

Chapter Two

Drug and Alcohol Court Intervention Programs



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Introduction

The social and financial cost of drug- and alcohol-related offending is substantial.¹ Internationally, it has been stated that 'the public pays a high price for the untreated dependency of drug-abusing offenders, mainly through the direct and indirect costs of ongoing crime to finance drug abuse'.² It has been estimated that the costs associated with drug-related crime in Western Australia are 'a staggering \$220 million every year'.³ And this figure does not include the social consequences to individuals and their families. Clearly, for the benefit of all members of the community, it is important to reduce drug and alcohol abuse and related offending. The Commission supports early intervention strategies to *prevent* drug and alcohol abuse⁴ but also believes that programs within the criminal justice system that aim to reduce reoffending are essential for the protection of the community. Relying solely on early intervention will not lessen the impact for victims who bear the burden of drug- and alcohol-related crime committed by recidivist offenders.

Currently, there are various strategies within the criminal justice system that respond to offenders with drug and alcohol issues. 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.⁵ Not all of these initiatives can be classified as court intervention programs: some do not involve the court at all and, in others, the court does not play any role in the treatment or supervision of offenders. In this chapter the Commission examines drug courts and other drug and alcohol court intervention programs to determine the most effective way for *courts* to maximise the successful treatment and rehabilitation of drug- and alcohol-dependent offenders.

DRUGS AND CRIME

It is widely accepted that there is a link between drug use and offending behaviour – drug use is more widespread among offenders than it is among members of the general community.⁶ Approximately 17% of Western Australians surveyed in 2004 reported that they had used an illicit drug (or used a legal drug for non-medical purposes) in the past 12 months.⁷ A study of drug use among adult detainees in 2006 found that 77% of those detainees at the East Perth lock-up who participated in the study returned a positive drug test.⁸ Similarly, a study (from December 2000 until June 2001) of sentenced prisoners in four Australian jurisdictions (including Western Australia) found that over 80% of prisoners reported that they had used an illegal drug and 62% of offenders reported regular illegal drug use.⁹

As stated by the Western Australian Department of Corrective Services, there 'is overwhelming evidence that drug use, criminal activity and re-offending are closely linked. Many drug-dependent offenders relapse into drug use on release and re-offend

1. Various terms are used when discussing drug and alcohol problems - 'drug abuse' has been used to refer to any use of illicit drugs or the dangerous use of licit drugs: Task Force on Drug Abuse, *Protecting the Community: Report of the Task Force of Drug Abuse*, Executive Summary and Recommendations (Perth: Government of Western Australia, 1995) 4. The term 'drugs' has been used to refer to drugs, alcohol and tobacco and sometimes illicit and licit drugs are distinguished: Pritchard E et al, *Compulsory Treatment in Australia* (Canberra: Australian National Council on Drugs, 2007) 6. In this Paper the Commission distinguishes between drugs and alcohol because many court intervention programs do not accept participants who only have alcohol-related problems. When using the term 'drugs' the Commission is referring to both illicit drugs and the unlawful use of licit drugs such as prescription medication.
2. United Nations Office on Drugs and Crime, *Report of the Informal Expert Working Group on Drug Treatment Courts* (1999) 3.
3. The Department of Corrective Services, *Managing Drugs in Prisons* <http://www.correctiveservices.wa.gov.au/_files/Drugs_in_prisons.pdf> accessed 1 May 2008.
4. It has been argued that '[w]hile policies and programs are still needed at the harder end – when offenders have become drug dependent or when drug dependants have become offenders ... expenditure might be more appropriately directed at preventing and delaying the onset of illicit drug use, than at dealing with its consequences': Payne J, *A Discrete-Time Survival Study of Drug Use and Property Offending: Implications for early intervention and treatment*, Australian Institute of Criminology, Technical and Background Paper No. 24 (2006) 39.

5. For a discussion of different types of diversion options throughout the criminal justice system, see Pritchard E et al, *Compulsory Treatment in Australia* (Canberra: Australian National Council on Drugs, 2007) 33.
6. See Crime Research Centre, *WA Diversion Program – Evaluation Framework (POP/STIR/IDP)*, Final Report for the Drug and Alcohol Office (2007) 19; Office of Inspector of Custodial Services, *Thematic Review of Offender Health Services*, Report No. 35 (2006) 27.
7. Australian Institute of Health and Welfare, *2004 National Drug Strategy Household Survey: State and territory supplement* (2005) 7. The Western Australia figure was higher than the national rate of 15.3%. Cannabis was the most frequently used drug in Western Australia – 13.7% of those surveyed reported cannabis use within the past 12 months.
8. 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) 68. Cannabis was the most commonly used drug by adult detainees – nearly 60% of adult detainees at East Perth tested positive for cannabis.
9. 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.

once they get back into the cycle of dependence'.¹⁰ However, it is important to consider the causal relationship between drug use and offending: in other words, 'do drugs cause crime?'

There are three principal ways to explain the relationship between drugs and crime. The first is simple – it is a crime to use, possess, supply or manufacture illicit drugs. The second is that drug dependency may lead to the commission of property crimes (such as robbery, burglary and stealing) in order to buy more drugs, to pay for past drug debts or to buy necessities because all funds have been used to support a drug habit.¹¹ Finally, some offences may be committed while the offender is under the influence of drugs.¹² Although the biological influence of drugs on the propensity to commit crime is unclear, 47% of adult detainees in a nationwide study reported that they had taken drugs just before committing at least one of the offences for which they had been charged in the preceding 12 months.¹³

Australian and international research has consistently found that 'minor offending precedes drug use' but offenders who use drugs 'are more likely to report higher rates of offending'.¹⁴ This observation is consistent with the *Drug Use Careers of Offenders* study of sentenced prisoners (including Western Australian prisoners) which found that over half of the offenders who had used drugs began committing offences prior to drug use.¹⁵ Nevertheless, 39% of those surveyed 'causally attributed their current most serious offence to illegal drugs or alcohol'.¹⁶

Interestingly, the results varied between male and female offenders. Male offenders were more likely to commence offending before drug use (with offending

continuing to rise after drug use).¹⁷ However, the same proportion of female prisoners reported using drugs before committing an offence as reported committing an offence before using drugs.¹⁸ Thus there is more likely to be a causal relationship between drugs and offending for women than men.

Overall, it is clear that irrespective of whether drug use precedes crime, drug use increases the level of offending behaviour.¹⁹ Thus, the answer to the question posed above—'do drugs cause crime?'— is 'yes'. But that does not mean that all drug use leads to criminal behaviour and all offenders use drugs.²⁰ What it means is that drug use increases the risk of criminal behaviour; offenders who use drugs commit more crime than offenders who do not use drugs.²¹ Reducing drug dependency is likely to reduce crime and hence improve safety for the community.

ALCOHOL AND CRIME

Alcohol is in a different category because alcohol use by adults is not illegal. The consumption of alcohol within the general community is high and is continuing to rise. Between 1990/1991 and 2004/2005 the total alcohol consumed per capita in Western Australia increased by 34%.²² In 1993 the proportion of Australians who had recently used alcohol (within the

10. The Department of Corrective Services, *Managing Drugs in Prisons* <http://www.correctiveservices.wa.gov.au/_files/Drugs_in_prisons.pdf> accessed 15 April 2008.
11. Costanzo J, *Final Report of the South-East Queensland Drug Court Pilot* (July 2003) 1. The association between illicit drug use (in particular, heroin) and 'income-generating crime' is well known: Taplin S, *New South Wales Drug Court Evaluation: A Process Evaluation* (Sydney: NSW Bureau of Crime Statistics and Research, 2002) 7.
12. Payne J, *A Discrete-Time Survival Study of Drug Use and Property Offending: Implications for early intervention and treatment*, Australian Institute of Criminology, Technical and Background Paper No. 24 (2006) 3. It is important to note that the propensity for violent or aggressive offending is arguably less for those intoxicated by illicit drugs than it is for those intoxicated by alcohol.
13. 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) 3. Increased propensity for violent and aggressive behaviour has been attributed to alcohol and some drugs (eg, amphetamines, anabolic steroids) while other drugs do not normally increase the tendency for violence (eg, cannabis, heroin): see Rajaratnam S et al, 'Intoxication and Criminal Behaviour' (2000) 7 *Psychiatry, Psychology and the Law* 59, 62–65.
14. 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.
15. Of those prisoners who had ever used illegal drugs, 17% used illegal drugs before committing any offences; 29% commenced offending and drug use concurrently; and 54% reported that offending commenced before drug use: *ibid* 6.
16. *Ibid* 8.

17. Johnson H, *Drugs and Crime: A study of incarcerated female offenders*, Australian Institute of Criminology, Research and Public Policy Series No. 63 (2004) xiv. The results for juveniles (both male and female) were similar to the results for male offenders. The study found 47% of juveniles commenced offending before drug use; 25% commenced offending and drug use within the same year; and 25% were drug users before commencement of offending: Prichard J & Payne J, 'Key Findings from the Drug Use Careers of Juvenile Offenders Study' (2005) 304 *Australian Institute of Criminology Trends and Issues*, 3.
18. Australian Institute of Criminology, *Gender Differences in the Sequence of Drug Use and Crime*, Crimes Facts Info No. 90 (2005) 1: 35% of female prisoners reported using illicit drugs before offending and 34% reported offending before using illicit drugs.
19. See Crime Research Centre, *WA Diversion Program – Evaluation Framework (POP/STIR/IDP)*, Final Report for the Drug and Alcohol Office (2007) 20; Hall W, 'The Role of Legal Coercion in the Treatment of Offenders with Alcohol and Heroin Problems' (1997) 30 *Australian and New Zealand Journal of Criminology* 103, 104; Cappa C, 'The Social, Political and Theoretical Context of Drug Courts' (2006) 32 *Monash University Law Review* 145, 148–49.
20. It has been stated that 'illicit drug consumption almost certainly does cause crime but not by driving large numbers of otherwise law-abiding people into crime': see Weatherburn D, *What Causes Crime?* New South Wales Bureau of Crime Statistics and Research, Crime and Justice Bulletin, No. 54 (2001) 5.
21. Makkai T, 'Drug Courts: Issues and Prospects' (1998) 95 *Australian Institute of Criminology Trends and Issues*, 4. A study in relation to property or income generating offences found that offenders who had used drugs before committing their first offence were more likely to regularly offend than non-drug users but less likely to regularly offend than those offenders who used drugs after committing their first offence: Payne J, *A Discrete-Time Survival Study of Drug Use and Property Offending: Implications for early intervention and treatment*, Australian Institute of Criminology, Technical and Background Paper No. 24 (2006) v.
22. Western Australian Department of Health, *Impact of Alcohol on the Population of Western Australia* (2008) 13. During this period there was a significant increase in the consumption of beverages with a high alcohol content and a decrease in the consumption of beverages with a low alcohol content.

past week) was 73% and by 2004 this had increased to nearly 84%. In contrast, recent illicit drug use and non-medical use of licit drugs (within the previous 12 months) declined since 1998.²³

So what is the link between alcohol and crime? The vast majority of people who consume alcohol do not commit crimes.²⁴ Nonetheless, commonsense suggests a causal relationship between particular types of crime and alcohol consumption: driving under the influence, disorderly conduct and other 'street offences'. Further, research demonstrates that there is a link between alcohol and violent offending.²⁵ It has been stated that:

Firstly, alcohol has been shown in behavioural experiments to increase aggression. Secondly, heavy drinkers are more likely to report committing alcohol-related violent offences than light drinkers or non-drinkers. Thirdly, criminal assaults tend to cluster around licensed premises. Fourthly, areas with high rates of alcohol consumption tend to have high rates of violence.²⁶

The study of adult detainees at the East Perth lock up found that 51% reported drinking alcohol prior to their arrest.²⁷ The same study revealed that of those adult detainees who reported drinking heavily in the previous 48 hours, 70% also tested positive to at least one other drug.²⁸ In the study of adult detainees nationwide, 46% were classified as dependent on illicit drugs and 31% were dependent on alcohol.²⁹ It was noted that, compared to previous years, the proportion of adult detainees dependent on alcohol is increasing and the proportion dependent on illicit drugs is decreasing. This information demonstrates that court intervention programs designed to reduce offending must target both drug and alcohol problems.

23. Australian Institute of Health and Welfare, *2004 National Drug Strategy Household Survey: First Results* (2005) 3.

24. See Mason G & Wilson P, 'Alcohol and Crime' (1989) 18 *Australian Institute of Criminology Trends and Issues* 4.

25. Rajaratnam S et al, 'Intoxication and Criminal Behaviour' (2000) 7 *Psychiatry, Psychology and the Law* 59, 62.

26. Weatherburn D, *What Causes Crime?* New South Wales Bureau of Crime Statistics and Research, Crime and Justice Bulletin, No. 54 (2001) 5. See also Government of Western Australia, *Preventing Violence: The State Community Violence Prevention Strategy 2005 – A green paper policy framework for development* (2005) 37; Tasmanian Law Reform Institute, *The Establishment of a Drug Court Pilot in Tasmania*, Research Paper No.2 (2006) 13; Pritchard E et al, *Compulsory Treatment in Australia* (Canberra: Australian National Council on Drugs, 2007) 1.

27. 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.

28. *Ibid* xiii.

29. *Ibid* xiii.

Drug and alcohol use and the criminal justice system

For centuries people have consumed alcohol and drugs.¹ However, the legal system's response to and the nature of drug use have changed over time.² In the 19th century in Australia many drugs were available from doctors, other health professionals and grocers. During this period drugs were usually consumed for therapeutic purposes and controlled only by laws regulating the sale and labelling of particular drugs. Following the approach adopted by international conventions, Australian laws became increasingly prohibitionist. At the beginning of the 20th century the Commonwealth government banned the importation of certain forms of opium. In 1914, the government limited and regulated the importation of opium, morphine, heroin and cocaine; it was illegal to possess these drugs without a medical prescription.

However, by the 1960s and 1970s the recreational use of drugs had increased and drug-dependency became more widespread.³ Further, the use of drugs such as cannabis, heroin and LSD was more common. From this time, the legal response changed; predominantly regulatory laws in each state were replaced by criminal laws (with significant penalties) prohibiting the use, supply and manufacture of many drugs.⁴ However, this change did not reduce the use of or access to illicit drugs.⁵ In 1989 it was

observed that 'illegal drugs are available throughout Australia to anyone who wants them, although at prices artificially inflated by their illegality'.⁶ While the criminalisation or decriminalisation of drug use is not within the scope of this reference, it is important to bear in mind that the high cost of purchasing illicit drugs is a significant factor in the drug-crime nexus: many drug-dependent offenders commit crimes to fund their drug use.

In 2008 drug use and drug-dependency remains a major social and criminal justice problem. In 2005 illicit drug offences constituted approximately 6% of all reported offences in Western Australia.⁷ Further, over 77% of all reported offences were property-related and, given the relationship between drug-dependency and income-generating crime, it is likely that a large proportion of these offences were drug-related.

ADDRESSING DRUG AND ALCOHOL RELATED OFFENDING

In recognition of the harmful impact that drug use has on individuals and on the community, the national drug policy has shifted from a wholly punitive response to include the goal of 'harm minimisation'.⁸ In 1997 the federal government launched the *National Illicit Drugs Strategy*. While this policy included law enforcement strategies to reduce the supply of illicit drugs, it also aimed to increase the diversion of drug offenders into appropriate education and treatment programs. In 1999 the Council of Australian Governments approved the national strategy and established the *Illicit Drug Diversion Initiative (IDDI)*.⁹ The IDDI aims to divert low-level illicit drug offenders into treatment.¹⁰ Funding provided by the federal government as part of this strategy is used for many drug diversion initiatives within the

1. Rajaratnam S et al, 'Intoxication and Criminal Behaviour' (2000) 7 *Psychiatry, Psychology and the Law* 59, 61; Hoffman M, 'The Drug Court Scandal' (2000) 78 *North Carolina Law Review* 1437, 1441.
2. As a consequence of scientific advancement more potent drugs have become available. For example, cocaine was commonly used in the United States in the 1960s and 1970s, but by the 1980s two potent and cheaper forms of cocaine (freebase and crack) were introduced: Hoffman M, 'The Drug Court Scandal' (2000) 78 *North Carolina Law Review* 1437, 1447. In Australia, amphetamines were frequently used in the 1980s, but by the 1990s the more potent form (methamphetamine) was more widespread; since the late 1990s 'ice' (high purity crystalline methamphetamine) has been more frequently used: National Drug and Alcohol Research Centre, *Illicit Drug Use in Australia: Epidemiology, use patterns and associated harm* (2007) 24.
3. In Australia there was widespread cannabis use in the 1970s. Cannabis remains the most commonly used illicit drug, with approximately one-third of Australians having used cannabis at least once: National Drug and Alcohol Research Centre, *Illicit Drug Use in Australia: Epidemiology, use patterns and associated harm* (2007) 4 & 17.
4. Norberry J, *Illicit Drugs, Their Use and the Law in Australia*, Commonwealth of Australia Parliamentary Library, Background Paper No. 12 (1996-97) <<http://www.aph.gov.au/library/pubs/bp>> accessed 28 April 2008.
5. Similarly, in the United States drug laws have not had any significant impact on the supply of or demand for drugs, but these laws have substantially increased the number of people being dealt with by the criminal justice system and being sent to prison. In 1999, 60% of federal prisoners were imprisoned for drug offences compared to only 16% in 1970: Hoffman M, 'The Drug Court Scandal' (2000) 78 *North Carolina Law Review* 1437, 1459.

6. Parliamentary Joint Committee on the National Crime Authority, *Drugs, Crime and Society* (Canberra: Australian Government, 1989) 1.
7. Over half of these offences involved the possession or use of illicit drugs and a further 31.6% were categorised as miscellaneous drug offences (such as the possession of instruments used for consuming drugs). Only 9.9% were related to the supply, sale and manufacture of illicit drugs: Loh N et al, *Crime and Justice Statistics for Western Australia 2005* (Perth: Crime Research Centre, 2007) 12.
8. Tasmanian Law Reform Institute, *The Establishment of a Drug Court Pilot in Tasmania*, Research Paper No. 2 (2006) 24.
9. Pritchard E et al, *Compulsory Treatment in Australia* (Canberra: Australian National Council on Drugs, 2007) 11.
10. Lawrence R & Freeman K, 'Design and Implementation of Australia's First Drug Court' (2002) 35 *Australian and New Zealand Journal of Criminology* 63, 64.

criminal justice system, including many diversionary programs in Western Australia.¹¹

It has been claimed that drug diversion initiatives in Australia have emerged because of an increase in drug-related crimes and the 'disillusionment with traditional criminal justice approaches to drug-using offenders'.¹² Overall, the traditional approach to drug-related offending (discussed below) has been punitive; drug-dependent offenders are held fully accountable for their criminal behaviour and the need to halt the cycle of drug-dependency and crime has been largely ignored.

