drug Court, simply target drug-dependent offenders.[5]

Significantly, not all Australian drug courts operate under the same legal framework. The adult drug courts in New South Wales, Victoria and Queensland have specific legislative backing.[6] In these jurisdictions, the program operates post-sentence. In contrast, the South Australian Drug Court and the Perth Drug Court have very limited legislative support.[7] In South Australia the drug court program is a pre-sentence option. In Western Australia the program is available both pre-sentence and post-sentence; however, in practice it is invariably used as a pre-sentence option.

BENEFITS OF DRUG COURTS

Reducing offending

The Commission observed in its Consultation Paper that there is evidence (both internationally and nationally) to demonstrate that drug court programs reduce drug use and reoffending.[8] In particular, a review of the Perth Drug Court found that the program reduced reoffending and was more cost-effective than prison and community corrections supervision.[9] The most recent published Australian

1. Freiberg A, 'Australian Drug Courts' (2000) 24 *Criminal Law Journal* 213, 214.
2. For further discussion of the key features of drug court programs, see LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 51–52.
3. See *Sentencing Act 1991* (Vic) s 18X. The New South Wales Youth Drug and Alcohol Court also permits alcohol-dependent offenders to participate: Children's Court of New South Wales, Practice Direction No. 27 (16 May 2007).
4. See *Sentencing Act 1991* (Vic) s 18Z(c); *Drug Court Act 2000* (Qld) s 6; Courts Administration Authority (SA), *Magistrates Court Drug Court* (2008) <http://www.courts.sa.gov.au/courts/drug_court/index.html> at 12 January 2008.
5. See *Drug Court Act 1998* (NSW) s 5; *Perth Drug Court Manual* (2007) 10.
6. See *Drug Court Act 1998* (NSW); *Magistrates Court Act 1989* (Vic) s 4A; *Sentencing Act 1991* (Vic) s 18X, 18Y & 18Z; *Drug Court Act 2000* (Qld).
7. The Perth Drug Court is a prescribed speciality court under the *Sentencing Act 1995* (WA) and this gives the Perth Drug Court additional powers in relation to Pre-Sentence Orders and Conditional Suspended Imprisonment. The South Australian Drug Court commenced without any specific legislation. The *Statutes Amendment (Intervention Programs and Sentencing Procedures) Act 2005* (SA) inserted specific provisions into the *Bail Act 1985* (SA) and *Criminal Law (Sentencing) Act 1988* (SA) dealing with 'intervention programs'. Intervention programs include supervised treatment and rehabilitation programs.
8. LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 53 & 59.
9. Department of the Attorney General, *Review of the Perth Drug Court* (2006) 3.

drug court evaluation is the 2008 re-evaluation of the New South Wales Drug Court. The re-evaluation found that drug court participants (both those who completed the program and those who were terminated from the program) were 17 per cent less likely to reoffend than the comparison group. The results were even more favourable for those offenders who successfully completed the drug court program: this group was 37 per cent less likely than the comparison group to be convicted of a further offence.[10]

A common finding from drug court evaluations is that criminal justice outcomes are substantially improved for successful drug court participants.[11] For example, a long-term recidivism analysis of the Queensland Drug Court program concluded that recidivism rates for graduates (successful participants) were significantly lower than for terminated participants or prisoner comparison groups. Further, the study found that the drug court program 'did not have any obvious effect in further worsening the criminal justice outcomes of those who fail the program'.[12] Thus, the key to achieving positive criminal justice outcomes is to maximise the number of successful drug court participants by attracting and retaining those drug-dependent offenders who are most likely to comply with the program.

Improving health and wellbeing

Drug courts also produce other social benefits such as exposure to available treatment options and support services in the community; improvements to health and wellbeing, increased employment opportunities; drug free babies; stronger families; and improved personal relationships.[13] Recently, *The West Australian* newspaper reported on some success stories from the local drug court programs. One young male offender was referred to the Perth Children's Court Drug Court in 2006 after committing an armed robbery with a blood-filled syringe in order to obtain money to buy drugs. It was reported that prior to becoming addicted to methylamphetamine and benzodiazepines (and developing a $1000 per week drug habit) this young boy was a successful tennis player and excelled at school. Since graduating from the drug court program in 2007, he has not reoffended and now has an apprenticeship. In another case, a mother of six developed a methylamphetamine and codeine habit to cope with past family violence and abuse. This woman was facing prison and feared that her children would be taken away from her. It was reported that since graduating from the Perth Drug Court she studies at university, maintains her house and takes proper care of her children.[14] Case studies such as these show how drug court programs can positively change the life of participants and their families.

Reducing imprisonment

Drug court programs are usually only available for offenders facing imprisonment. Thus there is a clear incentive for offenders to participate and comply with the program – successful drug court participants are rarely sentenced to imprisonment at the completion of the program. Studies have concluded that drug court programs are more cost-effective than prison.[15] Bearing in mind the high level (and high cost) of imprisonment in Western Australia, drug courts provide an effective and strictly monitored alternative to prison for drug-dependent offenders.

WESTERN AUSTRALIAN DRUG COURT PROGRAMS

There are two drug court programs in Western Australia: the Perth Drug Court and the Perth Children's Court Drug Court. Generally, these programs operate before sentencing for drug-dependent offenders who are facing custodial sentences. In its Consultation Paper, the Commission examined the operation of these programs and made a number of proposals designed to improve the effectiveness of Western Australian drug court programs, to safeguard the fundamental legal rights of participants and to ensure that the programs operate fairly.

Policy issues

Irrespective of whether drug court programs operate with or without legislative support, it is vital that there are sufficient resources and appropriate administrative and policy support to ensure that drug court programs can reach their full potential.[16] Western Australian drug court programs will fall within the ambit of the Commission's recommended court intervention programs unit (Recommendation 1) and, accordingly, this unit will provide administrative and policy support to the Perth Drug Court and the Perth Children's Court Drug Court. While drug court programs clearly focus on drug and alcohol treatment, participants may also experience other difficulties such as mental health issues, unemployment and homelessness. The coordinated unit will enable drug

10. Weatherburn D et al, 'The NSW Drug Court: A Re-evaluation of its effectiveness', *Crime and Justice Bulletin*, No. 121 (NSW Bureau of Crime Statistics and Research, 2008), 9–13.
11. LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 59.
12. Payne J, *The Queensland Drug Court: A recidivism study of the first 100 graduates,* Australian Institute of Criminology, Research and Public Policy Series No. 83 (2008) xiii.
13. LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 60.
14. Hampson, K, 'Breaking Free', *West Australian Magazine*, 11 April 2009, 8–14.
15. See for example, Centre for Health Economics Research and Evaluation, *The Costs of the NSW Drug Court: Final Report* (Sydney: NSW Bureau of Crime Statistics and Research, 2008) 8. King J & Hales J, *Victorian Drug Court Cost-effectiveness Study: May 2002 to December 2004* (St Peters: Health Outcomes International Pty Ltd, 2004); Department of the Attorney General, *A Review of the Perth Drug Court* (2006).
16. See Chapter One: Guiding Principle Four.

court program staff to access the skills and experience of staff working in other specialist programs as well as representatives from various government and non-government agencies. As recommended by the Commission, the court intervention programs unit will be partly comprised of individual court intervention program coordinators; however, there is currently no coordinator for the Perth Drug Court or the Perth Children's Court Drug Court.

Coordinator

In its Consultation Paper the Commission proposed that a full-time drug court coordinator be appointed. The Commission emphasised that because both the Department of the Attorney General and the Department of Corrective Services are directly involved in administering drug court programs in Western Australia, no one agency has overall responsibility.[17] Submissions were fully supportive of this proposal.[18] The Magistrates Court submitted that the appointment of a coordinator 'is both overdue and urgent'.[19] It was argued that administrative support is required for the provision of information sessions; the preparation of files; liaison with treatment and service providers; organisation of team meetings; and support for the magistrate. The Department of the Attorney General explained that a coordinator could provide the 'essential link across the various agencies and services that directly support the operation' of the drug court programs.[20]

Further, as explained in Chapter One of this Report, court intervention programs must be subject to regular independent and long-term evaluations. In order to do so, appropriate data must be collected and recorded.[21] Coordinating evaluations and data collection is one proposed role for the recommended court intervention programs unit. A drug court coordinator (who would be part of this unit) would be ideally placed to ensure that proper data collection methods are employed by the drug court programs. Accordingly, the Commission recommends the appointment of one full-time coordinator to provide administrative support to both the Perth Drug Court and Children's Court Drug Court programs.

17. LRCWA, *Court Intervention Programs,* Consultation Paper, Project No. 96 (2008) 70, Proposal 2.3.
18. Christine Anderton, Submission No. 1 (12 August 2008) 1; Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 3; Dr Andrew Cannon, Deputy Chief Magistrate of South Australia, Submission No. 17 (13 October 2008) 3; Department of the Attorney General, Submission No. 21 (13 November 2008) 5; Western Australia Police Prosecuting Division, Submission No. 22 (5 January 2009) 3.
19. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 3.
20. Department of the Attorney General, Submission No. 21 (13 November 2008) 5.
21. Chapter One: Guiding Principle Three. The deficiency in data collection has been identified as a 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.

RECOMMENDATION 18

Appointment of a Drug Court Coordinator

That the Western Australia government provide funding for the appointment of one full-time drug court coordinator to service both the Perth Drug Court and the Perth Children's Court Drug Court.

Custodial detoxification

In its Consultation Paper, the Commission identified that there is a lack of custodial detoxification facilities for drug court participants. Some drug court participants remain in custody during the assessment stage of the program or while they are waiting for a residential treatment place to become available. Further, drug court programs impose 'custody sanctions' for non-compliance and, in the absence of a dedicated custodial facility, participants may be returned to prison to serve the sanction during the program.[22] Although there are some custodial programs and facilities designed to support drug-dependent offenders in Western Australia[23] there are no dedicated detoxification facilities within publicly run prisons. Drug free units target prisoners who wish to abstain from drugs but they do not provide direct support for prisoners who need assistance in remaining drug free.[24]

Specific drug treatment and detoxification facilities have been developed in other jurisdictions: the Marngoneet Correctional Centre in Victoria provides intensive treatment and offender management programs for up to 300 male prisoners,[25] and the Compulsory Drug Treatment Correctional Centre (CDTCC) in New South Wales targets 'hard-core' offenders with long-term drug dependency. Prisoners at the CDTCC are placed on compulsory Drug Treatment Orders that are monitored by the

22. LRCWA, Court *Intervention Programs*, Consultation Paper, Project No. 96 (2008) 74.
23. For example, pharmacotherapy (such as methadone) and rehabilitation programs. However, the Inspector of Custodial Services reported in 2008 that the Managing Anger and Substance Abuse Program and 'drug awareness workshops have been withdrawn from delivery at all prisons in Western Australia' and that the 'Moving On From Dependency program has been severely restricted': Office of Inspector of Custodial Services, *Report of an Announced Inspection of Casuarina Prison*, Report No. 49 (2008) 47.
24. In relation to the drug free unit at Bandyup Prison it has been observed that female prisoners may be admitted to the unit even without a history of drug use: Office of Inspector of Custodial Services, *Report of an Announced Inspection of Bandyup Women's Prison*, Report No. 57 (2008) 55. Acacia Prison (the only privately run prison in Western Australia) also has a drug free unit but since a new private contractor was appointed to run the prison in 2006, the 'philosophy and management' of the unit is still being determined: Office of Inspector of Custodial Services, *Report of an Announced Inspection of Acacia Prison*, Report No. 53 (20080 60.
25. See Department of Justice (WA), *Prison Profiles: Marngoneet Correctional Centre* <http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Prisons/Prisons+in+Victoria/Prison+Management/JUSTICE+-+Marngoneet+Correctional+Centre+%28PDF%29> at 14 May 2009.

New South Wales Drug Court.[26] This facility provides custodial drug treatment for offenders who are not otherwise eligible for the standard drug court program. In its Consultation Paper the Commission invited submissions about whether a similar compulsory drug treatment correctional facility should be established in Western Australia.[27] There was interest from two submissions in the development of a similar facility. The Western Australia Police Prosecuting Division submitted that:

> [T]he rehabilitation of drug offenders in non-specialist correctional facilities has been less than successful. Drug offenders who serve their time in a general prison either continue to use drugs or fail to rehabilitate while serving their sentences. [28]

The Magistrates Court of Western Australia also expressed its support for the New South Wales model.[29] The Commission notes that the New South Wales CDTCC will shortly be independently evaluated and a report about its operations is due in Parliament in 2010. The Commission considers it would be prudent to re-examine this issue following the publication of the evaluation results.

The Commission is of the view that in the context of this reference, the viability of a custodial drug detoxification facility for drug court participants is the most pressing issue.[30] In its Consultation Paper the Commission observed that requiring drug court participants to serve custodial sanctions within a normal prison environment is not necessarily effective because the participant's treatment regime is put on hold and, in some instances, participants may be exposed to drugs in prison. It has been observed that a drug court cannot operate effectively without a discrete custodial prison unit for 'assessment, detoxification, and sanctions'.[31] The Commission received two submissions in response to this issue. The Magistrates Court was strongly of the opinion that a dedicated custodial facility for detoxification for drug court participants is needed. It explained that some potential participants who are undergoing assessment for suitability are remanded in custody and a 'lengthy wait in prison generally reduces considerably a person's enthusiasm' for the drug court program.[32] Further, the Magistrates Court explained that custodial sanctions may be imposed during the program when the participant 'has lost control of their drug use' and detoxification rather than punishment is required.

On the other hand, the Department of Corrective Services indicated that a separate facility for drug court participants would be impracticable. The Department submitted that—with additional resources for capital and recurrent costs—Hakea Prison could accommodate up to 50 prisoners 'needing specialist care in a detoxification unit at any time'.[33] The establishment of a custodial detoxification facility was supported but only if it was not reserved for the exclusive use of drug court participants. If such a facility was not to be established the Department of Corrective Services stated that 'smaller secure units' should be established within community health facilities. However, given that drug court participants are usually facing imprisonment, and that some potential participants will not be eligible for bail in the absence of a positive assessment, there will be offenders who must be remanded in custody before commencing the program. Drug court participants require appropriate custodial facilities for detoxification purposes so that their drug treatment regime can be continued without negative influences from the general prison population. The Commission has concluded that a custodial detoxification and drug treatment facility for use by drug court participants should be established within a Western Australian prison at the earliest opportunity. Whether other drug-dependent offenders should have access to this facility is best determined by the relevant government authorities.

RECOMMENDATION 19

Custodial detoxification and drug treatment facility

That the Western Australia government establish a custodial detoxification and drug treatment facility and that this facility be available for:

1. offenders who have been remanded in custody and are being assessed for suitability to participate in the Perth Drug Court;
2. drug court participants who are not suitable for release on bail until a placement is available at a community residential drug treatment facility; and
3. drug court participants who are required to serve a custodial sanction under the program.

26. *Compulsory Drug Treatment Correctional Centre Act 2004* (NSW)
27. Consultation Question 2.3.
28. Western Australia Police Prosecuting Division, Submission No. 22 (5 January 2009) 3.
29. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 14.
30. In its Consultation Paper the Commission noted that such facilities exist in New South Wales: see LRCWA, *Court Intervention Programs,* Consultation Paper, Project No. 96 (2008) 75–76.
31. Barrow B & Popovic J, *Drug Courts Operating in Other States* (2001) 4.
32. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 14.
33. Department of Corrective Services, Submission No. 19 (6 October 2008) 3. It was mentioned that it may also be possible to accommodate female prisoners if the facility was designed appropriately. The need for resources was also stressed by the Western Australia Drug and Alcohol Office. It was explained that the 'drug and alcohol treatment sector is currently not funded for service provision in custodial settings': Western Australia Drug and Alcohol Office, Submission No. 5 (22 September 2008) 3.

The Commission's proposed Drug Treatment Order

In its Consultation Paper, the Commission expressed its view that, as far as possible, legislative provisions dealing with court intervention programs should be generic. However, it also concluded that a specific pre-sentence Drug Treatment Order (DTO) is required in Western Australia.[34] The Commission received significant support from submissions for the introduction of a pre-sentence DTO. Agencies in support of the proposal include the Magistrates Court, the Department of the Attorney General, the Western Australia Police Prosecuting Division and the Aboriginal Legal Service.[35] The Department of Corrective Services is not in favour of a separate DTO, instead preferring existing options (such as the PSO) to be used.[36] The Commission also received two submissions asserting that specific drug court legislation is not required for the Children's Court Drug Court but these submissions did not comment on the appropriateness of the proposal for adult offenders.[37]

In Chapter Two of this Report the Commission makes a number of recommendations to improve the effectiveness of PSOs and highlights that PSOs will be the primary order used for court intervention program participants facing imprisonment. The Commission has considered the argument that PSOs could continue to be used for drug court participants. It has also taken into account the view expressed in one submission that if a DTO is introduced, it may be necessary to introduce a series of special orders (such as an Alcohol Treatment Order, a Gambling Treatment Order, Mental Illness Treatment Order, etc).[38] However, the Commission maintains its view that specific drug court legislation is necessary because drug courts are in a special category:

- Drug courts aim to address **illicit drug dependency** and drug court programs acknowledge that drug-dependent offenders are unlikely to immediately cease using illicit drugs. The program recognises that there will be lapses and relapses and, in response, a series of graduated rewards and sanctions are used to encourage compliance. Further, in comparison to other programs, it is relatively easy to objectively monitor compliance via urinalysis. Furthermore, imposing sanctions for detected drug use is reasonable bearing in mind that drug use is itself illegal.

- For repeated non-compliance, **custody sanctions** are imposed. The Perth Drug Court imposes a custody sanction only once but some other drug court programs may impose custody sanctions more often. In the absence of a specific legislative power to detain a drug court participant for failure to comply with the requirements of the program, the Perth Drug Court revokes bail for a set period and then re-releases the offender after he or she has served the custody sanction. In its Consultation Paper the Commission suggested that the Perth Drug Court was arguably 'stretching' the provisions of the *Bail Act 1982* (WA) to achieve this purpose.[39] The Western Australia Police Prosecuting Division agreed.[40] However, another submission noted that the Commission had not provided any evidence that drug court participants had appealed or challenged this practice.[41] But drug court participants are unlikely to challenge 'custody sanctions' because they wish to remain on the program. The Commission has concluded that if custody sanctions are to be imposed upon non-complying drug court participants the power to do so should be explicitly provided for in legislation.

- Offenders are required to acknowledge their illicit drug dependency to be eligible for participation in drug court programs and are encouraged to be honest about drug use throughout the program. If drug court participants are expected to disclose past and continued drug use, they should be **protected from self-incrimination**.

- Drug court programs hold out-of-court **case reviews** in the presence of the judicial officer but in the absence of offender. This does not occur in family violence court intervention programs or mental impairment court intervention programs.[42] Because the judicial officer is privy

34. LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 75–76 (Proposal 2.4).
35. Christine Anderton, Submission No. 1 (12 August 2008) 1; Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 4–7; Aboriginal Legal Service of WA (Inc), Submission No. 20 (13 November 2008) 2; Department of the Attorney General, Submission No. 21 (13 November 2008) 5; Western Australia Police Prosecuting Division, Submission No. 22 (5 January 2009) 3.
36. Department of Corrective Services, Submission No. 19 (6 October 2008) 1–2. Another submission questioned the need to introduce a new order that 'largely duplicates or overlaps' the PSO: Confidential Submission No. 8 (26 September 2008) 4 & 5. The Commission notes that the *Sentencing Act 1995* (WA) now incorporates sentencing orders that overlap or partly duplicate one another (eg, the provisions dealing with Community Based Orders and Intensive Supervision Orders are similar, although not identical).
37. Legal Aid WA, Submission No. 11 (1 October 2008) 24; Magistrate Stephen Vose, Submission No. 6 (23 September 2008) 1.
38. Confidential Submission No. 8 (26 September 2008) 6.
39. LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 65.
40. Western Australia Police Prosecuting Division, Submission No. 22 (5 January 2009) 1.
41. Confidential Submission No. 8 (26 September 2008) 4.
42. Generally, out-of-court discussions do not take place between a judicial officer and other people involved in a court intervention program. In its Consultation Paper the Commission observed that in Aboriginal Courts all discussions are held in the presence of the offender, the magistrate, the prosecutor, defence counsel, Aboriginal Elders or respected persons and other community members. And in the Neighbourhood Justice Centre in Victoria, problem-solving meetings are held before court with everyone but the magistrate in attendance: LRCWA,

to discussions held in the absence of the offender, it is necessary to ensure that the process is fair.

The Commission's proposed DTO had a number of different components. Each of the issues is considered separately below and the Commission's final recommendation appears at the end of this discussion.

Target group

Currently, there are four possible pathways to participation in the Perth Drug Court:

- **Supervised Treatment Intervention Regime (STIR):** The STIR is a four- to six-month program for less serious offenders who are not facing imprisonment. The Perth Drug Court administers this program for offenders in the metropolitan area but it is also available in a number of regional magistrates courts. For this reason it is not strictly a drug court program and is discussed separately in the following section of this chapter.
- **Drug Court Regime (DCR):** The DCR is a pre-sentence bail program lasting approximately six months. Offenders are placed on specific bail conditions to comply with the program and following a plea of guilty, sentencing is deferred to enable participation. On the face of it, the DCR appears to be designed for moderately serious offenders but has also been used for more serious offenders who are ineligible (due to statutory requirements) for a Pre-Sentence Order.
- **Pre-Sentence Order (PSO):** A PSO is available for offenders facing immediate imprisonment and is designed to provide an opportunity for offenders to address the underlying causes of their offending behaviour before sentencing takes place. The PSO is a generic order; however, there are additional statutory provisions that provide the Perth Drug Court with additional powers to set specific requirements of the order.[43]
- **Conditional Suspended Imprisonment (CSI):** CSI is a term of imprisonment suspended for a set period of time with specific conditions. It can only be imposed by the Supreme Court, the District Court, the Children's Court or the Perth Drug Court.[44] As explained in the Consultation Paper, CSI has proven to be ineffective for the purposes of the Perth Drug Court and is rarely used.[45] In Chapter Two of this Report the Commission recommends that all references to a speciality court (ie, the Perth Drug Court) be repealed from the legislative provisions dealing with CSI orders.[46]

Ignoring the STIR (which is not a specific drug court program) and CSI (which will no longer be available to the Perth Drug Court under the Commission's recommendations) the Perth Drug Court has two streams: the DCR and the PSO. This is unique to Western Australia: other drug court programs only target offenders facing imprisonment and do not have an intermediate drug court program.[47]

In determining the most appropriate target group for drug court programs, it is important to note that the most successful outcomes are achieved by those participants who complete the program and that the length of imprisonment faced by a drug court participant influences the likelihood of success.[48] As observed in one evaluation, offenders facing relatively short prison sentences may 'fail to see their potential imprisonment as a sufficient motivation for continuing with their drug court order'.[49]

The Commission concluded in its Consultation Paper that drug court programs should only target offenders facing imprisonment (or, in the case of young offenders, detention).[50] Drug court programs use significant resources and commonsense suggests that those resources should be allocated in the most effective manner. The PSO stream of the Perth Drug

Court Intervention Programs, Consultation Paper, Project No. 96 (2008) 64. The Commission notes that the Department of the Attorney General advised that in the Yandeyarra Aboriginal Community Court the magistrate held out-of-court discussions with the Aboriginal Elders: Department of the Attorney General, Submission No. 21 (13 November 2008) 4.

43. For further discussion see Chapter Two: Pre-Sentence Orders.
44. See *Sentencing Regulations 1996* (WA) Reg 6B, which refers to a speciality court. Regulation 4A provides that, for the purposes of the definition of a 'speciality court' in s 4 of the *Sentencing Act 1995* (WA), 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. However, this definition is somewhat unclear; the Commission understands that some magistrates have interpreted this provision to enable any magistrate in the Central Law Courts who is dealing with an offender who abuses drugs to be considered a speciality court: meeting with Chief Magistrate Heath (26 March 2008).
45. LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 54.
46. Recommendation 17.
47. In his submission Dr Andrew Cannon advised that South Australia is currently developing an intermediate drug rehabilitation program: Dr Andrew Cannon, Deputy Chief Magistrate of South Australia, Submission No. 17 (13 October 2008) 3. South Australia has the Court Assessment and Referral Drug Scheme (a three-month court diversion program which does not involve any ongoing judicial monitoring) and the 12-month intensive drug court program.
48. See Freeman K, *New South Wales Drug Court Evaluation: Health, well-being and participant satisfaction* (Sydney: NSW Bureau of Crime Statistics and Research, 2002) viii; Payne J, *The Queensland Drug Court: A recidivism study of the first 100 graduates, Australian Institute of Criminology*, Research and Public Policy Series No. 83 (2008) 79.
49. Ibid.
50. In its original proposal the Commission stated that in order to be eligible for a DTO it must be highly likely that the offender would otherwise be sentenced to a term of immediate imprisonment. In response, the Magistrates Court submitted that the wording should that the 'seriousness of the offence or offences warrants a term of immediate imprisonment': Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 5. The Commission has adopted this suggestion in its final recommendation.

Court currently targets this group of offenders; however, the DCR stream accepts some offenders who are facing non-custodial sentences. The Commission proposed that the DCR stream should be subsumed within the STIR program so that there is one intervention program for offenders facing imprisonment (the DTO as administered by the Drug Court) and one intervention program for offenders facing a non-custodial sentence (the STIR).[51]

The Commission received two submissions arguing that the proposed DTO should not be restricted to offenders facing immediate imprisonment. The primary reason being that there may be some drug-dependent offenders who are not facing imprisonment but nonetheless require the intensive intervention offered by drug court programs.[52] However, Dr Andrew Cannon (Deputy Chief Magistrate of South Australia), the Aboriginal Legal Service and the Western Australia Police Prosecuting Division agreed that the DTO should only be available to offenders facing immediate imprisonment.[53] Dr Cannon submitted that a 'coercive program involving custody and other sanctions' should only apply to offenders facing immediate imprisonment.[54] The Commission agrees that—as a matter of fairness—the potential for a participant to be detained in custody for failing to comply with the program must be reserved for offenders whose offending warrants imprisonment.

That leaves the question whether the intermediate stream (the DCR) should be subsumed within the STIR. Submissions were equally divided on this issue. The Aboriginal Legal Service and the Department of the Attorney General supported the Commission's proposal; however, the Department of the Attorney General did so only on the condition that there were appropriate alternatives for offenders not facing custodial sentences.[55] On the other hand, the Western Australia Police Prosecuting Division submitted that the DCR should remain for offenders with less serious offending but who require more intensive intervention than is available through the STIR.[56]

The Commission acknowledges that there are different types of drug-dependent offenders. The STIR program may not be appropriate for offenders with a major drug-dependency and a more rigorous program may be required. One option is to expand the STIR to cater for a wider variety of offenders. The other is to retain the DCR for offenders who are not facing imprisonment and who otherwise require more intervention than is available under the STIR. The Commission has concluded that this is a policy issue best determined by program staff and magistrates. Having said that, the Commission strongly discourages the DCR from being used as a defacto DTO: the existing practice of revoking bail as an informal custody sanction should cease.[57] Only offenders placed on a DTO should be liable to be detained in custody for failing to comply with the program.

Excluded offences

Having determined that the DTO should only be available for offenders facing immediate imprisonment, it is necessary to consider if eligibility should be further restricted. In order to attract the intended target group, the statutory eligibility criteria for the DTO should be as inclusive as possible. Currently, offenders who were subject to a suspended sentence at the time of committing the current offence are ineligible for a PSO (and therefore excluded from the PSO stream of the Perth Drug Court). In Chapter Two, the Commission recommends that this cohort of offenders should not be automatically excluded from being placed on a PSO.[58] Similarly, the Commission proposed in its Consultation Paper that the DTO should be potentially available for offenders who have breached a suspended term of imprisonment.[59] Overall, submissions were in favour of this proposal.[60] The Western Australia Police Prosecuting Division opposed the proposal on the basis that offenders who breach a suspended sentence should face the

51. Proposal 2.1.
52. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 2–3; Department of the Attorney General, Submission No. 21 (13 November 2008) 2.
53. Dr Andrew Cannon, Deputy Chief Magistrate of South Australia, Submission No. 17 (13 October 2008) 3; Aboriginal Legal Service of WA (Inc), Submission No. 20 (13 November 2008) 2; Western Australia Police Prosecuting Division, Submission No. 22 (5 January 2009) 2–3. However, the Western Australia Police Prosecuting Division also submitted that the penalty for stealing (less than $1000 worth of property) should be amended to include imprisonment as an option because drug-addicted offenders who repeatedly commit 'petty theft' have no incentive to complete the drug court program. The Commission does not agree with this suggestion because it would be inappropriate to change the penalty for an offence just so that the Perth Drug Court could 'capture' certain types of offenders. This would be a clear example of net-widening.
54. Dr Andrew Cannon, Deputy Chief Magistrate of South Australia, Submission No. 17 (13 October 2008) 3.
55. Aboriginal Legal Service of WA (Inc), Submission No. 20 (13 November 2008) 2; Department of the Attorney General, Submission No. 21 (13 November 2008) 2.
56. Western Australia Police Prosecuting Division, Submission No. 22 (5 January 2009) 2.
57. That does not mean that bail cannot be revoked if it appears that the offender is unlikely to comply with the requirements of bail. If that is the case, the offender would not be suitable for re-release after only serving a number of days in custody (unless his or her circumstances changed).
58. See Recommendation 6.
59. Proposal 2.2.
60. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 3; Dr Andrew Cannon, Deputy Chief Magistrate of South Australia, Submission No. 17 (13 October 2008) 3; Aboriginal Legal Service of WA (Inc), Submission No. 20 (13 November 2008) 2 Department of the Attorney General, Submission No. 21 (13 November 2008) 3. The Aboriginal Legal Service also submitted that offenders who were subject to parole at the time of the current offence should be eligible for a DTO. This was not raised in any other submissions. An offender who breaches parole by committing a further offence that warrants a term of immediate imprisonment is highly unlikely to be released from custody. For this reason the Commission has not further extended the eligibility criteria.

consequences of the breach.[61] Similarly, another submission noted that an offender who breaches a term of suspended imprisonment is likely to be sent to prison.[62] However, as the Commission explained in Chapter Two, an offender who has breached a suspended sentence is not always ordered to serve the period of imprisonment. Under s 80 of the *Sentencing Act*, if it would be unjust to send the offender to prison 'in view of all the circumstances that have arisen, or have become known, since the suspended imprisonment was imposed' a further opportunity may be given. The Commission recommends that offenders who have breached a suspended sentence should not be automatically excluded from a DTO because the DTO is intended to target offenders who are facing a term of immediate imprisonment and in some cases participation in the drug court program may be appropriate.

The Magistrates Court also submitted that legislation should provide for excluded offences and that these statutorily excluded offences should reflect the current Perth Drug Court practice.[63] Under the 2007 *Drug Court Manual* a number of offences are excluded from the program,[64] and for others a discretionary approach is taken. The Commission has determined (in relation to all court intervention programs) that whether any offences should be excluded from a specific program is best determined by program staff and coordinators.[65] In some instances, safety concerns for treatment staff may preclude certain types of offenders from participating in the program. However, overall the Commission encourages flexibility – the court should have discretion to take into account all of the circumstances of the offence and offender to determine suitability. The Commission is of the view if it is necessary to exclude certain offences from the ambit of the DTO then this should be done through regulations.

Availability of a Drug Treatment Order

As explained in the Consultation Paper, the Perth Drug Court takes referrals for offenders who must ultimately be dealt with by a superior court. Clearly, if drug court programs are to target serious high-risk drug-dependent offenders this is entirely appropriate. In this regard, the Commission emphasises that in its analysis of sentencing cases in the superior courts over one month, 70 per cent of offenders had substance abuse problems.

In its proposal for a DTO the Commission reflected current practice by enabling a DTO to be made by the Perth Drug Court, the District Court and the Supreme Court. It was proposed that if a superior court decides to make a DTO (after the Drug Court has first determined that the offender is suitable for inclusion in the program) the Drug Court would then supervise and monitor the offender's progress throughout the program.[66] In response, the Magistrates Court submitted that for superior court matters, both the Drug Court and the superior court should have the power to monitor participants throughout the program.[67] The Commission agrees and notes that this approach is consistent with the recommendations in Chapter Two in relation to Pre-Sentence Orders.

Whether the Children's Court should be empowered to make a DTO is a more difficult question. In its Consultation Paper the Commission did not make any proposals in regard to the Perth Children's Court Drug Court but invited submissions about whether any legislative reform was required to facilitate court intervention programs for young offenders.[68] In general terms, juvenile justice legislation is broad and flexible enough to accommodate most court intervention programs; however, as explained above, drug court programs are distinctive. The Department of the Attorney General submitted that the Commission's proposed DTO should be available to the Children's Court.[69] In contrast, Legal Aid WA and Children's Court Magistrate Stephen Vose submitted that specific drug court legislation was not required. In particular, Legal Aid WA stated that 'it is important not to be locked into a framework whereby Drug Court eligibility criteria and procedures are "set in stone"'.[70]

The Commission understands that given the small number of young offenders who participate in the Children's Court Drug Court program, specific drug court legislation may seem unnecessary. However, the observations made above in relation to the need for a specific DTO apply equally to young offenders. The Commission is mindful of the need to ensure

61. Western Australia Police Prosecuting Division, Submission No. 22 (5 January 2009) 2.
62. Confidential Submission No. 8 (26 September 2008) 7.
63. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 5.
64. For example, homicide, grievous bodily harm, stalking, some types of aggravated burglary, dangerous driving causing death, threat to kill, stealing a motor vehicle with reckless driving and going armed in public so as to cause terror are excluded. For other violent offences and drug trafficking, the court can take into account the actual circumstances of the offence when deciding if the offender is suitable to participate in the program.
65. See Chapter Two: Procedural and operational issues for individual programs.
66. See Proposal 2.4. It is also important to note that the Commission has made recommendations in Chapter Two to facilitate participation in court intervention programs for superior court matters. Under Recommendation 4 an offender with superior court matters could begin a drug court program (such as the DCR) and continue to be monitored by the Perth Drug Court up until his or her first appearance in the superior court. The superior court would then decide if a DTO was appropriate.
67. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 4.
68. Consultation Question 6.6.
69. Department of the Attorney General, Submission No. 21 (13 November 2008) 5.
70. Legal Aid WA, Submission No. 11 (1 October 2008) 24; Magistrate Stephen Vose, Submission No. 6 (23 September 2008) 1.

procedural fairness and that young offenders should not be subject to 'custody sanctions' unless they are facing a sentence of detention. Therefore, the Commission recommends that the DTO be available to the Children's Court for any eligible young offender.[71] The Commission emphasises that operational and procedural issues are not to be dealt with under the substantive legislation. Instead, regulations and/or court rules can be made in regard to these issues.

Duration of a Drug Treatment Order

In its Consultation Paper, the Commission proposed that the maximum duration of the DTO should be two years because achieving program objectives (abstinence, lack of offending, employment, and reintegration with family and community) takes time. It was envisaged that some drug court participants would be placed on a DTO for less than two years, but the court would have the power to extend or reduce the length of the order depending upon the participant's progress.[72] Only one submission discussed the duration of the order; the Aboriginal Legal Service submitted that the duration of the DTO should not be any longer than the operational period of a Community Based Order or suspended sentence.[73] The Commission notes that under the *Sentencing Act* the maximum operational period of all comparable orders is two years.[74] Accordingly, the Commission recommends that the maximum duration of the DTO should be two years.

Indicated sentences and final sentencing

Because the DTO is a pre-sentence order, sentencing is deferred to a later date (up to a maximum of two years from the date the order is made). It is a standard practice in drug court programs to provide an indicated or initial sentence so that the participants are aware of the likely sentence that they will receive if they do not agree to participate or if they fail to comply with the program. In the Perth Drug Court, only participants with offences that are within the magistrate's jurisdiction are given an indicated sentence. As the Commission observed in its Consultation Paper, indicated sentences set clear boundaries for participants: they know what will happen if they fail to comply with the program and, if successful, they will receive less than the indicated sentence. However, for superior court matters indicated sentences are not used because the Perth Drug Court magistrate does not have jurisdiction to sentence the offender at the end of the program. Instead, the Director of Public Prosecutions advises the offender of the likely submission on penalty in the event that the offender is successful (or unsuccessful).[75]

In its proposal the Commission stated that the court imposing the DTO should indicate to the offender the penalty that would be imposed if he or she does not agree to the making of the order or does not comply with the requirements of the order. Both the Department of the Attorney General and the Magistrates Court agreed with this proposal.[76] The Magistrates Court emphasised that the indicated sentence should not limit the final sentencing outcome if new offences have been committed.[77] Accordingly, the Commission recommends that before making a DTO the court must advise the offender of the sentence that is likely to be imposed if he or she does not agree to the order being made or if the order is cancelled for non-compliance.

Drug courts take into account successful completion of the program by imposing a different—more lenient—penalty than the indicated sentence. For those participants with an indicated sentence of immediate imprisonment, the expected outcome for successful completion of the program is a non-custodial sentence. If the participant is terminated from the program the indicated sentence will usually be imposed. Of course, if new offences have been committed an additional (cumulative) sentence may be given. In some instances, the indicated sentence may be reduced for partial compliance.

In Chapter Two, the Commission recommends that the *Sentencing Act* be amended to provide that failure to comply with or failure to agree to participate in a prescribed court intervention program is not an aggravating factor. Further, it is recommended that compliance with the requirements of a prescribed court intervention program is a mitigating factor and the greater the level of compliance the greater the mitigation.[78] It is made clear in the recommendation below that the same principles apply to a DTO.

71. Generally, orders under the *Sentencing Act 1995* (WA) are not available for young offenders aged less than 18 years (ss 50, 50A & 50B); however, the Commission believes that it is appropriate to enable the Perth Children's Court Drug Court to make a DTO for a young offender of any age provided that he or she is suitable and eligible for the Children's Court Drug Court program.
72. LRCWA, *Court Intervention Programs,* Consultation Paper, Project No. 96 (2008) 72.
73. Aboriginal Legal Service of WA (Inc), Submission No. 20 (13 November 2008) 2.
74. An offender cannot be placed on any of the following orders for longer than two years: Pre-Sentence Order (s 33B), Conditional Release Order (s 48), Community Based Order (s 62), Intensive Supervision Order (s 69), Suspended Imprisonment Order (s 76), Conditional Suspended Imprisonment Order (s 81), or a Parole Order (s 93).
75. See LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 56.
76. Department of the Attorney General, Submission No. 21 (13 November 2008) 6.
77. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 5.
78. See Recommendation 12.

Bail conditions and conditions of Drug Treatment Order

Once an offender is referred to the Perth Drug Court or Children's Court Drug Court, he or she may be assessed for suitability for a DTO (if ineligible the offender may still be assessed for other programs available through the applicable drug court). Until such time as a DTO is made, the offender may be subject to bail conditions, including residential and curfew conditions; reporting to the Court Assessment and Treatment Service (CATS); undertaking urinalysis; and complying with all lawful directions of the CATS officer. During the assessment phase offenders are expected to 'demonstrate their commitment to changing their lifestyle and their commitment to the Drug Court'.[79] If a DTO is made it may still be necessary to retain specific bail conditions because police (rather than community corrections) have standing to monitor bail conditions.[80] This is extremely important because local police are actively involved in monitoring residential and curfew bail conditions imposed on drug court participants.

The Commission believes that the types of conditions that can be imposed as part of a DTO should remain as flexible as possible so that conditions can be tailored to the individual needs and risks of participants. For this reason, the Commission recommends broad categories of conditions (with specifics to be dealt with under regulations). The Commission notes that the Magistrates Court submitted that the Perth Drug Court should have the power to direct that 'urine samples may be tested for DNA and in any other way necessary to maintain the integrity of the drug testing process'.[81] The Commission understands the importance of reliable drug testing and, therefore, recommends that specific conditions may include a condition to submit for urinalysis and that any samples provided can be tested for DNA to verify the identity of the participant providing the sample.

Rewards and sanctions

As mentioned above, drug court programs use a system of rewards and sanctions to encourage compliance and respond quickly and effectively to non-compliance. It has been stated that rewards and sanctions are

> essential to achieve the purposes of the program because [they apply] both *positive* … and negative reinforcement techniques quickly, consistently and publicly on persons who require a great deal of external motivation to successfully complete their programs.[82]

In the Perth Drug Court, rewards and sanctions are given via a breach point system: points are given for non-compliance and deducted for good behaviour. Rewards may also include praise from the judicial officer, or less frequent urinalysis, reporting and court attendances. Sanctions are the opposite: condemnation or warnings from the magistrate or more frequent obligations. The Commission's recommendation below provides that various rewards and sanctions can be given, including any rewards or sanctions that may be imposed under the regulations. The Commission notes that in other jurisdictions rewards include the giving of special privileges such as telephone cards or transport assistance[83] and it has been suggested that other rewards such as self-help books, meal vouchers, baby supplies and lifestyle courses would be beneficial.[84]

The ultimate sanction given in drug court programs (other than termination from the program) is time in custody. In its Consultation Paper, the Commission explained that custody sanctions are now given informally by revoking bail for a set period of time and then re-releasing the offender on bail to continue with the program. As stated earlier, the Commission does not consider that this practice is strictly in accordance with the provisions of the *Bail Act* and recommends that there should be an express power to impose custody sanctions for offenders who are subject to a DTO.[85] Informal custody sanctions are apparently now only given once during the program and the Magistrates Court submitted that legislation should provide that custody sanctions be limited to one only and to a maximum of 10 days' imprisonment.[86] The Commission understands the view that custody sanctions should only be used as a last resort; however, it may be counterproductive to stipulate that custody sanctions can only ever

79. *Perth Drug Court Manual* (2007) 12.
80. LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 70 & 196. One submission stated that it would be too complicated to require offenders to comply with bail conditions at the same time as a DTO: Confidential Submission No. 8 (26 September 2008) 7. However, s 33C(6) of the *Sentencing Act 1995* (WA) currently provides that if a PSO is made the court can grant the offender bail.
81. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 6.
82. Freiberg A, 'Therapeutic Jurisprudence in Australia: Paradigm shift or pragmatic incrementalism?' (2002) 20(2) *Law in Context* 6, 15.
83. In New South Wales external organisations may offer rewards for participants under strict conditions, provided that the reward is consistent with the objectives of the program: Drug Court of New South Wales, *Acceptance of Rewards*, Policy No. 4 (2002) cl 3.
84. Costanzo J, *South-East Queensland Drug Court Pilot,* Final Report (2003) 28.
85. One submission argued that it would be necessary to create a breaching offence to impose a custody sanction: Confidential Submission No. 8 (26 September 2008) 6. The Commission disagrees because legislation may give a court the power to detain a person in the absence of proof of committing an offence. For example, bail legislation enables a judicial officer to detain a person if charged with an offence and considered to be an unacceptable risk of absconding or reoffending. The Commission has concluded that if a person can be detained in the absence of proof of any wrongdoing then there is no reason why legislation cannot provide the power to detain a person for a set maximum period of time in circumstances where that person has been convicted of an offence; would otherwise be imprisoned; has agreed to participate in program in full knowledge of the consequences of non-compliance; and, importantly, with a right of review (see section below).
86. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 7.

be given once. There is no such limit in other jurisdictions. In Victoria, for example, custody sanctions can be accumulated (up to a maximum of 15 days) and accumulated unserved custody sanctions can be reduced as a reward for compliance. The Commission recommends that custody sanctions can be given up to a maximum of 10 days at any one time and that the serving of any custody sanctions can be deferred to a later time. The circumstances in which a custody sanction can be imposed, and any limit on how often they can be given, can be dealt with under regulations.[87]

In its Consultation Paper the Commission stated that the prescribed court sentencing an offender after a DTO has been cancelled should have discretion to take into account any custody sanctions served throughout the program.[88] This reflects current practice: informal custody sanctions are not generally taken into account at sentencing (because it is considered that the serving of the sanction was for the purpose of enabling the participant to have a second chance). However, if after serving a number of days in custody, a participant is immediately terminated from the program, time in custody is deducted from the final sentence. In its submission, the Magistrates Court agreed with this approach.[89]

Right of review

The Commission also proposed that there should be a right of appeal against the imposition of custody sanctions.[90] In this regard it has been observed that:

> A right of appeal against an adverse decision which affects a person's liberty or property is fundamental to the operation of any criminal justice system and should not be able to be waived, especially in circumstances where consent to the program cannot be wholly free, given the alternatives open to a defendant.[91]

In response, the Magistrates Court submitted that there should be no right of appeal against the imposition of custody sanctions because:

> Each participant will be fully aware from the outset that they will be liable to serve a custody sanction should they persistently fail to comply. Providing a right of appeal against a short sharp custody sanction will inevitably lead to the need to hold hearings with sworn evidence on every disputed point and militates against the acceptance of responsibility by the offender for their actions.[92]

87. In the Commission's recommendation below for the introduction of a pre-sentence DTO, it is provided that regulations can be made in relation to a number of different operational issues.
88. LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 66.
89. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 7.
90. LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 69.
91. Freiberg A, 'Australian Drug Courts' (2000) 24 *Criminal Law Journal* 213, 230.
92. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 7.

The above comments seem to assume that a drug court participant would never have reason to legitimately dispute an allegation of non-compliance. That cannot possibly be the case. There may be circumstances where a participant genuinely believes that urinalysis results are incorrect or where there was a very good reason for failing to appear in court or attend counselling. The drug court may impose a custody sanction being sceptical of a participant's reason for non-compliance because of past failures to comply. While the Commission has every confidence that the court provides the offender with an opportunity to be heard in regard to allegations of non-compliance, the absence of a right to review in these circumstances has the potential to lead to injustice. The Commission also notes that in practice it would be rare for a drug court participant to challenge the decision to impose a custody sanction because participants will know that, if they do so without good reason, the result is simply delaying the inevitable. Accordingly, the Commission recommends that the offender can apply for a rehearing before a judge of the Supreme Court against a decision to impose a custody sanction. This enables the Supreme Court to consider the matter afresh and as expeditiously as possible. For example, a drug court participant may wish to pay for his or her urine sample to be independently re-tested and the evidence of the results can be presented at the rehearing. Similarly, a participant may be able to obtain independent evidence that was not presented or available to the drug court.

Protection against self-incrimination

Drug court participants are expected to disclose any illicit drug use during the program. Further, eligibility is based upon demonstrated illicit drug dependency: offenders will necessarily be required to disclose the extent of their drug problem. In its Consultation Paper, the Commission noted that in other jurisdictions there is legislative protection for certain admissions made by drug court participants. In Victoria and New South Wales, the protection relates to admissions about drug use or drug possession. The legislative protection afforded under the Queensland legislation is broader but admissions concerning certain serious offences, such as sexual and violent offences, are excluded from the ambit of this provision.[93] The Commission considered that some degree of legislative protection for drug court participants is warranted and sought submissions about the appropriate scope for the protection against self-incrimination by drug court participants.[94]

In response, the Western Australia Police submitted that information about other offences should always be acted upon by the police.[95] The Western Australia

93. LRCWA, *Court Intervention Programs,* Consultation Paper, Project No. 96 (2008) 68.
94. Consultation Question 2.2.
95. Western Australia Police, Submission No. 18 (14 October 2008) 2.

Police Prosecuting Division implied that legislative protection is not necessary because there has never been an example where drug court team members have used admissions of drug use against the offender.[96] This sentiment was reiterated by the Magistrates Court; however, it was submitted that legislative protection should be afforded because the program encourages honesty. The Magistrates Court and the Department of the Attorney General submitted that any legislative protection should be limited to admissions made in relation to drug use and simple drug possession.[97]

The Commission agrees that drug court participants should be provided with legislative protection against self-incrimination in regard to admissions of drug use and possession because participants are required to make such admissions to be eligible and to participate effectively in the program. It would be unfair if admissions could be subsequently used against the participant as evidence or to obtain further evidence to substantiate a prosecution for drug use or possession.

Case reviews and the roles of team members

Case management of drug court participants is undertaken by the drug court team, which includes a magistrate, a police prosecutor, defence counsel, and Court Assessment Treatment Service officers. Team members aim to work together to address the offender's drug problem and encourage rehabilitation. As discussed in the Consultation Paper, once an offender is accepted onto the program, a non-adversarial approach is adopted because the common goal is to assist the offender in his or her rehabilitation efforts. However, if a dispute arises, defence counsel and the prosecutor adhere to their traditional adversarial roles and the magistrate makes the final decision.

Nevertheless, in its Consultation Paper, the Commission highlighted that case review meetings (held in the presence of all drug court team members including the magistrate, but in the absence of the offender) have the potential to compromise the traditional roles of team members. In particular, defence counsel is expected to collaborate with the team and at the same time advocate for the client.[98]

In this regard, the Commission observed that all team members should be fully aware of each other's professional and ethical obligations and acknowledge that these obligations may take precedence over treatment objectives. In Chapter Two the Commission recommends that regulations can be made in relation to the exchange of information between various agencies involved in court intervention programs and this should assist in ensuring that all agencies are aware of all information disclosure requirements.[99]

Further, it has been suggested that case reviews held in the absence of the offender are inappropriate because court proceedings should be conducted openly; the offender should be privy to all information upon which a decision is based.[100] Nonetheless, all Australian drug court programs hold case reviews in the absence of the offender. The Commission sought submissions about this issue, in particular, the best way to facilitate a collaborative approach while at the same time ensuring that the rights of offenders are protected.

Submissions were overwhelmingly in favour of retaining the current practice of holding case reviews in the absence of the offender. The Magistrates Court stated that it is 'strongly of the view that participants should not attend case review meetings'.[101] It was explained that if the offender was present he or she may feel uncomfortable during discussions and that in some instances the offender might be confronted with issues without having had any prior legal advice. Further, it was argued that some participants may not be in a fit and proper state to attend the meetings and it would be difficult to pre-determine their fitness (other than by holding a pre-hearing review in their absence). It was emphasised that defence counsel is 'free to inform the participant of what occurred at the team meeting' so that the participant is fully informed and that the offender is provided with the opportunity to address the magistrate in open court.[102] Others who agreed that the offender should not be present during case review meetings included the Department of the Attorney General and the Western Australia Police Prosecuting Division.[103] Even Dr Andrew Cannon, who stated that as 'a matter of principle' he prefers offenders to be present during case reviews, acknowledged that in practice it is preferable to hold reviews in the absence of the offender so long as the offender is informed of anything that may have negative consequences.[104]

96. Western Australia Police Prosecuting Division, Submission No. 22 (5 January 2009) 2.
97. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 13; Department of the Attorney General, Submission No. 21 (13 November 2008) 4–5. The Department also suggested that there should be protection from this information being used in other unrelated proceedings (such as family law proceedings). In Chapter Two the Commission recommends that regulations can be made under the *Criminal Procedure Regulations 2005* in regard to the exchange of information and in regard to the admissibility of information in subsequent proceedings: see Recommendation 2.
98. LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 62–65.
99. See Recommendation 2(1)(h).
100. LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 64.
101. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 11.
102. Ibid 12–13.
103. The Department of the Attorney General, Submission No. 21 (13 November 2008) 3; Western Australia Police Prosecuting Division, Submission No. 22 (5 January 2009) 2.
104. Dr Andrew Cannon, Deputy Chief Magistrate of South Australia, Submission No. 17 (13 October 2008) 3.

Although not directly addressing this issue, the Chief Justice of Western Australia questioned the appropriateness of judicial officers forming 'personal relationships' with program participants because this might undermine the 'role of the judicial officer as an impartial and independent adjudicator'.[105] This concern supports the existing practice because all proceedings and dealings between the drug court magistrate and the offender are held in open court.

Although no one submitted that the offender should attend case review meetings, Legal Aid WA suggested that case reviews should be held in the absence of both the magistrate and the offender so that

> adverse information, which is raised in relation to an offender, is not heard by the magistrate in the absence of the offender. Any adverse information relating to an offender should then be raised by the prosecution or the treatment provider in court so that the offender has an opportunity to respond to the allegation in court.[106]

However, the offender can still be provided with an opportunity to respond to any adverse information if the case review meetings are limited to discussions rather than decision-making. Both the Magistrates Court and the Department of the Attorney General suggested that legislative provisions could restrict the types of matters that can be discussed or determined during case reviews.[107] The Magistrates Court suggested that the Victorian model be followed.[108] In its Consultation Paper, the Commission explained that in Victoria decisions (such as a decision that the DTO should be varied or that particular rewards or sanctions should be imposed) cannot be made at the case conference.[109] As at the end of May 2009, the Victorian Magistrates Court website states that case conferences are held so that the various team members can inform the drug court magistrate about the participant's performance. Various matters that can be discussed during the case conference include the participant's compliance with the requirements of the program including any drug use; whether the DTO needs to be varied; appropriate rewards and sanctions; and whether the participant has been charged with any new offences or been subject to any further dealings with police. It is stated that:

> Regardless of what has been discussed and put forward at the case conference by the Drug Court team, no decision will be made officially until the participant is given the opportunity to be heard at the review hearing.[110]

The Commission agrees that this is a sensible approach but has concluded that it should be set out in legislation rather than policy documents. It is important that the requirement to ensure procedural fairness is protected. Accordingly, the Commission recommends below that all final decisions are to be made in open court[111] and further (consistent with current practice), that all termination proceedings must be held in open court.

Operational issues

In Chapter Two of this Report the Commission emphasises that legislative provisions for court intervention programs need to be flexible so that programs are not locked into rigid procedures and process, and so that programs can adapt as required. To achieve this, the Commission recommends that regulations and court rules can be made in relation to operational and procedural issues. This approach should also apply to the recommended DTO because, over time, experience and evaluation results may impact on what is considered best practice. Accordingly, the Commission recommends that certain operational and procedural issues should be dealt with under regulations and court rules rather than in substantive legislation.[112] The Commission also highlights that in drafting these regulations and rules it is essential that drug court team members and program staff are fully consulted.

105. Chief Justice of Western Australia, Wayne Martin, Submission No. 15 (30 September 2008) 2–3
106. Legal Aid WA, Submission No. 11 (1 October 2008) 10.
107. Department of the Attorney General, Submission No. 21 (13 November 2008) 4.
108. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 13.
109. The relevant legislation provides that case conferences can be convened to consider the drug court participant's progress and a 'case conference may be attended by a lawyer, a prosecutor, a health service provider, a community corrections officer or anyone else whom the magistrates thinks should attend: *Sentencing Act 1991* (Vic) s 18ZI. However, the Magistrates Court of Victoria website states that '[u]nder no circumstances is the participant to be present at the case conference': see <http://www.magistratescourt.vic.gov.au/wps/wcm/connect/Magistrates+Court> at 21 May 2009.
110. Ibid.
111. The Commission believes that this addresses another issue raised by the Chief Justice of Western Australia that if judicial officers have an 'informal association' with court intervention program participants (especially where that association is unrecorded) there may be issues 'with respect to the identification of the precise basis upon which sentence has in fact been passed': Chief Justice of Western Australia, Submission No. 15 (30 September 2008) 2–3. By providing that all decisions are to be made in open court the reasons for any decision will be clear and will be recorded.
112. As just one example, the Department of the Attorney General submitted that the current protocols between higher courts and Perth Drug Court should be maintained in legislation: Department of the Attorney General, Submission No. 21 (13 November 2008) 5. However, the Commission considers that these protocols would be best dealt with under court rules so that they can be quickly and easily changed if necessary and so that they are determined by the relevant judicial officers.

RECOMMENDATION 20

Drug Treatment Order

That the *Sentencing Act 1995* (WA) be amended to create a new pre-sentence Drug Treatment Order (DTO) to provide, among other things:

Objectives

1. That the primary objectives of a DTO are to rehabilitate offenders by providing judicially supervised drug treatment; to reduce drug dependency and to reduce drug-related offending.

Availability

2. That a DTO can only be imposed by a prescribed court or prescribed court intervention program (and initially the only prescribed courts and programs are to be the Perth Drug Court Program; the Supreme Court, the District Court and the Perth Children's Court Drug Court Program).[113]

3. That despite anything to the contrary under the *Young Offenders Act 1995* (WA) a court administering the Perth Children's Court Drug Court Program may impose a DTO on an eligible young offender even if that young offender is under 18 years of age.[114]

4. That any Western Australian court can refer an offender to the Perth Drug Court Program or the Perth Children's Court Drug Court Program for assessment and determination of the offender's eligibility and suitability for a DTO.

5. That if an offender has been charged with a superior court matter, the Perth Drug Court Program is to determine if the offender is suitable for a DTO; however, the applicable superior court is to make the final decision as to whether a DTO should be made.

6. That if a superior court makes a DTO, the Perth Drug Court Program is to supervise and monitor the offender's progress on the order and can vary the conditions of the order at any time, but only the superior court that imposed the order can cancel the order.

7. That a court administering the Perth Drug Court Program can commit the offender to the superior court that imposed the DTO at any time.

8. That if a superior court makes a DTO it may order that the offender reappear before the superior court at a particular time and place so that the superior court can monitor the offender's progress on the order.

Eligibility

9. That in order to be eligible for a DTO the offender must be convicted of an offence (or offences) that warrants a term of immediate imprisonment.

10. That an offender who was subject to a suspended sentence of imprisonment at the time of committing the current offence(s) may be eligible for a DTO.

11. That in order to be eligible for a DTO the offender must have an illicit drug-dependency.

12. That a DTO cannot be made without the written consent of the offender and that before the offender can consent to the making of a DTO he or she must be given an opportunity for legal advice and must be fully informed of the requirements of the DTO and the possible consequences of non-compliance.

Indicated sentences

13. That before the offender formally consents to the DTO, the court making the DTO must indicate to the offender the penalty that is likely to be imposed if he or she does not agree to the making of the order or if he or she fails to comply with the requirements of the order.

Final sentencing

14. That when determining the final sentence to be imposed after a DTO has been cancelled, compliance with the requirements of the DTO is a mitigating factor and the greater the level of the compliance the greater the mitigation.

15. That the final sentence imposed in relation to the offences that were subject to the DTO must not be greater than the indicated sentence.

16. That when sentencing the offender the court may take into account any custody sanctions served during the order.

17. That the final sentence can be appealed in the same way as any other sentence or order imposed as a consequence of conviction.

113. By enabling prescribed courts to impose a DTO additional courts can be subsequently added (if considered appropriate).
114. The Commission notes that it may be necessary for consequential amendments to be made to the *Young Offenders Act 1994* (WA).

Duration

18. That the maximum length of a DTO is two years.

19. That if a DTO is made for a period less than two years it can be extended for any period up to the maximum of two years.

20. That a DTO can be cancelled at any time prior to its expiration (either as a consequence of being terminated from the program or because of successful compliance with the program).

Case reviews

21. That regulations prescribe which agencies or individuals make up the Perth Drug Court Team and the Perth Children's Court Drug Court Team.

22. That regulations may provide for the specific roles and responsibilities of each team member.

23. That the Perth Drug Court Program and the Perth Children's Drug Court Program may hold 'out-of-court' case review meetings and that these meetings may be attended by any prescribed member of the Drug Court Team or anyone else whom the relevant magistrate considers should attend.

24. That at the case review meetings, Drug Court Team members may discuss and consider the participant's performance on the DTO; whether the DTO or any bail conditions previously imposed need to be varied; the participant's treatment and support needs; and whether the participant should be rewarded or sanctioned (and, if so, the appropriate reward or sanction in the circumstances). However, a final decision about the above issues must be made in open court and only after the participant has been informed about any adverse information presented at the case review meeting and given an opportunity to be heard.

25. That if possible termination from the program (and cancellation of the DTO is being considered) this issue is not to be discussed at the case review meeting. All termination proceedings are to be undertaken in open court.

Conditions of the DTO

26. That regulations may provide for the types of conditions that may be imposed as part of a DTO including:

    (a) standard conditions (eg, requirement to report after DTO made; requirement to notify of change of address; requirement to reside in Western Australia unless prior approval; requirement not to commit any offence during DTO)

    (b) core conditions (eg, residential; curfews; counselling; residential treatment; medical, psychiatric or psychological treatment; attendance at educational or vocational training programs; attendance at employment; urinalysis; reporting; and attendance at court)

    (c) specific conditions (eg, requirement that offender submit to urinalysis and that samples provided may be tested for DNA)

27. That if a prescribed court makes a DTO it can grant the offender bail.

Rewards and sanctions

28. That the Perth Drug Court Program or the Perth Children's Court Drug Court Program may give the following rewards if the court is satisfied that the offender has complied or is complying with the conditions of the Drug Treatment Order:

    (a) less frequent court attendances;

    (b) less frequent urinalysis;

    (c) less frequent attendance at counselling, treatment or other programs;

    (d) progression to the next phase of the program;

    (e) a reduction in the number of days to be served under a previously imposed but unserved custody sanction; or

    (f) any other reward prescribed under the regulations.

29. That the regulations may provide for a system of breach points to be imposed in the event of non-compliance and specify the number of breach points that are to be given for failing to comply with the various conditions of the DTO, including how breach points may be deducted for compliance.

30. That the Perth Drug Court Program or the Perth Children's Court Drug Court Program may give the following sanctions if the court is satisfied that the offender has not complied or is not complying with the conditions of the DTO:

    (a) more frequent court attendances;

    (b) more frequent urinalysis;

    (c) more frequent attendance at counselling, treatment or other programs;

(d) movement back to a previous phase of the program;

(e) an order that the offender be detained in custody up to a maximum of ten days at any one time; or

(f) any other sanction prescribed under the regulations.

31. That the Perth Drug Court Program or the Perth Children's Court Drug Court Program cannot impose a custody sanction (under 30(e) above) unless the offender has not complied or is not complying with the conditions of the order and that in all of the circumstances no other sanction is appropriate.

32. That the serving of a custody sanction may be deferred to a later date and that if custody sanctions have been given on more than one occasion, the offender can serve the accumulated sanctions at one time provided that the total number of days to be served is no longer than 10 days.

33. That a judicial officer can issue a warrant committing the offender to a prison or detention centre (whichever is applicable) for the purpose of serving the custody sanction.

34. That if a custody sanction (under 30(e) above) is imposed, the offender has the right to apply to a judge of the Supreme Court for a rehearing of the matter and, if the offender elects to exercise that right, the serving of the custody sanction is to be deferred until after the rehearing has been completed.

Operational

35. That regulations can be made in relation to the following matters:

(a) referral and assessment processes;

(b) eligibility criteria;

(c) excluded offences;

(d) the different phases of the program including the requirements under each phase;

(e) prescribed rewards and sanctions that may be given or imposed for compliance and non-compliance;

(f) any criteria that must be established before a DTO can be cancelled for non-compliance;[115]

(g) membership of the Drug Court Teams and the roles and responsibilities of team members;

(h) the provision of reports; and

(i) any other relevant matter.

36. That court rules can be made in relation to the following matters:

(a) procedures and processes for dealing with superior court matters, including how a superior court is to be informed of the offender's progress on the DTO; and

(b) any other relevant matter.

Amendment and cancellation

37. That a DTO can be varied or amended at any time by the court that made the DTO or by the Perth Drug Court Program or Perth Children's Court Drug Court Program (whichever is applicable) provided that all parties have had a reasonable opportunity to be heard.

38. That a DTO can only be cancelled by the court that made the order.

Immunity from prosecution

39. That any admission about personal use or possession of an illicit drug made by the offender during assessment for or while subject to a DTO cannot be used against the offender in proceedings for an offence.

40. That any evidence obtained as a result of that admission, cannot be used against the offender in proceedings for an offence.

41. That the above provisions do not prevent a prosecution for an offence if there is other evidence (ie, evidence other than the admission or evidence obtained as a result of the admission) implicating the offender.

Evaluation

42. That the effectiveness of the new DTO is to be independently evaluated two years from the date of commencement.

115. For example, s 10 of the *Drug Court Act 1998* (NSW) provides that the Drug Court may terminate the offender from the program 'if satisfied, on the balance of probabilities, that the offender is unlikely to make any further progress in the program or that the offender's further participation in the program poses an unacceptable risk to the community that the person may re-offend'. When determining the appropriate criteria for termination it is important to bear in mind that the best outcomes are achieved by those offenders who graduate from drug court programs and therefore those who are likely to fail should be removed from the program as soon as possible.

Other drug and alcohol court intervention programs

Apart from drug courts, there are numerous other court intervention programs in Australia targeting offenders with drug and/or alcohol problems. Generally, these programs are far less intensive than drug court programs and they target less serious offending. Some offenders are ineligible for drug court programs due to the nature of their offending behaviour and some are ineligible because they do not have an illicit drug problem. Others do not have access to drug court programs due to geographical circumstances. Because drug courts are relatively expensive and time consuming, it would not be feasible to establish a drug court in every court location. As the Aboriginal Legal Service observed in its submission, drug courts cannot be 'everything to everybody'.[1] Consistent with the Commission's first guiding principle—that court intervention programs should be available to as many offenders as possible—it is essential that there are alternative court intervention programs throughout Western Australia to address drug and alcohol dependency.[2]

ADDRESSING DRUG-RELATED OFFENDING

In its Consultation Paper the Commission described the operation of the Western Australian Supervised Treatment Intervention Regime (STIR). This program targets adult offenders who have an illicit drug problem. It is available in a number of regional magistrates courts and in the Perth Drug Court for offenders in the metropolitan area.[3] Under the Commission's recommendations in this Report, the length of the STIR could be increased to up to 12 months;[4] this may assist some offenders who require significant intervention to properly address their drug problem. Further, the program will be enhanced by the establishment of a coordinated policy unit for all court intervention programs. The recommended court intervention programs unit will be able to provide administrative, policy and training support to the STIR program staff across the state.[5] The Commission notes that since the preparation of its Consultation Paper, the Youth Supervised Treatment Intervention Regime (YSTIR) has commenced operation in the Perth Children's Court. The Commission has included both the STIR and the YSTIR in the list of prescribed court intervention programs under the recommended general legislative framework in Chapter Two of this Report.[6] The Commission supports the expansion of the STIR and the YSTIR to as many regional locations as possible.[7]

However, as the Commission highlighted in its Consultation Paper, there is one problematic aspect of the STIR; namely, that offenders are ineligible to participate until a plea of guilty has been entered. The Commission noted that other Australian pre-sentence drug court intervention programs[8] are not so restrictive. These programs aim to provide early intervention and consequently a plea of guilty is not a prerequisite for acceptance onto the program. Pre-plea programs increase access to court-supervised drug treatment by enabling participants to commence the program as soon as possible after arrest. In this regard, it is important to note that for some offenders the motivation to address underlying problems may peak at the time of arrest. On the other hand, effective participation in programs may be compromised if the participant is distracted by outstanding legal considerations.[9] The Commission sought submissions about whether it would be appropriate to enable participation in the STIR before a plea of guilty is entered.[10]

In response, the Drug and Alcohol Office submitted that the eligibility criteria for the STIR should not be altered because in order to access funding through the Commonwealth *Illicit Drug Diversion Initiative* participants must enter a plea of guilty.[11] In its submission, the Magistrates Court noted that because the STIR is supervised centrally in the metropolitan area (by the Perth Drug Court) a relaxation of the requirement for a plea of guilty may cause practical problems in relation to the transfer of matters from one court to another.[12] The Western Australia Police Prosecuting Division was strongly opposed to pre-plea participation on the basis that there should be an established connection between the offending

1. Aboriginal Legal Service of WA (Inc), Submission No. 20 (13 November 2008) 2.
2. See Chapter One: Guiding Principle One.
3. LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 79–80.
4. See Recommendation 13.
5. See Recommendations 1.
6. See Recommendation 2.
7. The Drug and Alcohol Office explained that the STIR is available in some circuit courts but that community corrections supervision and urinalysis is not always available: Western Australian Drug and Alcohol Office, Submission No. 5 (22 September 2008) 2.
8. For example, the Court Referral and Evaluation for Drug Intervention and Treatment (CREDIT) program, the Magistrates Early Referral into Treatment (MERIT) program: LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 80–83.
9. Department of the Attorney General, Submission No. 21 (13 November 2008) 7.
10. Consultation Question 2.5.
11. Western Australia Drug and Alcohol Office, Submission No. 5 (22 September 2008) 3.
12. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 14.

behaviour and the underlying drug problem.[13] On the other hand, the Department of the Attorney General expressed interest in the concept of pre-plea participation in court intervention programs but was cautious of the impact in practice.[14]

In Chapter Two of this Report, the Commission concludes that pre-plea participation in court intervention programs is appropriate so long as the effectiveness or availability of a specific program is not undermined. The Commission's recommended legislative framework *enables* pre-plea participation but it does not require it. The Commission is of the view that serious consideration should be given to permitting offenders to participate in the STIR before a plea of guilty is entered. If necessary, program eligibility criteria could be broad enough to enable the magistrate to assess the person's motivation and the reasons for not entering a plea of guilty (such as the need to obtain legal advice or negotiate with the prosecution). Also, eligibility criteria could ensure that only offenders (ie, those who plead guilty or those who have a history of prior offending) are permitted to participate. Having said that, the Commission is of the view that this issue is best determined by program managers, coordinators or staff.

ADDRESSING ALCOHOL-RELATED OFFENDING

Currently, there is no specialist court intervention program addressing alcohol dependency and abuse.[15] The Chief Justice of Western Australia recently stated that:

> Given the significant contribution which alcohol misuse makes to offending behaviour in Western Australia, it is arguable that there may be a significant gap in our programmes.[16]

In its Consultation Paper, the Commission recognised the need for court intervention strategies for alcohol-related offending, in particular, to address the needs of Aboriginal offenders. It has been found that Aboriginal detainees and prisoners are more likely to report alcohol-dependency than non-Aboriginal prisoners and detainees[17] and the rate of Aboriginal participation in court intervention programs is relatively low.[18] The exclusion of alcohol from the ambit of many programs is one reason for the low Aboriginal participation rate.[19] In its Consultation Paper, the Commission expressed its preliminary view that a flexible general program (available in both metropolitan and regional areas) is probably the best way to address the lack of alcohol-specific programs in Western Australia. Nonetheless, submissions were sought about the most appropriate way to increase the availability of court intervention programs for alcohol-dependent offenders and, further, whether an Aboriginal-specific alcohol court intervention program should be established in Western Australia.[20]

The Commission notes that alcohol-specific court intervention programs and Aboriginal-specific court intervention programs operate in other jurisdictions. Northern Territory has a separately constituted Alcohol Court targeting alcohol dependent offenders facing imprisonment.[21] The Rural Alcohol Diversion Program in New South Wales is based upon its pre-sentence drug program Magistrates Early Referral into Treatment Program (MERIT). Eligible offenders are diverted into alcohol treatment while on bail and are required to reappear before a magistrate to assess performance throughout the program.[22] The Queensland Indigenous Alcohol Diversion Program (QIADP) targets Aboriginal people who are dependent on, or are high-risk users of, alcohol and this program actively seeks to respect Aboriginal culture by employing Aboriginal staff; working closely with Aboriginal community justice groups and other organisations; and developing culturally appropriate programs.[23] The QIADP is available in three locations and eligible offenders complete up to 20 weeks of intensive alcohol treatment (including residential treatment). Progress on the program is managed by a team of agencies and participants generally appear in court fortnightly during the program.[24]

The Commission received strong support for the establishment of an alcohol court intervention program. The Magistrates Court of Western Australia stated in its submission that there 'is no doubt that

13. Western Australia Police Prosecuting Division, Submission No. 22 (5 January 2009) 3.
14. Department of the Attorney General, Submission No. 21 (13 November 2008) 7.
15. The Indigenous Diversion Program is a regional program which applies to Aboriginal offenders with illicit drug problems. It is not a court intervention program but rather a pre-sentence diversionary program. The magistrate takes into account the participant's performance on the program but is not involved in monitoring the participant during the program. It has been observed that anecdotal evidence suggests that Aboriginal offenders with alcohol and/or solvent abuse problems have been admitted to this program even though it is specifically funded to address illicit drug problems: Joudo J, *Responding to Substance Abuse and Offending in Indigenous Communities: Review of diversion programs*, Australian Institute of Criminology, Research and Public Policy Series No. 88 (2008) 35–36. The Commission has been advised that a new program, the Brief Alcohol Intervention Regime, is currently being developed; however, as the Commission understands it, this program will not involve *court* intervention: Western Australian Drug and Alcohol Office, Submission No. 5 (22 September 2008) 3.
16. The Hon Wayne Martin, Chief Justice of Western Australia, 'Drugs, Pipe Dreams and Hard Realities: Addressing substance abuse through the justice system' (Paper presented at Making it Happen: 2009 Western Australian Drug and Alcohol Conference, Fremantle, 13 May 2009) 27.
17. Putt J, Payne J & Milner L, 'Indigenous Male Offending and Substance Abuse' (2005) 293 *Australian Institute of Criminology Trends and Issues* 3–4.
18. See LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 72 and also Department of Indigenous Affairs, Submission No. 16 (8 October 2008) 1. One exception is the Geraldton Alternative Sentencing Regime: approximately 40% of participants were Aboriginal: LRCWA, 158.
19. For further discussion, see LRCWA, ibid 72.
20. Consultation Question 2.6.
21. See *Alcohol Court Act 2006* (NT) s 18.
22. New South Wales Government, *Rural Alcohol Diversion (RAD) Pilot Program,* Factsheet (December 2004).
23. See Queensland Government, *Queensland Indigenous Alcohol Diversion Program* (2007) <http://www.health.qld.gov.au/atods/programs/qiadp.asp> at 7 June 2009.
24. For further discussion of this program, see LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 83–85.

there is a need for programs to address alcohol dependency'.[25] Both the Department of Corrective Services and the Department of the Attorney General supported the establishment of alcohol-specific programs.[26] The Western Australia Police Prosecuting Division argued that a specialist alcohol court intervention program is necessary because alcohol-dependent offenders commit different types of offences and require different treatment programs than drug-dependent offenders.[27] Of course, submissions emphasised the need for adequate funding for service provision if such a program is to be successfully established.[28]

However, there was less support for a separate Aboriginal-specific alcohol court intervention program. Only two submissions were in favour of a separate Aboriginal program. The Department of Indigenous Affairs submitted that an Aboriginal-specific alcohol court intervention program should be established in Western Australia and supported the Queensland model but also supported flexible and inclusive general programs.[29] The Department of the Attorney General supported both a general alcohol court intervention program and Aboriginal-specific alcohol court intervention program.[30]

In contrast, others claimed that it is more important to ensure that mainstream programs are culturally relevant than to establish a separate Aboriginal program. The Magistrates Court submitted that:

> It is more important to have a culturally appropriate program and service provider to assist Aboriginal offenders than to create a separate program however there may be some additional benefits in adopting separate lists or procedures.[31]

The Western Australia Police Prosecuting Division suggested that 'a specialist program could be incorporated into the one court but with different programs for Indigenous people'.[32] In line with this sentiment, Dr Andrew Cannon commented that the South Australian Drug Court had retained more Aboriginal participants since 'grouping their attendances at one time and ensuring that Aboriginal workers are there to provide culturally relevant advice and support'.[33] In general terms, the Department of Indigenous Affairs and the Aboriginal Legal Service emphasised the need for adequate funding for Aboriginal-specific treatment programs and support staff.[34] In this regard, the Drug and Alcohol Office advised that it has provided funding for 'four Aboriginal service officers in the metropolitan area to provide culturally secure service provision in courts and key treatment agencies, so as to increase the number of Aboriginal people participating in court diversion programs'.[35]

In order to ensure that there are appropriate court intervention strategies for alcohol-dependent offenders, the Commission has two options: recommend the establishment of an alcohol court intervention program (with culturally relevant processes, treatment programs and support services) or recommend two separate programs (one being exclusively for Aboriginal people). In a 2008 Australian Institute of Criminology report, it was observed that some people consulted were of the view that:

> Indigenous-specific programs might actually be stigmatising, as they can be seen to label Indigenous people as particularly problematic and in need of specific interventions. The cost-effectiveness of running mainstream and Indigenous programs side by side was also raised as an issue, and this would be a concern in smaller jurisdictions. Some suggested that a better option, which would address concerns about negative labelling and program costs, would be to ensure that mainstream programs are flexible enough to be culturally responsive and relevant.[36]

The Commission is persuaded by the cost-effectiveness argument that a single alcohol court intervention program is the best way to proceed. It would be premature to establish two separate programs until a single program has been independently evaluated and assessed in terms of its effectiveness for both Aboriginal and non-Aboriginal offenders. An alcohol court intervention program in Western Australia should be designed in such a way as to attract Aboriginal offenders. It is essential that the program does not unintentionally exclude Aboriginal people by restrictive eligibility criteria (such as excluding offenders with offences

25. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 15.
26. Department of Corrective Services, Submission No. 19 (6 October 2008) 3; Department of the Attorney General, Submission No. 21 (13 November 2008) 7.
27. Western Australia Police Prosecuting Division, Submission No. 22 (5 January 2009) 4.
28. Western Australian Drug and Alcohol Office, Submission No. 5 (22 September 2008) 2; Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 15; Department of the Attorney General, Submission No. 21 (13 November 2008) 7–8.
29. Department of Indigenous Affairs, Submission No. 16 (8 October 2008) 3.
30. Department of the Attorney General, Submission No. 21 (13 November 2008) 7.
31. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 15.
32. Western Australia Police Prosecuting Division, Submission No. 22 (5 January 2009) 4.
33. Dr Andrew Cannon, Deputy Chief Magistrate of South Australia, Submission No. 17 (13 October 2008) 1. The Commission is aware that in order to encourage Aboriginal participation in the Perth Drug Court a separate list has been established for Aboriginal participants. It appears from the relevant brochure for Aboriginal drug court participants that this list will utilise Aboriginal drug and alcohol workers and may call on advice from Aboriginal community members: Department of the Attorney General, *What is the Drug Court: Information for adult Aboriginal participants* (2008). The Commission supports this approach, in particular, the involvement of Aboriginal Elders or other respected persons because they could assist the drug court magistrate to motivate and encourage Aboriginal offenders to comply with the conditions of the program.
34. Department of Indigenous Affairs, Submission No. 16 (8 October 2008) 3–4; Aboriginal Legal Service of WA (Inc), Submission No. 20 (13 November 2008) 4.
35. Western Australian Drug and Alcohol Office, Submission No. 5 (22 September 2008) 2.
36. Joudo J, *Responding to Substance Abuse and Offending in Indigenous Communities: Review of diversion programs*, Australian Institute of Criminology, Research and Public Policy Series No. 88 (2008) 73.

of a violent nature).[37] Most importantly, an alcohol court intervention program should have sufficient funding to provide access to Aboriginal-specific alcohol treatment programs, residential facilities and support services.