The Commonwealth IDDI is limited to illicit drugs. As far as the Commission is aware, Western Australia does not have any programs within the criminal justice system that exclusively address alcohol-related offending or alcohol abuse. It appears that the Drug and Alcohol Office is investigating funding options for alcohol diversion programs through the Office of Crime Prevention.¹³ Most of the programs discussed in this chapter do not accept offenders who have alcohol problems unless they can also establish the existence of an illicit drug problem. This issue is considered later in this chapter.¹⁴

Diverting offenders into education and treatment

When used in relation to drug offences and drug-related offending, the term 'diversion' generally refers to diversion into education and treatment.¹⁵ But, as explained in the Introduction to this Paper, the term 'diversion' has traditionally been used to refer to diversion out of the criminal justice system.¹⁶ Drug diversion initiatives do not always redirect offenders away from the justice system; instead, the justice system may be directly involved in supervising and administering the drug treatment regime. Hence, for the purposes of this Paper, the Commission distinguishes diversion from court intervention. In this chapter the term 'diversion program' refers to a program where the offender is diverted (either by the police or by the court) into

externally administered treatment options and the term 'court intervention program' refers to a program where the offender is diverted into *court* supervised or monitored treatment.

In Australia there is a continuum of drug diversion and court intervention programs: there are police diversion programs (where offenders are diverted away from the criminal justice system or diverted into education programs instead of being charged with an offence); court diversion programs (where offenders are diverted by the court into treatment programs); and court intervention programs (where offenders are diverted into court supervised treatment programs). On the whole, police and court diversion programs target minor offending and court intervention programs target moderate to high-level offending. It has been observed that different programs at various points within the criminal justice system are appropriate because offenders have different levels of offending and different levels of drug use.¹⁷ For example, a first-time offender who has just begun experimenting with cannabis is not a suitable candidate for a 12-month intensive drug court program and a heroin-dependent repeat offender is not suitable for diversion into a one-off education session.

A similar variety of programs for drug offenders exists in Western Australia. The state'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.¹⁸ Although police diversion and court diversion programs are not included within the scope of this reference, for background purposes the Commission briefly outlines the existing police and court diversion programs in Western Australian.¹⁹

Cannabis Infringement Notice Scheme: This scheme involves the diversion by police of adults found in possession of small amounts of cannabis or a cannabis smoking implement. The offender has a choice to attend an educational session or pay the prescribed fine.

All Drug Diversion: This is a police diversion option for adults found in possession of small amounts of an illicit drug who do not have any previous drug convictions or any convictions for violence. The offender has a choice of attending three treatment sessions or being dealt with by the court in the usual

11. The IDDI was implemented in Western Australia in 2000 (the Western Australian Diversion Program). For a description of the various diversionary programs: see Crime Research Centre, *WA Diversion Program – Evaluation Framework (POP/STIR/IDP)*, Final Report for the Drug and Alcohol Office (2007) 22; see Pritchard E et al, *Compulsory Treatment in Australia* (Canberra: Australian National Council on Drugs, 2007) 34.

12. Lawrence R & Freeman K, 'Design and Implementation of Australia's First Drug Court' (2002) 35 *Australian and New Zealand Journal of Criminology* 63, 63.

13. Crime Research Centre, *WA Diversion Program – Evaluation Framework (POP/STIR/IDP)*, Final Report for the Drug and Alcohol Office (2007) 146 & 151.

14. See discussion below under 'Consultation Issues: Alcohol'.

15. The vast majority of diversion and court intervention programs divert offenders into drug education or treatment: Hughes C & Ritter A, *A Summary of Diversion Programs for Drug and Drug-Related Offenders in Australia* (Sydney: National Drug and Alcohol Research Centre, 2008) 23.

16. Cautioning by the police is the classic example of diversion. See discussion under 'Other Rehabilitation and Diversionary Programs', Introduction.

17. Hughes C & Ritter A, *A Summary of Diversion Programs for Drug and Drug-Related Offenders in Australia* (Sydney: National Drug and Alcohol Research Centre, 2008) 24.

18. Western Australian Drug and Alcohol Office, *Western Australian Drug and Alcohol Strategy 2005–2009* (2005) 10.

19. See further Western Australian Drug and Alcohol Office, *The Drug Diversion Continuum*, available at <<http://www.dao.health.wa.gov.au/AboutDAO/WADiversionProgram/tabid/219/Default.aspx>> accessed 18 April 2008.

manner. If the offender complies with the program he or she will avoid a criminal conviction.²⁰

Young Person's Opportunity Program: This program is available for young offenders who have been identified as having a drug problem by their Juvenile Justice Team coordinator.

Pre-Sentence Opportunity Program: This court diversion program diverts first time offenders or low-level offenders into drug treatment.²¹ Compliance with the program may be taken into account in sentencing.

Indigenous Diversion Program: This program is similar to the Pre-Sentence Opportunity Program but is available for Aboriginal offenders in remote locations.²²

Also funded through the Commonwealth IDDI is the Supervised Treatment Intervention Regime (STIR). Because STIR is a court intervention program, it is examined in detail below. The Perth Drug Court is not funded through the IDDI.

Maximising 'crisis point' by legal coercion

A common feature of drug diversion and intervention programs is that they endeavour to maximise the opportunity for rehabilitation that arises because the offender is at a 'crisis point'. Contact with the criminal justice system provides leverage – the justice system offers legal incentives to those offenders who are willing to enter and comply with treatment. The extent of the 'crisis' will affect the type of incentive available. The predicament for a drug user with no criminal record is the possibility of obtaining a drug conviction and losing employment opportunities; for repeat offenders the crisis is often the threat of imprisonment. Thus there is a degree of coercion in all diversionary and intervention programs. Offenders are faced with a constrained choice: participate and comply with the program or accept the standard legal consequences. This constrained choice is often referred to as 'legal coercion'.²³ Legal coercion is not the same as compulsory drug treatment, such as the involuntary or civil commitment of non-offenders for assessment and treatment.²⁴ With diversionary and court intervention programs offenders have a choice whether to participate.

It has been suggested that legally coerced drug and alcohol treatment may not be effective because treatment is more successful if people are motivated to change voluntarily.²⁵ However, underlying the national approach to diversion is the belief that 'legally coerced' treatment for drug-dependency is effective.²⁶ Research in the United States has demonstrated that drug court participants are 'far more likely to successfully complete mandated substance abuse treatment than comparable participants who seek help on a voluntary basis'.²⁷ The Western Australian Crime Research Centre observed that '[r]eviews of research on coerced treatment have generally provided support for the effectiveness of coerced treatment in increasing treatment retention'.²⁸ While the evidence in support of coerced drug and alcohol treatment may not be conclusive,²⁹ it appears that legally coerced treatment is at least as effective as voluntary treatment. Further, it must be recognised that some offenders do not voluntarily enter treatment programs; therefore, it may be more appropriate to compare coerced treatment with no treatment at all. In this regard, it has been argued that:

Criminal justice pressure could bring into the treatment system large numbers of offenders who needed help but were not likely to obtain it on their own.³⁰

Further, for more serious offenders (such as those who participate in drug court programs) legally coerced drug treatment is usually more cost-effective than the alternative of imprisonment.³¹

The comparison between coerced and voluntary treatment raises another important issue: the impact of providing legally coerced programs on the availability of voluntary treatment programs

20. Crime Research Centre, *WA Diversion Program – Evaluation Framework (POP/STIR/IDP)*, Final Report for the Drug and Alcohol Office (2007) 24.

21. The Crime Research Centre reported in 2007 that POP is available in 12 Western Australian courts: *ibid* 55.

22. *Ibid* 11.

23. See further discussion in Hall W, 'The Role of Legal Coercion in the Treatment of Offenders with Alcohol and Heroin Problems' (1997) 30 *Australian and New Zealand Journal of Criminology* 103, 103.

24. Pritchard E et al, *Compulsory Treatment in Australia* (Canberra: Australian National Council on Drugs, 2007) xii.

25. Cappa C, 'The Social, Political and Theoretical Context of Drug Courts' (2006) 32 *Monash University Law Review* 145, 162.

26. Lawrence R & Freeman K, 'Design and Implementation of Australia's First Drug Court' (2002) 35 *Australian and New Zealand Journal of Criminology* 63, 64.

27. Berman G & Feinblatt J, 'Problem-Solving Courts: A brief primer' (2001) 23 *Law & Policy* 125, 132.

28. Crime Research Centre, *WA Diversion Program – Evaluation Framework (POP/STIR/IDP)*, Final Report for the Drug and Alcohol Office (2007) 27. It has been observed that in the United States the retention rate for drug courts is higher than voluntary treatment programs: Makkai T, 'Drug Courts: Issues and Prospects' (1998) 95 *Australian Institute of Criminology Trends and Issues* 4. See also Belenko S, 'Research on Drug Courts: A critical review' (1998) *National Drug Court Institute Review* 10, 11; Lind B et al, *New South Wales Drug Court Evaluation: Cost-effectiveness* (Sydney: NSW Bureau of Crime Statistics and Research, 2002) 2; Treloar C et al, *Barriers and Incentives to Treatment for Illicit Drug Users*, Australian Department of Health and Ageing, National Drug Strategy Monograph Series No. 53 (2004) 97.

29. It has been noted that international research about the effectiveness of coerced (and compulsory) drug treatment is inadequate and inconclusive: Pritchard E et al, *Compulsory Treatment in Australia* (Canberra: Australian National Council on Drugs, 2007) 65.

30. Young D, 'Impacts of Perceived Legal Pressure on Retention in Drug Treatment' (2002) 29 *Criminal Justice and Behaviour* 27, 28.

31. See Hall W, 'The Role of Legal Coercion in the Treatment of Offenders with Alcohol and Heroin Problems' (1997) 30 *Australian and New Zealand Journal of Criminology* 103, 114–115. See further discussion below: 'Reducing Costs'.

for other drug- and alcohol-dependent people. It has been asserted that treatment places through diversion programs

are allocated preferentially to people coercively referred via the criminal justice system, leaving fewer places for those voluntarily seeking treatment.³²

As explained in Chapter One, the Commission is of the view that extra funding must be provided for court intervention programs to operate effectively and to ensure that those who seek voluntary treatment are not disadvantaged.³³

THE TRADITIONAL APPROACH BY THE COURTS

The approach by courts to drug offences is relatively straightforward: the sale, supply or manufacture of illicit drugs is treated seriously, usually resulting in imprisonment.³⁴ Simple possession or the use of drugs is treated differently – the typical penalty is a fine.³⁵ In cases where charges of possession constitute a ‘symptom’ of drug-dependency, the penalty of a fine does not address the offender’s underlying drug dependency. In fact, imposing financial penalties on drug-dependent offenders may increase the risk of future offending because of the additional financial burden and the need to supplement income sources by illegal means.

A more complicated issue is how the courts should approach offences committed under the influence of drugs or alcohol, or committed as a consequence of drug or alcohol dependency. Generally, the law regards the consumption of drugs or alcohol as an exercise of free choice and therefore offenders are responsible for the consequences of using these substances. The voluntary consumption of drugs or alcohol does not affect criminal responsibility.³⁶ Likewise, the concepts of ‘free will and individual responsibility’ are evident in sentencing decisions.³⁷ The general rule is that drug or alcohol dependency or the fact that an offence was committed under the influence of drugs or alcohol does not, of itself, reduce the seriousness of the offence or provide any mitigation in sentencing.³⁸ It has been stated that:

The addictive quality of drugs, together with the anti-social behaviour which so commonly results from addiction, is so widely known that persons who choose a course of addiction must be treated as choosing its consequences... The decision to persist with an addiction, rather than to seek assistance, is also a choice.³⁹

The view taken by courts that drug and alcohol addiction is a choice has been criticised.⁴⁰ Freiberg states that:

[I]t can reasonably be argued that the ‘traditional’ court system, having been confronted by the growing drug problem for the best part of three decades, failed because it refused to recognise drug and alcohol addiction as something other than a form of wilful self-indulgence.⁴¹

Generally, the traditional approach to drug offenders is punitive. As the Western Australian *Justice Drug Plan 2003* acknowledges, the ‘justice system has traditionally been regarded as the “end of the line” for criminals with drug problems’.⁴² On the other hand, drug courts and other programs arguably represent a shift from this punitive response by recognising that drug addiction is a health issue requiring treatment, not just for the benefit of the individual, but for the benefit of community.⁴³

However, it is important to emphasise that alcohol or drug dependency has always been a relevant factor in sentencing when assessing the weight to be attached to rehabilitation.⁴⁴ It has been contended that evidence of demonstrated (as distinct from theoretical) prospects of rehabilitation provides the key to assessing the relevance of drug addiction in sentencing proceedings.⁴⁵ In Western Australia, evidence of genuine prospects of rehabilitation has been taken into account in sentencing, even for serious offences. In *Thomson*⁴⁶ the Court of Criminal Appeal reduced a sentence of immediate imprisonment to a term of suspended imprisonment for two young heroin-addicted offenders who were

32. Pritchard E et al, *Compulsory Treatment in Australia* (Canberra: Australian National Council on Drugs, 2007) 24.

33. See discussion under ‘Statement Two: Adequate resources’, Chapter One. See also Hall W, ‘The Role of Legal Coercion in the Treatment of Offenders with Alcohol and Heroin Problems’ (1997) 30 *Australian and New Zealand Journal of Criminology* 103, 115.

34. In 2005, offences involving the sale of commercial quantities of illicit drugs resulted in imprisonment in 69% of cases: Loh N et al, *Crime and Justice Statistics for Western Australia 2005* (Perth: Crime Research Centre, 2007) 75.

35. In 2005 over 80% of possession charges resulted in a fine: *ibid* viii.

36. Involuntary intoxication is a defence in certain circumstances: *Criminal Code* (WA) s 28.

37. Freiberg A, ‘Australian Drug Courts’ (2000) 24 *Criminal Law Journal* 213, 218.

38. *Henry* [1999] NSWCCA 111, [176] (Spigelman CJ). One exception to this rule is where the initial choice to use drugs

or alcohol was not willed: [194]. See also *Damiani* [2006] WASCA 47 [2] (Roberts-Smith JA).

39. *Henry* [1999] NSWCCA 111, [198] & [201]. See also *Damiani* [2006] WASCA 47 [2] (Roberts-Smith JA), [41] (McLure JA, Pullin JA concurring).

40. See Taylor G, ‘Should Addiction to Drugs be a Mitigating Factor in Sentencing’ (2002) 26 *Criminal Law Journal* 324, 338.

41. Freiberg A, ‘Australian Drug Courts’ (2000) 24 *Criminal Law Journal* 213, 219. The difficulties faced by drug- and alcohol-dependent offenders have been recognised by some judicial officers. See, for example, *Henry* [1999] NSWCCA 111 [338]–[339] where Simpson J drew an analogy between the life circumstances of some drug-dependent offenders and Aboriginal offenders addicted to alcohol, noting that the courts have recognised that alcohol abuse may be mitigatory for some Aboriginal offenders if it reflects the socio-economic disadvantages of the offender’s community.

42. Department of Justice, *Justice Drug Plan* (2003) 3.

43. See Cappa C, ‘The Social, Political and Theoretical Context of Drug Courts’ (2006) 32 *Monash University Law Review* 145, 146 & 149.

44. *Henry* [1999] NSWCCA 111, [174] (Spigelman CJ). See also Australian Law Reform Commission, *Same Crime, Same Time: Sentencing federal offenders*, Report No. 103 (2006) [29.90].

45. *Henry* [1999] NSWCCA 111, [343]–[344] (Simpson J).

46. [1998] WASCA 199.

convicted of robbery. The deciding factor in that matter was that both offenders had engaged in drug treatment while on bail and had made significant gains towards rehabilitation. In *Richardson*⁴⁷ a sentence of four years' imprisonment imposed for a robbery offence was reduced to two years eight months' imprisonment primarily because the offender had 'made a genuine, and relatively sustained, attempt to rehabilitate himself'.⁴⁸

In contrast, the fact that an offender is unlikely to abstain from alcohol or drug use in the community (in other words, there are no prospects of rehabilitation) will diminish any potential mitigation arising from the offender's drug or alcohol problems. In *Reynolds*⁴⁹ it was noted that the offender's underlying mental illness, coupled with alcoholism and drug dependency, reduced his culpability to some extent; however, the offender's repeated and failed attempts at alcohol and drug treatment indicated that it was unlikely he would be able to abstain from alcohol and drug use in the community and, accordingly, a term of imprisonment was required.⁵⁰

As discussed in Chapter Six, rehabilitation is a legitimate and important goal of sentencing.⁵¹ However, other important goals (such as deterrence and retribution) may point towards a sentence that is unlikely to assist the offender's long-term rehabilitation. Courts are required to consider all of the relevant sentencing principles and determine the appropriate sentence depending upon the particular circumstances of the case. If an alcohol- or drug-dependent offender has made significant gains in treatment, the court may consider that the offender has strong prospects of rehabilitation and the community is best protected by imposing a sentence that facilitates continued efforts at reform.

It is in this context that court intervention programs addressing alcohol and drug problems are important.⁵² For some offenders there may be no opportunity to engage in treatment before sentencing (because the offender is in custody or because no treatment options are available⁵³) and, therefore, there is no realistic way for the court to assess the offender's prospects for future reform. In borderline cases the court is faced with a dilemma: imprison a drug-dependent offender and possibly further exacerbate the problem and increase the risk of reoffending in the future, or give the offender a chance. If the latter course is chosen, the traditional approach has been to simply trust the offender's desire to reform and impose a community-based sentence. However, the court plays no further role in the administration of that sentence and will not know if the offender has complied with the conditions of the order unless formal breach proceedings are instituted by corrective services.

Because drug courts and other court intervention programs deliver judicially supervised drug treatment, they provide a mechanism to 'test' the offender's motivation and ability to refrain from drug or alcohol use and lead a law-abiding life. The court is able to strictly and regularly supervise the offender's progress, and it can therefore terminate the program for non-compliance at any time (and then sentence the offender in the usual manner). Also, drug courts and other programs recognise that addiction cannot be cured overnight and that drug- and alcohol-dependent offenders need substantial support and encouragement in their treatment efforts. As Freiberg argues, the traditional court system has 'also failed because it could not accept constant relapse and recidivism as a normal part of the support process. It is into this space that drug courts have emerged'.⁵⁴

47. [2005] WASCA 92.

48. *Ibid* [24] (Steytler P, McLure JA concurring). The offender had, to a significant extent, complied with the drug court program.

49. [2006] WASC 31.

50. *Ibid* [52] & [72].

51. See discussion under 'The Purpose of Sentencing', Chapter Six.

52. See *Henry* [1999] NSWCCA 111, [343] (Simpson J).

53. A survey of illicit drug users in a number of locations in Australia (including Western Australia) found that 28% of the drug users had unsuccessfully tried to enter treatment during the preceding five years. Of these, over half reported that there was no available treatment program in their area: Treloar C et al, *Barriers and Incentives to Treatment for Illicit Drug Users*, Australian Department of Health and Ageing, National Drug Strategy Monograph Series No. 53 (2004) xv.

54. Freiberg A, 'Australian Drug Courts' (2000) 24 *Criminal Law Journal* 213, 219.

Drug courts

Specialist drug courts exist in five Australian jurisdictions: Western Australia, South Australia, New South Wales, Victoria and Queensland.¹ Most Australian drug courts are only available for adult offenders; however, both Western Australia and New South Wales have a youth drug court. 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. The common feature of all drug courts is the diversion of drug-dependent offenders from imprisonment into 'judicially supervised drug treatment and rehabilitation'.² However, not all drug courts are the same – there are different operational and legal processes in each jurisdiction.

THE DEVELOPMENT OF DRUG COURTS

Drug courts began in the United States. The first drug court was established in 1989 in Dade County, Florida.³ There are now almost 1700 drug courts in the United States with 300 additional drug courts being planned.⁴ Drug courts have also been established in numerous international jurisdictions including Australia, Canada, Ireland, Scotland and New Zealand.

The development of drug courts in the United States was instigated by the judiciary in response to the pressure of increasing caseloads.⁵ From 1984 until 1999 (as a result of the 'War on Drugs') the number of people charged with drug offences in the United States federal courts more than doubled.⁶

The proportion of federal prisoners incarcerated for drug offences rose from 16% in 1970 to 60% by 1999.⁷ With this massive increase, and with rising imprisonment rates, the effectiveness of traditional responses to drug offending was questioned.⁸ Overall, the traditional response to drug offences in the United States has been extraordinarily punitive.⁹

When they were first established, drug courts in the United States targeted first offenders charged with drug offences, rather than more serious long-term offenders charged with drug-related offending (such as property offences committed to support a drug habit).¹⁰ Some drug courts still limit eligibility to first offenders; others target 'hard-core' drug users with significant but non-violent offending histories.¹¹ Now some United States drug courts also enable participation by offenders charged with other types of offending.¹²

1. The Northern Territory has an Alcohol Court. In 2007 Tasmania introduced the Court Mandated Diversion Program. This program operates statewide and, for more serious offenders, a Drug Treatment Order may be imposed and supervised by any magistrate: see <http://www.justice.tas.gov.au/corporateinfor/projects/court_mandate_diversion> accessed 15 January 2008. The Treatment Referral Program in the Australian Capital Territory commenced in 1989 – it is a post-sentence order directing the offender into drug treatment. The offender is supervised and monitored by a Treatment Assessment Panel: see *Drugs of Dependence Act 1989* (ACT).
2. Freiberg A, 'Australian Drug Courts' (2000) 24 *Criminal Law Journal* 213, 214.
3. This was the first drug treatment court. Specialist drug courts for case processing purposes only were established earlier: Hoffman M, 'The Drug Court Scandal' (2000) 78 *North Carolina Law Review* 1437, 1460.
4. Wolf R, 'Law as Therapy: What impact do drug courts have on judges? An interview with Judge Peggy Fulton Hora' (2008) 1 *Journal of Court Innovation* 159, 160.
5. Lawrence R & Freeman K, 'Design and Implementation of Australia's First Drug Court' (2002) 35 *Australian and New Zealand Journal of Criminology* 63, 65.
6. Lind B et al, *New South Wales Drug Court Evaluation: Cost-effectiveness* (Sydney: NSW Bureau of Crime Statistics and

- Research, 2002) 1. In New York from 1980 to 2000 the number of statewide arrests for drug offences increased by over 400%: Rempel M et al, *The New York State Adult Drug Court Evaluation* (New York: Center for Court Innovation, 2003) 5.
7. Hoffman M, 'The Drug Court Scandal' (2000) 78 *North Carolina Law Review* 1437, 1459. See also Hora P et al, 'Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the criminal justice system's response to drug use and crime in America' (1999) 74 *Notre Dame Law Review* 101, 110.
8. Lind B et al, *New South Wales Drug Court Evaluation: Cost-effectiveness* (Sydney: NSW Bureau of Crime Statistics and Research, 2002) 1.
9. As at 2000 the penalty for a first offence of possession of a controlled substance (except cocaine) was a maximum of 12 months' imprisonment. For a second offence, the penalty was a mandatory minimum of 15 days' imprisonment up to a maximum of two years. For a third offence, the penalty was a mandatory minimum of 90 days' imprisonment up to a maximum of three years. For a first offence of more than five grams of cocaine (or a second offence of more than three grams or a third offence of more than one gram) the penalty was a mandatory minimum sentence of five years' imprisonment with a maximum of up to 20 years. Some offences involving the sale or manufacture of controlled substances carried mandatory minimum terms of 10 years' imprisonment with a maximum of life imprisonment: Hoffman M, 'The Drug Court Scandal' (2000) 78 *North Carolina Law Review* 1437, 1458.
10. Freeman K, 'Evaluating Australia's First Drug Court: Research challenges' (Paper presented at the *Evaluation in Crime and Justice: Trends and Methods* conference, Canberra 24–25 March 2003) 7.
11. See Hoffman M, 'The Drug Court Scandal' (2000) 78 *North Carolina Law Review* 1437, 1462. The Miami Drug Court in Dade County, Florida initially only accepted first time offenders but has since been expanded to include repeat drug offenders: Hora P et al, 'Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the criminal justice system's response to drug use and crime in America' (1999) 74 *Notre Dame Law Review* 101, 141.
12. Freiberg A, 'Australian Drug Courts' (2000) 24 *Criminal Law Journal* 213, 227. See also Belenko S, 'Research on Drug Courts: A critical review' (1998) *National Drug Court Institute Review* 10, 11.

A decade after the commencement of the first drug court in the United States, the first Australian drug court (in Parramatta, New South Wales) was established. Within a few years, four more jurisdictions followed suit. While Australian drug courts are based on the United States model, the impetus for their establishment and the context in which they operate are significantly different. It has been observed that drug courts in Australia developed more in response to 'widespread public concern over drug-related crime than [to] public, political or judicial concern over the effect of drug arrests or drug laws on court congestion'.¹³ The traditional approach to drug use and related crime was seen as ineffective; in particular, many offenders who were imprisoned quickly resumed their life of drug addiction and crime upon release.¹⁴ The establishment of drug courts in Australia has been largely driven by government policy¹⁵ reacting to the drug-crime problem. As a consequence, Australian drug courts invariably target serious repeat drug-dependent offenders.

In addition, it has been argued that drug courts developed as part of a wider 'problem-solving' movement within the criminal justice system.¹⁶ A key feature of these 'problem-solving' initiatives is the direct involvement of the judiciary; judicial officers monitor offenders and, in drug courts, judicial officers are actively involved in case management. It has been observed that:

In many ways the actual programs offered through drug courts are not new and draw on decades of research on treating offenders and people with drug problems. The new approach represented by drug courts is the much more intimate involvement of the courts in the management of treatment.¹⁷

It has also been observed that, unlike the United States, Australia had a 'well developed range of treatment options and a number of mechanisms to encourage offenders into treatment'.¹⁸

13. Lind B et al, *New South Wales Drug Court Evaluation: Cost-effectiveness* (Sydney: NSW Bureau of Crime Statistics and Research, 2002) 2. See also Wundersitz J, *Criminal Justice Responses to Drug and Drug-Related Offending: Are they working?* Australian Institute of Criminology, Technical and Background Paper No. 25 (2007) 2.
14. Popovic J, 'Judicial Officers: Complementing Conventional Law and Changing the Culture of the Judiciary' (2003) 20 *Law in Context* 121, 123. See also Briscoe S & Coumarelos C, 'New South Wales Drug Court: Monitoring Report' (2000) 52 *NSW Bureau of Crime Statistics and Research: Crime and Justice Bulletin* 1.
15. Indermaur D & Roberts L, 'Finding Alternatives to Imprisonment' (2005) 86 *Reform* 28, 28. In three Australian jurisdictions legislation was enacted prior to the commencement of the drug court. The South Australian Drug Court is a formal government initiative: see Courts Administration Authority – South Australia, 'Magistrates Court: Drug Court' <http://www.courts.sa.gov.au/courts/drug_court> accessed 12 January 2008.
16. McGlone D, 'Drug Courts: A departure from adversarial justice' (2003) 28 *Alternative Law Journal* 136, 138.
17. Crime Research Centre, *Evaluation of the Perth Drug Court Pilot Project*, Final Report (2003) 14–15.
18. Indermaur D & Roberts L, 'Drug Courts in Australia: The first generation' (2003) 15 *Current Issues in Criminal Justice* 136, 145.

KEY FEATURES OF AUSTRALIAN DRUG COURTS

There are two important differences between drug court programs and traditional sentencing orders. First, compliance with the program is monitored by a court-based team (which is led by the judicial officer) instead of a community corrections officer (probation officer). Second, non-compliance does not necessarily lead to the cancellation of the program.¹⁹ Drug court participants are given a number of chances in recognition of the difficulty in overcoming drug addiction.

Australian drug courts have a number of common features:

Reducing drug use and related crime: Drug courts aim to encourage and assist drug-dependent (and sometimes alcohol-dependent) offenders to abstain from drug use and, as a consequence, reduce drug-related offending.

Targeting serious offenders facing imprisonment: Australian drug courts generally target offenders facing imprisonment. Participants may be facing imprisonment because they have committed one very serious offence, or because they have committed a number of offences and have a significant criminal record. It is important to emphasise that a 100% success rate is unrealistic because drug court programs deal with an 'entrenched client group'.²⁰ Because they are facing imprisonment, drug court participants are arguably the most 'legally coerced' group of offenders.

Intensive judicially supervised drug treatment: Drug court programs typically involve three phases over a 12-month period. Each phase is progressively less stringent. During the first phase, participants are required (either via bail conditions or other court orders) to appear in court weekly, attend counselling sessions weekly, and submit to urinalysis three times per week. The participant's progress is carefully monitored by the drug court team which includes the judicial officer. 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.

Collaborative team-based approach: The drug court team usually includes a judicial officer, a police prosecutor, a defence lawyer, program staff and/or treatment providers. This team regularly meets to

19. Makkai T, 'Drug Courts: Issues and Prospects' (1998) 95 *Australian Institute of Criminology Trends and Issues* 2.
20. Lawrence R & Freeman K, 'Design and Implementation of Australia's First Drug Court' (2002) 35 *Australian and New Zealand Journal of Criminology* 63, 68.

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.

Despite these common features, 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.²¹ 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.²² Some drug courts target drug-related offending by requiring a nexus between the drug dependency and the relevant offences;²³ but others (such as the Perth Drug Court), simply target drug-dependent offenders.²⁴

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.²⁵ 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.²⁶ 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 a pre-sentence option.

THE PERTH DRUG COURT

The Perth Drug Court commenced in December 2000 as a pilot project for two years.²⁷ The development of the Perth Drug Court followed a 'feasibility study' prepared for the (former) Ministry of Justice and (former) Drug Strategy Office. Despite a recommendation that legislation should be passed to support the program, the Perth Drug Court commenced without any specific legislative powers.²⁸ The program relied on existing legislation to defer sentencing for a maximum of six months while the offender participated in the program. The primary objective of the Perth Drug Court is to reduce illicit drug use and related offending. In addition, the program aims to assist offenders to achieve a positive lifestyle including improved family relationships, improved health and the opportunity for training and employment.²⁹

The program has changed significantly since its inception. At the start (unlike most other Australian drug courts) the Perth Drug Court targeted a broad range of offenders. There were three distinct program streams. The least intensive was for minor cannabis offences,³⁰ the middle stream was for minor drug-related offences,³¹ and the most intensive was for more serious offenders.³² Even at the 'hard-end', many participants were not facing imprisonment before commencing the program.³³ The first evaluation of the Perth Drug Court found that during the pilot phase 55.6% of participants completed the program.³⁴ Only one-third of the participants who were terminated from the program were sentenced to imprisonment.³⁵ The fact that the majority of unsuccessful participants remained in the community demonstrates that, in its early

21. In New South Wales eligible applicants are required to undergo detoxification and assessment at a dedicated drug court unit within the Metropolitan Remand and Reception Centre: see <http://www.lawlink.nsw.gov.au/lawlink/drug_court/11_drugcourt.nsf/pages/adrgcrt_aboutus#6> accessed 1 May 2008. The Parramatta Correctional Centre also has a dedicated wing for drug court participants who are serving custodial sanctions see <http://www.dcs.nsw.gov.au/offender_management/offender_management_in_custodymanagement/Correctional_Centres/paramatta.asp> accessed 1 May 2008. It has been observed that the availability of a drug treatment unit is critical because it provides a safe and therapeutic place for detoxification: Barrow B & Popovic J, *Drug Courts Operating in Other States* (2001) 20.

22. 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).

23. See *Sentencing Act 1991* (Vic) s 18Z(c); *Drug Court Act 2000* (Qld) s 6; South Australian Courts Administration Authority <http://www.courts.sa.gov.au/courts/drug_court/index.html> accessed 12 January 2008.

24. See *Drug Court Act 1998* (NSW) s 5; *Perth Drug Court Manual* (2007) 10.

25. The New South Wales Drug Court is a separately constituted court within the criminal jurisdiction of the local court and the District Court: *Drug Court Act 1998* (NSW) s 24. In Victoria, a drug court division of the magistrates court is created under s 4A of the *Magistrates Court Act 1989* (Vic). Sections 18X, 18Y and 18Z of the *Sentencing Act 1991* (Vic) provide for a Drug Treatment Order which is only available to the Victorian Drug Court. In Queensland, the legislation provides that the Governor may declare particular magistrates courts to be drug courts: *Drug Court Act 2000* (Qld) s 9. Also, this legislation provides for an Intensive Drug Rehabilitation Order.

26. Like the Perth Drug Court, 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.

27. Staff who had worked for the Western Australia Court Diversion Service (CDS) were subsumed into the Drug Court program as Court Assessment and Treatment Service officers (CATS). The CDS commenced in 1998 and was a court diversion program for drug-dependent offenders operating before conviction or before sentencing: Crime Research Centre, *Evaluation of the Perth Drug Court Pilot Project*, Final Report (2003) 49.

28. *Ibid* 29.

29. See *Perth Drug Court Manual* (2007) 3; King M, 'Perth Drug Court Practice' (2006) 33 (11) *Brief* 27, 29.

30. This was called the Brief Intervention Regime.

31. This was called the Supervised Treatment Intervention Regime.

32. This was called the Drug Court Regime.

33. Although data was incomplete, the evaluators noted that there were many offenders with indicated non-custodial sentences: Crime Research Centre, *Evaluation of the Perth Drug Court Pilot Project*, Final Report (2003) 94.

34. *Ibid* 102–103. The completion rates were higher for the less intensive streams: 80% of participants completed the Brief Intervention Regime, 75% of participants completed the Supervised Treatment Intervention Regime, and 43.5% of participants completed the Drug Court Regime. In the first evaluation the analysis of reoffending rates was inconclusive: *ibid* 128.

35. *Ibid* 108.

stages, the Perth Drug Court was not operating as an alternative to imprisonment.

The evaluators emphasised two pressing issues for the future of the program: the need for legislation and the fact that the program length was insufficient. To a very limited extent these issues have been rectified. The Pre-Sentence Order (PSO), introduced in 2003, enables some offenders to participate in the Drug Court for up to two years (instead of the previous six months). Significantly, because the PSO is only available if the offence(s) warrant an immediate term of imprisonment, the introduction of this order shifted the focus to more serious offenders facing imprisonment.³⁶

A subsequent review (conducted by the Department of the Attorney General) found that the Perth Drug Court had a positive impact on reoffending. This review considered offenders who had participated in the Drug Court during its first three years; 46.4% of these participants did not return to correctional services (as a result of new offending) within the following two years. This figure compares favourably to other groups of offenders: 29.4% of prisoners and 36% of offenders who had been subject to orders supervised by corrections did not return to correctional services in the subsequent two year period.³⁷ It was also found that the cost of the Perth Drug Court was higher than community-based orders but lower than prison. However, after factoring in reduced recidivism it was concluded that the Perth Drug Court was more cost-effective than the other two options.³⁸ This evaluation was limited to the previous regime – as far as the Commission is aware the Perth Drug Court has not been evaluated or reviewed since the introduction of the PSO.³⁹

Program operation

The Perth Drug Court operates from a separate courtroom at the Central Law Courts. It has a dedicated magistrate, and it sits daily with particular days reserved for monitoring the performance of participants already engaged in the program. The program operates in the magistrates court, but it also takes referrals from the District and Supreme Courts. For superior court matters, the superior court judge will determine if an offender is allowed to participate (and the ultimate sentence at the end of the program) and the Drug Court magistrate will monitor the offender's progress during the program.³⁹

36. See *Sentencing Act 1995* (WA) s 33A.

37. The review noted that similar groups of offenders were considered in the study; that is, offenders who had committed drug-related offences or were drug-dependent: Department of the Attorney General, *A Review of the Perth Drug Court* (2006) 1 & 7.

38. Ibid 1.

39. *Perth Drug Court Manual* (2007) 4.

There are four different program streams currently available in the Perth Drug Court.⁴⁰

Supervised Treatment Intervention Regime (STIR): STIR is a statewide program available in a number of regional magistrates courts for less serious offending or for offenders who are not facing imprisonment. In the metropolitan area it is administered by the Perth Drug Court (one day per week is set aside for STIR participants).⁴¹ The STIR program lasts for approximately four to six months and involves fortnightly or monthly appearances in the Drug Court, weekly urinalysis and regular counselling.⁴² The assessment for suitability in the STIR program is undertaken by program staff in the referring court, but the Drug Court may reject the participant if he or she is considered unsuitable. If this occurs, the offender will be sentenced by the Drug Court or referred to an alternative drug court program.⁴³ Because the Drug Court supervises STIR participants in much the same way as other STIR programs throughout the state,⁴⁴ the Commission discusses this program in more detail in the section below dealing with other court intervention programs. References to drug court participants in this section do not include STIR participants.