RECOMMENDATION 21

Establish an alcohol court intervention program

That there should be an alcohol court intervention program established in Western Australia at the earliest opportunity to service all metropolitan courts dealing with adults and with the following features:

1. The program should target both alcohol-dependent offenders and offenders who exhibit high-risk alcohol consumption.[38]
2. The program should be available, in principle, to offenders in all of the state's adult court jurisdictions, but be monitored by the Magistrates Court pursuant to Recommendation 2(1)(g), Recommendation 4 and Recommendation 10.
3. The program should be available both pre-plea and post-plea.
4. An applicant that has been referred but is assessed as ineligible to participate in the program should be returned to the general court list to be dealt with at the earliest opportunity.
5. Participation in the program must be on a voluntary basis and written consent to sharing of information among the court, relevant government departments and external service providers should be obtained.
6. Anything done by the offender in compliance with the program should be taken into account during sentencing and failure to comply with or failure to agree to participate in the program is not to be regarded as an aggravating factor.[39]
7. The program should be established as a justice initiative with joint resource responsibility from the Departments of the Attorney General, and Corrective Services and the Drug and Alcohol Office.
8. The program should be sufficiently resourced to purchase services from relevant non-government service providers on behalf of participants.
9. The program should develop, in consultation with Aboriginal people, culturally appropriate processes for Aboriginal offenders (eg, employment of an Aboriginal support worker, establishment of a separate list/day for Aboriginal participants, and involvement of Aboriginal community representatives). Further, sufficient funding should be provided to ensure that Aboriginal-specific alcohol treatment programs and service providers are obtained for Aboriginal participants.
10. The program should begin as a two-year pilot in the Perth Magistrates Court taking referrals from all metropolitan courts with the aim of extending its operation, subject to independent evaluation, to as many metropolitan courts as possible.

ADDRESSING ALCOHOL RELATED OFFENDING IN REGIONAL AREAS AND FOR YOUNG OFFENDERS

The availability of an alcohol court intervention program in the metropolitan area will provide Western Australia with a far more comprehensive court intervention strategy to deal with offending related to substance abuse. However, this strategy is not complete because there will be no programs addressing alcohol problems in regional areas or for young offenders. The Commission is mindful of the resource implications of the recommendations in this Report and has concluded that it would not be cost-effective to establish separate specialist programs in all regional courts. To address the lack of court intervention strategies in regional areas, in Chapter Six of this Report the Commission recommends the development of a flexible and inclusive general court intervention program.[40] The intention of this recommendation is to establish a statewide general program with flexibility to respond to local needs and circumstances. This general program should be equipped to address a wide variety of underlying issues including alcohol problems. The Commission also recommends that the general court intervention program be established in the Children's Court because a general program, rather than a series of specialist programs (with relatively low numbers), is also the most cost-effective way to provide access to court intervention programs for young offenders.[41]

37. In its Consultation Paper, the Commission encouraged a flexible approach in regard to offenders with violent histories. It was explained that some Aboriginal offenders are excluded from programs because of past convictions for offences such a resisting arrest or assault police: LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 185–186. A flexible approach was supported by the Department of the Attorney General, Submission No. 21 (13 November 2008) 3.
38. It has been observed that Aboriginal people do not consume more alcohol on average than non-Aboriginal people but Aboriginal people are 'more likely to engage in high-risk binge drinking': Willis M & Patrick-Moore J, *Reintegration of Indigenous Prisoners*, Australian Institute of Criminology, Research and Public Policy Series No. 90 (2008) 32.
39. See Recommendation 12.
40. See Recommendation 37.
41. Under the Commission's recommendations in this Report there would be three court intervention programs for young offenders: the Children's Court Drug Court, the Youth Supervised Treatment Intervention Regime and the recommended pilot general court intervention program (which can address drug and alcohol problems, mental health issues and other underlying issues).

Chapter Four

Mental Impairment Court Intervention Programs

Contents

Introduction 73

What is mental impairment? 73

Terminology 73

Mental Impairment Court Intervention Programs 75

What are mental impairment court intervention programs? 75

Why target mentally impaired offenders? 75

Benefits of mental impairment court intervention programs 76

Reducing reoffending and improving community safety 76

Bridging the gap between health and justice 76

Helping offenders engage with community services 76

Integrating service delivery for people with complex needs 77

Improving efficiency of the court process 77

Finding alternatives to prison for mentally impaired offenders 78

Cost savings in other areas 78

Health and unemployment 78

Legal Aid 78

Responses and Recommendations 79

Introduction 79

Common elements of recommended mental impairment court intervention programs 79

Legislative framework 79

Policy framework 79

Eligibility criteria 80

Voluntariness 80

Availability to superior courts 80

Availability of 'insanity' defence 80

Designated judicial officer with an understanding of mental health issues 81

Adequate resourcing 81

Resourcing for programs and courts 81

Resourcing for community support services 81

Recommendations 82

Expand the existing Intellectual Disability Diversion Program 82

Establish a mental impairment court intervention program 84

Establish general court intervention programs to service mentally impaired offenders in regional areas 85

Establish general court intervention programs to service mentally impaired young offenders 86

Introduction

It is estimated that one in five Australian adults will experience a mental illness at some time in their life,[1] while lifelong cognitive impairments (such as intellectual disability and acquired brain injury) affect approximately five per cent of the adult population.[2] Mental health problems represent a significant burden on social and economic resources and are 'one of the leading causes of non-fatal … disease and injury in Australia'.[3] Mental impairment is also associated with increased exposure to health risk factors (such as suicide, substance abuse and decline in physical health)[4] and social risk factors (such as homelessness, unemployment, family breakdown and social exclusion). These problems can combine to bring the mentally impaired into contact with the criminal justice system and to place them at a disadvantage within that system.[5]

Mental impairment court intervention programs have developed in response to the difficulties experienced by mentally impaired offenders in the mainstream criminal justice system. These programs target offenders whose mental illness or intellectual disability contributes to their offending behaviour or otherwise inhibits their understanding of the criminal justice system and, in particular, the court process. There are court intervention programs specifically designed for mentally impaired offenders currently operating in magistrates courts in South Australia, Western Australia, Tasmania and Queensland.[6] The Commission's Consultation Paper explored the ways in which these programs have developed to assist this group of offenders in their dealings with the criminal justice system and to address the underlying causes of their offending behaviour.

WHAT IS MENTAL IMPAIRMENT?

The table on page 74 broadly describes the types of mental impairment catered for by Australian mental impairment court intervention programs.

Terminology

Although mental illness, personality disorder, intellectual disability, acquired brain injury and senility are quite different (both in nature and aetiology), they are often grouped together for criminal justice purposes. For example, the *Criminal Code* (WA) defines 'mental impairment' broadly as intellectual disability, brain damage, senility or mental illness for the purposes of the 'insanity' defence.[7]

Throughout this Report the Commission uses the term 'mentally impaired' to describe the general group of offenders to whom mental impairment court intervention programs apply. However, some existing court intervention programs discussed in this chapter are limited to certain classes of offenders that make up this broader group.[8] For example, Western Australia's Intellectual Disability Diversion Program only caters for intellectually disabled offenders who meet defined program criteria. When discussing individual programs with such restrictions in this Report, the Commission will refer to the relevant class of offender to make the distinction clear.

1. Australian Bureau of Statistics (ABS), *Mental Health and Wellbeing: Profile of adults 1997* (Canberra: ABS, 1998) 1.
2. According to the most recent national statistics, intellectual disability affects 2.7% of the adult population, while acquired brain injury affects 2.6% of the adult population. It should be noted that because of similarities in cognitive dysfunction in some instances there is potential for these statistics to overlap making the combined statistic less than 5%; however, there is also potential for brain injuries acquired through stroke and other non-traumatic means to be counted under a different disability category. ABS, *Disability, Ageing and Carers: Disability and long term health conditions* (Canberra: ABS, 2004) Table 6; Australian Institute of Health and Welfare (AIHW), *Disability in Australia: Acquired brain injury*, Bulletin No. 55, (Canberra: AIHW 2007) Table 1.
3. AIHW, *Australia's Health 2006: The tenth biennial health report* (Canberra: AIHW, 2006) 97.
4. Ibid.
5. Bernstein R & Seltzer T, 'Criminalization of People with Mental Illnesses: The role of mental health courts in system reform' (2003) 7 *University of District Columbia Law Review* 143, 143; Karras M et al, *On the Edge of Justice: The legal needs of people with a mental illness in NSW* (Sydney: Law and Justice Foundation of New South Wales, 2006) xvi.
6. These programs are described and discussed in detail in the Commission's Consultation Paper. LRCWA, *Court Intervention Programs,* Consultation Paper, Project No. 96 (2008) 99–107.
7. See *Criminal Code* (WA) s 27. The Commission has previously recommended that the defence of insanity be renamed 'mental impairment' (among various other relevant recommendations): LRCWA, *Review of the Law of Homicide,* Final Report, Project No 97 (2007) Ch 5.
8. These limitations are often reflective of policy decisions and are generally based on the source of funding for support services aligned with the relevant program.

Types of mental impairment

Mental illness or mental disorder	Mental illness can range from short-term anxiety or depression to long-term psychotic disorders such as schizophrenia. The most prevalent mental disorders are anxiety disorders (eg, social phobias, obsessive-compulsive disorder and post-traumatic stress disorder), followed by affective disorders (eg, depression, bipolar affective disorder and hypomania). Psychotic and delusional disorders, such as schizophrenia and substance-induced psychoses, are considered to be low prevalence disorders. Each of these conditions can seriously distort a sufferer's perception, thought processes and capacity to control certain behaviours.
Personality disorder	Personality disorders refer to enduring patterns of maladaptive or harmful behaviour in an individual, which generally impair social, occupational and emotional functioning, as well as impulse control. There are a number of different types of personality disorder, but borderline and antisocial personality disorders are those most often associated with offending behaviour. People with borderline personality disorder have frequent and severe mood swings and their behaviour can be highly unpredictable. Antisocial personality disorder is characterised by a history of non-conformist, and often criminal, behaviour beginning in childhood.
Intellectual disability	Intellectual disability describes a condition of arrested development of the mind, which is characterised by impairment of cognitive, language, motor and social skills. Generally, the term intellectually disabled refers to an individual with below average cognitive functioning (indicated by an IQ of 70 or less) and associated deficits in adaptive behaviour (the practical, conceptual and social skills of daily living). Clinical definitions of intellectual disability require the onset of the disability to have occurred during the developmental period; that is, before the age of 18 years. This is a primary distinction between developmental intellectual disabilities and acquired intellectual disabilities, which are usually caused by brain injury.
Acquired brain injury	Acquired brain injury is a term used to describe an injury caused by severe head trauma, substance abuse, stroke, brain infections, brain tumours or other causes that lead to deterioration of the brain or reduced oxygen supply to the brain. Acquired brain injury may manifest in intellectual and adaptive deficits similar to intellectual disability.
Dementia or senility	Dementia is a term used to describe loss of cognitive skills and intellectual functioning, including memory loss; loss of emotional control; and impairment of perception, reasoning or problem solving capacity. Common causes of dementia include Alzheimer's disease, organic or acquired brain injury, meningitis or substance abuse. Although it is usually found in adults, dementia (particularly from disease, poisoning or infection) can occur in children, while the term senility is associated with similar mental impairment occurring in old age.

Mental impairment court intervention programs

WHAT ARE MENTAL IMPAIRMENT COURT INTERVENTION PROGRAMS?

As Chapter One explains, court intervention programs recognise that a person has reached a crisis point when they appear in court charged with an offence. In partnership with community-based services, and using the authority of the court, court intervention programs take advantage of this crisis to address the issues that underpin a person's offending behaviour in order to reduce the likelihood of reoffending.

Court intervention programs that target mentally impaired offenders focus primarily on assisting the offender to access treatment for his or her condition. For a mentally ill offender this would typically consist of securing appointments with doctors and psychiatrists, regular counselling and medication compliance checks. In the case of an intellectually impaired offender, the program would focus on providing support for the person's functional disabilities and specialised social training to enable the learning of appropriate behaviours.

Mental impairment court intervention programs also seek to address practical issues by facilitating connections with government and community service providers who can assist an offender to:

- find appropriate housing or supported disability accommodation;
- address coexisting substance or alcohol abuse and gambling problems;
- enable assessment for the disability support pension or resolve issues with Centrelink;
- reconnect with his or her family;
- become involved in community or recreational activities to improve interpersonal skills;
- enrol in education, literacy courses, budgeting courses or cognitive skills programs; or
- find suitable employment, activity or vocational rehabilitation.

Often these seemingly tangential issues also contribute to a person's offending behaviour and addressing these may be more important than mental health treatment in achieving the desired outcome of preventing reoffending. For example, a cognitively impaired person who constantly offends by making nuisance calls to emergency services may respond better to a program that involves activities to take up his or her time and so limiting the time in which he or she can offend.[1] So too, a mentally ill homeless person who is frequently arrested for public order offences may respond well to a program that targets his or her housing crisis and introduces the person to social networks or activities that reinforce acceptable social behaviour.[2]

WHY TARGET MENTALLY IMPAIRED OFFENDERS?

The Commonwealth Parliament's Senate Select Committee on Mental Health has observed that:

> The need for diversion programs and mental health liaison services becomes clear when the prevalence of mental illness among people who come into contact with the criminal justice system is considered.[3]

As discussed in the Commission's Consultation Paper, the most common offences committed by mentally impaired people are minor offences such as trespass, public transport offences, property damage, shoplifting and disorderly conduct.[4] Offending behaviour such as offensive language or conduct and resisting arrest is often a direct manifestation of an individual's mental illness or cognitive impairment, while offences of trespass, theft and transport offences may be manifestations of coexisting problems such as homelessness, indigence or dependence on drugs or alcohol.[5] Research has shown that mentally impaired people commonly present to court with coexisting problems such as homelessness,[6] lack of employment, poor

1. This example is a real life example from the Tasmanian program. The offender, who was schizophrenic with a low IQ, responded successfully to an intervention involving volunteer work and enrolment in a literacy course. Telephone consultation with Marita O'Connell, Forensic Mental Health Court Liaison Officer, Hobart Magistrates Court (17 March 2008).
2. The Human Rights and Equal Opportunity Commission (HREOC) has reported that the 'absence of suitable supported accommodation is one of the major obstacles to recovery and effective rehabilitation' of individuals with a mental illness: HREOC, *Human Rights and Mental Illness* (1993) ('The Burdekin Report') as discussed in Karras M et al, *On the Edge of Justice: The legal needs of people with a mental illness in NSW* (Sydney: Law and Justice Foundation of NSW, 2006) 27.
3. Commonwealth Parliament, Senate Select Committee on Mental Health, *A National Approach to Mental Health: From crisis to community,* First Report (March 2006) [13.19].
4. LRCWA, *Court Intervention Programs,* Consultation Paper, Project No. 96 (2008) 95–96.
5. Karras M et al, *On the Edge of Justice: The legal needs of people with a mental illness in NSW* (Sydney: Law and Justice Foundation of NSW, 2006) 58–60.
6. In Australia the prevalence of severe mental illness among marginally accommodated people has increased significantly

social or interpersonal skills (leading to behaviour that may be perceived as socially deviant) and social exclusion.[7] These problems can compound to make arrest and imprisonment of mentally impaired individuals for minor offences more likely.[8]

Further, because community residential facilities for mentally impaired people are in very high demand[9] and civil commitment requirements are extremely onerous, there are limited non-custodial pre-trial options for a homeless mentally impaired offender.[10] Magistrates are therefore often confronted with a dilemma when sentencing such offenders because non-custodial dispositions, such as fines and good behaviour bonds, are meaningless where an offender is clearly unable to pay or where the offender will continue to come before the court for fine default or breach of orders.[11] Consequently, mentally impaired people are disproportionately represented in prisons and in the criminal justice system in general.[12]

BENEFITS OF MENTAL IMPAIRMENT COURT INTERVENTION PROGRAMS

Reducing reoffending and improving community safety

It is recognised that traditional sentencing outcomes have little effect on reoffending rates among the severely mentally impaired. Deterrent forms of punishment, such as imprisonment, do not usually modify the behaviour of persons suffering from a mental impairment. And, as discussed below, deficiencies in treatment and management of mentally impaired offenders within prisons can exacerbate mental illnesses[13] and result in a high rate of recidivism upon release.[14] This has become known as the 'revolving door phenomenon',[15] where mentally ill or cognitively impaired people cycle through the courts and prisons with their problems and needs becoming increasingly complex to manage. Eventually, habituation to prison routines diminishes the ability of mentally impaired people to reintegrate back into the community and to establish or maintain socially competent behaviours.[16]

Early intervention and diversion programs are an effective means of diminishing this outcome. Evaluations of existing programs have shown that enabling community treatment of mental conditions, reinforcing socially acceptable behaviours and assisting offenders to access stable accommodation and appropriate vocational rehabilitation services can reduce the likelihood of reoffending and contribute to improving community safety.[17]

Bridging the gap between health and justice

Helping offenders engage with community services

Mental illness, intellectual disability and acquired or organic brain injury are major public health issues and coexisting problems—such as homelessness, poor physical health, substance abuse and associated crime—can have a high cost to the public purse, as well as a high personal cost for the mentally impaired and their families.[18] While services are available in the community to assist people to overcome these problems and to receive treatment or support for their mental impairment, access to these services is often inhibited.[19] This may be because of lack of knowledge of the existence of, or eligibility for,

in the past two decades. This has led to the establishment of a special list in Queensland dealing with homeless mentally ill people.

7. ABS, *Mental Health and Wellbeing: Profile of adults 1997* (Canberra: ABS, 1998) 8–9.
8. See LRCWA, *Court Intervention Programs,* Consultation Paper, Project No. 96 (2008) 97.
9. The policy of deinstitutionalisation of the mentally ill led to a significant reduction in psychiatric beds during the late 20th century, but facilities for the management of mentally ill persons in the community were not correspondingly improved. Western Australian corrective services administrators have conceded that '[t]here is general agreement that deinstitutionalisation of [community] services for the mentally ill and intellectually disabled is considered to have played a key role in the growing number of people with a mental impairment who are involved in the criminal justice system': Kellam M, 'Mental Health Issues in Parole' (Paper presented at the National Conference of Parole Authorities, Sydney, 10 May 2006) 3 citing a report by the Western Australian Corrective Services Administrators to the Corrective Service Administrators Conference on 3 May 2006.
10. Teplin LA, 'Criminalizing Mental Disorder: The comparative arrest rate of the mentally ill' (1984) 39 *American Psychologist* 794, 800. Teplin found that police were acutely aware of the onerous requirements for hospitalisation of a mentally ill person and the circumstances in which other dispositions, such as emergency psychiatric detention, were available. With no other community-based options, arrest was found to be the only available disposition to address public nuisance behaviour.
11. Commonwealth Parliament, Senate Select Committee on Mental Health, *A National Approach to Mental Health: From crisis to community,* First Report (March 2006) [13.42]; see also LRCWA, *Court Intervention Programs,* Consultation Paper, Project No. 96 (2008) 108–109.
12. Commonwealth Parliament, ibid [13.1] & [13.20].
13. Department of Mental Health (WA), *The Development of the 4th National Mental Health Plan: A Discussion Paper* (2009) 19.
14. Commonwealth Parliament, Senate Select Committee on Mental Health, *A National Approach to Mental Health: From crisis to community,* First Report (2006) [13.130].
15. Graham H, *A Foot in the (Revolving) Door: A preliminary evaluation of Tasmania's Mental Health Diversion List* (2007) 47.
16. Commonwealth Parliament, Senate Select Committee on Mental Health, *A National Approach to Mental Health: From crisis to community,* First Report (2006) [13.44].
17. For example, the 2004 evaluation of South Australia's Magistrates Court Diversion Program showed a significant reduction in the number of participants who reoffended after successful completion of the program. 'Two thirds (66.2%) of program participants did not offend during their post program year': Skrzypiec G, Wundersitz J & McRostie H, *Magistrates Court Diversion Program: An analysis of post-program offending* (Adelaide: Office of Crime Statistics and Research, 2004) ii. See also ibid.
18. Karras M et al, *On the Edge of Justice: The legal needs of people with a mental illness in NSW* (Sydney: Law and Justice Foundation of New South Wales, 2006) 26.
19. The ABS study found that only 38% of those with mental disorders had used a mental health service in the prior 12 months. Those with a combination of mental disorders were the most likely to access services. ABS, *Mental Health and Wellbeing: Profile of adults 1997* (Canberra: ABS, 1998) 14.

a service; mistrust of service providers; lack of capacity to seek assistance because of a chronic mental or physical condition; inability to cope with daily interactions or communicate effectively; embarrassment or shame about a mental health problem or intellectual disability; or denial of an underlying mental impairment or substance abuse problem.

Court intervention programs are an important means of introducing offenders to services to help them to cope with their mental impairment and address other matters that contribute to their offending behaviour. As Deputy Chief Magistrate of South Australia Dr Andrew Cannon submitted to the Commission, this 'coerced' engagement with community support services is important because it 'puts the [offender] in touch with resources that may continue to be available after the court programs are completed'.[20]

Integrating service delivery for people with complex needs

As discussed in the Consultation Paper, comorbidity—that is, the presence of more than one disorder at the same time—is common among people with mental health problems.[21] Comorbidity can involve a dual diagnosis of mental disorder and cognitive impairment or a combination of mental illnesses. Comorbidity of mental or cognitive disorders and substance-related disorders is particularly widespread.[22] People who suffer from comorbid disorders can encounter problems with coordination of community service delivery because funding for their care comes from different sources.[23] This problem was recently recognised in Western Australia by the Department of Premier and Cabinet's 'People with Exceptionally Complex Needs (PECN) Project', which supports collaborative interagency approaches to service delivery for individuals within this identified cohort.[24]

While PECN is focused on a very limited number of individuals[25] (mostly serious repeat offenders) at the highest end of the needs spectrum, mental impairment court intervention programs can reach a much broader target group and at a much earlier stage in the offending cycle. Because the court's program liaison officer takes responsibility for coordinating community service delivery and accessing funding, people with comorbidity or dual diagnosis mental and substance related disorders can break through superficial barriers that are sometimes placed on their eligibility for community-based services.[26] Further, because an offender's goals are set by the court in consultation with the offender and his or her service providers, all parties are working together to achieve a known outcome.

Improving efficiency of the court process

An important reason behind the establishment of mental impairment court intervention programs in Tasmania and South Australia was to improve the efficiency of the court process for mentally ill offenders charged with minor offences.[27] The magistrate in charge of the Tasmanian list has noted that:

> Defendants with mental health issues present 'challenges' to the court process due to their complex needs. They often present as unreliable and have difficultly attending and remembering appointments. Streamlining the process through a separate list and a dedicated Magistrate reduces the uncertainty in this process for defendants and for support staff that provide expert advice to the Court. This has the potential of reducing the number of listings that have to be rescheduled in general court lists, thereby improving listing potential for all Magistrates.[28]

As discussed in the Consultation Paper, mental impairment court intervention programs also play a part in considerably reducing the time and expense of determining fitness to plead issues and reliance on the defence of 'insanity' for minor offences.[29] In its submission to the Commission the Mental Health Law Centre WA agreed, saying:

> We find that much time is presently put into obtaining psychiatric reports with a view to establishing whether an offender has an arguable defence under the insanity provisions of the Criminal Code. … On obtaining a report favourable to the offender … we then frequently negotiate with the [prosecutor] to endeavour to have the charges dismissed on

20. Dr Andrew Cannon, Deputy Chief Magistrate of South Australia, Submission No. 17 (13 October 2008) 1.
21. The ABS study found that 'nearly one in three of those who had an anxiety disorder also had an affective disorder while one in five also had a substance use disorder': ABS, *Mental Health and Wellbeing: Profile of adults 1997* (Canberra: ABS, 1998) 10.
22. Department of Human Services (Vic), *Dual Diagnosis: Key directions for service development* (2007) 10.
23. For example, funding for intellectual disabilities is a Commonwealth responsibility, while funding for mental illness is a state responsibility.
24. Department of Premier and Cabinet, Social Policy Unit, *People with Exceptionally Complex Needs Project,* Phase 1 Report (2007).
25. The Commission is advised by the Complex Needs Coordinator that PECN is currently limited to only five participants (four of whom have significant offending histories).
26. For example, some community mental health services refuse to accept patients who have had 'drug-related exacerbations of mental illness': Davies GRW, 'Prisons: Mental health institutions of the 21st century' (2007) 186 *Medical Journal of Australia* 327. And, as discussed in the Consultation Paper, programs that concentrate on drug addiction, including the Perth Drug Court, will not usually accept a person with a serious mental health problem: LRCWA, *Court Intervention Programs,* Consultation Paper, Project No. 96 (2008) 96.
27. Magistrates Court Tasmania, *Mental Health Diversion List Procedural Manual* (April 2007) 4; Skrzypiec G et al, *Magistrates Court Diversion Program: An analysis of post-program offending* (Adelaide: Office of Crime Statistics and Research, 2004) 13.
28. Magistrates Court Tasmania, ibid.
29. The significance of these issues for Western Australia in light of mooted reforms to the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) is discussed in LRCWA, *Court Intervention Programs,* Consultation Paper, Project No. 96 (2008) 109.

those grounds. Again this is time consuming for ourselves, the [prosecutor] and the court. Frequent postponements of proceedings are necessary while the [prosecutor] considers our submissions.

It seems to us that a much cleaner method would be for offenders to be placed in the diversion program with the expectation that the court would consider psychiatric evidence as mitigating without the need to make findings under insanity provisions.[30]

Finding alternatives to prison for mentally impaired offenders

Prison can have a significant detrimental effect on mentally ill and intellectually disabled people. They are often vulnerable to assault and intimidation by other prisoners[31] and studies show that they will typically be held for much longer than other prisoners.[32] Management of mentally impaired prisoners generally follows the dominant correctional culture, and does not always recognise these prisoners' exceptionally complex needs.[33] In Western Australia there are very limited options for mentally ill people once they enter the prison system. There are only 30 secure inpatient beds in the Frankland Centre at Graylands and the calls placed on that facility extend beyond mentally ill sentenced prisoners.[34] There is therefore a practical and economic imperative to finding community-based treatment alternatives to prison for mentally impaired offenders.

Cost savings in other areas

Health and unemployment

Studies show mental disorder to be the highest cause of hospital admission among Western Australian prisoners following release from prison.[35] Combined with the recognised failure of Australian correctional facilities to properly assess and treat mental disorders,[36] the economic sustainability of imprisoning mentally ill offenders, particularly for minor offences, becomes questionable. There is not only the high cost of imprisonment (and complex needs management while in prison), but there is also a significantly higher impact on publicly funded health resources following release. Such impact also logically extends to unemployment benefits since people (and particularly mentally ill people[37]) can find it extremely difficult to secure employment with any form of prison record. These issues support the need for justice initiatives that enable the diversion of some mentally impaired offenders from the prison system and that enable the underlying causes of offending by mentally impaired offenders to be more effectively addressed.[38]

Legal Aid

An interesting insight that has come from the Tasmanian program is the cost savings that flow to Legal Aid and defence lawyers in light of the reduction in the need for expert psychiatric reports.[39] This is particularly so in cases where the participant is already known to court forensic mental health services or, such as in the case of Western Australia's Intellectual Disability Diversion Program, where the participant has been previously assessed by the Disability Services Commission. Because of this integration of services, relevant information about an offender's impairment, treatment history and previous interaction with relevant community services is known to court without the need to pay (and wait) for an expert psychiatric report.[40]

30. Mental Health Law Centre WA, Submission No. 2 (15 September 2008) 2.
31. Cockram J, *Equal Justice?: The experiences and needs of repeat offenders with intellectual disability in Western Australia* (Perth: Activ Foundation Inc, 2005) 76.
32. The Western Australian Parole Board has reported that mental health issues and the lack of appropriate support services in the community for the mentally impaired are significant factors in determining a prisoner's suitability for release on parole: Western Australian Parole Board, *Annual Report* (2006) 8. Inadequate treatment of mental illnesses in prison is cited by the Burdekin Report as a reason for mentally impaired people serving longer prison time than their non-impaired counterparts: Human Rights and Equal Opportunity Commission, *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness* (1993) 757.
33. The mentally ill are often managed by segregation in prison. This treatment can seriously exacerbate mental illness and cause significant psychological harm. Mullen PE, *A Review of the Relationship Between Mental Disorders and Offending Behaviours and on the Management of Mentally Abnormal Offenders in the Health and Criminal Justice Services* (Canberra: Criminology Research Council, 2001) 36.
34. It must also cater for people placed on indefinite custody orders, those declared unfit to stand trial and those referred by courts for psychiatric assessment. Mahoney D, *Inquiry into the Management of Offenders in Custody and the Community* (Perth: Western Australian Government, 2005) [12.23].
35. See Australian Institute of Criminology, *Crime and Criminal Justice Statistics: Prisoner health – morbidity after release from prison* (2007) <http://www.aic.gov.au/stats/cjs/corrections/health.html>.
36. Ogloff JR et al, 'The Identification of Mental Disorders in the Criminal Justice System', *Trends and Issues in Crime and Criminal Justice,* No. 334 (Canberra: Australian Institute of Criminology, 2007) 2. The same criticism has been specifically levelled at Western Australian prisons: Mahoney D, *Inquiry into the Management of Offenders in Custody and the Community* (Perth: Western Australian Government, 2005) [12.31]; Office of the Inspector of Custodial Services, *Thematic Review of Offender Health Services,* Report No. 35 (2006) 25.
37. As noted by the Law and Justice Foundation (NSW), discrimination in employment is the most common type of discrimination for mentally impaired people: Karras M et al, *On the Edge of Justice: The legal needs of people with a mental illness in NSW* (Sydney: Law and Justice Foundation of NSW, 2006) 53–55.
38. As the Commonwealth Parliament's Senate Select Committee on Mental Health has observed, '[t]he need for diversion programs and mental health liaison services becomes clear when the prevalence of mental illness among people who come into contact with the criminal justice system is considered': Commonwealth Parliament, Senate Select Committee on Mental Health, *A National Approach to Mental Health: From crisis to community,* First Report (2006) [13.19].
39. Hill M, 'Hobart Magistrates Court's Mental Health Diversion List' (2009) 18 *Journal of Judicial Administration* 178, 182–183.
40. Graham H, *A Foot in the (Revolving) Door: A preliminary evaluation of Tasmania's Mental Health Diversion List* (November 2007) 54.

Responses and recommendations

INTRODUCTION

The research outlined above (and in more detail in the Commission's Consultation Paper) demonstrates that mental impairment court intervention programs are extremely useful tools for managing mentally impaired offenders through the court process, diverting offenders from unnecessary imprisonment and addressing the underlying causes of offending behaviour. Taking into account the benefits to the community (by reducing reoffending and welfare dependence), to offenders (by addressing underlying disadvantage and treating mental conditions) and to the efficiency of court processes (by streamlining procedures to deal with mentally impaired offenders and introducing a meaningful alternative to the insanity defence), it is the Commission's opinion that Western Australia would benefit from court intervention programs targeting mentally impaired offenders.

In its Consultation Paper the Commission made three proposals regarding court intervention programs specific to the area of mental impairment; briefly, these were to:

- establish a mental impairment court intervention program to service the Perth metropolitan area;
- expand the existing Intellectual Disability Diversion Program (IDDP); and
- establish a general court intervention program to service mentally impaired offenders in regional areas.

The Commission received submissions from a number of agencies, non-government organisations and individuals indicating overwhelming support for the proposals. Submitters included the Mental Health Law Centre, the Public Advocate of Western Australia, Legal Aid WA, the Magistrates Court of Western Australia, the Department of Corrective Services, the Aboriginal Legal Service of Western Australia, the Department of the Attorney General and Dr Andrew Cannon (Deputy Chief Magistrate of South Australia). Before discussing these submissions in relation to the Commission's final recommendations, it is useful to explain the elements that are common to each of the recommended mental impairment court intervention programs.

COMMON ELEMENTS OF RECOMMENDED MENTAL IMPAIRMENT COURT INTERVENTION PROGRAMS

Legislative framework

Chapter Two of this Report sets out the legislative framework that the Commission considers should underpin all court intervention programs in Western Australia. The legislative framework, to be inserted into Part 5 of the *Criminal Procedure Act 2004* (WA), provides for court intervention programs to be prescribed under the *Criminal Procedure Regulations 2005* (WA) and to operate at various stages of the criminal justice process.[1] To enable this, the Commission has recommended amendments to the *Bail Act 1982* (WA)[2] to provide for participation as a condition of bail either before conviction or before sentencing, and to the *Sentencing Act 1995* (WA)[3] to allow an offender to participate in a court intervention program while sentencing is deferred (for up to 12 months) or as part of a Pre-Sentence Order.

Policy framework

In Chapter Two the Commission recommends the establishment of a court intervention programs unit to, amongst other things, enable sharing of common program resources and enable efficient cross-referral between programs.[4] The unit would comprise of program staff and representatives from relevant government agencies and community services co-located in a central office to improve coordination between all parties to court intervention programs. As discussed later in this Chapter, such a unit will assist in the development of treatment plans for mentally impaired offenders participating in general court intervention programs in regional areas and also provide specialised training and advice for court staff dealing with mentally impaired offenders.[5]

1. Recommendation 2. Before conviction an accused may participate as a condition of bail or voluntarily before entering a plea. Before sentencing an accused may participate as a condition of bail or as part of a Pre-Sentence Order.
2. Recommendations 3 & 4.
3. Recommendations 5–10.
4. Recommendation 1.
5. See below 'Recommendations: Establish general court intervention programs to service mentally impaired offenders in regional areas'.

Eligibility criteria

Each court intervention program has pre-determined criteria to enable program staff to assess an offender's eligibility to participate. In Chapter Two the Commission recommends that these be posited in rules in the same manner as court rules are made.[6] Mental impairment court intervention programs consider a mixture of psychiatric diagnostic criteria and legal criteria when assessing eligibility to participate in a program. Psychiatric diagnostic criteria may include the diagnosis of a specified mental illness or a specific level of cognitive impairment, and consideration of whether the offender is likely to respond to an appropriate treatment plan. Legal criteria include the seriousness of the offence, the offender's willingness to plead guilty or indicate no contest to the objective facts of an offence, and his or her offending history. The capacity of the program to service an offender's practical needs, such as finding accommodation with adequate support or enabling treatment for substance abuse or behavioural modification, will also influence assessment of eligibility for a mental impairment court intervention program. All these matters will be taken into account by a judicial officer in determining whether it is appropriate to allow a particular offender to participate in a court intervention program.

Voluntariness

It is important that participation in court intervention programs is voluntary[7] and for programs that involve treatment of a mental impairment this is particularly so. The United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care[8] provides that treatment (including diagnosis or assessment) cannot be given without a person's informed consent, voluntarily given.[9] In the circumstances of a mentally impaired offender this may require that the court intervention program's processes and consequences of involvement be explained to the offender in the presence of a legal representative or guardian. The Commission recommends in this Report that assessment for and participation in any court intervention program can only be undertaken with the offender's informed consent.[10]

Another important aspect of voluntary participation is that offenders must consent to sharing information about their medical status, offending history and any substance abuse with government departments, relevant non-government service providers and the court. Information sharing is discussed in detail in this Report in Chapter Two and is the subject of Recommendation 2(1)(h).

Availability to superior courts

As discussed in Chapter Two, it is the Commission's opinion that court intervention programs should, in principle, be available to offenders in all court jurisdictions irrespective of the seriousness of the offence category.[11] Although existing mental impairment court intervention programs in Australia limit legal eligibility for participation to less serious offences in the magistrates' jurisdiction,[12] there is no reason to believe that a program would not be effective for mentally impaired offenders who commit offences that are more serious. The benefits of these programs extend beyond treating offenders and addressing non-conformist personal behaviours: they provide tangible benefits to the community by reducing reoffending. These benefits do not diminish as an offence becomes more serious.

Although the seriousness of the offence should not necessarily be a barrier to an offender's participation in the program, the offender must be able to be managed in the community. In some cases this may not be possible because of the perceived dangerousness of the offender or because relevant service providers are unwilling or unable to assist the offender.[13] All these matters must be taken into account in determining whether a particular offender can participate in the program.

Availability of 'insanity' defence

An offender who has been referred to a mental impairment court intervention program, but is assessed as ineligible to participate should be returned to the general court list to be dealt with at the earliest opportunity. These offenders—and any offender who withdraws or is terminated from the program before completion—should retain the option to plead the defence of insanity under s 27 of the *Criminal Code*

6. Recommendation 2(1)(i).
7. Court intervention programs would be unlikely to be effective without the voluntary participation of the offender and the motivation to succeed in addressing the problems underlying their offending behaviour. Court intervention programs are onerous and intensive and for some offenders a term of imprisonment may be preferable to participation.
8. Adopted by the United Nations General Assembly, resolution 46/119 (17 December 1991).
9. Ibid, principle 11. Except in circumstances of involuntary commitment meeting certain criteria: in Western Australia this criteria is specified in the *Mental Health Act 1996* (WA).
10. Recommendation 2(1)(f).
11. See above Chapter Two: Jurisdictions.
12. It should be remembered that the types of offences dealt with in magistrates' jurisdictions in different states varies greatly and that the jurisdiction in Western Australia appears to deal with much less serious offences than its interstate counterparts.
13. In his submission, Don Spedelwinde, a clinical nurse specialist with Royal Perth Hospital's CHANGES program (which deals with personality disordered individuals), stressed that the determination whether a person is suitable for a particular community-based program or support service must ultimately lie with the service provider. Donald Spedelwinde, Submission No. 4 (19 September 2008). In this regard, the Commission notes that some programs may wish to exclude specific offences and the Commission's recommended general legislative framework enables court rules to be made in relation to any excluded offences (Recommendation 2(1)(i)).