Drug Court Regime (DCR): The DCR is a drug program lasting for approximately six months. Following a plea of guilty, sentencing is deferred to enable participation.⁴⁵ The DCR participants tend to have committed moderately serious offences and are usually facing a short term of imprisonment or a non-custodial sentence.⁴⁶ Nonetheless, there are some offenders facing substantial periods of imprisonment who are admitted onto the DCR. More serious offenders have been included in DCR because of the statutory restrictions placed on the availability of the Pre-Sentence Order.⁴⁷ The program is adapted for this group by reducing the number of breach

40. Department of the Attorney General website only refers to two (the DCR and the PSO).

41. The Commission was advised that STIR numbers in the Perth Drug Court are low and there is a need to increase program numbers: meeting with Magistrate Pontifex (20 February 2008).

42. *Perth Drug Court Manual* (2007) 19.

43. Ibid 24–26.

44. Meeting with Magistrate Pontifex (20 February 2008).

45. Under s 16 of the *Sentencing Act 1995* (WA) sentencing cannot be deferred for more than six months after a plea of guilty is entered. During preliminary consultations the Commission was told that the DCR would operate more effectively if it could be extended beyond the six month limit: meeting with Valerie Thatcher, CATS and Ian Donaldson, Department of Corrective Services (21 February 2008). See also Wager J, 'The Drug Court: Can a relationship between health and justice really work?' (Paper presented at the *Alcohol and Other Drugs: Collaboration for better care*, Inaugural Alcohol & Other Drug Symposium, Fremantle, 20–21 August 2002) 15. In Chapter Six the Commission has proposed that s 16 of the *Sentencing Act* be amended to allow any court to defer sentencing for up to a maximum of 12 months: see Proposal 6.8.

46. See <<http://www.justice.wa.gov.au/D/drugcourt.aspx>> accessed 9 May 2008.

47. For example, offenders who committed an offence during a period of suspended imprisonment are not eligible for a Pre-Sentence Order.

points that can be incurred before the participant is terminated.⁴⁸

Pre-Sentence Order (PSO): The PSO⁴⁹ 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. It is intended that successful completion of the order will result in a non-custodial sentence. The order can be imposed for up to two years with various conditions attached; however, the practice in the Drug Court is to impose a PSO for a period of 12 months.⁵⁰ The PSO is a generic order; however, there are additional statutory provisions that provide the Drug Court with additional powers to set specific requirements of the order.⁵¹ A PSO cannot be imposed if the offender was subject to an early release order⁵² or a suspended term of imprisonment at the time of committing the current offence. Those facing mandatory terms of imprisonment are also excluded.

Conditional Suspended Imprisonment (CSI): A CSI order, which is a term of imprisonment suspended for a set period of time with specific conditions, became available in 2006 and was introduced partly to support the operation of the Drug Court.⁵³ The provisions of the *Sentencing Act 1995* (WA) enable the Drug Court (rather than a community corrections officer) to set assessment and treatment requirements; impose curfew monitoring conditions; and regularly monitor the offender's progress throughout the order.⁵⁴ Currently, CSI can only be imposed by the Supreme Court, the District Court, the Children's Court or the Perth Drug Court.⁵⁵ If a superior court imposes CSI it may

order that the Drug Court monitor the offender's progress throughout the order. Unlike a PSO, CSI can be imposed if the offences were committed during a period of suspended imprisonment.⁵⁶ CSI has been used by the Perth Drug Court for offenders who have breached a suspended sentence; however, it is now current practice to exclude from the Drug Court matters within the magistrate's jurisdiction if the only available option is CSI.⁵⁷ This policy has arisen because CSI has proven to be ineffective for Drug Court purposes (since the order is a post-sentencing option, offenders cannot be placed on bail and the monitoring of curfew conditions and residential conditions cannot be undertaken by the police). Further, the relevant statutory provisions do not enable immediate and flexible responses by the Drug Court to non-compliance.⁵⁸ It is apparent from preliminary consultations that CSI is not the preferred option for the Drug Court.⁵⁹

Although the precise requirements for each stream differ, drug court participants are typically required to attend court weekly, undergo urinalysis three times a week, attend counselling weekly, attend the Court Assessment and Treatment Service (CATS) weekly, reside at a nominated address and abide by a curfew at night. Many participants also undergo residential drug treatment. Over time, the requirements of the program may be progressively relaxed depending on the participant's progress, which is closely monitored and managed by the Drug Court Team (the magistrate, CATS officers, lawyers, the police prosecutor, a psychologist and medical officer). CATS officers are senior correctional staff responsible for the assessment and supervision of offenders during the program. The capacity of the Perth Drug Court program is limited by the number of CATS officers. There are six CATS officers each with capacity to manage 15 offenders, thus the Drug Court currently has a total limit of 90 participants.⁶⁰

Eligibility criteria

The Perth Drug Court is only available to offenders with an illicit drug dependency who are willing to

48. The breach point system is discussed further below. For more serious offenders facing imprisonment who are ineligible for a Pre-Sentence Order, the breach point limit is 10 points; for all other drug court participants the limit is 20 points: meeting with Magistrate Pontifex (26 February 2008).

49. See *Sentencing Act 1995* (WA) s 33A.

50. Meeting with Sergeant Julia Foster, Drug Court prosecutor (26 February 2008).

51. The PSO was introduced principally for the purposes of the Drug Court. For a detailed discussion of PSOs and the Commission's proposals in relation to these orders, see 'Pre-Sentence Orders', Chapter Six.

52. An early release order is a parole order, work release order, re-entry release order or home detention order: *Sentencing Act 1995* (WA).

53. Western Australia, *Parliamentary Debates*, Legislative Assembly, 24 August 2004, 5473 (Mr JA McGinty, Attorney General). For further discussion of this order and the Commission's proposals, see 'Conditional Suspended Imprisonment', Chapter Six.

54. *Sentencing Act 1995* (WA) ss 84A, 84C & 84O.

55. 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*, 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).

56. *Sentencing Act 1995* (WA) s 81.

57. *Perth Drug Court Manual* (2007) 22. The Drug Court may accept an offender even if he or she has some charges where the only possible option is CSI so long as there are other charges where a PSO can be imposed and the sentencing for the excluded matters does not require immediate imprisonment. If a superior court imposes CSI and orders that the offender is to be managed by the Drug Court, the Drug Court endeavours to supervise the order as if it were a PSO: *Perth Drug Court Manual* (2007) 22.

58. Formal breach proceedings must be instigated by the Chief Executive Officer (corrections) and the available options in dealing with any breach are limited. A court dealing with the breach of CSI may fine the offender up to a maximum of \$1,000 and must either order that the offender serve the term (or part of the term) of imprisonment, substitute another CSI or make no order in relation to CSI: *Sentencing Act 1995* (WA) s 84L.

59. Meeting with Magistrates Pontifex and Stewart (20 February 2008); meeting with Catie Parsons, LAC (20 February 2008); meeting with Tanya Watt, DPP (21 February 2008).

60. *Perth Drug Court Manual* (2007) 4.

participate in drug treatment.⁶¹ Therefore, offenders with only alcohol-related issues are excluded. All that is necessary is the existence of a drug dependency; the eligibility criteria do not require a 'direct connection between the use of illicit drugs and the facts of the offence under consideration'.⁶² Participants must also be willing to reside in the Perth metropolitan area for the duration of the program. Offenders with 'serious psychopathology or very serious personality problems and psychiatric issues that require ongoing intensive psychiatric or psychological intervention' are not eligible.⁶³

While the Drug Court clearly targets offenders facing imprisonment, those offenders facing mandatory or inevitable imprisonment are excluded. The phrase 'inevitable imprisonment' simply means that the circumstances are so serious that a term of imprisonment must be imposed. Thus, the Drug Court is aimed at offenders who are on the borderline: imprisonment is warranted but successful compliance with the program could 'tip the balance' and enable a non-custodial sentence to be imposed.

Certain offences are excluded from the program including homicide, grievous bodily harm, threat to kill, stalking, dangerous driving causing death, sexual offences, sophisticated drug trafficking charges⁶⁴ and certain violent aggravated burglaries. The principal basis for excluding these offences is to ensure the safety of treatment staff; as a general rule, if there is any 'demonstrated violence in the offending behaviour' it is unlikely that the offender will be accepted onto the program. Past offending will be taken into account – if the offender has a criminal record for 'actual violence' or sexual assaults the offender may be rejected.⁶⁵

In order to participate, an offender must plead guilty to all offences that are being referred to the Drug Court.⁶⁶ The Drug Court requires all outstanding charges to be listed in the court in order that the offender can be properly assessed. If the offender has pleaded not guilty to one or more offences, he or she may be accepted onto the program, so long as the contested charges are not closely related to the matters being referred to the Drug Court. If the charges are closely related it may prevent the offender from being open about the circumstances

of the offending behaviour. Also, an offender will not be accepted if the contested charges are excluded offences.⁶⁷ The principal justification for requiring a plea of guilty is that drug courts 'are about offenders confronting their addiction and being willing to do something about it'.⁶⁸ Further, participants are expected to give priority to the Drug Court and because the program is so intensive and demanding, outstanding contested matters (especially if serious) may compromise the offender's treatment regime.⁶⁹

Referral and court process

The Perth Drug Court accepts referrals from any magistrates court in Western Australia. However, as stated above, participants must reside in Perth for the duration of the program. Once referred, an offender is required to attend a compulsory information session before the first appearance in the Drug Court.⁷⁰ At the first appearance, the Drug Court magistrate will consider the offender's suitability after hearing from the police prosecutor and defence counsel. If considered suitable, the offender will be required to undergo a comprehensive assessment (undertaken by CATS). If the offender is in custody, the assessment will take 21 days; if the offender is on bail, the assessment period is 28 days.⁷¹ During the pilot stage (December 2000–November 2002) there were 729 offenders referred to the Perth Drug Court.⁷² Nearly 50% of all referrals were not accepted onto the program; it was noted that many referrals were unsuccessful because the offenders did not meet the eligibility criteria and this demonstrated that there was some inefficiency in the referral process.⁷³ However, it appears that this is no longer a significant problem because, although some offenders are still 'incorrectly' referred to the Drug Court, it is relatively easy to ascertain ineligibility on the first appearance and many ineligible offenders are redirected onto the STIR program.⁷⁴

For those offenders who are not remanded in custody, the bail conditions include residential and curfew conditions; reporting to CATS; undertaking urinalysis; and complying with all lawful directions of CATS.⁷⁵ Residential and curfew conditions are usually set as 'protective bail conditions'. If participants breach a protective condition they are liable to be charged with the offence of breaching bail. Further, a

61. Ibid 10. It has been suggested that some offenders may feign drug dependency to enable participation in drug court programs in order to avoid imprisonment: McGlone D, 'Drug Courts: A departure from adversarial justice' (2003) 28 *Alternative Law Journal* 136, 137. The Commission was informed that some offenders overstate the extent of their drug problems during the referral stage but the true nature of the drug problem is usually quickly ascertained by CATS officers: meeting with Valerie Thatcher, CATS (21 February 2008).

62. *Perth Drug Court Manual* (2007) 31.

63. Ibid 30 & 32.

64. The court may accept 'low level dealers' as long as there is no risk to other participants: King M, 'Perth Drug Court Practice' (December 2006) *Brief* 27, 27.

65. *Perth Drug Court Manual* (2007) 31–34.

66. Ibid 30; Department of the Attorney General, *What is the Drug Court: Information for adult participants* (2008).

67. *Perth Drug Court Manual* (2007) 31.

68. See <<http://www.justice.wa.gov.au/Q/qadrugcourt.aspx>> accessed 9 May 2008.

69. Meeting with Magistrate Pontifex (26 February 2008).

70. *Perth Drug Court Manual* (2007) 10.

71. Ibid 30. The Commission was told that about half of the participants are in custody at the time of their first appearance in the Drug Court and the remaining participants are on bail (usually with a surety): meeting with Sergeant Julia Foster (26 February 2008).

72. Crime Research Centre, *Evaluation of the Perth Drug Court Pilot Project*, Final Report (2003) 73.

73. Ibid 91 & 93.

74. Meeting with Valerie Thatcher, CATS (21 February 2008).

75. *Perth Drug Court Manual* (2007) 30.

breach of a protective condition of bail is classified as a serious offence under the *Bail Act 1982* (WA).⁷⁶

During the assessment phase offenders are expected to 'demonstrate their commitment to changing their lifestyle and their commitment to the Drug Court'.⁷⁷ Failure to comply with bail conditions during the assessment period will significantly prejudice the offender's chances of being accepted onto the program. At the end of the assessment period the CATS officer will provide a report about the offender's suitability to be placed on a Drug Court program to the Drug Court Team.⁷⁸ If unsuitable, the offender will be sentenced in the usual manner.

If the offences fall within the magistrate's jurisdiction, participants are given an 'indicated sentence'.⁷⁹ The indicated sentence 'is what the participant would normally receive as their penalty if there was no Drug Court'.⁸⁰ In determining the indicated sentence, the magistrate considers submissions from defence counsel and the police prosecutor.⁸¹ 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. A further benefit of this practice is that it reduces the potential for the Drug Court magistrate, after becoming closely involved in the participant's life over a substantial period of time, to lose objectivity when sentencing an unsuccessful participant.⁸²

The Drug Court also takes referrals from the Supreme Court and the District Court. For District Court matters, the Drug Court magistrate may decide to accept a participant before his or her first appearance in the District Court. For superior court matters, a representative from the Office of the Director of Public Prosecutions (DPP) makes submissions about the offender's suitability. If considered suitable by the Drug Court magistrate, the offender will commence the program on bail until the matter is listed in the superior court.⁸³ The superior court may decide to enable further participation in the program and, if so, the superior court will impose a PSO with a requirement that the order be supervised by the

Drug Court.⁸⁴ Because the Drug Court magistrate does not have jurisdiction to sentence the offender, an indicated sentence is not given for superior court matters. However, the DPP advises the offender of its likely submission on penalty in the event that the offender is successful (or unsuccessful).⁸⁵

Throughout the program, participants are regularly monitored and managed by the Drug Court Team. Before each court review, the team meets to discuss the participant's progress. Participants are required in the initial stages to appear in court weekly. At each court review the participant is actively monitored by the Drug Court magistrate. The magistrate speaks directly to the participant, offering praise and encouragement for success and, if necessary, warnings and condemnation for non-compliance.

Further, the Drug Court uses a breach point system to reward or sanction offenders at each court review hearing. Points are imposed for infractions (such as positive drug tests or failing to attend appointments); however, points can also be deducted for compliant behaviour.⁸⁶ A breach point score of zero demonstrates that the participant is complying well with the program. Participants are usually terminated from the program if they incur 20 breach points.⁸⁷ If participants are close to the breach point limit, or they are struggling to maintain compliance, bail may be revoked for a short period as an informal 'custody sanction'. The effect of serving a custody sanction is that accrued breach points are deducted. The Commission has been told that this only occurs once throughout the program.⁸⁸

76. This means that if the offender was already on bail for another serious offence he or she will be required to show exceptional circumstances in order to be released on bail again.

77. *Perth Drug Court Manual* (2007) 12.

78. *Ibid* 13.

79. *Ibid* 14.

80. *Ibid* 6.

81. King M, 'Perth Drug Court Practice' (2006) 33 (11) *Brief* 27, 28.

82. Eardley T et al, *Evaluation of the New South Wales Youth Drug Court Pilot Program*, University of New South Wales Evaluation Consortium, Final Report (2004) 147.

83. In Chapter Six the Commission has proposed that the *Bail Act 1982* (WA) be amended to provide that, when committing an offender for sentence to a superior court, a magistrate may order that the offender appear before a 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: see Proposal 6.4.

84. Under s 33C(2) of the *Sentencing Act 1995* (WA) a superior court judge may also order that the offender reappear before the superior court throughout the order for review: see further *Perth Drug Court Manual* (2007) 35–41. In *O'Brien* [2007] WASC 292, the offender (who had no prior record and an extensive drug problem) was placed on a 12-month PSO for armed robbery (and other offences) to be supervised by the Drug Court and the offender was also required to reappear in the Supreme Court three months later for the sentencing judge to consider how she was progressing on the order. The offender was subject to strict Drug Court requirements and home detention bail.

85. The Commission was told that this practice is done in fairness to participants so that they have some idea of what to expect, and to ensure consistency if different DPP lawyers appear in the Drug Court and in the superior court for sentencing: meeting with Tanya Watt, DPP (21 February 2008).

86. For example, participants will lose one point for missing an appointment or a positive urine test and two points for failing to provide a urine sample: *Perth Drug Court Manual* (2007) 9.

87. Participants will also be terminated (at any time) if they falsify a urine test. Termination is also considered if there is no suitable treatment plan; the participant has absconded or committed new offences; the participant has not significantly reduced his or her drug dependency; the participant threatens other participants, treatment providers or program staff; the participant is found in possession of illicit drugs within the court precincts; or the participant demonstrates a lack of commitment to the program: Magistrates Court of Western Australia, *Drug Court Rules of Court: Terminations of Program* (14 December 2000). The breach point limit may be less for certain participants (eg, superior court matters): Magistrates Court of Western Australia, *Drug Court Rules of Court: Breach Points* (14 December 2000; reviewed June 2005).

88. Meeting with Magistrate Pontifex (20 February 2008).

During court reviews other Drug Court participants are present in the courtroom.⁸⁹ This enables other participants to witness the consequences of non-compliance and be encouraged by the success of others. Successful participants graduate at the end of the program; this occasion is marked by positive words of encouragement from team members and applause from courtroom observers. The magistrate steps down from the bench, shakes the participant's hand and presents a certificate. The participant is then sentenced.

Powers of the court and program outcomes

Successful completion of the drug court program is taken into account in sentencing by the magistrate. For superior court matters, reports about the offender's compliance with the program are prepared for the sentencing judge. For most Drug Court participants the expected outcome for successful completion of the program is a non-custodial sentence. It has been observed that a number of successful participants who had indicated sentences of imprisonment have been sentenced to Community Based Orders, Intensive Supervision Orders and suspended sentences.⁹⁰

Assuming that there is no new offending, the indicated sentence is generally imposed for participants who have been terminated for non-compliance (or who have chosen to leave the program).⁹¹ In some instances, the indicated sentence may be reduced for partial compliance.⁹² For example, the Commission observed one matter where the offender had complied with a PSO for just over a year; the offender had not been charged with any new offences and had tested negative for drug use during the entire period. However, the offender suffered a relapse and committed further offences. His indicated sentence was 15 months' imprisonment, but this was reduced to 12 months' imprisonment because of the offender's compliance with the program for a substantial period of time. For the new offences, the offender was sentenced to four months' imprisonment cumulatively: a total sentence of 16 months' imprisonment with parole.

The *Sentencing Act* provides that if an offender is subject to a PSO the sentencing court (whether that is the Drug Court or another court) 'must take into account the offender's behaviour while subject

to the PSO'.⁹³ The term 'behaviour' is not defined; arguably a sentencing court must take into account both positive and negative performance. In Chapter Six, the Commission proposes that the *Sentencing Act* be amended to provide that anything done by the offender in compliance with a prescribed court intervention program is a relevant sentencing factor and that failure to successfully complete a prescribed court intervention program is not relevant to sentencing.⁹⁴ Offenders should not be discouraged from or penalised for attempting to engage in rehabilitation programs. The Commission is of the view that this proposal is consistent with Drug Court practice: the use of indicated sentences prevents the magistrate from imposing a more severe penalty as a result of non-compliance and compliance with the program is considered during sentencing.

The Children's Court Drug Court

A drug court program is also available in the Perth Children's Court. Juvenile drug courts exist in the United States and a Youth Drug and Alcohol Court commenced in 2000 in New South Wales.⁹⁵ The Perth Children's Court Drug Court targets young offenders who are facing detention.⁹⁶ The program generally lasts for 12 months. Unlike in the adult jurisdiction, there is no restriction on the power to defer sentencing in the Children's Court. Sentencing is deferred and participants are placed on bail with conditions to comply with the drug court program. The President of the Children's Court determines if an offender can participate and sentences the offender at the end of the program; however, a Children's Court magistrate case manages and monitors the offender throughout the program.⁹⁷

The numbers in the Children's Court Drug Court are low: in November 2007 there were a total of nine current participants. From 2001 until 2007 the annual number of participants ranged from 6 to 18 with approximately half completing the program requirements.⁹⁸ Like its adult counterpart, the program's capacity is limited by the number of CATS officers. Although it was expected that a second CATS officer would be appointed at the end of 2007, as at March 2008 this position had not been filled.⁹⁹

89. However, not all drug courts operate in this way. In Victoria participants are not permitted to sit in the courtroom unless they have been invited to attend a graduation ceremony because program staff found that other participants did not always open up with the magistrate if others were present and some participants began copying excuses offered by others: meeting with Scott MacDonald, Deputy Registrar, Drug Court of Victoria (6 December 2007).

90. Airey M & Wiese J, 'How the WA Pilot Drug Court is Progressing: A lawyer's perspective' (2001) 28 (10) *Brief* 12.

91. *Perth Drug Court Manual* (2007) 14.

92. Meeting with Magistrate Pontifex (20 February 2008).

93. *Sentencing Act 1995 (WA)* s 33K(1).

94. See Proposal 6.6.

95. Flick M & Eardley T, *Evaluation of the NSW Youth Drug Court Pilot Program: First implementation review* (Sydney: Social Policy Research Centre, UNSW Evaluation Consortium, 2001) 1.

96. Juvenile participants are usually given an indicated sentence of detention: Crime Research Centre, *Evaluation of the Perth Drug Court Pilot Project*, Final Report (2003) 59.

97. *Ibid* 60; *Perth Drug Court Manual* (2007) 4.

98. Western Australia, Legislative Council, Parliamentary Question on Notice No. 5589, 15 November 2007 (Mr JA McGinty, Attorney General). In March 2008 the Commission was advised that there were eight participants and to take on additional participants it is essential that a second CATS officer is appointed: meeting with Magistrate Vose (1 March 2008).

99. Meeting with Magistrate Vose (1 March 2008).

In the Children's Court, the Drug Court team includes a magistrate, a police prosecutor, a Legal Aid lawyer, a representative from the Aboriginal Legal Service, CATS, a supervised bail officer, a psychologist and a representative from a residential treatment facility. The supervised bail officer is involved in the team because all participants are placed on supervised bail.¹⁰⁰ Bail conditions such as curfews are set by the court but supervised bail officers also set their own rules. If the participant does not comply with the supervised bail requirements, the supervised bail officer can withdraw bail and the participant may then be liable to arrest.

Like the adult Drug Court, the Children's Court Drug Court uses a breach point system to respond to compliance and non-compliance but it operates in reverse: participants are given 20 points at the start of the program, losing points for non-compliance and gaining points for doing well. Bail is also revoked during the program as an informal 'custody sanction' for serious non-compliance.

The traditional focus in sentencing young offenders is rehabilitation and, consequently, traditional Children's Court processes and court intervention programs share many common aspects. Sentencing proceedings tend to examine the young offender's social background and circumstances and impose orders to address underlying problems to ensure that future offending and contact with the criminal justice system is reduced. Further, there are a number of diversionary options available for young offenders in the Children's Court (eg, cautions, juvenile justice teams) with the aim of diverting young people away from the formal criminal justice system and avoiding contact with more serious offenders.¹⁰¹ While court intervention programs divert offenders away from imprisonment or divert offenders into treatment, they do not divert offenders away from the criminal justice system. Instead, the court is actively involved in supervising and monitoring participants' progress and participants are required to appear in court more, not less, often.

The Commission believes that court intervention programs for young offenders should only be aimed at those who are facing significant custodial sentences.¹⁰² Otherwise, it is probable that

participation in court intervention programs will increase or deepen the offender's involvement in the justice system (known as net-widening). Because detention is a sentence of last resort, and because there are many alternative options available for young offenders before they reach the stage of detention,¹⁰³ the likely participant numbers in the Children's Court will be lower than for adults. In Chapter Five the Commission proposes the establishment of a general court intervention program and proposes that this program be piloted in a number of locations, including the Children's Court.¹⁰⁴ Such a program could address not only drug-dependency but issues such as mental impairment, alcohol-dependency and homelessness. The Commission is of the view that a general program in the Children's Court will be more effective than a series of specialist programs, each with only a very small number of participants.

100. Young offenders can only be released on bail if a responsible adult signs an undertaking. Supervised bail officers act as the responsible adult for some young offenders.

101. See further discussion 'Young Offenders', Chapter Six.

102. The Commission was told that it is difficult to manage drug court participants unless they are facing a significant period of detention because some young people will consider that serving a short period of detention (such as two months) is easier than complying with an intensive 12-month drug court program: meeting with Magistrate Vose (1 March 2008). In its early stages, the New South Wales Youth Drug and Alcohol Court had low participant rates; one reason offered for this was that for some offenders the likely penalty was significantly less than the minimum six months required to complete the drug court program. About 25% of young offenders referred to the program chose not to participate even though they

were likely to receive a custodial sentence: Flick M & Eardley T, *Evaluation of the NSW Youth Drug Court Pilot Program: First implementation review* (Sydney: Social Policy Research Centre, UNSW Evaluation Consortium, 2001) 10 & 14.

103. Although there are various options available that does not necessarily mean that all of these options are appropriately resourced to provide effective rehabilitation. The Commission was told that more effective treatment programs for young people are needed across the board: meeting with Tanya Watt, DPP (21 February 2008).

104. See Proposal 5.1. The Commission also seeks submissions about appropriate court intervention programs for young offenders, see Consultation Question 6.6.

Consultation issues – drug courts

THE BENEFITS OF DRUG COURTS

Addressing drug-related offending behaviour

The primary goal of drug courts is to reduce drug use and related offending behaviour.¹ In the United States it has been found that drug court participants commit substantially less crime while the program is in force and, further, it appears that long-term recidivism is also reduced.² In Australia, drug court evaluations suggest similar outcomes.³ As stated earlier, a review of the Perth Drug Court found that reoffending rates for participants were lower than for prisoners and offenders subject to traditional community supervision.⁴

A common finding is that criminal justice outcomes are substantially improved for *successful* drug court participants. An evaluation of the South Australian Drug Court pilot program found that approximately 80% of successful participants had 'lower detected offending levels post-program compared with pre-program'.⁵ Described as one of the 'most rigorous drug court evaluations yet conducted',⁶ the evaluation of the New South Wales Drug Court found that the program was more effective at reducing

crime for those offenders who remained on the program.⁷ A recent long-term recidivism analysis of the Queensland Drug Court program concluded that recidivism rates for graduates 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'.⁸

Although successful participants achieve positive outcomes, a considerable proportion of drug court participants do not complete the program. Approximately, 45% of participants did not complete the pilot Perth Drug Court program.⁹ From May 2002 until 30 November 2007, almost 47% of participants in the Victorian Drug Court had been terminated for non-compliance.¹⁰ During its first 17 months 42.5% of New South Wales Drug Court participants were terminated.¹¹ And, from 2000 to 2006 approximately 53% of the Queensland Drug Court program's participants had been terminated.¹² Thus, the ability to retain participants on drug court programs is critical to achieving better long-term outcomes.

Nonetheless, a level of failure must be expected; drug court participants are typically high risk serious offenders and overcoming drug-dependency is not easy.¹³ Although approximately half of all drug court

1. Some drug courts also expressly include among their objectives the goal of reducing health risks associated with drug use: see eg *Sentencing Act 1991* (Vic) s 18X; *Drug Court Act 2000* (Qld) s 3.
2. Berman G & Feinblatt J, *Good Courts: The case for problem-solving justice* (New York: The New Press, 2005) 155; Indermaur D & Roberts L, 'Finding Alternatives to Imprisonment' (2005) 86 *Reform* 28, 30; Belenko S, 'Research on Drug Courts: A critical review' (1998) *National Drug Court Institute Review* 10, 11. See also Latimer et al, *A Meta-Analytical Examination of Drug Treatment Courts: Do they reduce recidivism?* (Canada: Department of Justice, 2006) 9; 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) xii–xiii.
3. See eg Victorian Department of Justice, *The Drug Court: An evaluation of the Victorian pilot program* (2006) 6–7; Makkai T & Veraar K, *Final Report on the South East Queensland Drug Court*, Australian Institute of Criminology, Technical and Background Paper No. 6 (2003) 8.
4. The review noted that similar groups of offenders were considered in the study, that is, offenders with drug-related offending or drug-dependency: The Department of the Attorney General, *A Review of the Perth Drug Court* (2006) 1 & 7.
5. Corlett E et al, *Offending profiles of SA Drug Court Pilot: Program 'completers'* (Adelaide: Office of Crime Statistics and Research, 2005) 27. Note that this evaluation only compared the offending of participants before and after the program because it was unable to compare offending rates with a comparison group.
6. Freeman K, 'Evaluating Australia's First Drug Court: Research challenges' (Paper presented at the *Evaluation in Crime and Justice: Trends and Methods* Conference, Canberra, 24–25 March 2003) 2. The evaluation process for the New South Wales Drug Court began while the program was still in its planning stages.

7. Lind B et al, *New South Wales Drug Court Evaluation: Cost-effectiveness* (Sydney: NSW Bureau of Crime Statistics and Research, 2002) 66. See also Makkai T & Veraar K, *Final Report on the South East Queensland Drug Court*, Australian Institute of Criminology, Technical and Background Paper No. 6 (2003) 46.
8. 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.
9. Crime Research Centre, *Evaluation of the Perth Drug Court Pilot Project*, Final Report (2003) 102–103. The completion rates were higher for the less intensive streams: 80% of participants completed the Brief Intervention Regime, 75% of participants completed the Supervised Treatment Intervention Regime, and 43.5% of participants completed the Drug Court Regime.
10. Drug Court of Victoria statistics provided to the Commission by Scott MacDonald, Deputy Registrar Victorian Drug Court (6 December 2007). It is not possible to state the number of successful participants during this period because a large number were still currently participating in the program.
11. Briscoe S & Coumarelos C, *New South Wales Drug Court: Monitoring Report*, NSW Bureau of Crime Statistics and Research, Crime and Justice Bulletin No. 52 (2000) 17. Although in 2006 it was reported that the retention rate for the court is 'now at record levels': Dive R, 'Sentencing Drug Offenders' (Paper presented at the *Sentencing: Principles, perspectives and possibilities* conference, Canberra: 10–12 February 2006) 4.
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) xi.
13. Further, it has been noted that non-compliance with drug court programs is more likely to be detected than for traditional

participants fail to complete the program, it has been asserted that retention rates compare favourably with the retention rates of voluntary residential rehabilitation programs.¹⁴ Also, there are potential benefits for unsuccessful participants. In Queensland it was noted that 60% of drug court participants had never previously sought drug treatment in the community. Therefore, even those who failed the program were exposed to treatment options¹⁵ and a number of terminated participants subsequently returned to drug treatment in the community on a voluntary basis.¹⁶ Finally, it is important to acknowledge that drug courts achieve less concrete outcomes: improvements to health and wellbeing; increased employment opportunities; drug free babies; stronger families; and improved personal relationships.¹⁷

Reducing imprisonment

Most Australian drug court programs target offenders facing imprisonment. In South Australia and Queensland, participants must be likely to receive imprisonment;¹⁸ in New South Wales it must be 'highly likely' that imprisonment will be imposed;¹⁹ and the Victorian Drug Court must consider that a sentence of imprisonment would otherwise be appropriate.²⁰ Western Australia is the only jurisdiction that enables participation by offenders who are facing a non-custodial sentence.

Successful drug court participants are rarely sentenced to imprisonment at the completion of the program. For example, in Queensland (over a six-year period) 100% of graduates received a non-custodial sentence whereas 91% of terminated offenders were sentenced to imprisonment.²¹ Accordingly,

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- community-based sentences because of the intensive monitoring involved: Hoffman M, 'The Drug Court Scandal' (2000) 78 *North Carolina Law Review* 1437, 1485.
14. Costanzo J, *Final Report of the South-East Queensland Drug Court Pilot* (July 2003) viii.
 15. Taplin S, *New South Wales Drug Court Evaluation: A process evaluation* (Sydney: NSW Bureau of Crime Statistics and Research, 2002) 79.
 16. Costanzo J, *Final Report of the South-East Queensland Drug Court Pilot* (July 2003) ix.
 17. See McGlone D, 'Drug Courts: A departure from adversarial justice' (2003) 28 *Alternative Law Journal* 136, 138; Freeman K, *New South Wales Drug Court Evaluation: Health, well-being and participant satisfaction* (Sydney: NSW Bureau of Crime Statistics and Research, 2002) viii; Eardley T et al, *Evaluation of the New South Wales Youth Drug Court Pilot Program*, University of New South Wales Evaluation Consortium, Final Report (2004) v.
 18. See <http://www.courts.sa.gov.au/courts/drug_court> accessed 12 January 2008; *Drug Court Act 2000* (Qld) s 6.
 19. *Drug Court Act 1998* (NSW) s 5. Originally the legislation provided that it must be likely that the offender will be sentenced to imprisonment; however, this was changed after the Drug Court had been operating for about six months in order to ensure that the program targeted those actually facing imprisonment: Taplin S, *New South Wales Drug Court Evaluation: A process evaluation* (Sydney: NSW Bureau of Crime Statistics and Research, 2002) 10.
 20. It has been observed that the Victorian Drug Treatment Order is a 'last resort before the imposition of a custodial disposition': McGlone D, 'Drug Courts: A departure from adversarial justice' (2003) 28 *Alternative Law Journal* 136, 137.
 21. 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) 32.

increasing the number of offenders participating in drug courts will reduce the total prison population. So while this is obviously a desirable result for offenders and their families, reducing imprisonment also saves the community a substantial amount of money. In New South Wales, 49% of the participants whose programs were finalised in 2005 (either completed or terminated) did not receive a prison sentence. It was estimated that if these 73 offenders had been sent to prison the total cost would have been \$4.6 million.²²

Reducing costs

Drug courts reduce imprisonment costs, but are they cost-effective? An evaluation of the Victorian Drug Court compared the cost-effectiveness of the program with a comparison group of offenders imprisoned for similar types of offences. The only measure of effectiveness was reoffending rates and therefore other benefits such as reduced drug use and improved health were not considered.²³ The evaluation found that, at least in the short term, the drug court program produced lower reoffending rates than imprisonment.²⁴ On that basis, so long as the Drug Court was not more expensive than prison, it would be cost-effective. The average daily cost of the Drug Court (from May 2002 until May 2004) was \$184 per participant and the average daily cost of imprisonment for the comparison group was \$168 per prisoner. Thus, at first glance, the Victorian Drug Court was more expensive than imprisonment. However, the study period included the 'start up phase' when the maximum capacity for the program had not been reached. It was concluded that if the Drug Court operated at 95% of its capacity the cost would be \$162 per day and it would therefore be cheaper than prison.²⁵ It has been reported that the Perth Drug Court is cheaper than prison but more expensive than supervision by community corrections; however, once reoffending rates are taken into account, the Drug Court is more cost-effective than both of the traditional sentencing options.²⁶ When other savings (such as reduced expenditure in the health system) are included, it is apparent that the Drug Court is significantly more cost-effective than imprisonment.²⁷ The Commission is of the view that the most important

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22. Dive R, *Drug Court of NSW in Review: Reflections on 2005* (2006) 3 & 6.
 23. An evaluation of the health and wellbeing status of current Drug Court participants (as distinct to graduates) found that there was a significant reduction in heroin use among participants. On the other hand, cannabis use increased which may suggest drug substitution: Alberti S et al, *Health and Well-being Study: Victorian Drug Court* (Turning Point Alcohol and Drug Centre & Health Outcomes International, 2004) 3.
 24. King J & Hales J, *Victorian Drug Court Cost-effectiveness Study: May 2002 to December 2004* (St Peters: Health Outcomes International Pty Ltd, 2004) 1–2.
 25. *Ibid* 1–2.
 26. The Department of the Attorney General, *A Review of the Perth Drug Court* (2006) 3.
 27. See McGlone D, 'Drug Courts: A departure from adversarial justice' (2003) 28 *Alternative Law Journal* 136, 138.

future challenge for drug court programs is to ensure that they attract and retain participants who would otherwise be imprisoned.