(WA). Participation in the Commission's proposed mental impairment court intervention program and in the existing IDDP does not require a plea of guilty. They simply require an indication of willingness to plead guilty or a declaration of no contest to the objective facts of the offence. Offenders with a relevant mental impairment[14] for the purposes of the s 27 defence are in a unique category as compared to other offenders because they may admit to the objective facts of the offence (that is, the offending behaviour and its consequences) and still have a valid and complete defence.

Designated judicial officer with an understanding of mental health issues

In its Consultation Paper the Commission proposed that the mental impairment court intervention program should be assigned a designated magistrate who has an appropriate understanding of issues faced by mentally impaired offenders and an interest in improving outcomes for mentally impaired offenders. The Commission further proposed that other magistrates should be appropriately trained as relief magistrates.[15]

The submission of the Deputy Chief Magistrate of South Australia, Dr Andrew Cannon, supported this proposal.

> We need to develop a proper intellectual discipline and consequent educational programs to support the work of intervention programs. This work is cross disciplinary, including aspects of psychology, psychiatry, drug, alcohol and other addiction treatment, social work, budgetary and living skills, community relations, Indigenous cultural relationships and other skills … '[O]n the job' training … is simply insufficient for such complicated and important work. Appropriate education programs should be available for all participants, including the judicial officers.[16]

In its submission, the Office of the Public Advocate of Western Australia highlighted the importance of specialised training to effectively deal with mentally impaired individuals, both for judicial officers and program staff.[17]

Adequate resourcing

Resourcing for programs and courts

In Chapter One the Commission stresses the need for adequate resourcing of programs to cover the administration of the program including enabling judicial monitoring, program coordination and assessment of participants.[18] The latter is particularly important in mental impairment court intervention programs because assessment of an offender's eligibility for the program will need to be augmented by professional diagnosis of mental impairment.

In its submission the Aboriginal Legal Service of Western Australia stressed that adequate resourcing at the diagnostic stage is crucial and noted that '[m]any Aboriginal participants in the criminal justice system suffer from a mental impairment which has not been properly assessed'.[19] Like its Tasmanian counterpart, the Commission's recommended mental impairment court intervention program will most likely be provided with diagnostic services through the state's Forensic Mental Health Service. This is the basis for the Commission's recommendation that the Department of Health have joint resourcing responsibility for the program. However, it is recognised that some discretionary program funding will be necessary to allow for specialist diagnoses from private practitioners in certain circumstances.

Resourcing for community support services

Like most court intervention programs, the effectiveness of mental impairment programs is reliant on the availability of appropriate support services in the community.[20] Existing programs in Australia use a mix of government and non-government community support services. Since the publication of the Commission's Consultation Paper, a new National Disability Agreement has come into effect.[21] Under this agreement, significantly more Commonwealth funds[22] (and increased state and territory funding) have been allocated to disability services including sustainable supported accommodation, employment opportunities, income support and non-vocational activities. It is hoped that this injection of funding will begin to impact positively upon the community mental health and disability providers that service offenders in court intervention programs, including those that are not government affiliated.

The role of block government-funded[23] or alternatively funded[24] non-government organisations is important

14. *Criminal Code* (WA) s 1.
15. See Proposal 3.1.
16. Dr Andrew Cannon, Deputy Chief Magistrate of South Australia, Submission No. 17 (13 October 2008) 2.
17. Office of the Public Advocate, Submission No. 9 (30 September 2008) 6–7.
18. See Chapter One: Guiding Principle Four.
19. Aboriginal Legal Service of WA (Inc), Submission No. 20 (13 November 2008).
20. Bernstein R & Seltzer T, 'Criminalization of People with Mental Illnesses: The role of mental health courts in system reform (2003) 7 *University of District Columbia Law Review* 143, 147.
21. The National Disability Agreement came into effect on 1 January 2009 and replaces the Commonwealth–State/Territory Disability Agreement (2002–2007).
22. The agreement means that by 2013, the Australian Government's contribution will reach $1.25 billion, compared to $620 million in 2007 under the former agreement.
23. Block funding is government funding that is able to be applied at the service provider's discretion and may not, therefore, require individual recipients of services to meet strict eligibility criteria or legislative definitions.
24. Non-government organisations often rely on a complex mix of funding sources including Commonwealth or state government grants, specifically funded activities and private

for the effective operation of mental impairment court intervention programs. These organisations ensure that people with mental impairments who meet the court intervention program eligibility criteria, but may not fit precisely within the government's criteria for specific disability funding, can still participate in the program and address the issues that contribute to or cause their offending behaviour.

RECOMMENDATIONS

Expand the existing Intellectual Disability Diversion Program

The review of programs and relevant literature outlined in the Commission's Consultation Paper highlighted a significant difference between the management needs of mentally ill offenders and cognitively impaired offenders. For example, it became apparent that cognitively impaired offenders require far more intensive hands-on case management and often longer-term supervision or support than mentally ill offenders.[25] While many mentally ill offenders may be treated effectively in the short term by medication and counselling, cognitively impaired offenders must learn skills to manage a lifelong disability. Cognitively impaired offenders also present more often with severe functional disabilities (especially those people who have degenerative brain injury or acquired brain injury) and sometimes require supported accommodation with assistance in all aspects of daily living from toileting to decision-making.

Because of the different needs in the mentally ill and cognitively impaired offender groups and taking into account the acknowledged success of the existing Intellectual Disability Diversion Program (IDDP), the Commission proposed in its Consultation Paper that the IDDP be retained rather than subsumed within an all-encompassing mental impairment court intervention program. However, the Commission expressed concern[26] that the IDDP's eligibility criteria (born of its initial funding association with the Disability Services Commission) unnecessarily denied the participation of many cognitively impaired offenders who would benefit from the program. In particular, those offenders with a brain injury acquired after age 18,[27] offenders with borderline IQ and offenders with organic or degenerative brain disorders.

In its Consultation Paper the Commission proposed[28] that the IDDP's eligibility criteria be broadened to include offenders with all types of cognitive impairment (including acquired and organic brain injury, intellectual disability, dementia and other degenerative brain disorders) and that it be expanded to service the outer metropolitan courts. The Commission further proposed that the IDDP should be made available, in principle, to offenders in the District Court and Supreme Court but that the progress of such offenders on the program should be monitored by the Magistrates Court. Finally, the Commission proposed that the defence of insanity found in s 27 of the *Criminal Code* be available to an offender who has been returned to the general court list or who has withdrawn from the program before completion in certain circumstances.[29]

The Commission received six submissions on its proposal to expand the IDDP, all of which supported the proposed changes.[30] The Office of the Public Advocate submitted that the feedback from its guardians showed that the IDDP was 'responsive to the needs of consumers'.[31] It agreed that the primary drawback of the IDDP was that it is 'limited in size' and that the eligibility criteria are 'very restrictive' so that 'many people cannot access the program'.[32] It is particularly encouraging to note that the Department of Corrective Services, which presently funds the coordinator position for the IDDP and was a partner (with the Disability Services Commission) in the program's establishment, submitted that:

> [The Department] agrees with the Commission's distinction between mentally ill and cognitively impaired offenders and that different responses are appropriate for each group and that service systems for the cognitively impaired generally require longer term commitment to support and intervention.[33]

donations and bequests. So far as mental health is concerned, certain services such as medical and medication services and some psychological counselling are funded by Medicare on an individual basis.

25. This is supported by the frequency of offender–court liaison contact in each of the programs. Western Australia's IDDP coordinator reported that she requires at least weekly contact with most offenders to ensure that they continue on the program and comply with its conditions. The Queensland Special Circumstances List court liaison officer reported that intellectually disabled offenders required more-intensive management and often spent longer on the program than other offenders. Email correspondence with Amanda Perlinski, IDDP Coordinator (22 March 2008); telephone consultation with Philip Macey, Homeless Persons Court Liaison Officer, Brisbane Magistrates Court (25 March 2008).
26. Similar concerns were raised by stakeholders in the 2004 evaluation of the program where it was observed that many cognitively impaired offenders who are deserving of assistance to navigate their way through the criminal justice system were simply 'falling through the gaps': Zapelli R & Mellor A, *Evaluation of the IDDP Project* (2004) 40–41. See also Cockram J, *Equal Justice?:The experiences and needs of repeat offenders with intellectual disability in Western Australia* (Perth: Activ Foundation Inc, 2005) 19.
27. These offenders are currently excluded regardless of whether they have similar cognitive and adaptive deficits to an intellectually impaired individual.
28. Proposal 3.2.
29. See discussion above 'Availability of insanity defence'.
30. Office of the Public Advocate, Submission No. 9 (30 September 2008) 7; Legal Aid WA, Submission No. 11 (30 September 2008) 26; Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 8; Department of Corrective Services, Submission No. 19 (6 October 2008); Aboriginal Legal Service of WA (Inc), Submission No. 20 (13 November 2008); Department of the Attorney General (WA), Submission No. 21 (13 November 2008) 8–9.
31. Office of the Public Advocate, Submission No. 9 (30 September 2008) 7.
32. Ibid.
33. Department of Corrective Services, Submission No. 19 (6 October 2008).

In light of such overwhelming support, the Commission makes the following recommendation. The original proposal has been augmented to reflect the common elements (discussed above) that should exist in all mental impairment court intervention programs, including matters covered in the Commission's recommended legislative framework. It should, however, be noted that several of these features (such as voluntariness, consent to information sharing and assignment of a designated magistrate) already exist in the current IDDP.

RECOMMENDATION 22

Expand Intellectual Disability Diversion Program

1. That the Intellectual Disability Diversion Program remain a specialist list, but that it be expanded and adequately resourced to service the outer-metropolitan courts and to include offenders with all types of cognitive impairment including acquired or organic brain injury, intellectual disability, dementia and other degenerative brain disorders. The level of cognitive impairment that a participant must have is a matter of policy for the court.

2. That the program should formally be made available, in principle, to offenders in all adult court jurisdictions, but be monitored by the Magistrates Court pursuant to Recommendations 2(1)(g), 4 and 10. Whether an offender is eligible to participate in the program is a matter for the court to decide after assessment, consideration of the applicable eligibility criteria and consultation with relevant community service providers.[34]

3. That there should be no formal requirement to plead guilty to an offence to be accepted onto the program; however, the objective facts of the offence should not be in dispute or contested.

4. That an offender should not be barred from participating in the program for a particular offence simply because he or she has pleaded not guilty to, or disputes the facts of, another offence, whether related or unrelated.[35]

5. That an applicant who has been referred but is assessed as ineligible to participate in the program should be returned to the general court list to be dealt with at the earliest opportunity.

6. That an offender who has been returned to the general court list or who withdraws or is terminated from the program before completion and who has simply indicated no contest to the objective facts of the offence should retain the option to plead the defence of insanity under s 27 of the *Criminal Code* (WA).

7. That participation in the program must be on a voluntary basis and written consent to sharing of information among the court, relevant government departments and external service providers should be obtained.

8. That anything done by the offender in compliance with the program should be taken into account during sentencing and all sentencing options (including the option to impose no sentence under Recommendation 15) after successful completion of a program should be available to the magistrate. Failure to comply with or failure to agree to participate in the program is not to be regarded as an aggravating factor.[36]

9. That the program should be assigned a designated magistrate who has received relevant training and has an appropriate understanding of issues faced by mentally impaired offenders and an interest in improving outcomes for mentally impaired offenders. Other magistrates should be appropriately trained as relief magistrates or to service the program in outer-metropolitan areas.

10. That the program should be sufficiently resourced to purchase services from relevant non-government service providers on behalf of participants.

34. It is noted that there have been exceptional cases where an offender charged with more-serious offences has been dealt with under the IDDP. As discussed in the Commission's Consultation Paper, whether a court intervention program is in fact considered for a particular offender for a particular offence will depend upon satisfaction of the eligibility criteria; the capacity for community service providers to manage the offender; the perceived dangerousness of the offender, whether a custodial sentence is required; and, ultimately, a determination by the judicial officer in all the circumstances. See LRCWA, *Court Intervention Programs,* Consultation Paper, Project No. 96 (J2008) 110–111.
35. The Commission notes that the IDDP already allows participation of an offender in these circumstances and supports this flexibility.
36. See Recommendation 12.

Establish a mental impairment court intervention program

The Commission received nine submissions in respect of its proposal to establish a metal impairment court intervention program – all expressing enthusiastic support.[37] The Commission now recommends that a mental impairment court intervention program should be established in Western Australia, preferably as a justice initiative with joint resource responsibility from the Departments of the Attorney General, Health,[38] Corrective Services and the Disability Services Commission. The program should operate initially as a two-year pilot with clearly defined outcomes for evaluation purposes[39] and should be sufficiently resourced to purchase services from non-government organisations to enable those who might 'fall between the funding cracks' to be adequately catered for in the justice system.

For the reasons set out in its Consultation Paper,[40] and with which the submissions agreed, the Commission recommends that the program should have inclusive psychiatric diagnostic criteria that include personality disorders and dual diagnosis substance abuse. However, the Commission recommends that offenders with a *primary diagnosis* of intellectual disability or other recognised cognitive dysfunction be dealt with under an expanded version of the existing IDDP[41] and therefore should not be specified in the diagnostic criteria of the proposed mental impairment court intervention program. Nonetheless, those offenders whose primary diagnosis is of a mental illness or personality disorder with a *secondary diagnosis* of intellectual disability or other cognitive dysfunction may apply to participate in the mental impairment court intervention program.

37. Mental Health Law Centre, Submission No. 2 (15 September 2008); Donald Speldewinde, Submission No. 4 (19 September 2008); Office of the Public Advocate, Submission No. 9 (30 September 2008) 7; Legal Aid WA, Submission No. 11 (30 September 2008) 26; Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 8; Dr Andrew Cannon, Deputy Chief Magistrate of South Australia, Submission No. 17 (13 October 2008) 2; Department of Corrective Services, Submission No. 19 (6 October 2008); Aboriginal Legal Service of WA (Inc), Submission No. 20 (13 November 2008); Department of the Attorney General (WA), Submission No. 21 (13 November 2008) 8–9.
38. In particular the State Forensic Mental Health Service and Court Liaison Service.
39. See the Commission's Guiding Principle Three, which highlights the importance of ongoing evaluation of court intervention programs and states that programs must be provided with funds to enable data collection and, where possible, that evaluators should be involved in the planning stage of any new program to ensure best practice in regard to the collection and recording of relevant information and statistics: Chapter One: Guiding Principle Three.
40. LRCWA, *Court Intervention Programs,* Consultation Paper, Project No. 96 (2008) 110.
41. See discussion above under 'Expand the existing Intellectual Disability Diversion Program'.

RECOMMENDATION 23

Establish a mental impairment court intervention program

That there should be a mental impairment court intervention program established in Western Australia at the earliest opportunity to service all metropolitan courts dealing with adults and with the following features:

1. The program should have psychiatric diagnostic criteria that includes mental illness, personality disorder and dual diagnosis substance use disorder, but excludes offenders with a *primary* diagnosis of intellectual disability or other cognitive impairment (who may apply for referral to the expanded Intellectual Disability Diversion Program).

2. The program should be available, in principle, to offenders in all of the state's adult court jurisdictions, but be monitored by the Magistrates Court pursuant to Recommendations 2(1)(g), 4 and 10. Whether an offender is eligible to participate in the program is a matter for the court to decide after assessment, consideration of the applicable eligibility criteria and consultation with relevant community service providers.

3. There should be no formal requirement to plead guilty to an offence to be accepted onto the program; however, the objective facts of the offence should not be in dispute or contested.

4. An offender should not be barred from participating in the program for a particular offence simply because he or she has pleaded not guilty to, or disputes the facts of, another offence, whether related or unrelated.

5. An applicant that has been referred but is assessed as ineligible to participate in the program should be returned to the general court list to be dealt with at the earliest opportunity.

6. An offender who has been returned to the general court list or who withdraws or is terminated from the program before completion and who has simply indicated no contest to the objective facts of the offence should retain the option to plead the defence of insanity under s 27 of the *Criminal Code* (WA).

7. Participation in the program must be on a voluntary basis and written consent to sharing of information among the court, relevant government departments and external service providers should be obtained.

8. Anything done by the offender in compliance with the program should be taken into account during sentencing and all sentencing options (including the option to impose no sentence under Recommendation 15) after successful completion of a program should be available to the magistrate. Failure to comply with or failure to agree to participate in the program is not to be regarded as an aggravating factor.[42]

9. The program should be established as a justice initiative with joint resource responsibility from the Departments of the Attorney General, Health and Corrective Services and the Disability Services Commission.

10. The program should be sufficiently resourced to purchase services from relevant non-government service providers on behalf of participants.

11. The program should begin as a two-year pilot in the Perth Magistrates Court taking referrals from all metropolitan courts with the aim of extending its operation, subject to independent evaluation, to as many metropolitan courts as possible.

12. The program should be assigned a designated magistrate who has received relevant training and has an appropriate understanding of issues faced by mentally impaired offenders and an interest in improving outcomes for mentally impaired offenders. Other magistrates should be appropriately trained as relief magistrates or to service the program in outer-metropolitan areas.

Establish general court intervention programs to service mentally impaired offenders in regional areas

The Commission recognises the need for court intervention programs to address mental health issues in regional areas and the unique impact that regional magistrates can have in facilitating court intervention programs.[43] Because there is limited access to early intervention, rehabilitation and counselling opportunities in remote and regional areas, the court becomes an important catchment point for disadvantaged offenders and court processes can be an effective tool for encouraging rehabilitation and reducing reoffending.[44] Having separately constituted court intervention programs addressing different issues in each regional court is clearly unrealistic.

In Chapter Six the Commission discusses its recommendations for general court intervention programs that assist offenders to engage with relevant services as part of a judicially monitored plan. These programs are a cost-effective way of servicing courts in regional areas and closing the gaps between specialist court intervention programs. The Commission considers that general programs that can deal with mental impairment as well as other offender rehabilitation and community reparation needs are likely to be more effective than a specialist program that travels to the regions on a periodic basis. Experience with programs such as the Geraldton Alternative Sentencing Regime shows that there is invaluable rapport built between the court and service providers when they are reporting to the magistrate or court liaison officer at the local level. This same rapport would be unlikely to develop with remote reporting to a liaison officer based in Perth.

Recognising that court liaison officers or general program coordinators in regional courts may not necessarily be expert in dealing with mentally impaired offenders, it is important that sufficient training be given to enable them to effectively case manage participants and to design appropriate intervention plans. In the Commission's opinion, responsibility for training of regional court officers involved in coordinating general court intervention programs should fall to the coordinators of specialist programs in the metropolitan area.[45] A collegial relationship should also be encouraged whereby regional court officers can call upon the expertise of coordinators of specialist programs and local mental health professionals to advise on appropriate program or treatment plans for offenders. This will be enabled by the development of the Court Intervention Programs Unit outlined in Recommendation 1.

Four submissions were received in respect of the proposal dealing with mentally impaired offenders in regional areas.[46] All submissions supported the Commission's proposal, which is now reiterated as a final recommendation. Other submissions commented favourably on the base proposal to establish general court intervention programs. These submissions and

42. See Recommendation 12.
43. This is recognised by regional magistrates in Western Australia who have signed a resolution supporting the use of therapeutic jurisprudence in their courts: King MS & Auty K, 'Therapeutic Jurisprudence: An emerging trend in courts of summary jurisdiction' (2005) 30 *Alternative Law Journal* 69, 72.
44. King MS, 'Applying Therapeutic jurisprudence in Regional Areas – The Western Australian Experience' (2003) 10(2) *ELaw: Murdoch University Electronic Journal of Law* [11].
45. See Chapter Two: Training, and Recommendation 1(9).
46. Office of the Public Advocate, Submission No. 9 (30 September 2008); Legal Aid WA, Submission No. 11 (30 September 2008); Aboriginal Legal Service of WA (Inc), Submission No. 20 (13 November 2008); Department of the Attorney General (WA), Submission No. 21 (13 November 2008).

the final recommendations in this area are discussed in Chapter Six.

RECOMMENDATION 24

Establish general court intervention programs to service mentally impaired offenders in regional areas

1. That mentally impaired offenders be eligible for referral to general court intervention programs in regional areas pursuant to Recommendation 37.

2. That staff of regional courts running general court intervention programs be trained by and, where necessary, take advice from coordinators of specialist programs including the recommended mental impairment court intervention program and the Intellectual Disability Diversion Program.

Establish general court intervention programs to service mentally impaired young offenders

In June 2008 the Office of the Auditor General for Western Australia reported that 'significant numbers of young people with high levels of offending have mental health or substance abuse problems' and that there is currently 'no structure or process to ensure that mental health and substance abuse problems associated with repeated offending are identified and treated'.[47] An earlier review of the incidence of mental health issues in the Western Australian justice system found that 26 per cent of young offenders in detention had mental health problems.[48] The high level of mentally impaired offenders in juvenile detention may, as Legal Aid WA submitted to the Commission, be attributable to a lack of hostel accommodation to cater for mentally ill young people who are charged with violent or serious offences.[49]

The Office of the Auditor General drew attention to the need for a coordinated multi-agency response to deal with mentally impaired young offenders. It recommended that:

> Government agencies that have contact with young people in the justice system (that is, Department for Child Protection, Department of Corrective Services, Department of Health and Western Australia Police) work together to ensure that young people who offend repeatedly are identified and case managed until the mental health, substance abuse and other problems that are associated with their offending are successfully managed.[50]

As outlined in Chapter Six, the Commission has recommended that a general court intervention program be established and piloted in the Perth Children's Court to address all issues underlying offending behaviour including mental impairment, substance abuse and homelessness.[51] As discussed above, such a program—though tailored to young offenders—will have the benefit of advice and assistance from coordinators and staff of the IDDP and the proposed mental impairment court intervention program. It would also benefit from being co-located with programs staff in the proposed Court Intervention Programs Unit outlined in Recommendation 1.

RECOMMENDATION 25

Establish general court intervention programs to service mentally impaired young offenders

1. That mentally impaired young offenders be eligible for referral to the proposed Children's Court general court intervention program outlined in Recommendation 37.

2. That those responsible for coordinating and running the Children's Court general court intervention program be trained by and, where necessary, take advice from coordinators of specialist programs including the recommended mental impairment court intervention program and the Intellectual Disability Diversion Program.

47. Office of the Auditor General (WA), *The Juvenile Justice System: Dealing with young people under the Young Offenders Act 1994,* Report No. 4 (2008) 7.
48. Department of Justice (WA), *A Review of the Incidence of Various Mental Health Issues in the WA Justice System* (2006) as cited in ibid.
49. Legal Aid WA, Submission No. 11 (30 September 2008) 34.
50. Office of the Auditor General (WA), *The Juvenile Justice System: Dealing with young people under the Young Offenders Act 1994,* Report No. 4 (2008) 8.
51. See Recommendation 37.

Chapter Five

Family Violence Court Intervention Programs

Contents

Introduction 89
- Family violence: seriousness and prevalence 89
- Family violence in the justice system 89
- A specialist family violence jurisdiction 90

Family Violence Court Intervention Programs 91

What are family violence court intervention programs? 91

Benefits of family violence court intervention programs 91
- Specialisation 91
- Integrated response 91
- Improved efficiency of the court process 92
- Offender accountability 92
- Victim safety 92

Responses and Recommendations 93

Introduction 93

Legislative framework 93

Policy unit 93

Eligibility criteria 94
- Acceptance of the statement of material facts 94
- Superior court matters 94

Supervision by the court 94
- Pre-Sentence Orders 95
  - Breach of a Pre-Sentence Order 95
- Bail 95
  - Protective bail conditions 95
  - Breach of bail 96
  - Variation of protective bail conditions 96
  - Protective bail conditions and violence restraining orders 97

Victim involvement 99
- Sentencing 99
- Support and assistance to victims and children 99

Personnel 100
- Case management team 100
- Police 101
  - Police prosecutors 101
  - Specialist policing 101
- Defence lawyers 102

Ensuring broad access to family violence court intervention programs 102
- Information for participants 102
- Information for lawyers 103
- Access by vulnerable and disadvantaged groups 103
  - Aboriginal people 103
  - Other vulnerable and disadvantaged groups 105
- Regional Courts 105
- Programs for respondents to violence restraining orders 106

Introduction

FAMILY VIOLENCE: SERIOUSNESS AND PREVALENCE

The key characteristic of family violence is the use of violence or other forms of abuse to control someone with whom the perpetrator has an intimate or family relationship. Family violence[1] includes physical, sexual and psychological abuse, forced social isolation, and economic deprivation.[2] It has been recognised that incidents of non-physical abuse, 'which individually appear minor, are in fact extremely serious if they continually occur'.[3]

As discussed by the Commission in its Consultation Paper,[4] violence within a family or intimate relationship is different to other forms of violence or a series of isolated incidents. It can be ongoing and hidden. Because of the relationship between the perpetrator and the victim—and the fear of further abuse—it can be both difficult and dangerous for the victim to resist the abuse or leave the relationship.

Family violence has a significant impact on the community, as well as the criminal justice system (and its resources).[5] Western Australia Police statistics show that in 2005 half of all murders and attempted murders were related to domestic violence. Further, domestic violence was a factor in one-quarter of all aggravated sexual assaults and threatening behaviour; over one-third of all aggravated and non-aggravated assaults; and over one-fifth of deprivation of liberty charges.[6] In addition, 63.7 per cent of breaches of restraining order offences were related to domestic violence and 34.7 per cent of breaches of bail.[7]

The social and psychological consequences of family violence for victims include anxiety, depression and self-harm; alcohol and drug abuse; inability to work and poor work performance; sleep deprivation; and reduced coping and problem-solving skills. The impact of domestic violence on the children of victims includes emotional and behavioural problems, and difficulties with school and peers. Further, children who experience violence are at risk of becoming perpetrators of violence in their future relationships.[8]

FAMILY VIOLENCE IN THE JUSTICE SYSTEM

Thirty years ago family violence was largely an 'invisible crime',[9] but now matters involving family violence make up a considerable portion of the workload of the justice system. In its Consultation Paper the Commission described the various ways that victims and perpetrators of family violence come into contact with the courts,[10] including where the perpetrator has been charged with a criminal offence; where the victim has made an application for a violence restraining order; and where they are parties to family court proceedings.

Despite improvements in recent years, there are significant inadequacies in the response by the justice system to family violence.[11] These are made clear in the way that both victims and perpetrators engage, or fail to engage, with the system.

Many victims of family violence simply do not use the justice system, and those who do attempt to use it often withdraw from it.[12] The fact that so many victims are not prepared to appear in court at contested hearings or at return dates for violence restraining orders is evidence that the system is not sufficiently responsive to their needs. Victim non-appearance contributes to low prosecution rates; the

1. In this report the Commission uses the term 'family violence'. 'Domestic violence' usually refers to abuse against an intimate partner (people who are in a de facto relationship, married, separated, divorced or in an intimate relationship) while 'family violence' is a broader expression encompassing domestic violence and the abuse of children, elderly and other family members.
2. Family and Domestic Violence Unit, *Western Australian Family and Domestic Violence State Strategic Plan 2004–2008* (Perth: Department for Community Development, 2004) 5.
3. Mann J, *Family and Domestic Violence in Western Australia: Building a profile of those involved* (Perth: Western Australia Police, 2007) 12.
4. See LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 120.
5. Mann J, *Family and Domestic Violence in Western Australia: Building a profile of those involved* (Perth: Western Australia Police, 2007) 13. The Western Australia Police note that these statistics are conservative when compared to crime victimisation surveys.
6. Western Australia Police, 'Percentage of Offences which are Domestic Violence' cited in Mann, ibid 62.
7. Ibid.
8. Phillips J & Park M, *Measuring Domestic Violence and Sexual Assault Against Women: A review of the literature and statistics* (Canberra: Parliament of Australia, 2006).
9. Ministry of Justice (WA), *Review of Legislation Relating to Domestic Violence*, Final Report (2002) 12.
10. See LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 125, 126.
11. Stewart J, *Specialist Domestic/Family Violence Courts within the Australian Context*, Australian Domestic and Family Violence Clearinghouse Issues Paper No. 10 (2005) 3.
12. Reasons for the failure to access the justice system or the decision to withdraw from the justice system include fear of retribution from the perpetrator; the belief that the perpetrator will change; shame and embarrassment; a lack of awareness of available services; and the difficulty in making contact with service agencies if the victim is under constant 'surveillance' by the perpetrator. Urbis Keys Young, *Research into Good Practice Models to Facilitate Access to the Civil and Criminal Justice System by People Experiencing Domestic and Family Violence* (Canberra: Office of the Status of Women, 2001) 120.

laying of less serious charges than the circumstances might indicate; low rates of conviction; and high rates of recidivism among perpetrators.

That many perpetrators of family violence do not respect the justice system is evidenced by the continued prevalence of family violence, and the frequency with which perpetrators of that violence breach bail conditions, violence restraining orders, community-based orders, suspended sentences and parole orders. It is further demonstrated by the fact that many family violence offenders plead not guilty to the charges and then place pressure on the victim not to give evidence.[13]

Recognition of the shortcomings of the justice system's response to family violence has led justice agencies to propose alternative methods of dealing with the issue. Specialist responses are increasingly being used by courts to recognise the differences between family violence and other forms of violence. Specialist training in the nature and dynamics of family and domestic violence has been provided to some personnel in the justice system, including magistrates, police prosecutors and community corrections officers. Such specialisation can provide 'a healthy signal to offenders that their conduct will not be tolerated and to victims that their suffering will not be ignored'.[14]

A specialist family violence jurisdiction

In its Consultation Paper the Commission described the emergence of specialist family violence jurisdictions.[15] The Commission determined that a detailed examination of these jurisdictions is beyond the scope of this reference because although these jurisdictions often include the supervision of an offender on a pre-sentence program, they also deal with other matters involving family violence in the court system, including criminal trials and sentencing, civil protection orders, child contact, residence and maintenance orders. Nonetheless, the Commission recognised the advantages of an integrated jurisdiction to deal with family violence and proposed that an inquiry be held to determine whether Western Australia should establish a family violence division of the Magistrates Court.[16]

The Commission acknowledges that the family violence courts operating in metropolitan magistrates courts in Western Australia also deal with a broader range of matters than the supervision of offenders, including hearing trials of family violence offences and applications for, and final hearings in respect of, violence restraining orders. But family violence courts do not have exclusive jurisdiction over these matters; the bulk of such matters is heard in the general list of the Magistrates Court. There is also no integration between family violence courts and the Family Court of Western Australia. The Commission was advised that this lack of integration was of concern to the magistrates presiding in the family violence courts.[17]

The Commission received submissions in support of its proposal to further enquire into specialist family violence jurisdictions from Legal Aid WA, the Magistrates Court and the Aboriginal Legal Service.[18] The need for better integration of court systems dealing with family violence has also been recently highlighted on a national level by the federal government's acceptance of a number of recommendations that support the establishment of specialist family violence jurisdictions.[19] These include an urgent recommendation that the Australian Law Reform Commission examine present state and territory 'domestic and family violence, child protection legislation and federal family law, and propose solutions to ensure that the inter-relationship in the application of these laws works to protect women and children from violence'.[20]

In light of this impetus for reform and the support for the Commission's proposal in submissions, the Commission makes the following recommendation.

RECOMMENDATION 26

Review family violence legislation

That the Attorney General of Western Australia should review the interaction of family violence matters in criminal, civil and family law jurisdictions to determine if any changes are required to better integrate the Western Australian justice system's response to family violence matters.

13. Department of the Attorney General, *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (May 2008) 38.
14. Winick B, 'The Case for a Specialized Domestic Violence Court' in Winick B & Wexler D (eds), *Judging in a Therapeutic Key* (Durham: Carolina Academic Press, 2003) 287.
15. LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 10–12. See also National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to reduce violence against women and their children, 2009–2021* (2009) 115–117.
16. Proposal 1.1.
17. Meeting with Magistrate Geoff Lawrence (12 August 2008); meeting with Magistrate Gluestein (25 August 2008).
18. Legal Aid WA, Submission No. 11 (30 September 2008); Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 2; Aboriginal Legal Service of WA (Inc), Submission No. 20 (13 November 2008) 1.
19. The National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to reduce violence against women and their children, 2009–2021* (2009) 119–122, in particular Recommendation 4.3.5.
20. Ibid 120, 168.

Family violence court intervention programs

WHAT ARE FAMILY VIOLENCE COURT INTERVENTION PROGRAMS?

Family violence court intervention programs seek to focus both on the rehabilitation of the offender and victim safety and support. As discussed in the Commission's Consultation Paper, there are many different models of family violence court intervention programs. In Australia, each state and territory has taken a different approach, although they all have common features.[1] There are court-ordered counselling programs and victim support services available in all jurisdictions; most jurisdictions have specialist magistrates; and some locations have specialist police, police prosecutors and defence lawyers.

In Western Australia, there are family violence court intervention programs operating in metropolitan and regional courts.[2] Family violence court intervention programs in the metropolitan area are referred to as 'courts'; however, they are not separately constituted courts, they are specialist lists within the general magistrates court. There are family violence courts located at the Armadale, Joondalup, Rockingham, Fremantle and Midland magistrates courts and at the Central Law Courts.[3]

BENEFITS OF FAMILY VIOLENCE COURT INTERVENTION PROGRAMS

Specialisation

Personnel working in family violence court intervention programs develop an understanding of the nature of family violence and the availability (and limitations) of support and services for victims, perpetrators and their children.[4] This enhanced understanding has the capacity to greatly improve services provided by the justice system (such as victim support) and to better inform the decision-making of magistrates. Further, through steering committees and other forums this knowledge is shared with other government agencies and the wider community. The experience of the Joondalup pilot court showed that having skilled and dedicated staff is crucial to the success of a family violence court,[5] it 'provides skills, energy, commitment and drive for the project that would be lacking if a more mainstreaming approach was adopted'.[6]

Integrated response

One of the key principles of the Western Australian government's response to family and domestic violence is that the various government and non-government agencies need to provide a collaborative response.[7] This enables diverse agencies to work toward the same goals and ensure consistency of response to victims and perpetrators. The court can also be a linking point for government and non-government agencies, so that both victims and perpetrators are made aware of the services that can be provided to them, such as housing assistance, drug and alcohol counselling, and parenting groups. Moreover, it is an attempt to have community agencies take some joint responsibility for the management of the problem, rather than relying on the victim to access all agencies independently and be the sole 'manager' of the assistance provided.

Integration occurs at two levels in the present model of family violence courts used in the metropolitan area. For individual families, the case management team provides an interagency response;[8] and at the policy level, the steering committee for the family violence courts will bring together high-level representatives from relevant agencies to make policy decisions.[9]

1. See LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 125, 126.
2. The various programs operating in Western Australia are described by the Commission in its Consultation Paper: ibid, 131–139.
3. In April 2009 there were 92 offenders in the family violence courts in the metropolitan area: 10 at Armadale, 23 at the Central Law Courts, 20 at Fremantle, 18 at Joondalup, 12 at Midland, and 9 at Rockingham: email corespondence with Ray Warnes, Executive Director Court and Tribunal Services, Department of the Attorney General (29 May 2009).
4. Stewart J, *Specialist Domestic/Family Violence Courts within the Australian Context*, Australian Domestic and Family Violence Clearinghouse Issues Paper No. 10 (2005) 10.
5. Urbis Keys Young, *Research into Good Practice Models to Facilitate Access to the Civil and Criminal Justice System by People Experiencing Domestic and Family Violence* (Office of the Status of Women, Department of Prime Minister and Cabinet, 2001) 69.
6. Ibid.
7. Family Domestic Violence Unit, *Western Australian Family and Domestic Violence State Strategic Plan 2004–2008* (2004).
8. The Family Violence Service and the case management team attempt to reduce the fragmentation of the justice system's response to families by providing assistance with violence restraining orders, child protection issues and criminal matters.
9. An operational steering committee for all of the family violence courts is being set up. It will be comprised of senior officers from the key agencies involved in the family violence courts to ensure there is a forum for them to share information and discuss any issues that arise: email correspondence with

Improved efficiency of the court process

Family violence court intervention programs can improve the efficiency of the court process because they provide an incentive for perpetrators to address their behaviour and this may encourage more guilty pleas. The support offered and the safety measures put in place for victims in family violence court intervention programs may further reduce delay and cost. For example, victims may be less likely to refuse to give evidence if appropriate support has been given.

Offender accountability

Family violence court intervention programs take advantage of the 'crisis point' of contact with the justice system to motivate offenders to address their offending behaviour.[10] Magistrate Geoff Lawrence told the Commission he has observed that, through the perpetrator program, many offenders have gained valuable insights into the dynamics of their relationships and into their behaviour.[11] A number of community corrections officers also told the Commission that there is real value in pre-sentence family violence programs because offenders are more motivated in such programs.[12] This is shown in a better attendance rate at meetings and a better relationship with the community corrections officers.[13]

Victim safety

The guiding principles for Western Australia's family violence courts state that '[s]afety of victims … is paramount at all times'.[14] To that end, information and services are provided to victims; the magistrates' understanding of the nature and dynamics of family violence helps with their interaction with victims; and the case management team takes victims' safety into account in monitoring the performance of offenders on the program. In addition, the emphasis on rehabilitation is crucial to the safety of many victims because of the frequency with which victims remain in a relationship, or reconcile, with offenders.[15]

Ray Warnes, Executive Director Court and Tribunal Services, Department of the Attorney General (29 May 2009).

10. Winick B, 'The Case for a Specialized Domestic Violence Court' in Winick B & Wexler D (eds), *Judging in a Therapeutic Key* (Durham: Carolina Academic Press, 2003) 292.
11. Meeting with Magistrate Geoff Lawrence (18 March 2008).
12. Telephone consultation with Maggie Woodhead, Acting Programs Coordinator, Sex Offender Treatment Program, Offender Management and Professional Development, Department of Corrective Services (5 March 2008); telephone consultation with Paula Hyde, Senior Community Corrections Officer, Department of Corrective Services (10 March 2008); telephone consultation with Hazel Moore, Coordinator Aboriginal Family and Domestic Violence Program, Department of Corrective Services (13 March 2008).
13. Telephone consultation with Maggie Woodhead, Acting Programs Coordinator, Sex Offender Treatment Program, Offender Management and Professional Development, Department of Corrective Services (5 March 2008).
14. Department of the Attorney General, Magistrates' Courts: Metropolitan Family Violence Court Operating Procedures (24 May 2007) 4.
15. Meeting with Magistrate Geoff Lawrence (18 March 2008). See also Johnson R, 'The Evolution of Family Violence Criminal Courts in New Zealand' (Paper presented to the Police Executive Conference, Nelson, 8 November 2005).

Responses and recommendations

INTRODUCTION

The Commission recognises that family violence court intervention programs are at a very early stage of development in Western Australia. Although there has been a family violence court operating at Joondalup Magistrates Court since 1999, new programs have been established in the past two years.[1] The Commission has been advised that an evaluation of the family violence courts is scheduled for the 2010–2011 financial year. This will provide time to gather information about recidivism rates among offenders who have completed the family violence court program.[2] In this Chapter the Commission makes recommendations for changes to the legislation and policy that underpin the operation of family violence court intervention programs.

In the Consultation Paper the Commission noted that family violence raises some difficult questions and that there are divergent views about the best way in which issues in this area should be approached. In particular, the Commission noted the inherent challenge of incorporating the community's goals—protecting the victim, holding the offender accountable and reducing the incidence of family and domestic violence—into the court system. For that reason, rather than formulating proposals, the Commission posed questions in the Consultation Paper designed to stimulate discussion.

As anticipated, the submissions on this Chapter expressed a wide variety of views. The Commission received submissions from some of the key government and non-government agencies involved in the family violence courts (including the Department of the Attorney General, the Magistrates Court, Western Australia Police, and Legal Aid WA), as well as some individuals working in the area. The Commission also visited the family violence courts and discussed the Consultation Paper with some of the presiding magistrates.

1. The family violence courts at the Central Law Courts and Midland and Armadale Magistrates Courts commenced operating in 2008, the family violence courts at Rockingham and Fremantle Magistrates Courts commenced operating in 2007.
2. A review of the processes of the family violence courts was completed in 2008. Although the review was conducted by an independent agency, the Commission has not been provided with a copy of the report prepared by the agency because it is an internal document. The Commission has been advised that the recommendations from the review, which relate to processes within the family violence courts and communication between agencies, have 'largely been implemented': email correspondence with Ray Warnes, Executive Director Court and Tribunal Services, Department of the Attorney General (29 May 2009).

LEGISLATIVE FRAMEWORK

The general legislative framework that the Commission recommends is described in Chapter Two of this Report; it is intended to underpin all court intervention programs in Western Australia. The legislative framework described in Recommendation 2 provides for court intervention programs to be prescribed under the *Criminal Procedure Regulations 2005* (WA). The Commission recommends that the metropolitan family violence courts and the Barndimalgu Court be prescribed as court intervention programs under the *Criminal Procedure Regulations*. The recommended amendments provide for an offender to be eligible to participate in a court intervention program at various stages of the criminal justice process,[3] and allow a magistrate to order the offender to reappear in court at a particular time and place for the purposes of determining if the offender is complying with the requirements of the program.[4]

The Commission's recommendation provides for procedural and operational matters to be determined by each individual court intervention program, and for these to be set out in regulations or court rules.[5] Examples of such matters include eligibility criteria, program length and the exchange of information between participating agencies. Therefore, while the *Criminal Procedure Act 2005* (WA) will set the broad parameters for court intervention programs, each program will determine what kind of offenders it will accept and the manner in which it will operate. At present in the family violence courts procedural and operational matters are set out in the Magistrates Court *Metropolitan Family Violence Court Operating Procedures*.[6]

POLICY UNIT

The Commission recommends that the family violence court intervention programs operating in metropolitan and regional Western Australia receive administrative and policy support from the court intervention programs unit that is the subject of Recommendation 1.[7] This will enable increased

3. Recommendation 2. Before conviction an accused may participate unconditionally or as a condition of bail. Before sentencing an accused may participate as a condition of bail or as part of a Pre-Sentence Order.
4. Recommendation 2(1)(e).
5. See Chapter Two: Procedural and operational issues for individual programs.
6. Magistrates Court, *Metropolitan Family Violence Court Operating Procedures* (24 May 2007) 12.
7. See Chapter Two: Court intervention programs unit.

interagency collaboration, and improve services to participants (both victims and offenders) who have other problems, such as substance abuse, mental health issues, unemployment and homelessness. The coordinated unit will enable family violence court staff to access the skills and experience of staff working in other specialist programs as well as representatives from various government and non-government agencies.

ELIGIBILITY CRITERIA

Acceptance of the statement of material facts

The effect of the Commission's recommendations in Chapter Two is that an offender may be eligible to participate in a court intervention program before conviction either voluntarily (ie, unconditionally) or as a condition of bail.[8] The present eligibility criteria for the family violence courts provide, among other things, that the offender must enter a plea of guilty to a family violence related offence. In the Consultation Paper the Commission sought submissions about the desirability of an offender participating in a family violence court intervention program before a plea of guilty is entered, or on the basis of an indicated plea of guilty in circumstances where there is some dispute about the statement of material facts.[9] In posing this question the Commission noted the importance of offenders accepting some element of wrongdoing before being able to participate in a family violence perpetrator program; however, it questioned whether offenders might be better able to resolve factual disputes as part of the assessment and counselling experience—with the assistance of trained counsellors—than as part of the remand process in court.

Legal Aid WA supported the idea of enabling offenders who accept responsibility for their actions to commence the assessment process while factual disputes are being resolved. Legal Aid WA suggested that this approach would allow a wider range of offenders to take part in the program, increase the likelihood of resolving factual issues without a hearing on the facts and allow for an earlier entry into the program for some offenders.[10]

The Department of the Attorney General submitted that it might be appropriate to allow eligibility for assessment on the basis of an indicated plea of guilty, but noted that there are limited places in the family violence courts.[11] The Magistrates Court submitted that it does not favour allowing assessment prior to a plea of guilty and cautioned against a 'one size fits all' approach in relation to participation before a plea is taken. The Magistrates Court recognised that 'minimisation, justification and rationalisation' are often associated with offences committed in a family context; it asserted that entering a plea of guilty is a 'first step towards a more contemplative mind set and is imperative not just for the individual but for the dynamic of the group'.[12]

The Commission accepts that practical limitations mean that those offenders who enter a plea of guilty and accept the statement of material facts are most likely to be accepted for assessment. Nonetheless, the Commission considers it sensible for the eligibility criteria for court intervention programs to be drawn as widely as possible. In that way, while the magistrate and the program provider retain discretion over who can be admitted to the program, genuinely remorseful offenders can participate as soon as possible in a perpetrator program, even where there is further negotiation about the facts required.

Superior court matters

In Chapter Two the Commission recommends that an offender who has been committed to the District Court or the Supreme Court may participate in a court intervention program prior to sentencing in the superior court.[13] The Commission invited submissions about whether it is appropriate for offenders who plead guilty to superior court family violence matters to be able to participate in family violence court intervention programs.[14]

Legal Aid WA and the Department of the Attorney General expressed in-principle support for family violence offenders participating in pre-sentence programs after being committed to superior courts.[15] The Magistrates Court noted that some indictable offences will attract sentences of imprisonment and that it would not always be appropriate for such offenders to participate in family violence court intervention programs.[16]

SUPERVISION BY THE COURT

One of the most important aspects of court intervention programs is the supervision of the offender by the court for the duration of the program. The Commission's Consultation Paper discussed the way that offenders are supervised on bail and on Pre-Sentence Orders in court intervention programs and made a number of proposals for change to

8. Recommendation 2(1)(d)(i).
9. Consultation Question 4.1.
10. Legal Aid WA, Submission No. 11 (30 September 2008) 12.
11. Department of the Attorney General, Submission No. 21 (13 November 2008) 9.
12. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 15.
13. Recommendation 2(1)(g).
14. Consultation Question 4.2.
15. Legal Aid WA, Submission No. 11 (30 September 2008) 12; Department of the Attorney General, Submission No. 21 (13 November 2008) 10.
16. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 15.

the *Bail Act 1982* (WA)[17] and the *Sentencing Act 1995* (WA).[18] The Commission posed consultation questions designed to ascertain whether, in addition to the general reforms proposed, there was a need to change the way that offenders are supervised in family violence court intervention programs.[19]

Pre-Sentence Orders

When an offender is facing an immediate term of imprisonment a magistrate can impose a Pre-Sentence Order (PSO). A PSO can be imposed by any court for up to two years to enable an offender who is facing a term of imprisonment to address his or her offending behaviour. The purpose of the PSO is to give an offender the opportunity to demonstrate that a sentence of imprisonment may not be necessary. Under the present provisions of the Sentencing Act a prescribed 'specialty court' has additional powers when imposing a PSO. A specialty court can make orders for assessment of offenders, treatment programs, educational and vocational programs and residential and curfew conditions.[20] The present statutory scheme only prescribes the Perth Drug Court as a specialty court. In any other court imposing a PSO (including family violence courts) these requirements are determined by a community corrections officer.[21]

In Chapter Two the Commission recommends a number of changes to the current provisions dealing with PSOs.[22] Specifically, it is recommended that all references to a 'speciality court' in Part 3A of the *Sentencing Act* be deleted and replaced with the phrase 'a court administering a prescribed court intervention program'. This proposed amendment (and the prescription of the relevant programs) will allow magistrates sitting in courts administering family violence court intervention programs to impose PSOs and make the kinds of orders set out above when dealing with offenders who are facing a term of imprisonment.

17. For discussion and proposals about bail, see LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 187–193, Proposals 6.3 & 6.4 and Consultation Question 6.2.
18. For discussion and proposals about Pre-Sentence Orders, see LRCWA, ibid 199–202, Proposals 6.9–6.12 and Consultation Question 6.4.
19. Consultation Questions 4.3, 4.4, 4.7 & 4.8.
20. *Sentencing Act 1995* (WA) ss 33G & 33H.
21. The Commission notes that no offender in the metropolitan family violence courts has ever been placed on a PSO: email correspondence with Ray Warnes, Executive Director Court and Tribunal Services, Department of the Attorney General (29 May 2009). The Commission cannot determine whether this is because the offences committed by offenders in the family violence courts are not likely to attract a sentence of imprisonment, or whether the magistrates in the family violence courts prefer not to impose PSOs because they do not have the power to make specific programming requirements under the current statutory scheme.
22. For discussion of PSOs and recommendations, see Chapter Two: Pre-Sentence Orders, and Recommendations 5–10.

Breach of a Pre-Sentence Order

In the family violence context, one of the most important aspects of the Commission's recommendations in relation to PSOs is the way that the court can respond to breaches of its orders.[23] In the Consultation Paper the Commission noted that currently the power to respond to a breach of the requirements of a PSO is dependent upon a warrant being issued by the CEO (Corrections). The CEO may issue a warrant to bring the offender to court if he or she has reasonable grounds to believe that the offender has been, is, or is likely to be, in breach of any of the requirements of the PSO. The Commission observed that in the context of a court intervention program (with a number of agencies involved in the offender's supervision) this may be unduly restrictive. For this reason, the Commission recommends[24] that the *Sentencing Act* be amended to provide that if a court administering a prescribed court intervention program has made a PSO it can amend, cancel or confirm the PSO at any time if the magistrate is satisfied that the offender has been, is, or is likely to be, in breach of any requirement of the PSO, even though no warrant has been issued.

Bail

When an offender is not facing an immediate term of imprisonment, magistrates in family violence court intervention programs use the provisions of the *Bail Act* to enable the supervision of the offender. As discussed in Chapter Two, under the present statutory scheme a magistrate can impose a bail condition requiring an offender to comply with the requirements of a court intervention program in order to reduce the risk of reoffending or the risk of the offender failing to appear in court. Failure to comply with bail conditions means that the offender can be brought back to court and the court can reconsider whether the offender should be remanded in custody. In the family violence courts, magistrates also impose protective bail conditions in order to prevent the victim being further abused.

Protective bail conditions

Protective bail conditions are conditions imposed by a judicial officer that aim to ensure that the accused does not endanger the safety, welfare or property of any person; or does not interfere with witnesses or otherwise obstruct the course of justice.[25] Typically, these conditions are used in the family violence courts to prohibit the offender from contacting or going near the victim. For example, bail conditions often provide that the offender will not:

23. See Chapter Two: The operation of Pre-Sentence Orders, breaching a Pre-Sentence Order.
24. Recommendation 8.
25. *Bail Act 1982* (WA) Sch 1, Pt D, cl 2.

- communicate or attempt to communicate by whatever means (including telephone, SMS and email or through another person) with the victim;
- approach within 50 metres of the victim; or
- enter or remain upon specified premises, or any premises where the victim lives or works, or be within 50 metres of the nearest external boundary of such premises.

If the offender and the victim are still in contact, or are living together, the magistrate may impose a condition that the offender will not 'behave in an aggressive or violent manner towards the victim'.[26]

Failure to comply with a protective bail condition is an offence under s 51(2a) of the *Bail Act*. Accordingly, a family violence court participant can be charged with a new offence for breaching any of the above conditions. Also, special rules apply if the offender is already on bail for a serious offence and it will be very difficult to again be released on bail in these circumstances.[27]

Breach of bail

Two submissions noted that the enforcement of bail conditions imposed on family violence court participants is not always effective. In responding to the Commission's Consultation Question about the need for a specific family violence order,[28] Fiona Caporn (Senior Community Corrections Officer)[29] and the Magistrates Court suggested that it was desirable to create a family violence order so that offenders (who are not facing immediate imprisonment) can be brought back to court quickly. The Magistrates Court submitted that:

> A pre-sentence family violence order would have greater force than the current conditional bail arrangement. The current position is somewhat ad hoc and depends to a great degree on close networking between the [case management team] and the police. Like the current PSO the family violence order should allow the CEO to issue a warrant if satisfied on reasonable grounds that the offender has or is likely to breach the conditions of the order.[30]

The Commission notes that the powers in s 54 of the *Bail Act* enable an offender to be brought back to court (and show cause why bail should not be revoked) if the prosecutor or a police officer has reasonable grounds to believe that the offender will not comply with protective bail conditions. Once the offender is brought to court, under s 55 the judicial officer can reconsider bail and, if necessary, revoke bail if he or she is also satisfied that the offender will not comply with protective bail conditions. Further, the *Bail Act* provides that a police officer may arrest the offender without a warrant in order to bring him or her to court for these purposes.[31] It is the Commission's opinion that these powers are sufficient.

The Department of the Attorney General submitted that a special family violence order is not necessary for the operation of family violence court intervention programs.[32] Although the Commission has made a recommendation for a specific order in relation to drug treatment, it must be noted that the Drug Treatment Order is necessary because some of the processes—in particular, custody sanctions—used by the Drug Court require specific legislative provisions.[33] The Commission agrees that a specific order is not appropriate in family violence matters. First, unlike drug court participants, offenders in the family violence courts are rarely facing imprisonment. In fact, some are first offenders and most might otherwise be dealt with by the imposition of a fine or community-based sentence. Secondly, compliance with family violence-type orders would not be capable of clinical assessment in the way that is possible in drug court programs. Introducing a 'points system' or monitoring compliance daily would place a great deal of pressure on the victim to 'police' the orders. This would effect an unacceptable shifting of obligations from the court and other agencies to the victim.

Variation of protective bail conditions

One of the challenges for family violence courts is how to deal with applications to vary protective bail conditions. As noted above, in many cases in the family violence courts the offender's bail conditions prevent him or her from contacting or approaching the victim. Given that the perpetrator program can take up to six months to complete—and also given the frequency with which offenders seek to reconcile with the victim—the family violence courts often hear applications to vary protective bail conditions to allow the offender to contact the victim.

At each of the family violence courts visited by the Commission concern was expressed about the best procedure to be adopted in these circumstances. The main issue being that the offender may place pressure on the victim to agree to a variation of the conditions. Further, there is concern that if the application is refused on the basis that the victim does not consent, the victim's safety might be compromised.

The practical problem is that sometimes applications to vary bail are made without notice in a busy list: the victim support worker, prosecutor and magistrate

26. The Commission is grateful to Magistrate Brian Gluestein for providing an example of the bail conditions often imposed in a family violence dourt.
27. *Bail Act 1982* (WA) Sch 1, Pt C, cl 3B.
28. Consultation Question 4.7.
29. Fiona Caporn, Senior Community Corrections Officer, Submission No. 10 (30 September 2008) 2.
30. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 10.
31. Section 54(2).
32. Department of the Attorney General, Submission No. 21 (13 November 2008).
33. See Chapter Three: The Commission's proposed Drug Treatment Order.

have little time to consider the best approach. For that reason, the Commission suggested in its Consultation Paper that a practice direction should be published to provide a clear guide to all concerned about how such decisions are made and invited submissions about the best way to ensure that the court is aware of the victim's views about the application.[34]

Submissions recognised that this is a complex area. The Magistrates Court submitted that s 22 of the *Bail Act,* which permits magistrates to inform themselves as they see fit, is sufficient and that no practice direction is required.[35] The Department of the Attorney General agreed with the Commission's suggestion for a practice direction and a period of notice before such an application is heard.[36] Legal Aid WA submitted that the victim's opinion about an application to vary bail should be communicated to the magistrate through the victim support worker.[37]

While the Commission accepts that magistrates have a broad discretion to accept information in this context, concern was expressed by the other agencies involved in family violence court intervention programs about the process of varying protective bail conditions. Although in each court it was recognised that these conditions should only be varied when the victim has been consulted and consents to the change, approaches are diverse. In some courts the magistrate seeks the opinion of the victim support worker about the application and the victim support worker tells the magistrate (in court) whether the victim consents or not. In other courts, the victim support worker consults the police prosecutor who takes the victim's view into account when deciding whether to oppose the application to vary the orders. The Commission also acknowledges that often it is not possible for contact to be made with the victim, which is a source of concern for magistrates.[38]

In the Commission's view it would be useful for all agencies to have some guidance about the procedure to be followed for applications to vary protective bail conditions while offenders are part of family violence court intervention programs. The Commission agrees with the submission of Legal Aid WA that there should be a notice period of 14 days to vary protective bail conditions, or such other period as the court directs. Within that period the case management team will have the opportunity to meet to discuss and plan the best way of obtaining the victim's views and communicating them to the court. While the Department of the Attorney General noted that this would significantly expand the role of the case management team,[39] the Commission believes that the case management team is in the best position to assess an application and its effect on the whole family.

34. Consultation Question 4.3.
35. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 16.
36. Department of the Attorney General, Submission No. 21 (13 November 2008) 10.
37. Legal Aid WA, Submission No. 11 (30 September 2008) 14.
38. Meeting with Magistrate Geoff Lawrence (12 August 2008).
39. Department of the Attorney General, Submission No. 21 (13 November 2008) 10.

RECOMMENDATION 27

Practice direction for applications to vary protective bail conditions in family violence court intervention programs

That a practice direction be created to set out the procedure to be followed for applications to vary protective bail conditions in family violence court intervention programs.

Protective bail conditions and violence restraining orders

Clause 2(2a) of Schedule 1 Part D of the *Bail Act* provides that a judicial officer, before imposing a protective bail condition for one of the stated purposes of bail, should consider whether 'that purpose would be better served, or could be better assisted, by a restraining order made under the *Restraining Orders Act 1997*' (WA).[40] If the judicial officer determines that a restraining order is more appropriate to the circumstances, then a final order can be made under s 63 of the *Restraining Orders Act*.[41]

As the Commission outlined in the Consultation Paper, there are potential problems with the intersection of the two Acts in this regard. The Commission notes that it is common for both protective bail conditions and violence restraining orders to be imposed in family violence court matters. Some magistrates in the family violence courts consider that protective bail conditions are more effective and appropriate than violence restraining orders in the family violence context. In some ways protective bail conditions provide greater protection for victims; unlike violence restraining orders, bail conditions cannot be withdrawn by the victim. Further, protective bail conditions can be granted to protect parties that might not be able to satisfy the grounds for a violence restraining order.[42] However, violence restraining orders have some advantages over protective bail conditions; for example, it has been suggested that it is difficult to get the police to act on a breach of bail – they are more likely to act on a breach of a violence restraining order.[43]

40. *Bail Act 1982* (WA) Sch 1, Pt D, cl 2(2a).
41. This section empowers a judicial officer to make a violence restraining order during other proceedings, but in the case of criminal proceedings there is 'no capacity for an interim order'. See Department of the Attorney General, *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (2008) 36.
42. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 17.
43. Email correspondence with Paula Hyde, Senior Community Corrections Officer, Department of Corrective Services (17 April 2008); email correspondence with Rochelle Watson, Family Violence Service, Rockingham (12 May 2008).

In its Consultation Paper the Commission sought submissions about whether clause 2(2a) of Schedule 1 Part D of the *Bail Act* should be repealed or amended and whether s 63 of the *Restraining Orders Act* should be amended to enable a judicial officer hearing a bail application to make an interim, rather than a final, violence restraining order.[44] The benefit of enabling a magistrate to make an interim order is practical; for a final order to be made the magistrate would be required to conduct a hearing, which will not always be possible in the context of a busy list.[45]

The Department of the Attorney General submitted that the Commission's suggested changes provide 'the option to enable restraining orders to be made without it being a requirement'.[46] Legal Aid WA submitted that s 63 of the *Restraining Orders Act* should be amended to allow a judicial officer to impose an interim violence restraining order in the course of other proceedings (ie, bail hearings) and that there should also be clear prosecution policies and guidelines for magistrates in dealing with the imposition of violence restraining orders and protective bail conditions.

Legal Aid WA also suggested that where an interim restraining order is made in the family violence courts the resulting civil process should follow the criminal court process.[47] It is noted that this would have the advantage of allowing one court process to determine the issues rather than there being two hearings. Legal Aid WA also suggested that there should be a clear process for a magistrate to consider the making of a final violence restraining order at the conclusion of a criminal charge. It reported that at present 'there is no integration and it can be very difficult for the victim to raise this issue with the prosecution'.[48]

The submission from the Deputy Magistrate of South Australia, Dr Andrew Cannon, suggested that Western Australia adopt the policy in place in South Australia: that in each matter in the family violence courts there is both protective bail conditions and a violence restraining order. Thus, if the victim decides not to pursue the charges, the violence restraining order is still in place. As noted above, the reverse is also true: if the applicant for the violence restraining order decides to withdraw the order, the bail conditions are still in place until such time as they are revoked or cancelled by the magistrate. On the other hand, the Magistrates Court submitted that repeal or amendment of clause 2(2a) of Schedule 1 Part D of the *Bail Act* is not required and that the penalties for breach of protective bail conditions are sufficient.

In the Commission's view, magistrates should be able to impose either or both protective bail conditions and violence restraining orders when an offender first comes before the court. The Commission therefore makes the recommendation below for changes to the *Bail Act*. Further, in light of the practical considerations, the Commission's view is that magistrates should be able to make an interim, rather than a final, violence restraining order during a hearing in relation to bail. Accordingly, the Commission makes a recommendation for change to the violence restraining orders legislation.

The Magistrates Court submitted that the *Restraining Orders Act* should be amended to provide that an application to cancel a violence restraining order (where protective bail conditions are already in place) will not be heard unless the court has given the local police prosecuting branch 24 hours' notice of the application. The Commission agrees with this suggestion, and makes a recommendation to that effect.

RECOMMENDATION 28

Protective bail conditions and violence restraining orders

1. That clause 2(2a) of Schedule 1 Part D of the *Bail Act 1982* (WA) be amended to provide that on a grant of bail for a purpose set out in subclause (2)(c) or (d) a judicial or authorised officer should consider whether that purpose might be better served or assisted by a violence restraining order, or protective bail conditions, or both.

2. That s 63 of the *Restraining Orders Act 1997* (WA) be amended to enable a judicial officer hearing a bail application to make an interim violence restraining order.

3. That the *Restraining Orders Act 1997* (WA) be amended to provide that where protective bail conditions are in place to protect a person, an application to cancel a violence restraining order that protects that person can only be cancelled on 24 hours' written notice to the court.

44. Consultation Question 4.4.
45. Department of the Attorney General, *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (2008) 36.
46. The Commission notes that in the Department of the Attorney General's review of the changes to violence restraining order legislation submissions suggested that s 63 of the *Restraining Orders Act 1997* (WA) should be amended to allow the judicial officer to make an interim violence restraining order; however, that review did not make a recommendation to that effect. Ibid 36–37.
47. Legal Aid WA observes that this may require some change to the Department of Attorney General database so that criminal and restraining order matters are flagged and listed on the same day.
48. Legal Aid WA, Submission No. 11 (30 September 2008) 15–16.

VICTIM INVOLVEMENT

Sentencing

In the family violence courts, victims are given a choice whether or not to provide input into the final pre-sentence report that will be relied on by the magistrate in sentencing. When the Commission visited the family violence courts in Western Australia, there was a range of views expressed about how the victim's input is, and should be, taken into account. Similar concerns were raised about the possibility of compromise to victim safety as with bail variations.

Some members of case management teams said that victims often did not wish to have their views recorded because they were likely to experience abuse from the offender. Others considered that magistrates would understand, from the absence of input, that the victim did not feel safe enough to include his or her views. Some suggested that there needed to be a way that the victim's views could be communicated to the magistrate without the offender being made aware of them.

This presents a difficult balancing exercise for the family violence courts. On one hand, the magistrate seeks to take into account the victim's safety throughout the process, including in sentencing. On the other hand, concerns for the victim's safety may prevent the victim from putting forward his or her views. It would be contrary to fundamental principles of justice for information to be provided to the magistrate without the offender's knowledge. Given the concerns (and divergent views) expressed to the Commission in its preliminary consultations, the Commission invited submissions about whether the operating procedures should be clarified or changed.[49]

The Commission received several submissions on this issue. The Magistrates Court submitted that no information should be provided to the court without the offender's knowledge and that there should be no change to the current process.[50] The Department of the Attorney General agreed that the operating procedures are sufficient. It expressed a preference for the input from the victim to be given to the court directly where no threat is posed and commented that:

> It would be useful to have a mechanism whereby the Victim Support Worker could be enabled to express any concerns that they have for a victim's safety without this information having to be disclosed before the accused/offender or their legal representative and compromising victim safety. It is acknowledged however, that such a mechanism would likely contravene the rules or natural justice and cause a lack of transparency in proceedings. That being the case, it may be appropriate that specific legislation or rules of court are developed to deal with these types of circumstances.[51]

Legal Aid WA submitted that to ensure procedural fairness, a person should have the opportunity to respond to any adverse information provided to a magistrate and, in order to minimise risk to the victim's safety, that his or her views are best provided in open court in a report from the case management team.

Legal Aid WA also submitted that, at the victim's request, his or her input could be provided to the case management team or the court from victim advocates other than the Family Violence Service. It suggested that this would provide greater flexibility and may reduce duplication and trauma to victims by having to tell their story to multiple agencies.[52] For this reason, the Commission suggests that the case management team structure should be sufficiently flexible to allow for input from agencies other than the Family Violence Service. The Commission notes that the operating procedures for the family violence courts state that service providers from other departments or non-government organisations that are involved with the service provision to victims may be invited to attend case management.[53]

In these circumstances, the Commission does not consider that any changes to current procedures are required.

Support and assistance to victims and children

A key component of family violence court intervention programs is the implementation of effective measures to support and assist victims. This support is essential to promote victim safety; to encourage victims to continue to support the prosecution of family violence offences; and to give practical assistance to avoid future episodes of violence. Support and assistance to victims is primarily undertaken by victim support workers: the importance of their role cannot be understated.

In each of the metropolitan family violence courts there are two workers employed by the Family Violence Service to support victims. The main role of one of the workers is to provide advice and support in relation to violence restraining orders.[54] The other, the senior victim support worker, is the coordinator

49. Consultation Question 4.5.
50. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 17.
51. Department of the Attorney General, Submission No. 21 (13 November 2008) 10–11.
52. Legal Aid WA, Submission No. 11 (30 September 2008) 16. Dr Andrew Cannon submitted that victim input in the sentencing process should be made in the course of submissions by the police prosecutor: Dr Andrew Cannon, Deputy Magistrate of South Australia, Submission No. 17 (13 October 2008) 4.
53. Department of the Attorney General, *Magistrates' Courts: Metropolitan Family Violence Court operating procedures* (24 May 2007) 12.
54. It is important to note that these workers provide advice and assistance to all people seeking violence restraining orders, not only those involved with the family violence courts program.

of the case management team and oversees the monitoring of the offender on the program. The senior victim support worker is also required to attend court (some sit at the bar table) and provide information to the magistrate if required. In some metropolitan family violence courts the victim support worker addresses the court, although there is no formal arrangement for them to do so.[55] As noted in the Consultation Paper, the Commission observed that different procedures were adopted in each court.[56]

The Commission sought submissions about how the victim support worker should provide information to the magistrate during court proceedings.[57] The Commission received three submissions on this point. Legal Aid WA submitted that the Victim Support Service worker should sit at the bar table, which would 'send the message that victims are central to the court process'.[58] The Magistrates Court submitted that there was 'no indication that the flow or quality of information from the victim's perspective is adversely affected by the physical location of victim support personnel within the courtroom'.[59] It noted that there were differing arrangements in each court, depending on architecture. However, the Department of the Attorney General suggested that there was a need to formalise the process because currently the magistrate must give leave for such information to be provided to the court. In the Commission's view, because the victim support worker is able (if he or she wishes) to sit at the bar table and address the court under the present arrangements, there is no need for a recommendation to that effect.

In addition, Magistrate Geoff Lawrence advised the Commission that at present the representatives from the Department of Child Protection do not provide their views to the court; his Honour expressed the view that they should.[60] The Commission agrees: the department has an important role to play in the protection of children in families where there is violence in the home.[61] As noted above in respect of victim support workers, there is no need for change to the present arrangements to permit this to occur.

PERSONNEL

Case management team

Case management is a key aspect of court intervention programs operating in the family violence area. In its Consultation Paper, the Commission described the case management process in family violence courts and identified two areas of concern. First, the Commission noted that there were some instances in which members of case management teams were unsure about how and what information should be shared with other members of the team. The Commission deals with information sharing in Chapter Two.[62] The Commission also notes that communication between participating agencies was also a focus of the process review of the family violence courts carried out in 2008.[63]

Secondly, a lack of funding has resulted in some agencies that are part of the case management team not being able to properly participate in some courts. The Commission has been advised that although the Western Australia Police[64] and Department for Child Protection are part of the case management team, in some family violence courts neither agency has sufficient funding to send a representative to the case management meetings.[65] The project manager of the expansion of the family violence courts, Andrea Walsh, observed that one of the challenges facing the project was 'cross-government participation due to resource constraints and differing priorities despite recognition of the merits of the process'.[66] The Commission's view is that the case management approach is undermined if all of the relevant agencies are not funded to participate. This view was supported by the submissions from the Magistrates Court and the Department of the Attorney General.[67] The Commission therefore makes the following recommendation.

RECOMMENDATION 29

Funding for agencies in case management team

That the Western Australian government provide funding to enable all relevant agencies (including the Department for Child Protection and the Western Australia Police) to participate in the family violence courts' case management processes and attend court where necessary.

55. Meeting with Lynne Ridgeway, Acting Coordinator of the Family Violence Service, Department of the Attorney General, and Andrea Walsh, Project Manager, Metropolitan Family Violence Courts Expansion Project, Department of the Attorney General (31 January 2008).
56. LRCWA, *Court Intervention Programs,* Consultation Paper, Project No. 96 (2008) 146.
57. Consultation Question 4.6.
58. Legal Aid WA, Submission No. 11 (30 September 2008) 16.
59. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 17.
60. Meeting with Magistrate Geoff Lawrence (12 August 2008).
61. The Commission has also recommended that sufficient funding be made available for all case management agencies to attend court where necessary: see Recommendation 29 below.
62. See Chapter Two: Information sharing.
63. The Commission has been told that the report from this review is an internal document and has not been provided with a copy: email correspondence with Ray Warnes, Executive Director Court and Tribunal Services, Department of the Attorney General (29 May 2009).
64. The Commission has been advised that the police cooperate informally with the case management team, particularly specialist domestic violence officers: Ray Warnes, ibid.
65. Ibid.
66. Walsh A & Ruthven R, 'Metropolitan Family Violence Court Expansion' (Paper presented at Family Violence and Aggression: Fear is not the Only Consequence, Adelaide, 24–26 October 2007) (unpaginated).
67. Submissions to Consultation Question 4.9: Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 18; Department of the Attorney General, Submission No. 21 (13 November 2008) 11–12.

Police

Police prosecutors

In the Consultation Paper the Commission proposed that specialist prosecutors be assigned to each of the family violence courts.[68] The Commission has been advised that there are now police prosecutors assigned to the court in all metropolitan family violence courts.[69]

Specialist policing

In the pilot Joondalup family violence court, a specialist police unit was set up to support the operation of the court. Policing was one of the most marked benefits of the Joondalup pilot.[70] Specialist policing for family violence offending usually focuses on two aspects of policing that have been identified as problematic in these matters: evidence gathering and charging policy. Improved evidence gathering can enhance the quality of prosecution briefs and thereby increase the number of convictions and guilty pleas. Police policies that encourage officers to charge offenders when they attend family violence call-outs are known as 'pro-arrest' policies.

The Commission notes that since the Joondalup pilot court was established, there have been attempts to make pro-arrest policies and improved evidence gathering part of the response to family violence by all Western Australian police officers. Nonetheless, it is clear that there are still inadequacies in the police response. The Commission was told in preliminary consultations that most family violence prosecution briefs consist only of the statement of the victim; rarely do the arresting officers attend to give evidence about their observations at the time of arrest; and other investigative techniques (such as photographs and forensic samples) are seldom used.

The Commission suggests that better policing practices will not only improve the conviction rate in family violence matters but also place less pressure on victims in the process. If offenders are aware that the police have independent evidence against them, then they are more likely to admit responsibility and more likely to engage in perpetrator programs. These shortfalls alone are sufficient reason to assign specialist police to all family violence courts.

In addition, specialist police will be better equipped to enforce protective bail conditions and violence restraining orders. In her submission, Senior Community Corrections Officer Fiona Caporn provided some examples of the inadequacies of 'front line' policing in the area of family violence.[71] In one example, an offender who was subject to protective bail conditions for a family violence offence was charged with unlawful wounding against the same victim and was summonsed to appear in the main arrest court two weeks later, instead of being expeditiously brought to court or remanded in custody to the next family violence court date.

Given the importance of protective bail conditions and violence restraining orders to both the safety of the victim and the integrity of the family violence court process, breaches of these orders should not be treated lightly. The Commission notes that bail conditions (including curfews) are policed strictly in the Perth Drug Court, and sees no reason why the enforcement of bail conditions should be any less rigorous in family violence courts. This view was overwhelmingly supported by submissions to this reference,[72] including by the Magistrates Court and the Department of the Attorney General. However, the submission from the Western Australia Police stated that it is not one of its core functions to be practically involved in the programs or to allocate already limited and diminished resources to the operation of the programs.[73]

Magistrate Geoff Lawrence told the Commission that the family violence court at Joondalup is greatly assisted by the specialist domestic violence unit of the police station in that area.[74] A sergeant from the domestic violence unit participates in the case management meetings and an inspector (or officer of higher rank) attends the reference group meetings.[75] Magistrate Geoff Lawrence said that there is a need for specialist units in all police stations to deal with family violence, and that a good response to family violence by the police is necessary for the proper operation of the family violence courts.

In the Commission's view, it is necessary for a specialist police officer or unit to be attached to the family violence courts to ensure that offenders are brought back to court expeditiously, and that breaches of protective bail conditions and violence restraining orders are acted upon appropriately. The Commission therefore makes the following recommendation.

68. Proposal 4.1.
69. Email correspondence with Ray Warnes, Executive Director Court and Tribunal Services, Department of the Attorney General (29 May 2009).
70. Krazlan K & West R 'Western Australia Trials a Specialised Court' (2001) 26 *Alternative Law Journal* 197, 198.
71. Fiona Caporn, Senior Community Corrections Officer, Submission No. 10 (30 September 2008) 1.
72. Fiona Caporn, Senior Community Corrections Officer, Submission No. 10 (30 September 2008) 1; Legal Aid WA, Submission No. 11 (30 September 2008) 18–19; Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 19; Department of the Attorney General, Submission No. 21 (13 November 2008) 12.
73. Western Australia Police, Submission No. 18 (14 October 2008) 6.
74. This was also noted in the submission from the Magistrates Court: Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 18.
75. Ibid.

RECOMMENDATION 30

Specialist policing

That a specialist family violence police officer or unit be attached to each of the family violence courts.

Defence lawyers

Unlike the Perth Drug Court, Western Australia's family violence courts do not have duty lawyers assigned to them. Most offenders are represented by the general duty lawyer service of Legal Aid WA. The Commission sought submissions about whether funding should be made available to Legal Aid WA to enable specialist duty lawyers to appear in the family violence courts.[76]

The Magistrates Court submitted that Legal Aid WA provides a high standard of duty lawyers to family violence courts, and that it is clear that Legal Aid WA attempts where possible to assign lawyers to the family violence courts that are familiar with their proceedings.[77] The Department of the Attorney General submitted that having specialist family violence duty lawyers is an 'ideal' that would require the support of Legal Aid WA and the Aboriginal Legal Service.[78] Fiona Caporn[79] and Legal Aid WA are supportive of having specialist duty lawyers for the family violence courts. Legal Aid WA noted that '[p]riority is currently being given by Legal Aid WA to resourcing the [family violence courts] out of already stretched existing resources'.[80]

Legal Aid WA also submitted that it was desirable to have specialist victim duty lawyers at each family violence court. At present, duty lawyers provide support for victims every morning in the Central Law Courts and every Thursday at Joondalup Magistrates Court.[81] Legal Aid WA described that:

> The duty lawyers advise and represent victims, which non-lawyers cannot do. Victims have a critical need at court for legal advice specific to their situation. The duty lawyer is able to meet this need. This includes giving advice on the merits of restraining order applications, the specific wording or terms of restraining orders to suit their situation and related children's or family law issues. Provision of duty lawyers supports and promotes a collaborative, integrated response to legal issues.[82]

76. Consultation Question 4.11.
77. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 19.
78. Department of the Attorney General, Submission No. 21 (13 November 2008) 12.
79. Fiona Caporn, Senior Community Corrections Officer, Submission No. 10 (30 September 2008) 1.
80. Legal Aid WA, Submission No. 11 (30 September 2008) 19.
81. Ibid.
82. Ibid.

The Commission agrees that it is desirable for duty lawyers to be available to appear for both offenders and victims in the family violence courts. Where there is a conflict, Legal Aid WA can fund a private lawyer to act for one of the parties. Legal Aid WA must therefore be given sufficient funding to enable it to provide this service.

RECOMMENDATION 31

Duty lawyers for offenders and victims in the family violence courts

That Legal Aid WA be funded to provide duty lawyers for both offenders and victims in each of the metropolitan family violence courts in Western Australia.

ENSURING BROAD ACCESS TO FAMILY VIOLENCE COURT INTERVENTION PROGRAMS

Information for participants

In its Consultation Paper the Commission recognised the importance of providing appropriate and easily accessible information about the family violence courts to both victims and offenders. The Commission proposed that the Department of the Attorney General provide information about the family violence courts on its website and in written brochures.[83] The Commission notes that since the publication of the Consultation Paper updated material has been published by the department and that the website has been updated.

Legal Aid WA supported this proposal, and offered to assist the Department of the Attorney General to develop 'detailed, practical and appropriately targeted' material.[84] In its submission, the Aboriginal Legal Service suggested that consideration should be given to other ways of providing information about the family violence courts.