OPERATIONAL ISSUES

The target group

Drug court graduates are much less likely to reoffend than participants who are terminated from the program. Therefore, the positive outcomes that drug courts can achieve for both the community and for offenders can be improved by increasing retention rates and ensuring that drug courts target those offenders who are most likely to succeed on the program.²⁸

The length of imprisonment faced by a drug court participant has been found to influence the likelihood of success on the program. In New South Wales, drug court participants are given an initial sentence which is suspended to enable program participation. An evaluation of the New South Wales Drug Court found that the longer the suspended sentence the more likely it was that the offender would remain on the program: 47% of offenders who received a suspended sentence greater than six months graduated or stayed on the program for at least 12 months. Whereas, only 25% of offenders who received a suspended sentence less than six months graduated or stayed on the program for at least 12 months.²⁹

Similarly, an evaluation of the Queensland Drug Court found that participants 'with shorter initial sentences were more likely to terminate than those with longer initial sentences'.³⁰ It was suggested that participants with longer initial sentences may have more entrenched criminal histories and, therefore, may be 'closer to the end of their criminal career and see the drug court order as a viable life-changing alternative to criminality'.³¹ Importantly, it was also observed that a longer initial sentence provides greater motivation to succeed and those offenders with relatively short initial sentences may 'fail to see their potential imprisonment as a sufficient motivation for continuing with their drug court order'.³²

The Perth Drug Court uses indicated sentences at the start of the program so that participants are aware of the consequences of non-compliance.³³ However,

this process brings with it a risk of net-widening; in other words more severe indicated sentences may be given in order to encourage compliance.³⁴ As King and Wager stated, it is well known that the threat of imprisonment is a powerful motivating factor and there 'remains a belief in all of us that if the participant is facing prison, then the participant will work harder'.³⁵ They emphasised that the indicated sentence must be appropriate because the entire process will be undermined if that sentence is later revisited and reduced.³⁶ Freiberg argues that a drug court 'cannot inflate a sentence which would otherwise be appropriate in order to bring an offender under their jurisdiction, no matter how beneficial the court considers that the treatment regime may be for that offender'.³⁷

The Commission is of the view that drug courts should only target offenders facing imprisonment (or detention). 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 does target this group of offenders; however, the DCR stream accepts some offenders who are facing non-custodial sentences. All other Australian drug courts require that the offender is, at least, likely to be imprisoned. For this reason the Commission is of the view that the DCR stream should be subsumed within the STIR program. Irrespective of whether the STIR program is administered by the Drug Court or any other court, this option would leave two distinct drug court intervention programs in Western Australia: STIR for offenders who are not facing imprisonment and the Drug Court for offenders who are facing imprisonment.

PROPOSAL 2.1

Drug Court target group

- That the Perth Drug Court and the Children's Court Drug Court only accept offenders who are facing a term of immediate imprisonment or detention.
- That the Drug Court Regime program be abolished.
- That the Supervised Treatment Intervention Regime program be available for offenders who are facing non-custodial sentences.

28. The importance of identifying which types of offenders are more likely to benefit from drug court type intervention has been emphasised: Indermaur D & Roberts L, 'Drug Courts in Australia: The first generation' (2003) 15 *Current Issues in Criminal Justice* 136, 148.

29. Freeman K, *New South Wales Drug Court Evaluation: Health, well-being and participant satisfaction* (Sydney: NSW Bureau of Crime Statistics and Research, 2002) viii.

30. 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.

31. *Ibid* 79.

32. *Ibid*.

33. Similarly in other jurisdictions, sentences of imprisonment are imposed at the start of the program and then suspended to enable participation.

34. Although it has been stated that the risk of net-widening is reduced to some extent by giving an indicated sentence because 'there is less chance of a person receiving a drug-court order when they may have received no prison term at all': Cappa C, 'The Social, Political and Theoretical Context of Drug Courts' (2006) 32 *Monash University Law Review* 145, 162.

35. King M & Wager J, 'Therapeutic Jurisprudence and Problem-Solving Judicial Case Management' (2005) 15 *Journal of Judicial Administration* 28, 33.

36. *Ibid*.

37. Freiberg A, 'Australian Drug Courts' (2000) 24 *Criminal Law Journal* 213, 229.

Eligibility criteria

Excluded offences

The best way to target participants who would otherwise face imprisonment is through appropriate eligibility criteria. The option of a PSO in Western Australia is only available for offenders who are facing imprisonment; however, it excludes offenders who have committed the current offence while subject to an early release order or a suspended sentence of imprisonment. Particular concern was expressed during preliminary consultations about the exclusion of offenders subject to suspended sentences.³⁸ For instance, an offender may have been placed on a suspended sentence of imprisonment for driving without a licence and then committed drug-related offences such as stealing and burglary. Participation in the Drug Court may be appropriate, despite the existence of a breach of a suspended sentence. The Commission believes that the Drug Court should have the option of considering whether such offenders are suitable candidates.

PROPOSAL 2.2

Eligibility criteria

That offenders who were subject to a suspended sentence of imprisonment at the time of the current offence(s) not be automatically excluded from the operation of the Perth Drug Court.

Because the Perth Drug Court takes referrals from superior courts participation is not precluded for many serious offences. If the aim is to divert offenders away from imprisonment this is entirely appropriate. Nevertheless, there is potential inconsistency between those offences that are excluded and those that are not.³⁹ For example, armed robbery is not automatically excluded but burglary—aggravated by being armed—is a precluded offence. If there was serious actual violence associated with the armed robbery then it would also be likely to be excluded. However, the same discretionary approach should probably be taken with aggravated burglary.

Violent offending is invariably excluded from drug court programs.⁴⁰ Safety (for program staff and participants) is the principal justification for excluding this type of offending. The Commission has concluded that the decision to exclude specified

offences should be made at the policy level and by program staff. Nevertheless, the Commission encourages a discretionary approach; blanket exclusions may inadvertently exclude offenders who would otherwise benefit from participation in the program and who do not pose any significant risk to program staff.⁴¹ The current protocol for the Perth Drug Court appears in general to enable such an approach; the crucial issue is whether any serious actual violence was used.⁴²

Drug-crime nexus

Australian drug courts vary in their approach to the drug-crime nexus: for some programs the offending behaviour must be connected to the offender's drug problem,⁴³ others only require the existence of a drug problem.⁴⁴ A link between the offending behaviour and the illicit drug problem is not required in the Perth Drug Court.⁴⁵ Freiberg has stated that there are two competing views on this issue. The first is that drug court participation should only be allowed if the offending behaviour relates to the offender's drug problem because this ensures that the 'punishment' is linked to the crime. The second view is that any offence should create an opportunity for diversion into court supervised treatment.⁴⁶ The Commission favours the Western Australian approach because, as explained at the beginning of this chapter, drug-dependency exacerbates offending behaviour – even if the current offending is not directly connected with the drug problem, continued drug use is likely to lead to further offending.

Case reviews: a non-adversarial approach

Case management of drug court participants is undertaken by the Drug Court Team which includes a magistrate, a police prosecutor, defence counsel, and CATS officers. In traditional sentencing proceedings, judicial officers, prosecutors, defence counsel and community corrections officers have defined roles. The magistrate determines the appropriate

38. Meeting with Magistrate Pontifex (26 February 2008).

39. *Perth Drug Court Manual* (2007) 33; meeting with Magistrate Pontifex (20 February 2008).

40. In Victoria, sexual offences and offences involving actual bodily harm are excluded: *Sentencing Act 1991* (Vic) s 18Z; offenders charged with an offence of violence or who have a history of violence are excluded from the South Australian Drug Court: see <http://www.courts.sa.gov.au/courts/drug_court> accessed 12 January 2008; see also *Drug Court Act 1998* (NSW) s 5; Children's Court of New South Wales, *Practice Direction No. 27* (16 May 2007); *Drug Court Act 2000* (Qld) s 7; *Perth Drug Court Manual* (2007) 33.

41. See discussion under 'Offences Excluded from Court Intervention Programs', Chapter Six.

42. This is similar to the statutory provisions in Queensland. Offences involving violence are excluded and an offence is one of violence if the offence 'involves an allegation of personal violence, whether as an element of the offence or as an act of violence associated with the offence': *Drug Court Act 2000* (Qld) s 7.

43. The Victorian Drug Court must be satisfied on the balance of probabilities that the offender is dependent on drugs or alcohol and that this dependency 'contributed to the commission of the offence': *Sentencing Act 1991* (Vic) s 18Z. In South Australia, the offence must be related to drug use: See <http://www.courts.sa.gov.au/courts/drug_court> accessed 12 January 2008. In Queensland the drug-dependency must have contributed to the offending behaviour: *Drug Court Act 2000* (Qld) s 6.

44. See *Drug Court Act 1998* (NSW) s 5; Children's Court of New South Wales, *Practice Direction No. 27* (16 May 2007).

45. *Perth Drug Court Manual* (2007) 15. The Commission notes that in its early stages, the Perth Drug Court required a causal connection between the drug use and the offending.

46. Freiberg A, 'Australian Drug Courts' (2000) 24 *Criminal Law Journal* 213, 228.

sentence according to law; the prosecutor seeks the most suitable penalty to reflect the seriousness of the offence and the protection of the community; subject to client instructions, defence counsel aims for the least punitive sentence possible. Community corrections officers make observations and recommendations to the court about the offender's circumstances and needs and, if required, supervise offenders post-sentence. It is a commonly held view that these roles are markedly transformed in drug court programs; however, the reality is that rather than undertaking new roles, the various agencies are performing their traditional roles in a different context.⁴⁷ In drug courts, the judicial officer remains responsible for determining the appropriate sentence (and resolving any factual and legal disputes);⁴⁸ the prosecutor's role is to protect the community;⁴⁹ defence counsel are still required to obtain the 'best deal' for their clients;⁵⁰ and CATS officers are responsible for undertaking assessments, providing reports to the court and supervising offenders.

A frequent observation is that drug courts 'abandon the traditional adversarial approach of the court system'.⁵¹ In its purest form, adversarial justice involves defence counsel and the prosecution in conflict; the judicial officer (or a jury) is responsible for resolving that conflict. An adversarial approach is required whenever there is a legal or factual dispute. However, drug courts operate at a stage of proceedings where legal or factual disputes are unlikely. The participant has pleaded guilty and therefore there is no issue in relation to criminal responsibility. Once the offender is accepted onto the program, the goal is to facilitate drug treatment; each team member works together to achieve this goal. However, an adversarial approach is explicitly used at various stages of the drug court program: during the initial

47. See United Nations Office on Drugs and Crime, *Report of the Informal Expert Working Group on Drug Treatment Courts* (1999) 5.

48. The Drug Court manual provides that the judicial officer is responsible for making the final determination about issues concerning eligibility, termination, treatment and sentencing: *Perth Drug Court Manual* (2007) 44. Of course, judicial officers in drug courts take on additional functions such as attending meetings, interacting directly with participants about their life circumstances and treatment goals, and developing drug court policy.

49. The prosecutor is responsible for monitoring participants' compliance with bail conditions such as curfews; and providing information to the team from arresting police officers, victims and participant's family members: *Perth Drug Court Manual* (2007) 45–46. The prosecutor's primary role is to ensure that the offender complies with the program for the protection of the community: Foster J, 'The Drug Court: A police perspective' in Reinhardt G & Cannon A (eds) *Transforming Legal Processes in Court and Beyond* (Melbourne: Australian Institute of Judicial Administration, 2007) 108.

50. The manual provides that the drug court Legal Aid duty lawyer is required to 'advise and represent clients in accordance with professional and ethical obligations'. These obligations include acting 'in the client's best interests'. Further, defence counsel must always act in accordance with their client's instructions: *Perth Drug Court Manual* (2007) 46. If the client is of the view that the drug court program is the 'best deal' then, by facilitating participation, the defence lawyer is acting in that client's best interests.

51. Tasmanian Law Reform Institute, *The Establishment of a Drug Court Pilot in Tasmania*, Research Paper No. 2 (2006) 38.

assessment; when determining bail conditions; when setting the indicated sentence; if there is an application by a team member for the participant to be terminated; if the participant has been charged with new offences; and at final sentencing.⁵² In the Commission's view, drug courts do not discard the adversarial approach – the reality is that an adversarial approach is not usually necessary.⁵³ And this is not unique to drug courts – overall the legal system does not 'function adversarially for the vast majority of cases'.⁵⁴ In particular, for sentencing and bail matters, it is not uncommon for defence counsel and the prosecution to discuss the matter before court so that submissions and outcomes can be negotiated and agreed.

Nevertheless, there is one aspect of the drug court process that has the potential to compromise traditional roles. Before a participant appears in court, the Drug Court Team meets to discuss the case – the participant is not present during this case review. While better coordination and cooperation between various criminal justice agencies is to be encouraged, it is important that drug court procedures ensure that the rights of individuals are protected.⁵⁵

Team meetings operate in a non-adversarial manner because these meetings do not deal with bail and sentencing issues and discussions about possible termination from the program are not permitted.⁵⁶ However, team meetings do discuss and endeavour to reach agreement about the imposition or deduction of breach points.⁵⁷ The breach point system has significant consequences for participants; informal custody sanctions may be imposed as a means of wiping the slate clean and, once the breach point limit is reached, termination proceedings may be instigated. The absence of the participant during discussions about breach points is a concern, especially given that decisions to impose or deduct breach points are not subject to review or appeal.

The relevant policy provides that case reviews and subsequent court reviews are non-adversarial and the policy is that, as a team member, the Legal Aid duty lawyer 'ceases to "act" in the traditional sense'.⁵⁸ The Drug Court manual also provides that defence counsel are expected to focus on treatment during case reviews but it is also expressly stated that

52. Magistrates Court of Western Australia, *Drug Court Rules of Court: Adversarial sittings* (December 2000; revised May 2005); *Perth Drug Court Manual* (2007) 29–30; see also King M, 'Perth Drug Court Practice' (December 2006) *Brief* 27, 28.

53. See further discussion under 'Characteristics of court intervention programs', Chapter One.

54. Freiberg A, 'Non-Adversarial Approaches to Criminal Justice' (Paper presented at the 10th International Criminal Law Congress, Perth, 21 October 2006) 1.

55. See discussion under 'Statement Four: Legal and procedural safeguards', Chapter One.

56. Magistrates Court of Western Australia, *Drug Court Rules of Court: Terminations of program* (December 2000).

57. However, if agreement cannot be reached the 'decision to award or deduct points is at the discretion of the Magistrate': *ibid* (reviewed June 2005).

58. *Ibid*.

defence counsel may 'advocate for breach points not to be imposed or for their removal' and ask for urine samples to be re-tested.⁵⁹ This is ambiguous because on the one hand a collaborative approach is required but, on the other, defence lawyers are expected to maintain professional obligations and advocate on behalf on their clients. Further, in practice, team members may feel pressured to agree with other members to avoid being criticised for undermining the collaborative approach.⁶⁰ In order to avoid any conflict of interest, 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.⁶¹ In this regard, it has been stated that the boundaries between the roles of different members of case management teams should be 'clearly established and honoured'.⁶² In particular, team members must understand that, if considered necessary, defence counsel will disclose to the participant material presented and discussed during the meeting.⁶³

If drug court participants are potentially privy to all discussions held during case reviews, then it is necessary to consider why they are excluded in the first place.⁶⁴ Presumably, the presence of the participant may prevent team members from freely discussing issues but the knowledge that discussions may be repeated to the participant afterwards would also have this effect. The justification for excluding the offender has been questioned.⁶⁵ All court

intervention programs adopt a collaborative team-based approach but they do not all hold meetings or discussions in the absence of the offender. 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.⁶⁶ In the Neighbourhood Justice Centre in Victoria, problem-solving meetings are held before court with everyone but the magistrate in attendance.⁶⁷

The Commission acknowledges that although drug court participants are not present during case reviews they are subsequently provided with the opportunity to be heard before any final decision about imposing or deducting breach points is made.⁶⁸ However, the offender is deprived of the opportunity to hear the 'evidence' and it is likely that a 'presumptive decision' is made by consensus at the meeting in the offender's absence.⁶⁹ The Deputy Chief Magistrate of South Australia, Dr Andrew Cannon, has argued that case conferences held in the absence of the offender are inappropriate. He emphasises that '[o]ne of the foundations of a court is that it conducts its work in public'.⁷⁰ Specifically, in relation to drug court case reviews he states that:

I am opposed philosophically to this approach. The court is stage managing its process in front of the defendant. It is a show performance. The real decision is made behind closed doors and in the absence of the key person affected.⁷¹

59. *Perth Drug Court Manual* (2007) 48.

60. The Commission's preliminary consultations revealed that team members seem to understand each other's roles and these roles are rarely comprised: meeting with Catie Parsons, LAC (20 February 2008); meeting with Valerie Thatcher, CATS and Ian Donaldson, Department of Corrective Services (21 February 2008); meeting with Sergeant Julia Foster (26 February 2008); meeting with Magistrate Pontifex (26 February 2008).

61. Eardley T et al, *Evaluation of the New South Wales Youth Drug Court Pilot Program*, University of New South Wales Evaluation Consortium, Final Report (2004) 150; meeting with Chief Magistrate Heath (26 March 2008). The Commission notes that the Law Society of Western Australia's Professional Conduct Rules 2005 demand that legal practitioners must, subject to an overriding duty not to mislead the court, give 'undivided faithfulness to the client's interest': see Rule 7.1 & 14.2.

62. Foster J, 'The Drug Court: A police perspective' in Reinhardt G & Cannon A (eds), *Transforming Legal Processes in Court and Beyond* (Melbourne: Australian Institute of Judicial Administration, 2007) 110.

63. Magistrate Pontifex advised the Commission that it is her view that everything said in the team meeting may be told to the offender and, in fact, this is desirable so that appropriate instructions can be obtained before court: meeting with Magistrate Pontifex (26 February 2008).

64. In Victoria, case reviews are held in the absence of the offender but the legislation is silent on whether they are entitled to attend these meetings: see *Sentencing Act 1991* (Vic) s 18Z1. In New South Wales the offender is entitled to attend team meetings in exceptional circumstances: New South Wales Drug Court, *Drug Court Team Meetings*, Policy No. 1 (May 2006) cl 3. It has been observed that the South Australian Drug Court trialled team meetings in the presence of the offender but this was stopped because it was considered 'unworkable': Popovic J, 'Court Process and Therapeutic Jurisprudence: Have we thrown the baby out with the bathwater' in King M & Auty K (eds), 'The Therapeutic Role of Magistrates Courts' (2006) 1 *Murdoch University Electronic Journal Special Series* 64.

65. Popovic, *ibid* 64.

66. Telephone meeting with Magistrate Kate Auty; Magistrate Greg Benn; Richard Stevenson, Regional Manager, Magistrates Courts Kalgoorlie; and Beverly Burns, Aboriginal Justice Officer, Kalgoorlie-Boulder Community Court (10 March 2008). There may be some preliminary discussions before court where reports and other material are given to the Aboriginal Elders but in all cases the penalty to be imposed or decision to be made is discussed in open court with everyone including the offender present. Everyone present is given the opportunity to participate in the discussions but of course the ultimate decision is made by the magistrate.