> It is inadequate to rely solely upon written brochures and websites. With low literacy levels and limited access to electronic and computer based information services, there is a risk that large sections of the Aboriginal community will simply be unaware of the existence of family violence court intervention programs.[85]

The Commission noted in the Consultation Paper that there has to date been mixed success in involving Aboriginal people in family violence court intervention programs.[86] The Department

83. Proposal 4.2.
84. Legal Aid WA, Submission No. 11 (30 September 2008) 23.
85. Aboriginal Legal Service of WA (Inc), Submission No. 20 (13 November 2008) 3.
86. LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 152.

of Indigenous Affairs stated in its submission that factors that stop Aboriginal people from accessing court services include a general lack of knowledge of the role and functions of the court and language and cultural barriers.[87]

The provision of material about the family violence courts in a way that is appropriate to inform people with limited access to computers, poor literacy skills or who do not speak or read English is clearly one way of making the courts more accessible to Aboriginal people, as well as other disadvantaged groups. Accordingly, the Commission makes the following recommendation.

RECOMMENDATION 32

Information for participants

That the Department of the Attorney General in partnership with other government agencies involved in the family violence courts, as well as Legal Aid WA, the Aboriginal Legal Service and the Department of Indigenous Affairs devise ways of providing information to people about the family violence courts that do not rely on computer access or literacy skills.

Information for lawyers

In order for as many offenders as possible to be able to access the family violence courts, it is also necessary for lawyers working in private practice to be provided with information about the workings of the family violence courts. The Department of the Attorney General[88] and the Magistrates Court submitted that seminars for lawyers about the family violence courts should be provided. The Magistrates Court suggested that such seminars would ideally include presentations by magistrates from the family violence courts.[89] Legal Aid WA suggested that specialist family violence duty lawyers could be a 'linking point' for seminars of this kind.[90]

The Commission notes that the Department of the Attorney General recently held an information session[91] for lawyers that included a presentation by Magistrate Gluestein from the family violence courts. The Commission's view is that this kind of information session should be regularly held.

87. Department of Indigenous Affairs, Submission No. 16 (8 October 2008) 5.
88. Department of the Attorney General, Submission No. 21 (13 November 2008) 12.
89. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 19.
90. Legal Aid WA, Submission No. 11 (30 September 2008) 19.
91. 'Information Session: Drug Court, Drug Diversion and Family Violence Courts' (pamphlet, 21 May 2009).

Access by vulnerable and disadvantaged groups

Research is increasingly identifying specific groups that are at particular risk of becoming victims of family violence. These vulnerable groups include Aboriginal people, people with disabilities, people suffering from mental illness, women who have previously had contact with the criminal justice system, and people involved in high-risk behaviour such as drug use. There is also an increasing awareness by the community of the abuse suffered by elderly people and gay, lesbian, bisexual, transgender and intersex people.[92] The Commission's view is that it is imperative for family violence court intervention programs to ensure that they are properly servicing the needs of these vulnerable groups. In the Consultation Paper the Commission posed two questions designed to gather opinions about the best way for the needs of these groups to be met and received several submissions in response.[93]

Aboriginal people

Aboriginal people experience much higher levels of violence in their families than non-Aboriginal people, and Aboriginal women are much more likely to experience sexual violence and sustain injury than non-Aboriginal women.[94] Despite this, it has been frequently reported that many Aboriginal people do not access the justice system in order to deal with family violence.[95] The reasons for this are numerous, and include (as noted above and described in the submission from the Department of Indigenous Affairs) a lack of knowledge about courts and their function, and language and cultural barriers.[96]

Involving Aboriginal participants is a challenge for the family violence court intervention programs in Western Australia. The Barndimalgu Court is an example of a court intervention program that is successful in engaging Aboriginal offenders. It is an Aboriginal-specific program and involves respected people from the local Aboriginal community. On the other hand, (and as noted by the Department of Indigenous Affairs in its submission) the evaluation of the Joondalup family violence court found that Aboriginal people were under-represented in statistics from the pilot court.[97]

92. National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to reduce violence against women and their children, 2009–2021* (2009) 9.
93. Consultation Questions 4.13 and 4.14.
94. National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to reduce violence against women and their children, 2009–2021* (2009) 9.
95. See LRCWA, *Aboriginal Customary Laws: The interaction of Western Australia law with Aboriginal law and culture*, Final Report (2006) 283–288.
96. Department of Indigenous Affairs, Submission No. 16 (8 October 2008) 5.
97. Ibid 5–6.

It is of particular importance for the new metropolitan family violence courts to consider whether and how Aboriginal offenders participate in the programs; the funding for the expansion of the family violence courts was obtained through the Western Australian government's investment in initiatives designed to reduce rates of Aboriginal imprisonment.[98] Since the publication of the Consultation Paper, the number of Aboriginal participants in the metropolitan family violence courts appears to have increased. The Commission has been advised that of the 92 offenders participating in the family violence courts in the metropolitan area in April 2009, 36 were 'of Indigenous descent'.[99] Importantly, there is now a perpetrator program designed for Aboriginal participants.

The Commission notes that the Aboriginal reference group that was formed to provide input into the expansion of the metropolitan family violence courts has been disbanded since the expansion project is now complete.[100] A number of submissions stressed the need to continue to seek input from Aboriginal people into the running of the family violence courts.[101] Legal Aid WA submitted that there has been limited input by Aboriginal people into the metropolitan family violence courts so far, and that there 'needs to be a process of real consultation and partnership'.[102] Legal Aid WA also submitted that the process of seeking input from Aboriginal people is

> more than mere consultation or having an 'Aboriginal reference group' but a genuine adherence to good practice principles.[103]

In addition to seeking input from Aboriginal people, both the Department of Indigenous Affairs and the Aboriginal Legal Service highlighted the need for Aboriginal staff in court intervention programs.[104] The Magistrates Court submitted that it is important for services to be provided closer to where Aboriginal people live.[105]

The Department of the Attorney General noted that:

> The inclusion of Aboriginal Elders or community members in the judicial process is an important way of making the court more culturally appropriate, and may be a means to help the [family violence courts] better meet the needs of Aboriginal people, and increase Aboriginal participation in these courts.[106]

The Commission agrees that appropriate processes should be developed to ensure that family violence court intervention programs operate in a culturally appropriate way and makes the following recommendation.

It is also important that evaluations of family violence court intervention programs identify whether the programs have worked for Aboriginal participants, both perpetrators and victims. The Department of Indigenous Affairs pointed out in its submission that, unlike drug courts, 'little is known about what works and what does not in terms of the reduction of family violence'.[107] Accordingly, the Commission makes a recommendation below for continued consultation and evidence gathering in the operation of family violence court intervention programs.

RECOMMENDATION 33

Improving family violence court programs for Aboriginal people

1. That family violence court intervention programs develop, in consultation with Aboriginal people, culturally appropriate processes (such as the involvement of respected members of the local Aboriginal community in the court process, services and programs) to improve the effectiveness of family violence court intervention programs for Aboriginal people.

2. That the data collection for the evaluation of family violence court intervention programs include information about whether Aboriginal people and other vulnerable groups are accessing the programs and achieving successful outcomes on the programs.

3. That family violence court intervention programs be regularly evaluated in terms of their effectiveness for Aboriginal offenders and victims.

98. Meeting with Lynne Ridgeway, Acting Coordinator of the Family Violence Service, Department of the Attorney General, and Andrea Walsh, Project Manager, Metropolitan Family Violence Courts Expansion Project, Department of the Attorney General (31 January 2008).
99. Email correspondence with Ray Warnes, Executive Director Court and Tribunal Services, Department of the Attorney General (29 May 2009). Notably, there are no Aboriginal offenders among the nine currently being case managed by the Rockingham family violence court. The statistics for the other courts are: Central Law Courts 23 participants (11 Aboriginal), Midland 12 participants (6 Aboriginal), Joondalup 18 participants (5 Aboriginal), Armadale 10 participants (4 Aboriginal), Fremantle 20 participants (10 Aboriginal).
100. Ibid.
101. Legal Aid WA, Submission No. 11 (30 September 2008) 20; Department of Indigenous Affairs, Submission No. 16 (8 October 2008) 5; Aboriginal Legal Service of WA (Inc), Submission No. 20 (13 November 2008) 4.
102. Legal Aid WA, Submission No. 11 (30 September 2008) 21.
103. Ibid 22. Legal Aid WA suggested, as an example, the process and principles in: Aboriginal and Torres Strait Islander Services, Department of Indigenous Affairs, *Engaging with Aboriginal West Australians* (2005).
104. Department of Indigenous Affairs, Submission No. 16 (8 October 2008) 5–7; Aboriginal Legal Service of WA (Inc), Submission No. 20 (13 November 2008) 4.
105. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 20.
106. Department of the Attorney General, Submission No. 21 (13 November 2008) 13.
107. Department of Indigenous Affairs, Submission No. 16 (8 October 2008) 6.

Other vulnerable and disadvantaged groups

The importance of the family violence courts for other vulnerable groups was also recognised in submissions. The Magistrates Court provided the example of elderly perpetrators and victims (including parents subjected to abuse by their children) and noted that a properly resourced case management team is needed to deal with these cases.[108] Another example provided by the Magistrates Court is 'parental discipline' cases, it stated:

> It is common for the accused parent who has assaulted his or her child, particularly a child in the mid to late teens, to admit their guilt but to literally plead for the court to provide the child with some form of counselling. In those circumstances the accused parent is in need of an appropriate parenting programme and the child and the family is in need of some form of intervention.[109]

Legal Aid WA suggested that a range of victim support workers having input into the process would assist vulnerable groups to participate in the family violence courts.[110] The Department of the Attorney General submitted that development of relationships between family violence courts and multi-cultural services will assist in improving access to family violence court intervention programs for people from culturally and linguistically diverse backgrounds.[111]

The Commission notes that a number of the recommendations in this Report will enable the family violence courts to meet the needs of vulnerable groups; in particular, the recommendation for a policy unit to enable information sharing and linking up of services across all court intervention programs.[112] In addition, continued consultation by the Department of the Attorney General with vulnerable groups, and government and non-government agencies that represent those groups, is imperative in order to develop further successful programs that are accessible to a broad range of victims and perpetrators of family violence.

As noted above in respect of Aboriginal participants, it is also important that evaluations of family violence court intervention programs identify whether the programs have worked for members of vulnerable groups. The Commission therefore recommends continued consultation and evidence gathering in the operation of family violence court intervention programs for this purpose.

108. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 21.
109. Ibid.
110. Legal Aid WA, Submission No. 11 (30 September 2008) 21.
111. Department of the Attorney General, Submission No. 21 (13 November 2008) 13.
112. See Chapter Two: Court intervention programs unit.

RECOMMENDATION 34

Improving family violence court intervention programs for vulnerable and disadvantaged groups

1. That the Department of the Attorney General consult with relevant government and non-government agencies to ensure broad access to metropolitan and regional family violence court intervention programs by vulnerable groups.
2. That the data collection for the evaluation of family violence court intervention programs include information about whether vulnerable groups (including elderly people; gay, lesbian, transgender and intersex people; mentally impaired people; people from culturally and linguistically diverse backgrounds; and people with disabilities) are accessing the programs and achieving successful outcomes on the programs.
3. That family violence court intervention programs be regularly evaluated in terms of their effectiveness for vulnerable offenders and victims.

Regional Courts

The Commission noted in its Consultation Paper that because of population levels and very limited available resources, specialist court intervention programs are not suitable in regional locations. For that reason, the Commission recommended the establishment of a general court intervention program in Western Australia.[113] The Commission sought submissions about whether family violence offending could be included within such a general program, and the best way to facilitate access to family violence court intervention in regional areas.

The submission from the Magistrates Court strongly opposed the idea of including family violence in a general court intervention program. It asserted that the dynamics in family violence 'are quite specific to this type of offending and require specialist judicial officers and specialists from Community Justice Services, Department of Child Protection and service providers'.[114] Nonetheless, the Magistrates Court recognised that the 'limit on intervention in regional areas is resourcing and the tyranny of distance'.[115]

The Commission acknowledges that it is preferable for court intervention in family violence matters

113. Proposal 5.1
114. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 21.
115. Ibid.

to be carried out within a specialist court. The Department of the Attorney General noted that where numbers and resources permit, specialist programs are possible in regional areas.[116] In the Commission's view, dedicated and motivated judicial officers and local agency staff are also necessary. The Commission recommends that specialist family violence court intervention programs should be expanded to regional areas where resources permit.

However, it is clearly not possible for there to be family violence court intervention programs at every magistrates court in Western Australia. Legal Aid WA and the Department of the Attorney General recognised that in regional areas the lack of programs and resourcing might require family violence matters to be part of a general program, and were supportive of this idea.[117] In Chapter Six the Commission sets out its recommendations for a general court intervention program that assists offenders with a variety of underlying issues to engage with relevant services as part of a judicially monitored pre-sentence program.[118]

The Commission recognises the difficulties inherent in including family violence offenders in general court intervention programs; however, it considers its recommended court intervention program unit (Recommendation 1) will allow for sharing of expertise with the judicial officers and court staff administering general regional court intervention programs. This unit would comprise of program staff and representatives from relevant government agencies and community services co-located in a central office to improve coordination between all parties to court intervention programs. A unit of this kind could assist in the development of program requirements for family violence offenders participating in general court intervention programs in regional areas,[119] as well as services to victims in regional areas. It will also provide specialised training and advice for court staff dealing with family violence matters.

The Commission accordingly recommends that, in those regional locations where there are no specialist family violence court intervention programs, family violence offenders be permitted to participate in general court intervention programs. The Commission's final recommendations in respect of general court intervention programs are in Chapter Six.

116. Department of the Attorney General, Submission No. 21 (13 November 2008) 13.
117. Legal Aid WA, Submission No. 11 (30 September 2008) 22; Department of the Attorney General, Submission No. 21 (13 November 2008) 13.
118. See Recommendation 37.
119. The Commission recommends that the coordinators of specialist programs in the metropolitan area should be responsible for training of regional court officers involved in coordinating general court intervention programs: see Recommendation 37.

RECOMMENDATION 35

Court intervention programs for family violence offenders in regional areas

1. That the Department of the Attorney General establish family violence court intervention programs where there are available programs for offenders and services to victims.
2. That family violence offenders be permitted to participate in general court intervention programs in regional areas pursuant to Recommendation 37.
3. That the staff of regional courts running general court intervention programs be trained by and, where necessary, take advice from the coordinators and staff of the specialist programs, including the family violence courts.

Programs for respondents to violence restraining orders

A relatively small percentage of family violence matters are reported to police, and many matters that are reported to police do not result in charges being laid. Thus many victims of family violence seek violence restraining orders to protect themselves from future violence. The existing perpetrator programs in family violence courts are only available to offenders; therefore, the options for respondents to violence restraining orders are to either voluntarily seek assistance or do nothing.

At present in other Australian jurisdictions respondents to violence restraining orders are either ordered by the court to participate in counselling programs,[120] or offered the opportunity to participate voluntarily in perpetrator programs.[121] The Commission sought submissions about whether it is desirable to give respondents to violence restraining orders the opportunity to participate in perpetrator programs and whether such participation should be compulsory or voluntary.[122]

This idea was strongly supported by submissions.[123] Legal Aid WA noted that research suggests that applicants for violence restraining orders may be

120. See *Crimes (Family Violence Act) 1987* (Vic) s 8D(4).
121. In South Australia participation in the program is voluntary and, because the participants in the program are not 'offenders', the program is not managed by the Department for Correctional Services in South Australia: telephone consultation with Cornelia Steinhausser, Case Manager, Central Violence Intervention Program, Department for Correctional Services, South Australia (2 April 2008).
122. Consultation Question 4.12.
123. Legal Aid WA, Submission No. 11 (30 September 2008) 20; Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 21; Dr Andrew Cannon, Deputy Magistrate of South Australia, Submission No. 17 (13 October 2008) 4–5 Department of the Attorney General, Submission No. 21 (13 November 2008) 12.

more at risk of further abuse than victims of criminal charges,[124] and the Department of the Attorney General said that 'participation at an early stage may well be the most significant point of change for an offender'.[125]

The Magistrates Court submitted that court-ordered counselling would be of significant benefit in some cases and noted that a respondent could be fined for non-compliance with an order to attend counselling.[126] In contrast, Legal Aid WA submitted that participation in the program should be voluntary, except after a final hearing (when a magistrate has heard and assessed all the evidence) when participation could be compulsory.[127]

The Department of the Attorney General submitted that feedback about the respondent's participation in the program could be provided to the court, and suggested that the Department of Corrective Services might be able to monitor attendance and participation. The department submitted that further research should be conducted on the manner of participation in such a program.

All the submissions noted that there would be an obvious need for increased funding to enable respondents to violence restraining orders to participate in perpetrator programs. In light of the strong in-principle support expressed in the submissions, the Commission recommends that the Department of the Attorney General develop, in consultation with other relevant agencies, a perpetrator program for respondents to violence restraining orders in family violence matters. In developing this program, it will need to be determined if participation in the program should be voluntary or court-ordered, what penalty might apply for non-compliance, which agency could monitor the respondent's participation, and how and whether the respondent's participation could be taken into account by the court.

RECOMMENDATION 36

Program for respondents to violence restraining orders

That the Department for the Attorney General develop a program that enables courts to refer or order respondents to violence restraining orders in family violence matters to participate in counselling programs.

124. Legal Aid WA, Submission No. 11 (30 September 2008) 20.
125. Department of the Attorney General, Submission No. 21 (13 November 2008) 12.
126. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 19–20.
127. Legal Aid WA, Submission No. 11 (30 September 2008) 20.

Chapter Six

General Court Intervention Programs

Contents

Introduction 111

General Court Intervention Programs 112

How general court intervention programs work 112

CISP: A general court intervention program 112

NJC: A community court 113

The benefits of general court intervention programs 113

Increasing access to court intervention programs 113

Access to court intervention programs in regional areas 113

Access to court intervention programs for young offenders 115

Earlier intervention 115

Reducing costs 116

Responses and recommendation 117

Should Western Australia establish a community court? 117

Establishing a general court intervention program 117

Legislative framework 118

Judicial monitoring 118

Policy framework 119

Eligibility criteria 119

Availability for superior court matters 120

Resources 120

Evaluation and expansion 120

Introduction

Court intervention programs can be broadly separated into two categories: specialist programs and general programs. In the preceding three chapters of this Report the Commission has examined three types of specialist court intervention programs (drug and alcohol court intervention programs; mental impairment court intervention programs; and family violence court intervention programs). Specialist programs focus on particular problems and therefore their eligibility criteria tend to be restrictive. For example, the Perth Drug Court will only accept offenders with an illicit drug-dependency who are able to reside in the metropolitan area throughout the program; family violence courts only apply to offenders who plead guilty to family violence offences; and mental impairment court intervention programs are only available to offenders with a diagnosed mental impairment.

In its Consultation Paper the Commission observed that specialisation is important because certain problems and issues require different offender management approaches and need staff with particular skills and experience.[1] For example, drug court programs require program staff with the skills and experience to closely monitor high-risk serious offenders with entrenched drug problems. Family violence court intervention programs involve victim support workers and, in some cases, child protection workers. Mental impairment court intervention programs require psychiatric and psychological services. Specialist programs also enable judicial officers, lawyers, prosecutors and court staff to gain experience in dealing with particular types of offenders.

Like specialist programs, general court intervention programs use the authority of the court in partnership with other agencies to address the underlying causes of offending behaviour and encourage rehabilitation. However, general court intervention programs are not restricted to a particular cohort of offenders; instead, they provide flexible court intervention strategies for a wide range of underlying issues. General programs respond to the individual circumstances of the offender, targeting the degree and type of intervention to the offender's needs and level of risk.

1. LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 157.

General court intervention programs

HOW GENERAL COURT INTERVENTION PROGRAMS WORK

In its Consultation Paper the Commission described in detail the operation of three general programs: the Geraldton Alternative Sentencing Regime (GASR), the Court Integrated Services Program (CISP) in Victoria and the Neighbourhood Justice Centre (NJC) in Collingwood.[1] The GASR (which is no longer used[2]) dealt with a range of problems underlying an offender's behaviour including alcohol, illicit drug and solvent abuse; domestic violence; gambling; and financial problems.

CISP: A general court intervention program

The CISP is available at three Victorian magistrates courts (two in the metropolitan area and one in a regional location). Subject to the results of an evaluation, it is expected that this program will be expanded across the state.[3] The program adopts a coordinated, team-based approach to address offenders' underlying issues such as drug dependency, homelessness, disability and mental health problems.[4] Because of the wide variety of underlying problems addressed through the CISP, the program employs case managers with a range of experience and skills. Further, the program has sufficient budget control to purchase services and treatment programs from external agencies on an 'as needs' basis.

General programs, such as the CISP, provide flexible and individualised responses and can therefore provide the necessary support to offenders with multiple and complex needs. The following case study reproduced from the Victorian Magistrates Court Annual Report 2007–2008, illustrates this point.

CISP case study

A man in his fifties referred himself to the CISP while in custody at the Melbourne Custody Centre. He was applying for bail on shop theft charges and a breach of a [Community Based Order] but was homeless, had no income benefits, a 30-year history of drug and alcohol misuse and a lack of community supports. The man was highly institutionalised after more than 30 years in the prison system.

He was assessed by a CISP case manager and found to be eligible for case management, with the issues above identifying his need for support and treatment. He was granted bail and referred to CISP as a bail condition. He was housed in supported accommodation, CISP paid two weeks rent and referred [him] to the housing case manager for assistance in finding long-term housing.

He stated he 'wanted to stop using drugs', but had found it difficult to access the methadone program in the community. The CISP workers helped him to obtain photo identification for the pharmacotherapy permit, located a pharmacy and also funded two weeks of treatment. He was also referred to the Acquired Brain Injury case manager and subsequently to Alcohol Related Brain Injury Services Australia (*arbias*) for a neuropsychological assessment. He was also referred to a drug and alcohol counselling program.

The man completed all program requirements including attendance at CISP for four months. He was ultimately diagnosed as having a brain injury. Recommendations were made for long-term case management and treatment. During his period on CISP, his behaviour changed from a very angry, desperate and difficult man, to a calm, polite and respectful person. He was extremely grateful for the support and treatment he had received and felt he was just beginning to learn how to live in the community at 51 years of age.

The man completed bail successfully for the first time in his offending career and received a suspended sentence. He has not returned to prison or re-offended since December 2006.[5]

1. LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 158–163 &171–173.
2. Email correspondence with Magistrate Steve Sharratt (4 May 2009).
3. Magistrates Court of Victoria, *Strategic Plan 2005–2008*, 17. The CISP is currently being evaluated and the evaluation is expected to be completed by October 2009. The Commission has been advised that from its inception in November 2006 to the end of June 2008, 3106 people have been referred to the CISP; 2663 of these were assessed to determine if they were suitable for the program; and 1951 people were accepted onto the program. In its first year approximately 53.5% of participants completed the program: correspondence with John Griffin, Executive Director, Courts, Victorian Department of Justice (23 February 2009). No information has been provided in relation to recidivism rates or other outcomes.
4. The CISP's eligibility criteria are very broad: offenders must have a physical or mental disability or illness; a drug or alcohol problem; or inadequate social, family or economic support that contributes to their offending behaviour.
5. Magistrates' Court of Victoria, *Annual Report 2007–2008* (2008) 64.

NJC: A community court

The NJC in Collingwood is in a different category because it is a separate division of the Magistrates Court of Victoria and has jurisdiction to hear both criminal and civil matters. However, in so far as it uses court intervention strategies for offenders, it adopts the approach used in general court intervention programs. The NJC offers a number of on- and off-site services 'designed to address the underlying causes of offending and prevent further crime'.[6] These services include housing and homelessness support; personal and family support; financial counselling; community corrections and juvenile justice; drug and alcohol counselling; mental health services; legal assistance; and a Koori justice worker.[7] Offenders may be referred to a 'Screening, Assessment and Referral Team' either by the court or by others, such as lawyers and police. This team has four members with expertise in social work, mental health, and drug and alcohol abuse. Offenders are assessed and then directed into the most appropriate programs and services. Offenders may also attend 'problem-solving meetings' designed to identify and address the underlying causes of offending behaviour. These strategies are supported by judicial monitoring both pre- and post-sentence.

THE BENEFITS OF GENERAL COURT INTERVENTION PROGRAMS

Like all court intervention programs, general programs address the underlying causes of offending behaviour in order to reduce crime. If successful, these programs benefit both the offender and the wider community. There are, however, a number of additional benefits that general programs bring to the justice system.

Increasing access to court intervention programs

Consistent with its first guiding principle for reform (that court intervention programs should be available to as many offenders as possible[8]) the Commission makes various recommendations that increase access to specialist programs. For example, the Commission has recommended the establishment of two new programs—a mental impairment court intervention program and an alcohol court intervention program—and an expansion of the existing Intellectual Disability Diversion Program.[9] But, even if all of the Commission's recommendations relating to specialist programs are implemented, there will still be a significant number of offenders (particularly in regional areas) who will be unable to access court intervention programs. The table on page 114 summarises the existing, and the Commission's recommended, specialist court intervention programs.

Offenders who may be unable to access court intervention programs include:

- mentally impaired or intellectually disabled young offenders;
- mentally impaired or intellectually disabled offenders in regional areas;
- alcohol-dependent adult offenders in regional areas;
- alcohol-dependent young offenders;
- illicit drug-dependent young offenders in regional areas;
- family violence offenders in regional areas (other than Geraldton); and
- offenders who do not fit within strict eligibility criteria for drug or alcohol court intervention programs, mental impairment court intervention programs and family violence court intervention programs but who, nonetheless, have problems that contribute to their offending behaviour (eg, homelessness, gambling, a lack of family and social support, solvent abuse).

One way of closing the gaps is to establish specialist court intervention programs for every conceivable problem that may lead to offending behaviour and to make these programs available in every court. But this option is clearly unrealistic and cost-prohibitive. Alternatively, general programs (like the CISP) could be established and expanded to maximise the opportunity for all offenders to participate in effective intervention programs.

Access to court intervention programs in regional areas

The most disadvantaged group of offenders in terms of access to court intervention strategies are offenders in regional areas. In its submission Legal Aid WA emphasised the importance of adequate court intervention programs for 'offenders in regional and remote communities, particularly indigenous offenders'.[10] The Commission agrees with this submission.

Generally, Aboriginal participation levels in court intervention programs are, relative to their overall involvement in the criminal justice system, low.[11]

6. Neighbourhood Justice Centre Brochure.
7. Neighbourhood Justice Centre, *Court Operations and Procedures* (2007) 31; Neighbourhood Justice Centre Project Team, *The Neighbourhood Justice Centre: Community justice in action in Victoria* (2007) 18–31.
8. See Chapter One: Increasing access to court intervention programs.
9. Recommendations 21, 22 & 23.
10. Legal Aid WA, Submission No. 11 (30 September 2008) 6.
11. LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 72.

Program	Eligibility	Availability
Perth Drug Court	Illicit drug-dependent adult offenders	Metropolitan area[12]
Perth Children's Court Drug Court	Illicit drug-dependent young offenders	Metropolitan area
Supervised Treatment Intervention Regime	Adult offenders with an illicit drug problem	Metropolitan area and some regional locations
Youth Supervised Treatment Intervention Regime	Young offenders with an illicit drug problem	Metropolitan area
Alcohol court intervention program	Adult offenders with alcohol dependency or high-risk alcohol consumption	Metropolitan area
Intellectual Disability Diversion Program (expanded)	Adult offenders with cognitive impairment including acquired or organic brain injury, intellectual disability, dementia and other degenerative brain disorders	Metropolitan area
Mental Impairment court intervention program	Adult offenders with a diagnosed mental illness, personality disorder or dual diagnosis substance use disorder	Metropolitan area
Family Violence Courts	Adult offenders charged with a family violence offence	Metropolitan area
Barndimalgu Court	Aboriginal adult offenders charged with a family violence offence	Geraldton
Kalgoorlie & Norseman Aboriginal Community Courts[13]	Aboriginal offenders	Kalgoorlie and Norseman

In its submission the Department of Indigenous Affairs reiterated this issue, as well as highlighting the unacceptable level of Aboriginal imprisonment in this state.[14] Possible explanations for low Aboriginal participation rates in court intervention programs include restrictive eligibility criteria; the exclusion of alcohol and solvent abuse from many drug programs;[15] and a lack of culturally appropriate services and programs.[16]

One clear exception to this general rule was the GASR. Although this program was not Aboriginal-specific, approximately 40 per cent of its participants were Aboriginal. As the Commission observed in its Consultation Paper, explanations for the high Aboriginal participation rate in this program possibly include demographic factors, the involvement of local Aboriginal service providers and broad eligibility criteria that did not exclude problems often experienced by Aboriginal offenders.[17]

The Commission is mindful that the lack of court intervention programs in regional areas will further disadvantage Aboriginal offenders. The Commission believes that a flexible general program is the best way to provide appropriate access to court intervention programs in regional areas and to increase Aboriginal participation levels in these initiatives. In particular, the Commission emphasises that general programs are appropriate for less populated regional areas because potential participant numbers and available resources do not support the establishment of a number of separate specialist programs. As stated by the Department of Corrective Services, a general program is needed in regional areas because specialised programs can

12. Regional offenders can participate if they reside in the metropolitan area during the program.
13. In its Final Report on Aboriginal Customary Laws the Commission recommended that the Western Australian government establish, as a matter of priority, Aboriginal courts for both adults and children in regional locations and in the metropolitan area: LRCWA, Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture, Final Report, Project No. 94 (2006) 136, Recommendation 24. In its Consultation Paper the Commission reiterated its support for Aboriginal courts to be expanded: LRCWA, *Court Intervention Programs,* Consultation Paper, Project No. 96 (2008) 6. The Commission understands that the Kalgoorlie Aboriginal Community Court is currently being evaluated.
14. Department of Indigenous Affairs, Submission No. 16 (8 October 2008) 1–2.
15. Joudo J, *Responding to Substance Abuse and Offending in Indigenous Communities: Review of diversion programs*, Australian Institute of Criminology, Research and Public Policy Series No. 88 (2008) 75 & 82.
16. See further LRCWA, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report, Project No. 94 (2006) 84–86.
17. LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 158.

only operate in the metropolitan area and larger regional locations.[18]

However, one of the greatest challenges in establishing effective court intervention programs in regional areas is resourcing (both human and financial). Given the remoteness of many parts of Western Australia, suitable treatment programs and support services are unavailable in many areas. As the Chief Justice of Western Australia recently stated:

> Unfortunately, drug and alcohol programmes for convicted offenders are in limited supply in the regions of the State most affected by these issues.[19]

Furthermore, as emphasised by the Department of Indigenous Affairs, court intervention programs need Aboriginal support workers, interpreters and Aboriginal-specific treatment programs.[20] As the Commission highlights in Chapter One, adequate resourcing for court intervention programs is vital and this is especially important for programs operating in regional areas.[21]

Access to court intervention programs for young offenders

There is also a lack of court intervention programs for young offenders. Presently, only the drug court program and the Youth Supervised Treatment Intervention Regime are available for young offenders in Perth. The Commission's approach to court intervention for young offenders is necessarily different than it is for adults. For adults, it is contended that court intervention programs should be available for a wide variety of offenders with different offending and risk levels. However, less serious young offenders should be diverted away from or out of the formal justice system whenever possible. This is a well-established principle of juvenile justice and widely recognised. In this regard, the Auditor General for Western Australia stated in a recent review of juvenile justice legislation that:

> The concept of directing young people away from court, when appropriate, is embodied in the *Young Offenders Act 1994*. This practice not only keeps many young people out of the court system, it is also a lower cost option when dealing with young people who have committed less serious offences.[22]

While supporting court intervention programs for young offenders, Legal Aid WA stressed the need for diversion of young offenders *out* of the system.[23] The Commission agrees that court intervention strategies for young offenders should generally be limited to more serious young offenders.

As a consequence, the potential number of participants for any specialist program will be relatively low. The Commission noted in the Consultation Paper that from 2001 until 2007 the annual number of participants in the Perth Children's Court Drug Court ranged from six to 18.[24] It is acknowledged that one reason for low participation numbers is a lack of supervising officers from the Court Assessment Treatment Service. Nonetheless, the potential participant numbers in the Children's Court will be low in comparison to the adult jurisdiction because diversionary options such as cautions and juvenile justice teams should be preferred to court proceedings for less serious offending. It is the Commission's view that it would not be cost-effective to establish a series of separate specialist court intervention programs each having only a small number of participants.

Instead, a general program with broad eligibility criteria could target serious repeat young offenders with various underlying problems such as substance abuse, mental impairment and homelessness. Legal Aid WA submitted that many young offenders are homeless and estranged from or in conflict with their families.[25] And as the Auditor General observed, 'significant numbers of young people with high levels of offending have mental health or substance abuse problems'.[26] Repeat young offenders with multiple and complex needs would benefit from general and flexible intervention.

Earlier intervention

General court intervention programs (such as the CISP and the GASR) do not require a plea of guilty as a precondition to participation. This is possible because general programs address a wide variety of underlying problems – it is not necessary to establish a link between the current charges and a specified problem. For instance, a participant in a general program may dispute a particular drug-related charge but acknowledge that homelessness and mental health problems have contributed to past offending and create a risk of future offending.

Because a general program has flexibility, intervention can be targeted to the individual circumstances and adjusted when appropriate. So, if the offender subsequently pleads guilty to the drug-

18. Department of Corrective Services, Submission No. 19 (6 October 2008) 1.
19. The Hon Wayne Martin, Chief Justice of Western Australia, 'Drugs, Pipe Dreams and Hard Realities: Addressing substance abuse through the justice system' (Paper presented at Making it Happen: 2009 Western Australian Drug and Alcohol Conference, Fremantle, 13 May 2009) 23–24.
20. Department of Indigenous Affairs, Submission No. 16 (8 October 2008) 1–2.
21. Chapter One: Principle Four.
22. Office of the Auditor General (WA), *The Juvenile Justice System: Dealing with young people under the Young Offenders Act 1994,* Report No. 4 (2008) 13. Section 7(g) of the *Young Offenders Act 1994* (WA) provides that non-judicial proceedings should be encouraged where possible.
23. Legal Aid WA, Submission No. 11 (30 September 2008) 31.
24. LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 57.
25. Legal Aid WA, Submission No. 11 (30 September 2008) 31.
26. Auditor General (WA), *The Juvenile Justice System: Dealing with young people under the Young Offenders Act 1994,* Report No 4 (2008) 7.

related charge, participation in drug treatment may then be considered appropriate because the offender would be in a position to accept responsibility for drug-related offending. Likewise, a person may dispute family violence charges but admit to alcohol-dependency and a gambling problem. These issues could not be addressed by a family violence program because acceptance of responsibility for the family violence is required. In contrast, a general program could provide assistance in relation to alcohol and gambling to reduce the risk of future offending.

As the Commission highlights in Chapter Two, pre-plea participation in court intervention programs encourages early access to treatment programs and, therefore, addresses the risk of reoffending at the earliest possible stage of the formal court process. The Commission's recommended legislative framework for court intervention programs in Chapter Two enables pre-plea participation but does not require it.[27] In regard to a general court intervention program the Commission recommends that plea-participation be permitted. The CISP is a useful model because it enables the program to target offenders who are at risk of reoffending without requiring a plea of guilty to the current charges. To participate in the CISP, the person must either have a history of offending or a pattern of current offending that suggests the person is likely to reoffend.

Reducing costs

As mentioned above, the establishment of general programs appears to be the most cost-effective way to increase the opportunity for participation in court intervention programs. Simply put, it would be too expensive for every regional and metropolitan court to administer specialist programs for every underlying problem that contributes to offending behaviour. Clearly, there would not be sufficient numbers of potential participants in each location to justify separate program staff and separate administrative structures.

General court intervention programs will require adequate funding to ensure that there are sufficient case managers and staff to work with offenders, to enable ongoing judicial monitoring, and to facilitate the involvement of a variety of agencies. However, it should be noted that many locations have existing and effective community-based programs and support services that general court intervention programs can 'tap into'. One possible example is the Regional Youth Justice Strategy in Geraldton and Kalgoorlie. This strategy appears to have the hallmark of a general court intervention program: integrated and holistic service delivery to address the needs of young offenders and their families. The strategy does not, however, involve ongoing judicial monitoring. The Auditor General stated that this strategy (which may be extended to other regional locations)

> is designed to foster closer working relationships between the Department of Corrective Services and other government departments to ensure that regional youth have access to strategies that address current offending and minimise the risk of future offending.[28]

In each location the strategy involves after-hours services for young people and their families; bail and accommodation support; juvenile justice teams and—for serious persistent offenders—an intensive supervision program.[29] A general court intervention program could conceivably access these 'joined up' services; the inclusion of ongoing judicial monitoring and the possibility of receiving a sentencing reduction may provide an additional incentive for some persistent young offenders to address the causes of their offending behaviour.

27. See Recommendation 2.

28. Officer of the Auditor General (WA), *The Juvenile Justice System: Dealing with young people under the Young Offenders Act 1994,* Report No 4 (2008) 26.

29. Department of Corrective Services, *Mid West Gascoyne Youth Justice Services: Intensive Supervision Program,* Fact Sheet (undated); Department of Corrective Services, *Goldfields Youth Justice Services: Launch of new Youth Justice Services* (2008).

Responses and recommendation

SHOULD WESTERN AUSTRALIA ESTABLISH A COMMUNITY COURT?

In its Consultation Paper the Commission observed that the community court model encapsulates many of the key features of court intervention programs: inter-agency collaboration; efficient access to services; personalised and direct communication between the judicial officer and the offender; and a holistic response to social problems that lead to crime. Importantly, the co-location of staff and service providers on-site is the ideal way to maximise the benefits of court-supervised rehabilitation programs.[1] However, because community courts are expensive to set up, the Commission sought submissions about the viability of establishing a pilot community court (similar to the Neighbourhood Justice Centre (NJC)) in Western Australia.[2]

The Commission received only two responses to this question. The Department of the Attorney General expressed the view that a community court may well be beneficial but it is 'not a priority in the short to medium term'.[3] Further, it was noted that there is no 'community-driven demand' for a community court in Western Australia.[4] Community courts, especially in the United States, have developed in response to community frustration with ineffective justice responses to local 'quality-of-life' crimes such as vandalism, petty theft and prostitution.[5] The Commission is unaware of the level of community support in Western Australia for the establishment of a community court. The Commission notes that the idea for the NJC was conceived by the Victorian Attorney General, Rob Hulls,[6] and the concept further developed following consultations with magistrates, lawyers, academics, community members and government representatives.[7]

In its submission the Magistrates Court suggested that it 'may be beneficial to await a more critical appraisal of the success of the NJC in Collingwood'.[8] The Commission understands that an evaluation of the NJC is expected to be completed in 2010. The Commission agrees that it would be prudent to wait until the results of the evaluation are known. The Commission strongly suggests that the Western Australian Government examine, at the appropriate time, the feasibility of establishing a community court in this state. This examination should include consultation with community members; in particular, in those locations where a community justice centre might conceivably be established.[9]

ESTABLISHING A GENERAL COURT INTERVENTION PROGRAM

In order to increase access to court intervention programs, the Commission proposed in its Consultation Paper the establishment of a pilot general court intervention program in three locations: the Perth Magistrates Court, the Perth Children's Court and one regional court.[10] Submissions were very supportive of this proposal.[11] Those in support included the Magistrates Court, the Department of Corrective Services and the Aboriginal Legal Service. Dr Andrew Cannon (Deputy Chief Magistrate of South Australia) expressed his strong support for the Victorian Court Integrated Services Program (CISP), noting that budget bids had been presented for a similar program in South Australia.[12] The Aboriginal Legal Service stated that:

> A general intervention program would be able to primarily target critical issues underlying offending behaviour, such as homelessness, literacy, health

1. LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 175.
2. Consultation Question 5.2.
3. Department of the Attorney General, Submission No. 21 (13 November 2008) 16.
4. Ibid.
5. LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 170.
6. Victoria Bar Association, Attorney General's Column, 'Success of Victoria's First Neighbourhood Justice Centre' (2007) 140 *Victorian Bar News* 9.
7. Freiberg A, 'Problem-Oriented Courts: An update' (2005) 14 *Journal of Judicial Administration* 196, 205.
8. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 23.
9. The Magistrates Court suggested that Fremantle might be an appropriate location: Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 23. It was also noted that it will be necessary to consider the density of population required to ensure that a community court could operate successfully and, further, that eligibility for a community court should require that 'the residence of the accused and the location of the offence both be within the specified geographic boundaries'.
10. Proposal 5.1.
11. Christine Anderton, Submission No. 1 (12 August 2008) 1; Office of the Public Advocate, Submission No. 9 (30 September 2008) 6; Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 8; Dr Andrew Cannon, Deputy Chief Magistrate of South Australia, Submission No. 17 (13 October 2008) 5; Department of Corrective Services, Submission No. 19 (6 October 2008) 1; Aboriginal Legal Service of WA (Inc), Submission No. 20 (13 November 2008) 3; Western Australia Police Prosecuting Division, Submission No. 22 (5 January 2009) 4.
12. Dr Andrew Cannon, Deputy Chief Magistrate of South Australia, Submission No. 17 (13 October 2008) 5.

> care, unemployment, financial management, licit substance abuse, or gambling addiction, that would not otherwise be addressed unless also combined with illicit substance abuse, violent offending or mental impairment.[13]

Although there was no direct opposition to this proposal, the Department of the Attorney General qualified its support by claiming that it may be preferable to '[focus] on the range of already established court intervention programs and [seek] to improve the capacity and impact of those programs'.[14] However, the Commission emphasises that even with the expanded and new specialist programs recommended in this Report, major gaps remain (especially for young offenders and offenders in regional areas).

The Commission has concluded that the best and most cost-effective way to address the lack of court intervention programs in regional areas and for young offenders is to establish a general court intervention program. The program should be piloted in Perth for adult and young offenders and initially in one regional location. If successful outcomes are achieved and the program proves to be cost effective, it should be expanded to as many regional locations as possible. The details of this recommendation are discussed below.

Legislative framework

Under the Commission's recommended general legislative framework for court intervention programs in Chapter Two (Recommendation 2), the general court intervention program will be a prescribed court intervention program under the *Criminal Procedure Regulations 2005* (WA). Accordingly, all of the recommended changes to the *Bail Act 1982* (WA) and the *Sentencing Act 1995* (WA) in Chapter Two will apply to this program. Participation in the program will be possible in a number of ways: unconditionally before sentencing (ie, without being subject to any legal requirement to comply with the program); as a condition of bail before sentencing; or as a condition of a Pre-Sentence Order (PSO). PSOs are only available for offenders facing a term of immediate imprisonment (and can last for up to two years). Therefore, only more serious offenders participating in the general program will be subject to a PSO. In the absence of a PSO, sentencing will be able to be deferred (following conviction) for up to 12 months. Compliance with the general program will be taken into account in sentencing.

Although the Commission is strongly in favour of the CISP model, it is noted that the CISP is usually a short-term program, with most offenders participating for about four months. It is envisaged that the Commission's recommended program will engage participants for much longer. For more-serious offenders with multiple and complex needs a lengthy period of time may be required to properly address all of the underlying factors that have contributed to the offending behaviour. This will be particularly relevant in regional areas where more-intensive drug court programs are unavailable.

Judicial monitoring

The Commission's recommended changes to the *Criminal Procedure Act 2004* (WA) provide for ongoing judicial monitoring. It is recommended that the legislation provide that a court intervention program participant can be ordered to reappear in court at a particular time and place for the purpose of determining whether the offender is complying with, or has complied with, the requirements of a prescribed court intervention program. The degree of judicial monitoring required under a general court intervention program will vary because the program will attract offenders with a wide range of underlying issues and different risk levels. For some participants weekly court appearances may be necessary, but for others it may be appropriate to require the offender to reappear in court only once or twice during the course of the program.

In most (but not all) specialist programs, judicial monitoring is undertaken by the same judicial officer because specialist programs tend to operate as dedicated courts or lists. Where participant numbers are high in one court location this is a more efficient way to administer court intervention programs: all individuals involved can be present at the same place and at the same time. Further, specialist programs benefit from having dedicated judicial officers, lawyers, prosecutors and others with specialist skills and experience.

In contrast, the CISP at the Melbourne Magistrates Court 'travels' to whichever courtroom the applicant is appearing in. This avoids the need for the applicant to be referred to another court before eligibility can be determined and an assessment ordered. Participants may appear before a number of different magistrates during the program. For general programs operating in busy metropolitan courts this is understandable. The Commission was advised that despite a lack of continuity in some cases, the majority of magistrates keenly monitor the progress of CISP participants and provide appropriate praise and encouragement when required.[15] Nonetheless, in the Commission's view continuity of judicial monitoring should be maintained whenever possible. Whether a dedicated list is required for a general court intervention program will ultimately depend on participation levels and administrative requirements.

13. Aboriginal Legal Service of WA (Inc), Submission No. 20 (13 November 2008) 3.
14. Department of the Attorney General, Submission No. 21 (13 November 2008) 15.
15. Meeting with Jo Beckett, Project Manager, CISP (7 December 2007).

Policy framework

The Commission recommends that a program coordinator should be appointed to facilitate the establishment of the pilot general court intervention program and to continue to manage the program once it is implemented. This coordinator should be part of the Commission's recommended Court Intervention Programs Unit (Recommendation 1). As the Commission emphasised in its Consultation Paper, appropriate data collection and recording processes should be established before a new program commences so that useful outcome evaluations can be undertaken. To achieve this, independent evaluators should be engaged during the planning phase for any new program.[16] The evaluators can identify the required data and ensure that this data is recorded properly from the outset. Given that a general program has the potential to be expanded across the state, it is essential that this occurs.

At each court location where the program operates, there must be sufficient case managers to assess and manage participants on the program. Bearing in mind that general court intervention programs have broad and inclusive eligibility criteria, case managers should have a range of experience (such as dealing with drug- and alcohol-dependent offenders; assisting offenders with mental health problems; addressing homelessness; providing financial management advice; and communicating with and assisting Aboriginal offenders). The particular staffing needs will vary depending on the court location – one area may require staff with experience in communicating with Aboriginal people and another may need a dedicated housing support officer because of a high number of homeless offenders. More program staff, some with special expertise, may be justified in the metropolitan area. Where necessary, these specialists could be called upon for advice and assistance in smaller regional areas where staff with more general experience would be required. Moreover, case managers will have access to specialist staff and coordinators from specialist court intervention programs via the Court Interventions Program Unit. So, if an offender presented with complex mental health or cognitive disability issues, staff from the Intellectual Disability Diversion Program and the Commission's recommended Mental Impairment Court Intervention Program could provide advice and support about appropriate interventions and services. And, as recommended in Chapter Two, general program staff can be trained on an ongoing basis by specialist program staff about relevant issues.

16. Courts and Programs Development Unit, Department of Justice Victoria, *Policy Framework to Consolidate and Extend Problem-Solving Courts and Approaches* (2006) 19.

Eligibility criteria

Because general court intervention programs need to be flexible, eligibility criteria should be as broad and inclusive as possible. The Commission considers that the eligibility rules for the CISP are, for the most part, appropriate. To be eligible to participate in the CISP:

- the person must be charged with an offence;
- the person must either have a history of offending or a pattern of current offending that suggests the person is likely to reoffend;
- the person must have a physical or mental disability or illness; a drug or alcohol problem; or inadequate social, family or economic support that contributes to his or her offending behaviour;
- the matter before the court must 'warrant intervention to reduce risk and address needs'; and
- the person must consent to participation in the program.[17]

Thus, the program applies to 'offenders' but it is not a requirement that the person enter a plea of guilty to the current charge. Further, the eligibility criteria encompass very broad categories of underlying problems. Other than family violence, it is difficult to envisage a 'problem' that would not fit within any of these categories.

In regard to family violence, the Commission sought submissions in its Consultation Paper about whether a general court intervention program could accommodate family and domestic violence offending.[18] The Magistrates Court argued in its submission that family violence programs require specialist staff such as specialist judicial officers, specialist community corrections officers and victims support workers.[19] In contrast, the Department of the Attorney General and Legal Aid WA were broadly supportive of including family violence offending within the scope of a general court intervention program. The Department of the Attorney General stressed that judicial officers would require specific training and that victim services would be required.[20] Legal Aid WA supported general programs dealing with family violence provided that sufficient programs and services were available.[21] In Chapter Five, the Commission concludes that specialist family violence programs may be ideal but this ideal is unattainable on a statewide basis. The Commission believes that its recommended general court intervention

17. See Magistrates Court of Victoria, *Court Integrated Services Program* (2006) <www.magistratescourt.vic.gov.au> at 8 April 2008.
18. Consultation Question 4.15.
19. Magistrates Court of Western Australia, Submission No. 13 (30 September 2008) 21.
20. Department of the Attorney General, Submission No. 21 (13 November 2008) 13–14.
21. Legal Aid WA, Submission No. 11 (30 September 2008) 22.

program should not be precluded from dealing with family violence offending. Assuming that victim safety issues are properly considered and addressed, program staff may be able to refer the offender to appropriate counselling. Accordingly, the Commission recommends that the program's eligibility criteria should enable a person who is involved in a 'dysfunctional domestic or family relationship' to participate in the program provided that all other eligibility requirements are met.

Availability for superior court matters

As stated in Chapter Two, the Commission is of the view that as a general principle, court intervention programs should be available to offenders appearing in all jurisdictions.[22] However, it recognises that some programs may exclude specific offences for safety or other treatment-based concerns. Under the Commission's general legislative framework this will be possible by stipulating in court rules those offences that are excluded.[23]

The Commission's recommended general program will be a useful means of facilitating participation in court intervention programs by offenders facing superior court matters. Because the general program allows pre-plea participation, the accused can commence the program as soon as he or she first appears in the Magistrates Court. This is what happens in the CISP: participants facing County Court (District Court) charges can participate in the program while the charge remains in the magistrate's jurisdiction. However, once the offender is committed to appear in the County Court the participant is unable to continue with the program.

Unlike the CISP, under the Commission's recommendations in Chapter Two such an offender will be able to continue to participate in the program even after the charge has been committed to the superior court. In Recommendation 2 the Commission sets out that a magistrate may order that the offender reappear in the Magistrates Court before the first appearance in the District Court or the Supreme Court for the purpose of determining if the offender is complying with a prescribed court intervention program.[24] When the offender appears in the superior court for sentencing, a superior court may impose a PSO and, if necessary, continued participation in the program could be a requirement of this order.[25]

Resources

The Commission emphasises that for general programs to operate effectively, sufficient dedicated and flexible funding is required. The CISP was allocated $17.1 million for the development and implementation of the three-year pilot program,[26] and in May 2009 it was announced that a further $10.5 million had been allocated to the program for the next two years.[27]

Although the Commission believes that a degree of budget control is important for all court intervention programs, it is especially important for general programs. Program staff will not know in advance the particular treatment needs and support services required for the program's participants. In contrast, drug court program staff will be able to predict the number of drug treatment programs required per year and family violence programs will similarly be able to estimate the number of perpetrator programs needed. General court intervention program case managers should be empowered to 'purchase' services from external agencies where necessary, especially if the offender is ineligible for funding under government guidelines. It is also vital that the general program is sufficiently resourced to access culturally appropriate community-based programs and support services for Aboriginal participants.

Budget control is also important because short-term financial assistance may be required to ensure that the participant begins the program with appropriate supports in place. As the CISP case study above demonstrates, short-term assistance might include paying for temporary accommodation and medication. Short-term assistance could also include food and transport vouchers, and payment of medical expenses. The need for 'additional and dedicated recurrent funding' was supported by the Department of the Attorney General.[28]

Evaluation and expansion

As mentioned above, the Commission's recommended general court intervention program should be subject to a rigorous independent evaluation after two years and, if successful, be expanded across the state. In particular, the goal should be to establish a general program in those court locations where there are no or insufficient specialist programs available. Flexibility is the key: the program should

22. Chapter Two: Jurisdictions.
23. See Recommendation 2 (1)(i).
24. Necessary amendments to the *Bail Act 1982* (WA) have been made to facilitate this: Recommendation 4.
25. The Commission notes that a PSO is only appropriate if the offence warrants a term of immediate imprisonment. Because most superior court charges are serious this will more than likely be the case. In Chapter Two the Commission also recommends that if a PSO is made by a superior court, the court may order that the offender reappear in the Magistrates Court that is administering the court intervention program for the purpose of ascertaining whether the offender is complying with the order: Recommendation 10.
26. Courts and Programs Development Unit, Department of Justice (Vic), *Service Delivery Model for the Court Integrated Services Program* (2006) 2. The CISP model enables the program to purchase services from other government and non-government agencies to ensure that high-risk participants get priority access into treatment and other services (at 11).
27. Victoria, *Parliamentary Debates*, Legislative Assembly, 7 May 2009, 1295 (Attorney General, R Hulls).
28. Department of the Attorney General, Submission No. 21 (13 November 2008) 15.

be adapted to fit local circumstances and conditions. For instance, in remote areas case managers may need to travel with the circuit magistrates, and video or telephone link-ups may be necessary with other treatment and program staff.

Finally, the Commission emphasises the importance of this recommendation. It is a matter of fairness that as many offenders as possible have the opportunity to participate in and obtain the benefits of effective court intervention programs.

RECOMMENDATION 37

Establish a general court intervention program

That there should be a general court intervention program established in Western Australia at the earliest opportunity with the following features:

1. The program should be initially established as a pilot program in the Perth Magistrates Court, the Perth Children's Court and one regional court with the aim of extending its operation, subject to independent evaluation, to as many Western Australian courts as possible.

2. The program should be available, in principle, to offenders in all of the state's adult court jurisdictions, but be monitored by the Magistrates Court pursuant to Recommendation 2(1)(g), Recommendation 4 and Recommendation 10.

3. The program should be available both pre-plea and post-plea.

4. The program eligibility criteria should be as broad as possible to enable offenders with a wide range of underlying problems to participate (eg, drug and alcohol abuse; physical and mental health issues; family and domestic violence; homelessness; gambling; and other social, economic or family problems). Eligibility criteria should include that:
   (a) the person must be charged with an offence;
   (b) the person must either have a history of offending or a pattern of current offending that suggests the person is likely to reoffend;
   (c) the person must have a physical or mental disability or illness; a drug or alcohol problem; inadequate social, family or economic support; or must be involved in a dysfunctional domestic or family relationship that contributes to his or her offending behaviour; and
   (d) the matter before the court must 'warrant intervention to reduce risk and address needs'.

5. Program participants should be subject to judicial monitoring by way of regular court reviews and where possible the monitoring of each offender should be undertaken by the same judicial officer.

6. Participation in the program must be on a voluntary basis and written consent to sharing of information among the court, relevant government departments and external service providers should be obtained.

7. Anything done by the offender in compliance with the program should be taken into account during sentencing and failure to comply with or failure to agree to participate in the program is not to be regarded as an aggravating factor.[29]

8. The program should be established as a justice initiative with joint resource responsibility from the Departments of the Attorney General and Corrective Services.

9. The program should be sufficiently and independently resourced to purchase services from relevant non-government service providers on behalf of participants.

10. That a program coordinator should be appointed to supervise the development of the program and once the program has been implemented, to manage the program's operation.

11. The program should be independently evaluated after two years and evaluators should be appointed during the development stage of the program to assist in determining appropriate data collection and recording processes.

29. See Recommendation 12.

Appendices

Contents

Appendix A: List of recommendations 125

Legal and policy issues 125

Drug and alcohol court intervention programs 130

Mental impairment court intervention programs 134

Family violence court intervention programs 136

General court intervention programs 138

Appendix B: Recommendations requiring legislative amendment 141

Criminal Procedure Act 2004 141

Bail Act 1982 143

Sentencing Act 1995 143

Restraining Orders Act 1997 149

Appendix C: List of submissions and people consulted 150

Appendix D: Abbreviations used 152

Appendix A: List of recommendations

Legal and policy issues

RECOMMENDATION 1 . . . . . [page 24]

Court Intervention Programs Unit

1. That a Court Intervention Programs Unit be established within the Court and Tribunal Services Division of the Department of the Attorney General and that this unit have responsibility for providing policy and administrative support to all court intervention programs.

2. That a Director be appointed with overall responsibility for the Court Intervention Programs Unit.

3. That the Court Intervention Programs Unit be comprised of individual court intervention program coordinators (or where applicable a coordinator of a number of similar court intervention programs) and representatives from government and non-government agencies.

4. That staff from relevant government departments and agencies (eg, the Department of Corrective Services, the Department of Health, the Department of Housing and Works, the Department for Indigenous Affairs, the Department for Child Protection, the Department for Communities, the Department of Education and Training, the Disability Services Commission, the Alcohol and Drug Office, the Office of Crime Prevention, the Western Australia Police, the Office of the Director of Public Prosecutions) be seconded to the Court Intervention Programs Unit.

5. That the Court Intervention Programs Unit be allocated funding to secure seconded positions from relevant non-government agencies.

6. That the Court Intervention Programs Unit allocate specific funding to Legal Aid WA, the Aboriginal Legal Service of WA and other community legal services to ensure that offenders participating in court intervention programs have appropriate legal assistance.

7. That staff seconded to the Court Intervention Programs Unit be co-located in one central office to facilitate collaboration and effective service provision.

8. That staff seconded to the Court Intervention Programs Unit be required to provide their services and be available to individual court intervention program staff who are not located in the same office.

9. That the program coordinators of specialist programs (eg, Family Violence Court Programs, Aboriginal Court Programs, and the Perth Drug Court) provide training and other assistance to program staff working in other court intervention programs including a general court intervention program as recommended by the Commission.

RECOMMENDATION 2 . . . . . [pages 32–33]

General legislative framework for court intervention programs

1. That a new division headed 'Court Intervention Programs' be inserted into Part 5 of the *Criminal Procedure Act 2004* (WA). This division should:

   (a) Set out that the object of the Division is to provide a framework for the recognition and operation of court intervention programs.

   (b) Define a 'court intervention program' as a program:

      (i) that provides to persons charged with offences, prior to their sentence, treatment or support services designed to address the underlying causes of offending behaviour and encourage and assist rehabilitation;

(ii) in which the person's participation in the program is monitored, supervised or managed by a court, and is taken into account when sentencing the offender; and

(iii) that is prescribed to be a court intervention program under the *Criminal Procedure Regulations 2005* (WA).

(c) Provide that nothing in this Division affects or limits the operation of other diversionary, rehabilitation or treatment programs.

(d) Provide that participation in a court intervention program prescribed under the regulations can occur at various stages of the criminal justice process. Specifically:

(i) An accused may be eligible to voluntarily participate on an unconditional basis in a prescribed court intervention program before conviction.

(ii) An accused may be eligible to participate in a prescribed court intervention program before conviction as a condition of bail.

(iii) An offender may be eligible to participate in a prescribed court intervention program before sentencing for up to 12 months as a condition of bail.

(iv) An offender may be eligible to participate in a prescribed court intervention program as part of a Pre-Sentence Order.

(v) An offender may be eligible to participate in the Perth Drug Court Program as a condition of a Drug Treatment Order.

(e) Provide that for the purpose of determining an offender's eligibility and suitability for participation in a prescribed court intervention program and for the purpose of determining whether the offender is complying with or has complied with the requirements of a prescribed court intervention program, a judicial officer may order that the offender reappear in court at a particular time and place.

(f) Provide that assessment for and participation in any prescribed court intervention program can only be undertaken with the offender's informed written consent (including consent to the necessary exchange of information between agencies involved in the program).

(g) Provide that in relation to an accused who has been committed to the District Court or the Supreme Court, a magistrate may order that the offender reappear in the Magistrates Court before the first appearance in the District Court or the Supreme Court for the purpose of determining if the offender is complying with a prescribed court intervention program.

(h) Provide that regulations under the *Criminal Procedure Regulations 2005* may be made in relation to the following matters:

(i) the exchange of information between various agencies or individuals involved in one or more prescribed court intervention programs and that the regulations may provide:

(a) that compliance information (ie, information about whether the offender or the accused is complying with the requirements of the program) *must* be disclosed and that other relevant information *may* be disclosed;

(b) that relevant information is information that is required for the purposes of assessment; determining eligibility; considering the treatment and support needs for a participant; monitoring a participant's performance during the program; providing a report to the court about the participant's performance during the program and/or for sentencing, and facilitating continuity of treatment and support post-sentence or following termination from the program;

(c) that information that is subject to legal professional privilege is not to be disclosed;

(d) that information may be disclosed (even without the consent of the offender) if disclosure is reasonably necessary to lessen or prevent a serious threat to the health, safety or welfare of any person;

(e) the agencies, organisations and individuals that are required or entitled to disclose information in relation to a particular prescribed court intervention program;

(f) to whom the information is or may be disclosed;

(g) how information is to be recorded and stored;

(h) for the protection of an agency, organisation or individual from civil or criminal liability or disciplinary proceedings resulting from the provision of information in accordance with the regulations;

(i) for the admissibility of information in other legal proceedings.

(ii) a requirement for a qualified person to assess and/or recommend a particular type of treatment program for an offender participating in a prescribed court intervention program; and

(iii) any other relevant matter.

(i) Provide that any court may make rules in relation to the following matters (and that the rules are to be made in the same manner as court rules are required to be made under either the *Magistrates Court Act 2004*; *District Court Act 1969* or *Supreme Court Act 1935*):

(i) the requirements and conditions of a particular prescribed court intervention program;

(ii) the provision of reports to a court administering a prescribed court intervention program including who is entitled to access reports and how access is to be granted;

(iii) the eligibility criteria of a particular prescribed court intervention program;

(iv) any offences that are excluded from a particular prescribed court intervention program;

(v) the length of a particular prescribed court intervention program; and

(vi) any other relevant matter.

2. That under the *Criminal Procedure Regulations 2005* the following existing court intervention programs be prescribed:

Perth Drug Court Program;
Children's Court Drug Court Program;
Joondalup Family Violence Court Program;
Rockingham Family Violence Court Program;
Fremantle Family Violence Court Program;
Midland Family Violence Court Program;
Armadale Family Violence Court Program;
Perth Family Violence Court Program;
Barndimalgu Court Program;
Kalgoorlie-Boulder Community Court Program;
Norseman Community Court Program;
Geraldton Alternative Sentencing Regime;
Supervised Treatment Intervention Regime (STIR);
Youth Supervised Treatment Intervention Regime (YSTIR); and
Intellectual Disability Diversion Program (IDDP).

RECOMMENDATION 3 . . . . . [page 34]

Bail Conditions

That Schedule 1, Part D, clause 2 of the *Bail Act 1982* (WA) be amended to provide that a judicial officer may impose a condition upon an accused that he or she comply with any requirements of a court intervention program that has been prescribed under the *Criminal Procedure Regulations 2005* (WA) (including a condition that the accused comply with any requirements necessary to enable an assessment to be made in relation to the accused's suitability to participate in the prescribed court intervention program) provided that such a condition is desirable to ensure that the accused appears in court in accordance with his or her bail undertaking; does not, while on bail, commit an offence; or does not endanger the safety, welfare or property of any person.

RECOMMENDATION 4 . . . . . [page 36]

Committal for sentence to a superior court

That the *Bail Act 1982* (WA) be amended to provide that:

1. when committing an offender for sentence to a superior court a magistrate may order that an offender reappear before a Magistrates Court at a specified time and place in order to ascertain if the offender is complying with a court intervention program prescribed under the *Criminal Procedure Regulations 2005* (WA) during any period before the offender's first appearance in the superior court; and

2. at any reappearance ordered under (1) above, a magistrate may again order that the offender reappear before a Magistrates Court at a specified time and place in order to ascertain if the offender is complying with the court intervention program during any period before the offender's first appearance in the superior court.

RECOMMENDATION 5 . . . . . [page 37]

Court intervention programs and Pre-Sentence Orders

That all references to a 'speciality court' in Part 3A of the *Sentencing Act 1995* (WA) be deleted and replaced with the phrase 'a court administering a court intervention program that has been prescribed under the *Criminal Procedure Regulations 2005* (WA)'.

RECOMMENDATION 6 . . . . . [page 38]

Eligibility for Pre-Sentence Orders

That s 33A(2a)(b) of the *Sentencing Act 1995* (WA) be repealed so that an offender who was subject to a suspended sentence of imprisonment at the time of committing the current offence(s) is not automatically ineligible for a Pre-Sentence Order.

RECOMMENDATION 7 . . . . . [page 39]

Amending a Pre-Sentence Order

1. That s 33M of the *Sentencing Act 1995* (WA) be amended to provide that:

   (a) if a Pre-Sentence Order includes a requirement to obey the orders of a court administering a court intervention program prescribed under the *Criminal Procedure Regulations 2005* (WA), an application to amend the requirements of the Pre-Sentence Order can be made by the offender, a community corrections officer, a prosecutor or any person involved in providing treatment or support services to the offender as part of the prescribed court intervention program;

   (b) a court administering a prescribed court intervention program can waive the requirement under s 33M(3) that the application must be made in accordance with the regulations provided that all parties have been given reasonable notice and an opportunity to be heard.

2. That s 33N(1) of the *Sentencing Act 1995* (WA) be amended to provide that a court administering a court intervention program prescribed under the *Criminal Procedure Regulations 2005* (WA) can amend the requirements of a Pre-Sentence Order if satisfied that the amendment is necessary for the effective rehabilitation of the offender or to reduce the risk that the offender reoffends during his or her participation in the prescribed court intervention program.

RECOMMENDATION 8 . . . . . [page 40]

Breaching a Pre-Sentence Order

That s 33O of the *Sentencing Act 1995* (WA) be amended by inserting a new subsection 3A and that this subsection provide that if a court administering a court intervention program prescribed under the *Criminal Procedure Regulations 2005* (WA) has made a Pre-Sentence Order, that court can amend, cancel or confirm the Pre-Sentence Orders at any time if the court is satisfied that the offender has been, is, or is likely to be, in breach of any requirement of the Pre-Sentence Order even though a warrant under subsection (1) has not been issued.

RECOMMENDATION 9 . . . . . [page 41]

Non-compliance with a Pre-Sentence Order is not an aggravating sentencing factor

That s 33K(1) of the *Sentencing Act 1995* (WA) be amended so it provides that a court sentencing an offender who has been subject to a Pre-Sentence Order must take into account the offender's behaviour while subject to the Pre-Sentence Order; however, failure to comply with the requirements of the Pre-Sentence Order is not to be regarded as an aggravating factor.

RECOMMENDATION 10 . . . . . [page 41]

Pre-Sentence Orders imposed by superior courts

1. That s 33C of the *Sentencing Act 1995* (WA) be amended to provide that if a superior court imposes a Pre-Sentence Order on an offender who has been, is, or will be participating in a court intervention program prescribed under the *Criminal Procedure Regulations 2005* (WA), the superior court may order that the offender reappear in the Magistrates Court that is administering the court intervention program for the purpose of ascertaining whether the offender is complying with the order.

2. That s 33P of the *Sentencing Act 1995* (WA) be amended to provide that a court administering a court intervention program prescribed under the *Criminal Procedure Regulations 2005* (WA) may commit an offender to the superior court that imposed the Pre-Sentence Order if satisfied that the offender has been, is, or is likely to be in breach of any requirement of the order.

RECOMMENDATION 11 . . . . . [page 43]

The purposes of sentencing

1. That the *Sentencing Act 1995* (WA) be amended to provide that the purposes for which a court may impose a sentence on an offender are as follows:
   (a) to ensure that the offender is adequately punished for the offence;
   (b) to prevent crime by deterring the offender and other persons from committing similar offences;
   (c) to protect the community from the offender;
   (d) to promote the rehabilitation of the offender;
   (e) to make the offender accountable for his or her actions;
   (f) to denounce the conduct of the offender; and
   (g) to recognise the harm done to the victim of the crime and the community.

2. That the *Sentencing Act 1995* (WA) provide that the order in which these purposes are listed does not indicate that one purpose is more or less important than another and that a court may impose a sentence for one or more of the abovementioned purposes.

RECOMMENDATION 12 . . . . . [page 43–44]

Relevance of participation in a court intervention program to sentence

1. That s 7(2) of the *Sentencing Act 1995* (WA) be amended by adding that an offence is not aggravated by the fact that an offender has failed to comply with or failed to agree to participate in a court intervention program prescribed under the *Criminal Procedure Regulations 2005* (WA).

2. That s 8 of the *Sentencing Act 1995* (WA) be amended by adding that compliance with the requirements of a court intervention program prescribed under the *Criminal Procedure Regulations 2005* (WA), is a mitigating factor and the greater the level of compliance the greater the mitigation.

RECOMMENDATION 13 . . . . . [page 44]

Deferral of sentencing

1. That s 16(1) of the *Sentencing Act 1995* (WA) be amended to provide that a court may adjourn sentencing of an offender to allow an offender to be assessed for and participate in a court intervention program prescribed under the *Criminal Procedure Regulations 2005* (WA).

2. That s 16(2) of the *Sentencing Act 1995* (WA) be amended to provide that the sentencing of an offender must not be adjourned for more than 12 months after the offender is convicted.

RECOMMENDATION 14 . . . . . [page 45]

Recording of sentencing outcome

1. That the Department of the Attorney General develop procedures to ensure that when an offender who has successfully complied with a court intervention program prescribed under the *Criminal Procedure Regulations 2005* (WA) is sentenced the court records as part of the sentencing outcome the name and length of the specific program.
2. That when a sentencing outcome is recorded to include reference to a specific court intervention program (as set out above) the Western Australia Police also record the name and length of the court intervention program on the official criminal record of convictions.

RECOMMENDATION 15 . . . . . [page 45]

No sentence

That s 46 of the *Sentencing Act 1995* (WA) be amended to expand the criteria to impose the option of 'no sentence' so that a court sentencing an offender *may* impose no sentence if it considers that the offender has successfully completed a court intervention program prescribed under the *Criminal Procedure Regulations 2005* (WA) and, after considering the offender's character; antecedents; age; health, and mental condition; and any other relevant matter it considers that it is not just to impose any other sentencing option.

RECOMMENDATION 16 . . . . . [page 46]

Spent Convictions

That s 45(1) of the *Sentencing Act 1995* (WA) be amended to expand the criteria for making a spent conviction order under s 39(2) so that a court *may* make a spent conviction order if it considers that the offender is unlikely to commit such an offence again; and having regard to the fact that the offender has successfully completed a court intervention program prescribed under the *Criminal Procedure Act 2004* (WA) it considers that the offender should be relieved immediately of the adverse effect that the conviction might have on the offender.

RECOMMENDATION 17 . . . . . [page 46]

Conditional Suspended Imprisonment

That all references to a 'speciality court' in Part 12 of the *Sentencing Act 1995* (WA) be repealed.

Drug and alcohol court intervention programs

RECOMMENDATION 18 . . . . . [page 53]

Appointment of a Drug Court Coordinator

That the Western Australia government provide funding for the appointment of one full-time drug court coordinator to service both the Perth Drug Court and the Perth Children's Court Drug Court.

RECOMMENDATION 19 . . . . . [page 54]

Custodial detoxification and drug treatment facility

That the Western Australia government establish a custodial detoxification and drug treatment facility and that this facility be available for:

1. offenders who have been remanded in custody and are being assessed for suitability to participate in the Perth Drug Court;
2. drug court participants who are not suitable for release on bail until a placement is available at a community residential drug treatment facility; and
3. drug court participants who are required to serve a custodial sanction under the program.

RECOMMENDATION 20 . . . . . [pages 64–66]

Drug Treatment Order

That the *Sentencing Act 1995* (WA) be amended to create a new pre-sentence Drug Treatment Order (DTO) to provide, among other things:

Objectives

1. That the primary objectives of a DTO are to rehabilitate offenders by providing judicially supervised drug treatment; to reduce drug dependency and to reduce drug-related offending.

Availability

2. That a DTO can only be imposed by a prescribed court or prescribed court intervention program (and initially the only prescribed courts and programs are to be the Perth Drug Court Program; the Supreme Court, the District Court and the Perth Children's Court Drug Court Program).
3. That despite anything to the contrary under the *Young Offenders Act 1994* (WA) a court administering the Perth Children's Court Drug Court Program may impose a DTO on an eligible young offender even if that young offender is under 18 years of age.
4. That any Western Australian court can refer an offender to the Perth Drug Court Program or the Perth Children's Court Drug Court Program for assessment and determination of the offender's eligibility and suitability for a DTO.
5. That if an offender has been charged with a superior court matter, the Perth Drug Court Program is to determine if the offender is suitable for a DTO; however, the applicable superior court is to make the final decision as to whether a DTO should be made.
6. That if a superior court makes a DTO, the Perth Drug Court Program is to supervise and monitor the offender's progress on the order and can vary the conditions of the order at any time, but only the superior court that imposed the order can cancel the order.
7. That a court administering the Perth Drug Court Program can commit the offender to the superior court that imposed the DTO at any time.
8. That if a superior court makes a DTO it may order that the offender reappear before the superior court at a particular time and place so that the superior court can monitor the offender's progress on the order.

Eligibility

9. That in order to be eligible for a DTO the offender must be convicted of an offence (or offences) that warrants a term of immediate imprisonment.
10. That an offender who was subject to a suspended sentence of imprisonment at the time of committing the current offence(s) may be eligible for a DTO.
11. That in order to be eligible for a DTO the offender must have an illicit drug-dependency.
12. That a DTO cannot be made without the written consent of the offender and that before the offender can consent to the making of a DTO he or she must be given an opportunity for legal advice and must be fully informed of the requirements of the DTO and the possible consequences of non-compliance.

Indicated sentences

13. That before the offender formally consents to the DTO, the court making the DTO must indicate to the offender the penalty that is likely to be imposed if he or she does not agree to the making of the order or if he or she fails to comply with the requirements of the order.

Final sentencing

14. That when determining the final sentence to be imposed after a DTO has been cancelled, compliance with the requirements of the DTO is a mitigating factor and the greater the level of the compliance the greater the mitigation.
15. That the final sentence imposed in relation to the offences that were subject to the DTO must not be greater than the indicated sentence.
16. That when sentencing the offender the court may take into account any custody sanctions served during the order.

17. That the final sentence can be appealed in the same way as any other sentence or order imposed as a consequence of conviction.

Duration

18. That the maximum length of a DTO is two years.
19. That if a DTO is made for a period less than two years it can be extended for any period up to the maximum of two years.
20. That a DTO can be cancelled at any time prior to its expiration (either as a consequence of being terminated from the program or because of successful compliance with the program).

Case reviews

21. That regulations prescribe which agencies or individuals make up the Perth Drug Court Team and the Perth Children's Court Drug Court Team.
22. That regulations may provide for the specific roles and responsibilities of each team member.
23. That the Perth Drug Court Program and the Perth Children's Drug Court Program may hold 'out-of-court' case review meetings and that these meetings may be attended by any prescribed member of the Drug Court Team or anyone else whom the relevant magistrate considers should attend.
24. That at the case review meetings, Drug Court Team members may discuss and consider the participant's performance on the DTO; whether the DTO or any bail conditions previously imposed need to be varied; the participant's treatment and support needs; and whether the participant should be rewarded or sanctioned (and, if so, the appropriate reward or sanction in the circumstances). However, a final decision about the above issues must be made in open court and only after the participant has been informed about any adverse information presented at the case review meeting and given an opportunity to be heard.
25. That if possible termination from the program (and cancellation of the DTO is being considered) this issue is not to be discussed at the case review meeting. All termination proceedings are to be undertaken in open court.

Conditions of the DTO

26. That regulations may provide for the types of conditions that may be imposed as part of a DTO including:
    (a) standard conditions (eg, requirement to report after DTO made; requirement to notify of change of address; requirement to reside in Western Australia unless prior approval; requirement not to commit any offence during DTO)
    (b) core conditions (eg, residential; curfews; counselling; residential treatment; medical, psychiatric or psychological treatment; attendance at educational or vocational training programs; attendance at employment; urinalysis; reporting; and attendance at court)
    (c) specific conditions (eg, requirement that offender submit to urinalysis and that samples provided may be tested for DNA)
27. That if a prescribed court makes a DTO it can grant the offender bail.

Rewards and sanctions

28. That the Perth Drug Court Program or the Perth Children's Court Drug Court Program may give the following rewards if the court is satisfied that the offender has complied or is complying with the conditions of the Drug Treatment Order:
    (a) less frequent court attendances;
    (b) less frequent urinalysis;
    (c) less frequent attendance at counselling, treatment or other programs;
    (d) progression to the next phase of the program;
    (e) a reduction in the number of days to be served under a previously imposed but unserved custody sanction; or
    (f) any other reward prescribed under the regulations.

29. That the regulations may provide for a system of breach points to be imposed in the event of non-compliance and specify the number of breach points that are to be given for failing to comply with the various conditions of the DTO, including how breach points may be deducted for compliance.

30. That the Perth Drug Court Program or the Perth Children's Court Drug Court Program may give the following sanctions if the court is satisfied that the offender has not complied or is not complying with the conditions of the DTO:
    (a) more frequent court attendances;
    (b) more frequent urinalysis;
    (c) more frequent attendance at counselling, treatment or other programs;
    (d) movement back to a previous phase of the program;
    (e) an order that the offender be detained in custody up to a maximum of ten days at any one time; or
    (f) any other sanction prescribed under the regulations.

31. That the Perth Drug Court Program or the Perth Children's Court Drug Court Program cannot impose a custody sanction (under 30(e) above) unless the offender has not complied or is not complying with the conditions of the order and that in all of the circumstances no other sanction is appropriate.

32. That the serving of a custody sanction may be deferred to a later date and that if custody sanctions have been given on more than one occasion, the offender can serve the accumulated sanctions at one time provided that the total number of days to be served is no longer than 10 days.

33. That a judicial officer can issue a warrant committing the offender to a prison or detention centre (whichever is applicable) for the purpose of serving the custody sanction.