67. See discussion under 'Neighbourhood Justice Centre', Chapter Five.

68. Meeting with Magistrate Pontifex (20 February 2008). Participants with private representation will not be discussed at case reviews unless the private lawyer is present or a Legal Aid duty lawyer has been asked to be present on their behalf: Magistrates Court of Western Australia, *Drug Court Rules of Court: Case management planning and review meeting* (December 2000; reviewed June 2005). Similarly, in New South Wales if an offender is privately represented the team will not discuss the case in the absence of the offender's legal representative unless the legal representative has stated that he or she does not wish to attend: New South Wales Drug Court, *Drug Court Team Meetings*, Policy No. 1 (May 2006) cl 3.

69. Hoffman M, 'The Drug Court Scandal' (2000) 78 *North Carolina Law Review* 1437, 1524. It has been observed that in traditional courts 'the judicial officer is never privy to, or involved in discussions in the absence of a defendant; opinion evidence of the kind concerned is always inadmissible and a defendant has a right to see and hear the entirety of the proceedings against him/her': Previterra T, 'Responsibilities of TJ Team Members v Rights of Offenders' in King M & Auty K (eds), *The Therapeutic Role of Magistrates Courts* (2006) 1 *Murdoch University Electronic Journal Special Series* 55.

70. Cannon A, 'Therapeutic Jurisprudence in the Magistrates Court: Some issues of practice and principle' in Reinhardt G & Cannon A (eds), *Transforming Legal Processes in Court and Beyond* (Melbourne: Australian Institute of Judicial Administration, 2007) 129.

71. *Ibid* 130.

In Victoria, it is expressly provided that issues such as the participant's performance, whether the order should be varied and what rewards or sanctions should be given or imposed are discussed at a case conference, but no decision is made until the participant appears and is heard by the magistrate at the review hearing.⁷² In order to ensure that a balance is reached between facilitating effective rehabilitation and ensuring that the rights of offenders are not inadvertently prejudiced, it may be sufficient to provide for specific rules in relation to the imposition of breach points (or sanctions)⁷³ or restrict the types of issues that can be discussed during team meetings. The Commission acknowledges that this is a difficult issue; drug court reviews conducted in the absence of the offender are a common feature of Australian drug courts. Therefore, the Commission invites submissions as to whether any changes to the case review process are required to ensure that transparent and accountable justice is maintained. The Commission is particularly keen to receive submissions from all members of the Drug Court Team (in both the Perth Drug Court and the Children's Court Drug Court) about the way in which team meetings should be conducted.

CONSULTATION QUESTION 2.1

Case reviews

The Commission invites submissions about the best way to facilitate a collaborative team-based approach in the Drug Court but, at the same time, ensure that the rights of offenders are protected. In particular, the Commission seeks submissions as to the following matters:

- whether the offender should be entitled to be present during case review meetings;
- whether the matters that can be discussed during a case review meeting should be expressly limited; and
- whether the matters discussed in case review meetings should be formally recorded.

Rewards and sanctions

Drug courts use a system of rewards and sanctions to encourage compliance and respond quickly and effectively to non-compliance. This is one of the hallmarks of drug court programs: the system of rewards and sanctions acknowledges that overcoming drug addiction takes time and relapses will occur.⁷⁴ 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.⁷⁵

In the Perth Drug Court, rewards and sanctions are given via the breach point system: points are given for non-compliance and deducted for good behaviour. Further, rewards may include praise from the judicial officer, or less frequent urinalysis, reporting and court attendances. Sanctions are the reverse: condemnation or warnings from the magistrate or more frequent obligations. Further, in Western Australia, participants may be remanded in custody once during the program as an informal custody sanction. During the time in custody the participant is expected to consider his or her future on the program; if the participant chooses to continue participation, accrued breach points will be deducted due to time in custody. Because all drug court participants are subject to strict bail conditions, custody sanctions can be imposed by revoking bail. The participant returns to court and, if willing to remain on the program, bail is reset.

Under s 55 of the *Bail Act 1982* (WA) a judicial officer has the power to revoke bail or change the conditions of bail if satisfied that an offender 'is in, has been or is likely to be in, breach of a bail condition'. It is questionable whether a judicial officer has the power to revoke bail and within a matter of days re-release the offender on the existing bail conditions. The legislation provides that the judicial officer must re-release the offender on existing bail conditions if *not* satisfied that the offender has breached or is likely to breach the bail condition. The Commission understands that in some cases Drug Court participants are remanded in custody for a short 'break' if their lives are becoming 'out of control' and their motivation to comply with the program is in question.⁷⁶ In such cases the judicial officer may consider that the offender is likely to breach the bail conditions but, arguably, there is no change in the offender's circumstances after a few days in custody.

Other jurisdictions provide for rewards and sanctions in legislation. Examples of rewards include less frequent reporting or drug testing;⁷⁷ variation to the conditions of the program;⁷⁸ the giving of special privileges such as telephone cards or transport assistance;⁷⁹ a decrease in a monetary penalty not

72. Department of Justice Victoria, *An Introduction to the Drug Court of Victoria and Drug Treatment Orders* (2002) (unpaginated).

73. This is discussed immediately below.

74. King M, 'Perth Drug Court Practice' (2006) 33 (11) *Brief* 27, 29; see also Hulls R, 'Victoria's New Drug Court' (2002) *Law Institute Journal* 29, 29–30.

75. Freiberg A, 'Therapeutic Jurisprudence in Australia: Paradigm shift or pragmatic incrementalism?' (2002) 20(2) *Law in Context* 6, 15.

76. Meeting with Magistrate Pontifex (26 February 2008).

77. See *Sentencing Act 1991* (Vic) s 18ZJ.

78. See *Drug Court Act 1998* (NSW) s 16.

79. 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 (October 2002) cl 3.

yet paid or a decrease in community work hours not yet performed;⁸⁰ and progression to the next phase of the program.⁸¹ A Queensland Drug Court magistrate has suggested that other rewards such as self-help books, meal vouchers, baby supplies and lifestyle courses would be beneficial.⁸²

Sanctions include variations to the order increasing the frequency of program requirements; community work; an order that the participant remain at a specified place for up to two weeks;⁸³ a monetary penalty; and the withdrawal of special privileges.⁸⁴ The ultimate sanction is custody; each jurisdiction provides that a period of imprisonment can be imposed for failure to comply with the requirements of the program.⁸⁵ Generally, sanctions cannot be imposed unless the Drug Court is satisfied on the balance of probabilities that the participant has failed to comply with the conditions of the program.⁸⁶ However, in Victoria, a custody sanction cannot be imposed unless the Drug Court is satisfied beyond reasonable doubt that the participant has breached the program requirements.⁸⁷ The practice in Victoria is to allow offenders to accumulate 15 days' imprisonment before requiring them to spend any time in custody. Custody sanctions can be reduced by good performance.⁸⁸ For example, if a participant complies with the program for one week, a one day custody sanction can be removed.⁸⁹ Thus, in other jurisdictions the procedure for imposing sanctions is clearly set out in legislation and custody sanctions can be imposed without relying on bail legislation.

In the Perth Drug Court, informal custody sanctions (which are only given once during the program) are not generally taken into account at sentencing. The view is that any time spent in custody was for the purpose of 'wiping the slate clean' and giving the participant a further opportunity on the program.⁹⁰ 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.⁹¹

In contrast, in New South Wales if an offender is eventually terminated from the program the Drug Court must, when reconsidering the initial sentence, take into account any sanctions that have been imposed during the program and any time spent in custody during the program.⁹² In Victoria, custody sanctions served are deducted from the custodial sentence imposed if the program is terminated.⁹³ However, in Queensland the Drug Court has discretion to take into account any custody sanctions served.⁹⁴ It has been observed that:

If sanctions of imprisonment were always given full weight it would, arguably, be seen as a disincentive to fully participate because a person could continue to misbehave, use up all the sentence time and then quit the program, especially where the initial sentence is a relatively short one. The genuineness and quality of the participation are factors which the magistrate can, and should be able to, weigh in deciding whether to reduce the initial sentence.⁹⁵

It has also been stated that if custodial sanctions are automatically deducted from the final sentence some offenders may lose the incentive to comply with the remainder of the program because the threat of imprisonment is reduced. This is particularly relevant to drug court participants with short initial or indicated sentences.⁹⁶

The Commission is of the view that the process for imposing sanctions (including custody sanctions) and giving rewards should be included in legislation. Most importantly, it should be specified that custody sanctions can only be imposed if the Drug Court is satisfied (on the balance of probabilities) that the participant has breached a requirement of the program.⁹⁷ Further, the Commission believes that the Drug Court should have discretion to take into account any custody sanctions imposed throughout the program. This is preferable to custody sanctions being automatically deducted from the final sentence in order to discourage participants from serving their prison sentences in instalments.⁹⁸ The Commission's proposal for legislative reform appears at the end of this section on drug courts.

80. See *Drug Court Act 2000* (Qld) s 31.

81. Makkai T & Veraar K, *Final Report on the South East Queensland Drug Court*, Australian Institute of Criminology, Technical and Background Paper No. 6 (2003) 25.

82. Costanzo J, *Final Report of the South-East Queensland Drug Court Pilot* (July 2003) 28.

83. See *Sentencing Act 1991* (Vic) s 18ZL.

84. See *Drug Court Act 1998* (NSW) s 16. See also *Drug Court Act 2000* (Qld) s 32.

85. In Victoria imprisonment for up to seven days may be imposed: *Sentencing Act 1991* (Vic) s 18ZL. The New South Wales Drug Court can impose up to 14 days' imprisonment for any one breach: *Drug Court Act 1998* (NSW) s 16(f). In Queensland up to 15 days' imprisonment can be imposed for any one breach so long as no more than 22 days' imprisonment is imposed at any one time: *Drug Court Act 2000* (Qld) s 32.

86. See *Drug Court Act 1998* (NSW) s 10(1)(a); *Drug Court Act 2000* (Qld) s 32; *Sentencing Act 1991* (Vic) s 18ZL.

87. See *Sentencing Act 1991* (Vic) s 18ZM.

88. A similar process of accumulating custody sanctions is used in the New South Wales Drug Court: Taplin S, *New South Wales Drug Court Evaluation: A Process Evaluation* (Sydney: NSW Bureau of Crime Statistics and Research, 2002) ix-x.

89. Meeting with Scott MacDonald, Deputy Registrar Drug Court of Victoria (6 December 2007).

90. Meeting with Magistrate Pontifex (20 February 2008); meeting with Sergeant Julia Foster (26 February 2008).

91. Meeting with Sergeant Julia Foster (26 February 2008).

92. *Drug Court Act 1998* (NSW) s 12.

93. Meeting with Scott MacDonald, Deputy Registrar, Drug Court of Victoria (6 December 2007).

94. *Drug Court Act 2000* (Qld) s 36.

95. Costanzo J, *Final Report of the South-East Queensland Drug Court Pilot* (July 2003) 40.

96. Eardley T et al, *Evaluation of the New South Wales Youth Drug Court Pilot Program*, University of New South Wales Evaluation Consortium, Final Report (2004) 147.

97. The Commission believes that it would be inappropriate to require proof beyond reasonable doubt because such a high standard would encourage protracted and costly hearings in relation to urine testing and other matters which would undermine the treatment process.

98. See Taplin S, *New South Wales Drug Court Evaluation: A Process Evaluation* (Sydney: NSW Bureau of Crime Statistics and Research, 2002) x & 47: see Proposal 2.4.

Protective bail conditions

As explained above, participants in the Perth Drug Court are required to comply with a number of bail conditions. Residential and curfew conditions are stipulated as 'protective bail conditions' under the *Bail Act*. Breaching a protective bail condition has two significant consequences: the offender may be charged with an offence of breaching bail; and, if the offender is already on bail for a serious offence, he or she can only be released on bail again if there are exceptional circumstances.

A bail condition can only be categorised as a protective condition if it is imposed for the purpose of ensuring that the offender does not endanger the safety, welfare or property of any person or to ensure that the offender does not interfere with witnesses or otherwise obstruct the course of justice. The Commission understands that residential and curfew conditions are classified by the Drug Court as protective conditions because they are considered necessary to protect the offender or to protect the community.⁹⁹ Arguably, these conditions are in fact imposed to prevent reoffending. Conditions imposed for this purpose (and conditions imposed to ensure that the offender appears in court) should not be categorised as protective conditions.

It is clear from the second reading speech that the amendments to the *Bail Act* in relation to protective conditions were designed to protect victims and others associated with victims (such as children), especially in the context of domestic violence.

An important aspect of the Bill is that it introduces the concept of classifying certain bail conditions as 'protective conditions' for bail undertakings. They are those intended to protect persons who may be in fear of their safety or property and they also extend to conditions in a violence restraining order. ... [T]he approach taken is in part by referencing existing provisions ... sections 2(2)(c) or (d) of part D of schedule 1, which relate to a court's power to impose conditions aimed at protecting the safety, welfare or property of alleged victims.¹⁰⁰

The Commission acknowledges that the imposition of protective bail conditions in the Drug Court is considered necessary to ensure compliance with the program.¹⁰¹ However, there are alternative ways to provide the Drug Court with the tools necessary to encourage compliance and enforce non-compliance. The Commission believes that it is preferable to have an express power to impose custody sanctions for non-compliance, rather than relying on a strained

99. Meeting with Catie Parsons, Legal Aid (20 February 2008).

100. Western Australia, *Parliamentary Debates*, Legislative Assembly, 27 October 1998, 2673 (Mr Prince, Minister for Police).

101. The Drug Court prosecutor explained that the use of protective conditions is the 'teeth' of the program because the participants can be charged with breaching bail and this offence is regarded as a serious offence under the legislation: meeting with Sergeant Julia Foster (26 February 2008).

interpretation of the *Bail Act*.¹⁰² This does not mean that residential and curfew conditions cannot be set as conditions of bail. Failing to comply with any bail condition leaves the offender liable to be arrested and remanded in custody. The Commission strongly encourages the Drug Court to impose these conditions as normal bail conditions rather than specify that these conditions are protective conditions under the *Bail Act*. What this will mean is that failure to comply with these conditions cannot constitute a criminal offence and will not therefore have potential long-term consequences in any future bail applications for the offender.

Voluntariness and informed consent

Drug court programs are voluntary.¹⁰³ Offenders are not under any obligation to participate in a drug court program; however, there is a constrained choice if the only alternative is imprisonment. In other words, the choice between participating and going to jail is 'really no choice at all'.¹⁰⁴ Although there is an element of pressure, it is essential that consent is fully informed.¹⁰⁵ Armed with detailed information about the nature of the program, the processes involved and the consequences of non-compliance, some offenders may decide not to participate and choose instead to serve their sentence in prison.

In the Perth Drug Court referred offenders attend an information session on the morning of their first appearance in the court. During the assessment stage a CATS officer explains the program to the offender and obtains a signed authority from each participant to release information to relevant agencies.¹⁰⁶ Nonetheless, it has been suggested that some participants in the Perth Drug Court do not *fully*

102. See Proposal 2.4.

103. See *Perth Drug Court Manual* (2007) 10; *Sentencing Act 1991* (Vic) s 18Z; *Drug Court Act 1998* (NSW) s 7A; *Drug Court Act 2000* (Qld) s 15; <http://www.courts.sa.gov.au/courts/drug_court> accessed 12 January 2008. In New South Wales a Compulsory Drug Treatment Order can be made by the Drug Court requiring a sentenced prisoner to serve his or her sentence at the Compulsory Drug Treatment Correctional Centre: see discussion below under 'Custodial Drug Treatment Facilities'. The New South Wales Youth Drug and Alcohol Court originally required an offender's consent before charges could be referred to the court. In November 2002 the policy was changed because it was found that a large number of potentially suitable participants did not consent to the referral. Now, the policy is that the consent of the young person is not required before the matter is referred to the program for an assessment but participation in the program is not forced if it would be 'counter-productive': Dive R et al, *NSW Youth Drug Court Trial* (Paper presented at the *Juvenile Justice* conference: From lessons of the past to a road map for the future, Sydney 1–2 December 2003) 4.

104. Previtara T, 'Responsibilities of TJ Team Members v Rights of Offenders' in King M & Auty K (eds), *The Therapeutic Role of Magistrates Courts* (2006) 1 *Murdoch University Electronic Journal Special Series* 58.

105. Ibid 53–54; Payne J, *Final Report on the North Queensland Drug Court*, Australian Institute of Criminology, Technical and Background Paper No. 17 (2005) 46; Eardley T et al, *Evaluation of the New South Wales Youth Drug Court Pilot Program*, University of New South Wales Evaluation Consortium, Final Report (2004) 155.

106. Meeting with Valerie Thatcher, CATS (21 February 2008).

appreciate the intensive nature of the program.¹⁰⁷ In addition to ensuring consent is fully informed by explaining the program's requirements and the ramifications of non-compliance, it is important to provide participants with an opportunity to directly participate in the court process. For example, enabling participants to set goals or contribute to the program plan promotes a sense of ownership and choice.¹⁰⁸

In other jurisdictions, legislative provisions demand informed consent. Section 25 of the *Drug Court Act 2000* (Qld) provides that the drug court magistrate must explain to the offender the nature, requirements and consequences of an Intensive Drug Rehabilitation Order.¹⁰⁹ Similarly, in New South Wales it is provided that in order to participate an offender must be willing and must accept the conditions of the program *after* being informed of the powers of the Drug Court.¹¹⁰ The Commission agrees that offenders must be fully informed of all drug court procedures and rules and the likely consequences for failing to comply with the program. For that reason the Commission proposes (see Proposal 2.4 below) that legislation provide that before participating in the Drug Court an offender must consent and this consent can only be obtained if the offender has been fully informed of the consequences of non-compliance and the requirements of the program, and if the offender has been given the opportunity for legal advice.

Self-incrimination and information sharing

Drug courts emphasise honesty; in particular, participants are expected to disclose any 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 many cases, admission about the use of illicit drugs will not be directly connected with the offences before the court. In this regard, drug courts are different from traditional sentencing proceedings – in traditional proceedings offenders are not encouraged or required to divulge information

that relates to other offending behaviour. Only information about the current offence(s) is relevant.

The Commission is concerned about the potential for any admissions to be used against the participant in other proceedings. Former Drug Court magistrate, Julie Wager, contended that there should be some 'legislative protection against prosecution and self-incrimination in other proceedings'.¹¹¹ A further issue is the potential use of information contained in Drug Court files in other proceedings. It has been stated that:

Full and honest disclosure by participants is fundamental to the program and is jeopardised by any notion that the documents could be produced in another court.¹¹²

In some other jurisdictions there is legislative protection for certain admissions by drug court participants. In Victoria and New South Wales, evidence of any admissions about drug use or drug possession cannot be used against a drug court participant.¹¹³ Section 37 of the *Drug Court Act 2000* (Qld) is broader; it provides that any admission made during the drug court program or for the purpose of assessment (and any evidence obtained as a result of that admission) cannot be used against the offender. However, certain serious offences such as sexual and violent offences are excluded from the ambit of this provision.