34. That if a custody sanction (under 30(e) above) is imposed, the offender has the right to apply to a judge of the Supreme Court for a rehearing of the matter and, if the offender elects to exercise that right, the serving of the custody sanction is to be deferred until after the rehearing has been completed.

Operational

35. That regulations can be made in relation to the following matters:
    (a) referral and assessment processes;
    (b) eligibility criteria;
    (c) excluded offences;
    (d) the different phases of the program including the requirements under each phase;
    (e) prescribed rewards and sanctions that may be given or imposed for compliance and non-compliance;
    (f) any criteria that must be established before a DTO can be cancelled for non-compliance;
    (g) membership of the Drug Court Teams and the roles and responsibilities of team members;
    (h) the provision of reports; and
    (i) any other relevant matter.

36. That court rules can be made in relation to the following matters:
    (a) procedures and processes for dealing with superior court matters, including how a superior court is to be informed of the offender's progress on the DTO; and
    (b) any other relevant matter.

Amendment and cancellation

37. That a DTO can be varied or amended at any time by the court that made the DTO or by the Perth Drug Court Program or Perth Children's Court Drug Court Program (whichever is applicable) provided that all parties have had a reasonable opportunity to be heard.

38. That a DTO can only be cancelled by the court that made the order.

Immunity from prosecution

39. That any admission about personal use or possession of an illicit drug made by the offender during assessment for or while subject to a DTO cannot be used against the offender in proceedings for an offence.

40. That any evidence obtained as a result of that admission, cannot be used against the offender in proceedings for an offence.

41. That the above provisions do not prevent a prosecution for an offence if there is other evidence (ie, evidence other than the admission or evidence obtained as a result of the admission) implicating the offender.

Evaluation

42. That the effectiveness of the new DTO is to be independently evaluated two years from the date of commencement.

RECOMMENDATION 21 . . . . . [page 70]

Establish an alcohol court intervention program

That there should be an alcohol court intervention program established in Western Australia at the earliest opportunity to service all metropolitan courts dealing with adults and with the following features:

1. The program should target both alcohol-dependent offenders and offenders who exhibit high-risk alcohol consumption.

2. The program should be available, in principle, to offenders in all of the state's adult court jurisdictions, but be monitored by the Magistrates Court pursuant to Recommendation 2(1)(g), Recommendation 4 and Recommendation 10.

3. The program should be available both pre-plea and post-plea.

4. An applicant that has been referred but is assessed as ineligible to participate in the program should be returned to the general court list to be dealt with at the earliest opportunity.

5. Participation in the program must be on a voluntary basis and written consent to sharing of information among the court, relevant government departments and external service providers should be obtained.

6. Anything done by the offender in compliance with the program should be taken into account during sentencing and failure to comply with or failure to agree to participate in the program is not to be regarded as an aggravating factor.

7. The program should be established as a justice initiative with joint resource responsibility from the Departments of the Attorney General, and Corrective Services and the Drug and Alcohol Office.

8. The program should be sufficiently resourced to purchase services from relevant non-government service providers on behalf of participants.

9. The program should develop, in consultation with Aboriginal people, culturally appropriate processes for Aboriginal offenders (eg, employment of an Aboriginal support worker, establishment of a separate list/day for Aboriginal participants, and involvement of Aboriginal community representatives). Further, sufficient funding should be provided to ensure that Aboriginal-specific alcohol treatment programs and service providers are obtained for Aboriginal participants.

10. The program should begin as a two-year pilot in the Perth Magistrates Court taking referrals from all metropolitan courts with the aim of extending its operation, subject to independent evaluation, to as many metropolitan courts as possible.

Mental impairment court intervention programs

RECOMMENDATION 22 . . . . . [page 83]

Expand Intellectual Disability Diversion Program

1. That the Intellectual Disability Diversion Program remain a specialist list, but that it be expanded and adequately resourced to service the outer-metropolitan courts and to include offenders with all types of cognitive impairment including acquired or organic brain injury, intellectual disability, dementia and other degenerative brain disorders. The level of cognitive impairment that a participant must have is a matter of policy for the court.

2. That the program should formally be made available, in principle, to offenders in all adult court jurisdictions, but be monitored by the Magistrates Court pursuant to Recommendations 2(1)(g), 4 and 10. Whether an offender is eligible to participate in the program is a matter for the court to decide after assessment, consideration of the applicable eligibility criteria and consultation with relevant community service providers.
3. That there should be no formal requirement to plead guilty to an offence to be accepted onto the program; however, the objective facts of the offence should not be in dispute or contested.
4. That an offender should not be barred from participating in the program for a particular offence simply because he or she has pleaded not guilty to, or disputes the facts of, another offence, whether related or unrelated.
5. That an applicant who has been referred but is assessed as ineligible to participate in the program should be returned to the general court list to be dealt with at the earliest opportunity.
6. That an offender who has been returned to the general court list or who withdraws or is terminated from the program before completion and who has simply indicated no contest to the objective facts of the offence should retain the option to plead the defence of insanity under s 27 of the *Criminal Code* (WA).
7. That participation in the program must be on a voluntary basis and written consent to sharing of information among the court, relevant government departments and external service providers should be obtained.
8. That anything done by the offender in compliance with the program should be taken into account during sentencing and all sentencing options (including the option to impose no sentence under Recommendation 15) after successful completion of a program should be available to the magistrate. Failure to comply with or failure to agree to participate in the program is not to be regarded as an aggravating factor.
9. That the program should be assigned a designated magistrate who has received relevant training and has an appropriate understanding of issues faced by mentally impaired offenders and an interest in improving outcomes for mentally impaired offenders. Other magistrates should be appropriately trained as relief magistrates or to service the program in outer-metropolitan areas.
10. That the program should be sufficiently resourced to purchase services from relevant non-government service providers on behalf of participants.

RECOMMENDATION 23 . . . . . [pages 84–85]

Establish a mental impairment court intervention program

That there should be a mental impairment court intervention program established in Western Australia at the earliest opportunity to service all metropolitan courts dealing with adults and with the following features:

1. The program should have psychiatric diagnostic criteria that includes mental illness, personality disorder and dual diagnosis substance use disorder, but excludes offenders with a *primary* diagnosis of intellectual disability or other cognitive impairment (who may apply for referral to the expanded Intellectual Disability Diversion Program).
2. The program should be available, in principle, to offenders in all of the state's adult court jurisdictions, but be monitored by the Magistrates Court pursuant to Recommendations 2(1)(g), 4 and 10. Whether an offender is eligible to participate in the program is a matter for the court to decide after assessment, consideration of the applicable eligibility criteria and consultation with relevant community service providers.
3. There should be no formal requirement to plead guilty to an offence to be accepted onto the program; however, the objective facts of the offence should not be in dispute or contested.
4. An offender should not be barred from participating in the program for a particular offence simply because he or she has pleaded not guilty to, or disputes the facts of, another offence, whether related or unrelated.
5. An applicant that has been referred but is assessed as ineligible to participate in the program should be returned to the general court list to be dealt with at the earliest opportunity.
6. An offender who has been returned to the general court list or who withdraws or is terminated from the program before completion and who has simply indicated no contest to the objective facts of the offence should retain the option to plead the defence of insanity under s 27 of the *Criminal Code* (WA).
7. Participation in the program must be on a voluntary basis and written consent to sharing of information among the court, relevant government departments and external service providers should be obtained.

8. Anything done by the offender in compliance with the program should be taken into account during sentencing and all sentencing options (including the option to impose no sentence under Recommendation 15) after successful completion of a program should be available to the magistrate. Failure to comply with or failure to agree to participate in the program is not to be regarded as an aggravating factor.

9. The program should be established as a justice initiative with joint resource responsibility from the Departments of the Attorney General, Health and Corrective Services and the Disability Services Commission.

10. The program should be sufficiently resourced to purchase services from relevant non-government service providers on behalf of participants.

11. The program should begin as a two-year pilot in the Perth Magistrates Court taking referrals from all metropolitan courts with the aim of extending its operation, subject to independent evaluation, to as many metropolitan courts as possible.

12. The program should be assigned a designated magistrate who has received relevant training and has an appropriate understanding of issues faced by mentally impaired offenders and an interest in improving outcomes for mentally impaired offenders. Other magistrates should be appropriately trained as relief magistrates or to service the program in outer-metropolitan areas.

RECOMMENDATION 24 . . . . . [page 86]

Establish general court intervention programs to service mentally impaired offenders in regional areas

1. That mentally impaired offenders be eligible for referral to general court intervention programs in regional areas pursuant to Recommendation 37.

2. That staff of regional courts running general court intervention programs be trained by and, where necessary, take advice from coordinators of specialist programs including the recommended mental impairment court intervention program and the Intellectual Disability Diversion Program.

RECOMMENDATION 25 . . . . . [page 86]

Establish general court intervention programs to service mentally impaired young offenders

1. That mentally impaired young offenders be eligible for referral to the proposed Children's Court general court intervention program outlined in Recommendation 37.

2. That those responsible for coordinating and running the Children's Court general court intervention program be trained by and, where necessary, take advice from coordinators of specialist programs including the recommended mental impairment court intervention program and the Intellectual Disability Diversion Program.

Family violence court intervention programs

RECOMMENDATION 26 . . . . . [page 90]

Review family violence legislation

That the Attorney General of Western Australia should review the interaction of family violence matters in criminal, civil and family law jurisdictions to determine if any changes are required to better integrate the Western Australian justice system's response to family violence matters.

RECOMMENDATION 27 . . . . . [page 97]

Practice direction for applications to vary protective bail conditions in family violence court intervention programs

That a practice direction be created to set out the procedure to be followed for applications to vary protective bail conditions in family violence court intervention programs.

RECOMMENDATION 28 . . . . . [page 98]

Protective bail conditions and violence restraining orders

1. That clause 2(2a) of Schedule 1 Part D of the *Bail Act 1982* (WA) be amended to provide that on a grant of bail for a purpose set out in subclause (2)(c) or (d) a judicial or authorised officer should consider whether that purpose might be better served or assisted by a violence restraining order, or protective bail conditions, or both.
2. That s 63 of the *Restraining Orders Act 1997* (WA) be amended to enable a judicial officer hearing a bail application to make an interim violence restraining order.
3. That the *Restraining Orders Act 1997* (WA) be amended to provide that where protective bail conditions are in place to protect a person, an application to cancel a violence restraining order that protects that person can only be cancelled on 24 hours' written notice to the court.

RECOMMENDATION 29 . . . . . [page 100]

Funding for agencies in case management team

That the Western Australian government provide funding to enable all relevant agencies (including the Department for Child Protection and the Western Australia Police) to participate in the family violence courts' case management processes and attend court where necessary.

RECOMMENDATION 30 . . . . . [page 102]

Specialist policing

That a specialist family violence police officer or unit be attached to each of the family violence courts.

RECOMMENDATION 31 . . . . . [page 102]

Duty lawyers for offenders and victims in the family violence courts

That Legal Aid WA be funded to provide duty lawyers for both offenders and victims in each of the metropolitan family violence courts in Western Australia.

RECOMMENDATION 32 . . . . . [page 103]

Information for participants

That the Department of the Attorney General in partnership with other government agencies involved in the family violence courts, as well as Legal Aid, the Aboriginal Legal Service and the Department of Indigenous Affairs devise ways of providing information to people about the family violence courts that do not rely on computer access or literacy skills.

RECOMMENDATION 33 . . . . . [page 104]

Improving family violence court programs for Aboriginal people

1. That family violence court intervention programs develop, in consultation with Aboriginal people, culturally appropriate processes (such as the involvement of respected members of the local Aboriginal community in the court process, services and programs) to improve the effectiveness of family violence court intervention programs for Aboriginal people.
2. That the data collection for the evaluation of family violence court intervention programs include information about whether Aboriginal people and other vulnerable groups are accessing the programs and achieving successful outcomes on the programs.
3. That family violence court intervention programs be regularly evaluated in terms of their effectiveness for Aboriginal offenders and victims.

RECOMMENDATION 34 . . . . . [page 105]

Improving family violence court intervention programs for vulnerable and disadvantaged groups

1. That the Department of the Attorney General consult with relevant government and non-government agencies to ensure broad access to metropolitan and regional family violence court intervention programs by vulnerable groups.

2. That the data collection for the evaluation of family violence court intervention programs include information about whether vulnerable groups (including elderly people; gay, lesbian, transgender and intersex people; mentally impaired people; people from culturally and linguistically diverse backgrounds; and people with disabilities) are accessing the programs and achieving successful outcomes on the programs.

3. That family violence court intervention programs be regularly evaluated in terms of their effectiveness for vulnerable offenders and victims.

RECOMMENDATION 35 . . . . . [page 106]

Court intervention programs for family violence offenders in regional areas

1. That the Department of the Attorney General establish family violence court intervention programs where there are available programs for offenders and services to victims.

2. That family violence offenders be permitted to participate in general court intervention programs in regional areas pursuant to Recommendation 37.

3. That the staff of regional courts running general court intervention programs be trained by and, where necessary, take advice from the coordinators and staff of the specialist programs, including the family violence courts.

RECOMMENDATION 36 . . . . . [page 107]

Program for respondents to violence restraining orders

That the Department for the Attorney General develop a program that enables courts to refer or order respondents to violence restraining orders in family violence matters to participate in counselling programs.

General court intervention programs

RECOMMENDATION 37 . . . . . [page 121]

Establish a general court intervention program

That there should be a general court intervention program established in Western Australia at the earliest opportunity with the following features:

1. The program should be initially established as a pilot program in the Perth Magistrates Court, the Perth Children's Court and one regional court with the aim of extending its operation, subject to independent evaluation, to as many Western Australian courts as possible.

2. The program should be available, in principle, to offenders in all of the state's adult court jurisdictions, but be monitored by the Magistrates Court pursuant to Recommendation 2(1)(g), Recommendation 4 and Recommendation 10.

3. The program should be available both pre-plea and post-plea.

4. The program eligibility criteria should be as broad as possible to enable offenders with a wide range of underlying problems to participate (eg, drug and alcohol abuse; physical and mental health issues; family and domestic violence; homelessness; gambling; and other social, economic or family problems). Eligibility criteria should include that:

(a) the person must be charged with an offence;

(b) the person must either have a history of offending or a pattern of current offending that suggests the person is likely to reoffend;

(c) the person must have a physical or mental disability or illness; a drug or alcohol problem; inadequate social, family or economic support; or must be involved in a dysfunctional domestic or family relationship that contributes to his or her offending behaviour; and

(d) the matter before the court must 'warrant intervention to reduce risk and address needs'.

5. Program participants should be subject to judicial monitoring by way of regular court reviews and where possible the monitoring of each offender should be undertaken by the same judicial officer.

6. Participation in the program must be on a voluntary basis and written consent to sharing of information among the court, relevant government departments and external service providers should be obtained.

7. Anything done by the offender in compliance with the program should be taken into account during sentencing and failure to comply with or failure to agree to participate in the program is not to be regarded as an aggravating factor.

8. The program should be established as a justice initiative with joint resource responsibility from the Departments of the Attorney General and Corrective Services.

9. The program should be sufficiently and independently resourced to purchase services from relevant non-government service providers on behalf of participants.

10. A program coordinator should be appointed to supervise the development of the program and once the program has been implemented, to manage the program's operation.

11. The program should be independently evaluated after two years and evaluators should be appointed during the development stage of the program to assist in determining appropriate data collection and recording processes.

Appendix B: Recommendations requiring legislative amendment

Criminal Procedure Act 2004

RECOMMENDATION 2 . . . . . [pages 32–33]

General legislative framework for court intervention programs

1. That a new division headed 'Court Intervention Programs' be inserted into Part 5 of the *Criminal Procedure Act 2004* (WA). This division should:

   (a) Set out that the object of the Division is to provide a framework for the recognition and operation of court intervention programs.

   (b) Define a 'court intervention program' as a program:

      (i) that provides to persons charged with offences, prior to their sentence, treatment or support services designed to address the underlying causes of offending behaviour and encourage and assist rehabilitation;

      (ii) in which the person's participation in the program is monitored, supervised or managed by a court, and is taken into account when sentencing the offender; and

      (iii) that is prescribed to be a court intervention program under the *Criminal Procedure Regulations 2005* (WA).

   (c) Provide that nothing in this Division affects or limits the operation of other diversionary, rehabilitation or treatment programs.

   (d) Provide that participation in a court intervention program prescribed under the regulations can occur at various stages of the criminal justice process. Specifically:

      (i) An accused may be eligible to voluntarily participate on an unconditiional basis in a prescribed court intervention program before conviction.

      (ii) An accused may be eligible to participate in a prescribed court intervention program before conviction as a condition of bail.

      (iii) An offender may be eligible to participate in a prescribed court intervention program before sentencing for up to 12 months as a condition of bail.

      (iv) An offender may be eligible to participate in a prescribed court intervention program as part of a Pre-Sentence Order.

      (v) An offender may be eligible to participate in the Perth Drug Court Program as a condition of a Drug Treatment Order.

   (e) Provide that for the purpose of determining an offender's eligibility and suitability for participation in a prescribed court intervention program and for the purpose of determining whether the offender is complying with or has complied with the requirements of a prescribed court intervention program, a judicial officer may order that the offender reappear in court at a particular time and place.

   (f) Provide that assessment for and participation in any prescribed court intervention program can only be undertaken with the offender's informed written consent (including consent to the necessary exchange of information between agencies involved in the program).

   (g) Provide that in relation to an accused who has been committed to the District Court or the Supreme Court, a magistrate may order that the offender reappear in the Magistrates Court before the first appearance in the District Court or the Supreme Court for the purpose of determining if the offender is complying with a prescribed court intervention program.

   (h) Provide that regulations under the *Criminal Procedure Regulations 2005* may be made in relation to the following matters:

      (i) the exchange of information between various agencies or individuals involved in one or more prescribed court intervention programs and that the regulations may provide:

(a) that compliance information (ie, information about whether the offender or the accused is complying with the requirements of the program) *must* be disclosed and that other relevant information *may* be disclosed;

(b) that relevant information is information that is required for the purposes of assessment; determining eligibility; considering the treatment and support needs for a participant; monitoring a participant's performance during the program; providing a report to the court about the participant's performance during the program and/or for sentencing, and facilitating continuity of treatment and support post-sentence or following termination from the program;

(c) that information that is subject to legal professional privilege is not to be disclosed;

(d) that information may be disclosed (even without the consent of the offender) if disclosure is reasonably necessary to lessen or prevent a serious threat to the health, safety or welfare of any person;

(e) the agencies, organisations and individuals that are required or entitled to disclose information in relation to a particular prescribed court intervention program;

(f) to whom the information is or may be disclosed;

(g) how information is to be recorded and stored;

(h) for the protection of an agency, organisation or individual from civil or criminal liability or disciplinary proceedings resulting from the provision of information in accordance with the regulations;

(i) for the admissibility of information in other legal proceedings.

(ii) a requirement for a qualified person to assess and/or recommend a particular type of treatment program for an offender participating in a prescribed court intervention program; and

(iii) any other relevant matter.

(i) Provide that any court may make rules in relation to the following matters (and that the rules are to be made in the same manner as court rules are required to be made under either the *Magistrates Court Act 2004*; *District Court Act 1969* or *Supreme Court Act 1935*):

(i) the requirements and conditions of a particular prescribed court intervention program;

(ii) the provision of reports to a court administering a prescribed court intervention program including who is entitled to access reports and how access is to be granted;

(iii) the eligibility criteria of a particular prescribed court intervention program;

(iv) any offences that are excluded from a particular prescribed court intervention program;

(v) the length of a particular prescribed court intervention program; and

(vi) any other relevant matter.

2. That under the *Criminal Procedure Regulations 2005* the following existing court intervention programs be prescribed:

Perth Drug Court Program;
Children's Court Drug Court Program;
Joondalup Family Violence Court Program;
Rockingham Family Violence Court Program;
Fremantle Family Violence Court Program;
Midland Family Violence Court Program;
Armadale Family Violence Court Program;
Perth Family Violence Court Program;
Barndimalgu Court Program;
Kalgoorlie-Boulder Community Court Program;
Norseman Community Court Program;
Geraldton Alternative Sentencing Regime;
Supervised Treatment Intervention Regime (STIR);
Youth Supervised Treatment Intervention Regime (YSTIR); and
Intellectual Disability Diversion Program (IDDP).

Bail Act 1982

RECOMMENDATION 3 . . . . . [page 34]

Bail Conditions

That Schedule 1, Part D, clause 2 of the *Bail Act 1982* (WA) be amended to provide that a judicial officer may impose a condition upon an accused that he or she comply with any requirements of a court intervention program that has been prescribed under the *Criminal Procedure Regulations 2005* (WA) (including a condition that the accused comply with any requirements necessary to enable an assessment to be made in relation to the accused's suitability to participate in the prescribed court intervention program) provided that such a condition is desirable to ensure that the accused appears in court in accordance with his or her bail undertaking; does not, while on bail, commit an offence; or does not endanger the safety, welfare or property of any person.

RECOMMENDATION 4 . . . . . [page 36]

Committal for sentence to a superior court

That the *Bail Act 1982* (WA) be amended to provide that:

1. when committing an offender for sentence to a superior court a magistrate may order that an offender reappear before a Magistrates Court at a specified time and place in order to ascertain if the offender is complying with a court intervention program prescribed under the *Criminal Procedure Regulations 2005* (WA) during any period before the offender's first appearance in the superior court; and
2. at any reappearance ordered under (1) above, a magistrate may again order that the offender reappear before a Magistrates Court at a specified time and place in order to ascertain if the offender is complying with the court intervention program during any period before the offender's first appearance in the superior court.

RECOMMENDATION 28 . . . . . [page 98]

Protective bail conditions and violence restraining orders

1. That clause 2(2a) of Schedule 1 Part D of the *Bail Act 1982* (WA) be amended to provide that on a grant of bail for a purpose set out in subclause (2)(c) or (d) a judicial or authorised officer should consider whether that purpose might be better served or assisted by a violence restraining order, or protective bail conditions, or both.
2. That s 63 of the *Restraining Orders Act 1997* (WA) be amended to enable a judicial officer hearing a bail application to make an interim violence restraining order.
3. That the *Restraining Orders Act 1997* (WA) be amended to provide that where protective bail conditions are in place to protect a person, an application to cancel a violence restraining order that protects that person can only be cancelled on 24 hours' written notice to the court.

Sentencing Act 1995

RECOMMENDATION 5 . . . . . [page 37]

Court intervention programs and Pre-Sentence Orders

That all references to a 'speciality court' in Part 3A of the *Sentencing Act 1995* (WA) be deleted and replaced with the phrase 'a court administering a court intervention program that has been prescribed under the *Criminal Procedure Regulations 2005* (WA)'.

RECOMMENDATION 6 . . . . . [page 38]

Eligibility for Pre-Sentence Orders

That s 33A(2a)(b) of the *Sentencing Act 1995* (WA) be repealed so that an offender who was subject to a suspended sentence of imprisonment at the time of committing the current offence(s) is not automatically ineligible for a Pre-Sentence Order.

RECOMMENDATION 7 . . . . . [page 39]

Amending a Pre-Sentence Order

1. That s 33M of the *Sentencing Act 1995* (WA) be amended to provide that:

   (a) if a Pre-Sentence Order includes a requirement to obey the orders of a court administering a court intervention program prescribed under the *Criminal Procedure Regulations 2005* (WA), an application to amend the requirements of the Pre-Sentence Order can be made by the offender, a community corrections officer, a prosecutor or any person involved in providing treatment or support services to the offender as part of the prescribed court intervention program;

   (b) a court administering a prescribed court intervention program can waive the requirement under s 33M(3) that the application must be made in accordance with the regulations provided that all parties have been given reasonable notice and an opportunity to be heard.

2. That s 33N(1) of the *Sentencing Act 1995* (WA) be amended to provide that a court administering a court intervention program prescribed under the *Criminal Procedure Regulations 2005* (WA) can amend the requirements of a Pre-Sentence Order if satisfied that the amendment is necessary for the effective rehabilitation of the offender or to reduce the risk that the offender reoffends during his or her participation in the prescribed court intervention program.

RECOMMENDATION 8 . . . . . [page 40]

Breaching a Pre-Sentence Order

That s 33O of the *Sentencing Act 1995* (WA) be amended by inserting a new subsection 3A and that this subsection provide that if a court administering a court intervention program prescribed under the *Criminal Procedure Regulations 2005* (WA) has made a Pre-Sentence Order, that court can amend, cancel or confirm the Pre-Sentence Orders at any time if the court is satisfied that the offender has been, is, or is likely to be, in breach of any requirement of the Pre-Sentence Order even though a warrant under subsection (1) has not been issued.

RECOMMENDATION 9 . . . . . [page 41]

Non-compliance with a Pre-Sentence Order is not an aggravating sentencing factor

That s 33K(1) of the *Sentencing Act 1995* (WA) be amended so it provides that a court sentencing an offender who has been subject to a Pre-Sentence Order must take into account the offender's behaviour while subject to the Pre-Sentence Order; however, failure to comply with the requirements of the PSO is not to be regarded as an aggravating factor.

RECOMMENDATION 10 . . . . . [page 41]

Pre-Sentence Orders imposed by superior courts

1. That s 33C of the *Sentencing Act 1995* (WA) be amended to provide that if a superior court imposes a Pre-Sentence Order on an offender who has been, is, or will be participating in a court intervention program prescribed under the *Criminal Procedure Regulations 2005* (WA), the superior court may order that the offender reappear in the Magistrates Court that is administering the court intervention program for the purpose of ascertaining whether the offender is complying with the order.

2. That s 33P of the *Sentencing Act 1995* (WA) be amended to provide that a court administering a court intervention program prescribed under the *Criminal Procedure Regulations 2005* (WA) may commit an offender to the superior court that imposed the Pre-Sentence Order if satisfied that the offender has been, is, or is likely to be in breach of any requirement of the order.

RECOMMENDATION 11 . . . . . [page 43]

The purposes of sentencing

1. That the *Sentencing Act 1995* (WA) be amended to provide that the purposes for which a court may impose a sentence on an offender are as follows:

(a) to ensure that the offender is adequately punished for the offence;
(b) to prevent crime by deterring the offender and other persons from committing similar offences;
(c) to protect the community from the offender;
(d) to promote the rehabilitation of the offender;
(e) to make the offender accountable for his or her actions;
(f) to denounce the conduct of the offender; and
(g) to recognise the harm done to the victim of the crime and the community.

2. That the *Sentencing Act 1995* (WA) provide that the order in which these purposes are listed does not indicate that one purpose is more or less important than another and that a court may impose a sentence for one or more of the abovementioned purposes.

RECOMMENDATION 12 . . . . . [page 43–44]

Relevance of participation in a court intervention program to sentence

1. That s 7(2) of the *Sentencing Act 1995* (WA) be amended by adding that an offence is not aggravated by the fact that an offender has failed to comply with or failed to agree to participate in a court intervention program prescribed under the *Criminal Procedure Regulations 2005* (WA).
2. That s 8 of the *Sentencing Act 1995* (WA) be amended by adding that compliance with the requirements of a court intervention program prescribed under the *Criminal Procedure Regulations 2005* (WA), is a mitigating factor and the greater the level of compliance the greater the mitigation.

RECOMMENDATION 13 . . . . . [page 44]

Deferral of sentencing

1. That s 16(1) of the *Sentencing Act 1995* (WA) be amended to provide that a court may adjourn sentencing of an offender to allow an offender to be assessed for and participate in a court intervention program prescribed under the *Criminal Procedure Regulations 2005* (WA).
2. That s 16(2) of the *Sentencing Act 1995* (WA) be amended to provide that the sentencing of an offender must not be adjourned for more than 12 months after the offender is convicted.

RECOMMENDATION 15 . . . . . [page 45]

No sentence

That s 46 of the *Sentencing Act 1995* (WA) be amended to expand the criteria to impose the option of 'no sentence' so that a court sentencing an offender may impose no sentence if it considers that the offender has successfully completed a court intervention program prescribed under the *Criminal Procedure Regulations 2005* (WA) and, after considering the offender's character; antecedents; age; health, and mental condition; and any other relevant matter it considers that it is not just to impose any other sentencing option.

RECOMMENDATION 16 . . . . . [page 46]

Spent Convictions

That s 45(1) of the *Sentencing Act 1995* (WA) be amended to expand the criteria for making a spent conviction order under s 39(2) so that a court *may* make a spent conviction order if it considers that the offender is unlikely to commit such an offence again; and having regard to the fact that the offender has successfully completed a court intervention program prescribed under the *Criminal Procedure Act 2004* (WA) it considers that the offender should be relieved immediately of the adverse effect that the conviction might have on the offender.

RECOMMENDATION 17 . . . . . [page 46]

Conditional Suspended Imprisonment

That all references to a 'speciality court' in Part 12 of the *Sentencing Act 1995* (WA) be repealed.

RECOMMENDATION 20 . . . . . [pages 64–66]

Drug Treatment Order

That the *Sentencing Act 1995* (WA) be amended to create a new pre-sentence Drug Treatment Order (DTO) to provide, among other things:

Objectives

1. That the primary objectives of a DTO are to rehabilitate offenders by providing judicially supervised drug treatment; to reduce drug dependency and to reduce drug-related offending.

Availability

2. That a DTO can only be imposed by a prescribed court or prescribed court intervention program (and initially the only prescribed courts and programs are to be the Perth Drug Court Program; the Supreme Court, the District Court and the Perth Children's Court Drug Court Program).
3. That despite anything to the contrary under the *Young Offenders Act 1994* (WA) a court administering the Perth Children's Court Drug Court Program may impose a DTO on an eligible young offender even if that young offender is under 18 years of age.
4. That any Western Australian court can refer an offender to the Perth Drug Court Program or the Perth Children's Court Drug Court Program for assessment and determination of the offender's eligibility and suitability for a DTO.
5. That if an offender has been charged with a superior court matter, the Perth Drug Court Program is to determine if the offender is suitable for a DTO; however, the applicable superior court is to make the final decision as to whether a DTO should be made.
6. That if a superior court makes a DTO, the Perth Drug Court Program is to supervise and monitor the offender's progress on the order and can vary the conditions of the order at any time, but only the superior court that imposed the order can cancel the order.
7. That a court administering the Perth Drug Court Program can commit the offender to the superior court that imposed the DTO at any time.
8. That if a superior court makes a DTO it may order that the offender reappear before the superior court at a particular time and place so that the superior court can monitor the offender's progress on the order.

Eligibility

9. That in order to be eligible for a DTO the offender must be convicted of an offence (or offences) that warrants a term of immediate imprisonment.
10. That an offender who was subject to a suspended sentence of imprisonment at the time of committing the current offence(s) may be eligible for a DTO.
11. That in order to be eligible for a DTO the offender must have an illicit drug-dependency.
12. That a DTO cannot be made without the written consent of the offender and that before the offender can consent to the making of a DTO he or she must be given an opportunity for legal advice and must be fully informed of the requirements of the DTO and the possible consequences of non-compliance.

Indicated sentences

13. That before the offender formally consents to the DTO, the court making the DTO must indicate to the offender the penalty that is likely to be imposed if he or she does not agree to the making of the order or if he or she fails to comply with the requirements of the order.

Final sentencing

14. That when determining the final sentence to be imposed after a DTO has been cancelled, compliance with the requirements of the DTO is a mitigating factor and the greater the level of the compliance the greater the mitigation.
15. That the final sentence imposed in relation to the offences that were subject to the DTO must not be greater than the indicated sentence.
16. That when sentencing the offender the court may take into account any custody sanctions served during the order.

17. That the final sentence can be appealed in the same way as any other sentence or order imposed as a consequence of conviction.

Duration

18. That the maximum length of a DTO is two years.
19. That if a DTO is made for a period less than two years it can be extended for any period up to the maximum of two years.
20. That a DTO can be cancelled at any time prior to its expiration (either as a consequence of being terminated from the program or because of successful compliance with the program).

Case reviews

21. That regulations prescribe which agencies or individuals make up the Perth Drug Court Team and the Perth Children's Court Drug Court Team.
22. That regulations may provide for the specific roles and responsibilities of each team member.
23. That the Perth Drug Court Program and the Perth Children's Drug Court Program may hold 'out-of-court' case review meetings and that these meetings may be attended by any prescribed member of the Drug Court Team or anyone else whom the relevant magistrate considers should attend.
24. That at the case review meetings, Drug Court Team members may discuss and consider the participant's performance on the DTO; whether the DTO or any bail conditions previously imposed need to be varied; the participant's treatment and support needs; and whether the participant should be rewarded or sanctioned (and, if so, the appropriate reward or sanction in the circumstances). However, a final decision about the above issues must be made in open court and only after the participant has been informed about any adverse information presented at the case review meeting and given an opportunity to be heard.
25. That if possible termination from the program (and cancellation of the DTO is being considered) this issue is not to be discussed at the case review meeting. All termination proceedings are to be undertaken in open court.

Conditions of the DTO

26. That regulations may provide for the types of conditions that may be imposed as part of a DTO including:
    (a) standard conditions (eg, requirement to report after DTO made; requirement to notify of change of address; requirement to reside in Western Australia unless prior approval; requirement not to commit any offence during DTO)
    (b) core conditions (eg, residential; curfews; counselling; residential treatment; medical, psychiatric or psychological treatment; attendance at educational or vocational training programs; attendance at employment; urinalysis; reporting; and attendance at court)
    (c) specific conditions (eg, requirement that offender submit to urinalysis and that samples provided may be tested for DNA)
27. That if a prescribed court makes a DTO it can grant the offender bail.

Rewards and sanctions

28. That the Perth Drug Court Program or the Perth Children's Court Drug Court Program may give the following rewards if the court is satisfied that the offender has complied or is complying with the conditions of the Drug Treatment Order:
    (a) less frequent court attendances;
    (b) less frequent urinalysis;
    (c) less frequent attendance at counselling, treatment or other programs;
    (d) progression to the next phase of the program;
    (e) a reduction in the number of days to be served under a previously imposed but unserved custody sanction; or
    (f) any other reward prescribed under the regulations.

29. That the regulations may provide for a system of breach points to be imposed in the event of non-compliance and specify the number of breach points that are to be given for failing to comply with the various conditions of the DTO, including how breach points may be deducted for compliance.

30. That the Perth Drug Court Program or the Perth Children's Court Drug Court Program may give the following sanctions if the court is satisfied that the offender has not complied or is not complying with the conditions of the DTO:
    (a) more frequent court attendances;
    (b) more frequent urinalysis;
    (c) more frequent attendance at counselling, treatment or other programs;
    (d) movement back to a previous phase of the program;
    (e) an order that the offender be detained in custody up to a maximum of ten days at any one time; or
    (f) any other sanction prescribed under the regulations.

31. That the Perth Drug Court Program or the Perth Children's Court Drug Court Program cannot impose a custody sanction (under 30(e) above) unless the offender has not complied or is not complying with the conditions of the order and that in all of the circumstances no other sanction is appropriate.

32. That the serving of a custody sanction may be deferred to a later date and that if custody sanctions have been given on more than one occasion, the offender can serve the accumulated sanctions at one time provided that the total number of days to be served is no longer than 10 days.

33. That a judicial officer can issue a warrant committing the offender to a prison or detention centre (whichever is applicable) for the purpose of serving the custody sanction.

34. That if a custody sanction (under 30(e) above) is imposed, the offender has the right to apply to a judge of the Supreme Court for a rehearing of the matter and, if the offender elects to exercise that right, the serving of the custody sanction is to be deferred until after the rehearing has been completed.

Operational

35. That regulations can be made in relation to the following matters:
    (a) referral and assessment processes;
    (b) eligibility criteria;
    (c) excluded offences;
    (d) the different phases of the program including the requirements under each phase;
    (e) prescribed rewards and sanctions that may be given or imposed for compliance and non-compliance;
    (f) any criteria that must be established before a DTO can be cancelled for non-compliance;
    (g) membership of the Drug Court Teams and the roles and responsibilities of team members;
    (h) the provision of reports; and
    (i) any other relevant matter.

36. That court rules can be made in relation to the following matters:
    (a) procedures and processes for dealing with superior court matters, including how a superior court is to be informed of the offender's progress on the DTO; and
    (b) any other relevant matter.

Amendment and cancellation

37. That a DTO can be varied or amended at any time by the court that made the DTO or by the Perth Drug Court Program or Perth Children's Court Drug Court Program (whichever is applicable) provided that all parties have had a reasonable opportunity to be heard.

38. That a DTO can only be cancelled by the court that made the order.

Immunity from prosecution

39. That any admission about personal use or possession of an illicit drug made by the offender during assessment for or while subject to a DTO cannot be used against the offender in proceedings for an offence.

40. That any evidence obtained as a result of that admission, cannot be used against the offender in proceedings for an offence.

41. That the above provisions do not prevent a prosecution for an offence if there is other evidence (ie, evidence other than the admission or evidence obtained as a result of the admission) implicating the offender.

Evaluation

42. That the effectiveness of the new DTO is to be independently evaluated two years from the date of commencement.

Restraining Orders Act 1997

RECOMMENDATION 28 . . . . . [page 98]

Protective bail conditions and violence restraining orders

1. That clause 2(2a) of Schedule 1 Part D of the *Bail Act 1982* (WA) be amended to provide that on a grant of bail for a purpose set out in subclause (2)(c) or (d) a judicial or authorised officer should consider whether that purpose might be better served or assisted by a violence restraining order, or protective bail conditions, or both.
2. That s 63 of the *Restraining Orders Act 1997* (WA) be amended to enable a judicial officer hearing a bail application to make an interim violence restraining order.
3. That the *Restraining Orders Act 1997* (WA) be amended to provide that where protective bail conditions are in place to protect a person, an application to cancel a violence restraining order that protects that person can only be cancelled on 24 hours' written notice to the court.

Appendix C: List of submissions and people consulted

LIST OF SUBMISSIONS

Aboriginal Legal Service of WA (Inc)
Anderton, Christine
Cannon, Dr Andrew – Deputy Chief Magistrate of South Australia
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Appendix D: Abbreviations used

ABS	Australian Bureau of Statistics
AIHW	Australian Institute of Health and Welfare
CATS	Court Assessment and Treatment Service
CDTCC	Compulsory Drug Treatment Correctional Centre
CISP	Court Integrated Services Program
CREDIT	Court Referral and Evaluation for Drug Intervention and Treatment
CSI	Conditional Suspended Imprisonment
DCR	Drug Court Regime
DPP	Office of the Director of Public Prosecutions
DTO	Drug Treatment Order
GASR	Geraldton Alternative Sentencing Regime
IDDP	Intellectual Disability Diversion Program
LRCWA	Law Reform Commission of Western Australia
MERIT	Magistrates Early Referral into Treatment Program
NJC	Neighbourhood Justice Centre
PECN	People with Exceptionally Complex Needs Project
PSO	Pre-Sentence Order
QIADP	Queensland Indigenous Alcohol Diversion Program
STIR	Supervised Treatment Intervention Regime
YSTIR	Youth Supervised Treatment Intervention Regime