The Commission's preliminary view is that, in order to encourage honesty and effective engagement in drug treatment, participants should be offered a degree of legal protection for admissions made during the referral, assessment and treatment stages of the program. At the same time, the Commission understands that in some instances it may be necessary for program and treatment staff to provide information to others for the protection of other members of the community.¹¹⁴ The Commission

107. Foster J, 'The Drug Court: A police perspective' in Reinhardt G & Cannon A (eds), *Transforming Legal Processes in Court and Beyond* (Melbourne: Australian Institute of Judicial Administration, 2007) 112.

108. Previtera T, 'Responsibilities of TJ Team Members v Rights of Offenders' in King M & Auty K (eds) *The Therapeutic Role of Magistrates Courts* (2006) 1 *Murdoch University Electronic Journal Special Series* 59. See also King M & Tatasciore CL, 'Promoting Healing in the Family: Taking a therapeutic jurisprudence based approach in care and protection applications' in King M & Auty K (eds), *The Therapeutic Role of Magistrates Courts* (2006) 1 *Murdoch University Electronic Journal Special Series* 83.

109. Drug court participants are sentenced to an intensive drug rehabilitation order at the commencement of the program. It has been suggested that consent should not be obtained until a drug-dependent offender has undergone some form of detoxification: see Payne J, *Final Report on the North Queensland Drug Court*, Australian Institute of Criminology, Technical and Background Paper No. 17 (2005) 45; Previtera T, *ibid* 58.

110. *Drug Court Act 1998* (NSW) s 7A.

111. Wager J, 'The Drug Court: Can a relationship between health and justice really work?' (Paper presented at the inaugural Alcohol and Other Drugs Symposium, Fremantle, 20–21 August 2002) 16. See also Standing Committee on Legislation, *Sentencing Legislation Amendment and Repeal Bill 2002; Sentence Administration Bill 2002*, Transcript of Evidence, 5 March 2003 (former Drug Court Magistrate Julie Wager) 2–3; Eardley T et al, *Evaluation of the New South Wales Youth Drug Court Pilot Program*, University of New South Wales Evaluation Consortium, Final Report (2004) 149.

112. Barrow B & Popovic J, *Drug Courts Operating in Other States* (2001) 22.

113. See *Sentencing Act 1991* (Vic) s 18ZS; *Drug Court Act 1998* (NSW) s 17.

114. During preliminary consultations the Commission was advised that it would not be the practice of CATS staff to report admissions of drug use to the police, but it was emphasised that program staff need discretion to report any safety concerns: meeting with Valerie Thatcher, CATS and Ian Donaldson, Department of Corrective Services (21 February 2008). The Commission notes that a balance between protecting confidentiality and protecting the safety of other people is reached in the Family Court proceedings. Section 49 of the *Family Court Act 1997* (WA) provides that a family counsellor cannot disclose any communication made during counselling unless consent is given or disclosure is required by law. Further, appropriate exceptions are listed in order to ensure the protection of children; the protection of people

invites submissions as to the appropriate scope for the protection against self-incrimination by drug court participants.

CONSULTATION QUESTION 2.2

Protection against self-incrimination

The Commission invites submissions as to the following matters:

- whether offenders should be provided with legislative protection against the use of admissions made during referral to, assessment for, or participation in the Drug Court;
- if so, what is the appropriate scope of such a protection – in particular, should the protection relate only to admissions made about drug use and drug possession or should it extend to other offences; and
- whether legislation should provide that Drug Court program or treatment staff may disclose information for the protection of any person or the property of any person.

Right of appeal

It is a long-established feature of the justice system that parties have a right to appeal an adverse decision. Nevertheless, there is no absolute right to appeal; appeal rights are conferred by legislation in specific circumstances. The right to appeal certain decisions made during drug court programs is expressly excluded in some jurisdictions. In Queensland, the only drug court decision that may be appealed is the final sentence imposed at the end of the program.¹¹⁵ Similarly, in Victoria, there is no right to appeal a decision to refuse to make a Drug Treatment Order; a finding that the offender has failed to comply with a condition of the order; a variation of the order; or a cancellation of the order.¹¹⁶

Appeal rights are limited because drug court programs need to respond quickly and effectively to non-compliance – appeals against all of the various decisions made throughout the program would undermine the collaborative approach and objective of facilitating drug treatment. The whole process would become unworkable if programs were put on hold while appeals were instituted and

from violence; and the protection of property from intentional damage.

115. Section 42 of the *Drug Court Act 2000* (Qld) provides that there is no right to appeal the decision to refer or not to refer an offender to the Drug Court; the making of or refusal to make an Intensive Drug Rehabilitation Order; a decision to amend or not amend an Intensive Drug Rehabilitation Order; a decision to terminate or not terminate the program; and a decision to give a reward or to impose a sanction.

116. *Sentencing Act 1991* (Vic) s 18ZR.

heard.¹¹⁷ Arguably, it would also be inappropriate to enable a higher court to review a decision to reject an offender onto the program because the Drug Court is in the best position to assess an offender's suitability and level of motivation; and to determine administrative issues such as program numbers and available treatment.

However, the imposition of custody sanctions is in a different category.

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.¹¹⁸

The Victorian legislation provides that a drug court participant can appeal a decision to impose a 'custody sanction'. The Commission agrees that this approach strikes the appropriate balance between protecting the rights of participants and ensuring that drug court programs can operate as intended. Accordingly, the Commission proposes that participants have the right to appeal any custody sanctions imposed by the Drug Court.¹¹⁹

Staffing and resources

The Perth Drug Court is funded by both state and federal governments. The state government funds the court's infrastructure (eg, the judicial officer, the building and CATS) but external treatment providers and services are generally funded via the Commonwealth IDDI.¹²⁰ As the Commission discusses in Chapter One, court intervention programs cannot successfully address the underlying causes of offending behaviour without adequate resources. Drug court programs require substantial funding in order to appropriately cater for high-risk participants. The 'ideal components' of a drug court are expensive; it has been said that they include a dedicated unit in both a male and female prison; a small client base for case managers (no more than 15 participants); funds to assist participants with medicines, emergency accommodation and necessities; adequate training for drug court personnel; a consultant psychiatrist and psychologist; a drug court coordinator; appropriate information technology; and 'state-of-the-art' urine analysis technology, testing and procedures.¹²¹

Many of these components are absent in the Perth Drug Court. For example, information technology

117. Victoria, *Parliamentary Debates*, Legislative Assembly, 29 November 2001, 2194 (Mr R Hulls, Attorney General).

118. Freiberg A, 'Australian Drug Courts' (2000) 24 *Criminal Law Journal* 213, 230.

119. See Proposal 2.4.

120. Meeting with Lynton Piggott, Program Manager, Courts Drug Diversion Program, Department of the Attorney General (26 February 2008).

121. Barrow B & Popovic J, *Drug Courts Operating in Other States* (2001) 3.

is inadequate; there is no dedicated custodial drug court unit; and there is no funding for a drug court coordinator.¹²² The lack of a coordinator for the drug court is a continuing issue.¹²³ Both the Department of the Attorney General and the Department of Corrective Services have a role in the program, but no one agency has overall responsibility. The Commission considers that a full-time coordinator could provide a leadership role for the Perth Drug Court with responsibility for policy development, training and coordinating data collection.¹²⁴

PROPOSAL 2.3

Appointment of a drug court coordinator

That the Western Australian government provide funding for the appointment of a full-time coordinator for the Perth Drug Court.¹²⁵

One criticism of drug courts and other court intervention programs is that they take away scarce resources from the community. In other words, drug-dependent people who are not involved in the criminal justice system may miss out on treatment places because priority is given to drug court participants. Accordingly, it has been argued that drug courts should be provided with additional funding to create treatment places or facilities specifically for drug court participants.¹²⁶ The Commission agrees that the best way to ensure that other drug-dependent people are not disadvantaged is to give external drug-treatment providers extra funding to cater for drug court participants.

It has been observed that drug courts should have control over allocated funding in order to improve overall effectiveness. The United Nations Office on Drugs and Crimes has concluded that:

If the court lacks overall control of expenditure of allocated funds, there is no guarantee that funding will be expended in the manner that best meets the programme's needs. Governments may therefore wish to consider allocation of a specific budget to the courts for this purpose.¹²⁷

122. There is a manager of specialist jurisdictions which includes the Drug Court and Aboriginal courts.

123. See Crime Research Centre, *Evaluation of the Perth Drug Court Pilot Project*, Final Report (2003) 50 & 251. Meeting with Valerie Thatcher, CATS, and Ian Donaldson, Department of Corrective Services (21 February 2008); meeting with Lynton Piggott, Program Manager, Courts Drug Diversion Program, Department of the Attorney General (26 February 2008); meeting with Magistrate Pontifex (26 February 2008);.

124. At the moment, CATS, Legal Aid and the police record their own data separately.

125. The Commission notes that the Drug Court coordinator could also be responsible for policy development, training and coordinating data in the Children's Court Drug Court. The Commission has not made a specific proposal in relation to the Children's Court Drug Court because it has proposed the establishment of a general court intervention program in that jurisdiction: see Proposal 5.1.

126. Costanzo J, *Final Report of the South-East Queensland Drug Court Pilot* (July 2003) 77.

127. United Nations Office on Drugs and Crime, *Report of the Informal Expert Working Group on Drug Treatment Courts* (1999) 23.

The Commission discusses the need for adequate resources and the benefits of budget control in relation to all court intervention programs in Chapter One.¹²⁸

BROADER ISSUES

Pre-sentence vs post-sentence

Drug courts in New South Wales, Victoria and Queensland operate as post-sentencing options.¹²⁹ In contrast, the South Australian Drug Court is a post-plea but pre-sentence program. As explained above, the Perth Drug Court operates predominantly as a pre-sentence option.¹³⁰ In Chapter Six the Commission indicates its preference for court intervention programs to operate before sentencing takes place.¹³¹ One of main reasons for this conclusion is that pre-sentence options can operate in conjunction with bail and, therefore, the police have standing to monitor bail conditions and take an active role in the operation of court intervention programs. In this regard, the Commission has been told that it is essential for the Drug Court that police are involved in monitoring residential and curfew conditions.¹³² Further, pre-sentence options offer the opportunity for offenders to prove to the sentencing court that there are genuine prospects of rehabilitation. In contrast, courts imposing sentencing orders for the purpose of rehabilitation are sometimes required to take a leap of faith and assume that the offender is capable of complying with the requirements of the order.¹³³ Pre-sentence options are also more likely to encourage compliance because sentencing has not yet taken place; for post-sentence options offenders

128. See discussion under 'Statement Two: Adequate resources, Chapter One.

129. In Tasmania, any magistrate can impose a post-sentencing drug treatment order on eligible drug-dependent offenders facing imprisonment: *Sentencing Act 1997* (Tas) s 3A. This order is one aspect of a new Court Mandated Diversion program that commenced in August 2007. The order is similar to the Drug Treatment Order under Victorian legislation. During Parliamentary Debates it was noted that this order does not create a drug court. Instead it enables any magistrate to adopt a drug court style of intervention: see Tasmania, *Parliamentary Debates*, Legislative Assembly, 4 July 2007, 26–113 (Mr Kons, Minister for Justice and Workplace Relations).

130. The post-sentence option of a Conditional Suspended Imprisonment order is rarely used in the Drug Court. In Chapter Six the Commission has proposed that all references to speciality courts in the division of the *Sentencing Act 1995* (WA) dealing with the CSI order be removed: see Proposal 6.16.

131. See discussion under 'Pre-sentence Options', Chapter Six. There was a strong preference for pre-sentence options during preliminary consultations: meeting with Tanya Watt, DPP (21 February 2008); meeting with Ian Donaldson, Department of Corrective Services (21 February 2008); meeting with Sergeant Julia Foster (26 February 2008); meeting with Magistrate Pontifex (26 February 2008).

132. Meeting with Tanya Watt, DPP (21 February 2008); meeting with Sergeant Julia Foster (26 February 2008); meeting with Magistrate Pontifex (26 February 2008).

133. It has been stated that for post-sentencing options offenders are 'untested': Scantleton J et al, *MERIT: A cooperative approach addressing drug addiction and recidivism* (Paper presented at the 2nd International Conference on Drug Strategy, Perth, May 2002) 7.

may only do the minimum required to avoid a breach because there is less incentive to impress the court.

However, the Commission recognises that pre-sentence court intervention programs can be very onerous, especially the Drug Court.¹³⁴ Complying with a drug court program for 12 to 18 months is far more onerous than sentencing options such as a Community Based Order or an Intensive Supervision Order. At the completion of a drug court program, offenders are sentenced and they are often placed on a community-based sentence or given a suspended term of imprisonment. This process may skew the sentencing outcome because the final sentence does not fully reflect all that the offender has done. Hence, in Chapter Six the Commission proposes that when a court sentences an offender who has successfully completed a prescribed court intervention program, the court must record as part of the sentencing outcome the name and length of the program.¹³⁵ This will enable, for example, a drug court magistrate to record the sentencing outcome as follows: Intensive Supervision Order (12 months) – completed Drug Court program (12 months). This outcome should appear on the offender's criminal record and also be recorded as the final outcome for statistical and evaluation purposes.

Drug Court participants build a strong rapport with the Drug Court magistrate and other team members during the program. Once sentencing takes place the participant has no further involvement with the Drug Court. For some Drug Court participants the magistrate may consider that continued judicial monitoring (ie, regular court reviews) may be beneficial. This may be especially useful in the initial stages of a new sentencing order to enable an appropriate handover period between the Drug Court and community corrections. In Chapter Six, the Commission seeks submissions about whether judicial monitoring should be available post-sentence.¹³⁶

The need for specific legislation

From the Commission's research and preliminary consultations, it is clear that the Drug Court needs specific legislation to accommodate its distinctive features and processes. During preliminary consultations there was overwhelming support for a clear and specific legislative foundation for the Drug Court.¹³⁷ The Commission believes that as

far as possible legislative provisions dealing with court intervention programs should be generic because this encourages consistency and equity of access. In other words, the same powers and orders are available to all court intervention programs. However, the Drug Court is in a special category: it applies to very serious offenders who are facing imprisonment and has the difficult task of addressing drug-dependency.

Because drug-dependency is not easily treated and relapses are to be expected, drug courts use special processes (eg, rewards and sanctions) to encourage rehabilitation. In Western Australia it is arguable that existing legislative provisions are being 'stretched' to accommodate these processes. The Pre-Sentence Order (which was intended to support the Drug Court) does not deal with drug court processes such as rewards and sanctions and case reviews.¹³⁸ The Commission understands that imposing short custody sanctions on drug court participants is an effective response to non-compliance; it ensures that continued non-compliance is not excused but enables participants to continue the program. If the Drug Court decides to impose a custody sanction because a participant has repeatedly missed appointments or returned positive drug tests it should be able to do so explicitly.

Drug courts also need to be able to amend or vary orders quickly to promote future compliance. For example, if a participant who is doing well suddenly obtains employment, the Drug Court should be able to immediately vary the conditions of the program to enable the offender to attend work. This may simply require a variation to the order but traditional court orders cannot usually be amended until community corrections have lodged the appropriate paperwork in the court.

Drug courts in Victoria, New South Wales and Queensland have clear legislative power to impose sanctions (including custody sanctions), give rewards, vary programs, terminate participants, conduct case review meetings in the absence of the participant, impose an initial or indicated sentence and impose a final sentence at the end of the program. The Commission has concluded that a pre-

134. Former Drug Court magistrate, Julie Wager, has stated her preference for the Drug Court to operate post-sentencing: Standing Committee on Legislation, *Sentencing Legislation Amendment and Repeal Bill 2002; Sentence Administration Bill 2002*, Transcript of Evidence, 5 March 2003 (former Perth Drug Court Magistrate Julie Wager) 3. See also Crime Research Centre, *Evaluation of the Perth Drug Court Pilot Project*, Final Report (2003) 250.

135. See Proposal 6.7.

136. See Consultation Question 6.5.

137. Meeting with Magistrate Stewart (20 February 2008); meeting with Catie Parsons, Legal Aid (20 February 2008); meeting with Mara Barone, Aboriginal Legal Service (21

February 2008); meeting with Valerie Thatcher, CATS and Ian Donaldson, Department of Corrective Services (21 February 2008); meeting with Tanya Watt, DPP (21 February 2008); meeting with Magistrate Pontifex (26 February 2008); meeting with Sergeant Julia Foster (26 February 2008); meeting with Chief Magistrate Heath (26 March 2008). The need for specific drug court legislation has been expressed elsewhere: Standing Committee on Legislation, *Sentencing Legislation Amendment and Repeal Bill 2002; Sentence Administration Bill 2002*, Transcript of Evidence, 5 March 2003 (Perth Drug Court Magistrate Julie Wager) 1; King M, 'Problem-Solving Court Programs in Western Australia' (Paper presented at the *Sentencing: Principles, perspectives and possibilities* conference, Canberra, 10–12 February 2006) 11. During the first evaluation of the Perth Drug Court, stakeholders interviewed referred to the lack of legislation: Crime Research Centre, *Evaluation of the Perth Drug Court Pilot Project*, Final Report (2003) 189.

138. Crime Research Centre, *ibid* 219.

sentence Drug Treatment Order should be enacted in Western Australia.¹³⁹ The maximum duration of the order should be two years because achieving the objectives of the Drug Court (abstinence, lack of offending, employment, reintegration with family and community) takes time.¹⁴⁰ This does not mean that all drug court participants will be placed on a two-year order. The duration of the order should be set, but there should also be the power to reduce or extend the duration (up to the maximum of two years) as another way of responding to compliance and non-compliance. In other words, an offender may be placed on a Drug Treatment Order for 18 months. If after 12 months the offender has achieved full rehabilitation the order could be cancelled. Conversely, if an offender is given a 12-month order but it is apparent that further treatment is necessary the order could be extended. The Commission's proposal for a Drug Treatment Order is set out at the end of this section.

Aboriginal participation

Australian drug courts do not tend to attract high numbers of Aboriginal offenders. During the pilot phase of the Perth Drug Court (December 2000–November 2002) approximately 90% of participants were non-Aboriginal.¹⁴¹ This is not unique to drug courts; Aboriginal participation in all types of diversionary programs is consistently low when compared to the disproportionate rate of Aboriginal arrest and imprisonment.¹⁴² Various reasons have been offered to explain the low Aboriginal participation levels. It has been contended that a lack of support or lack of interest by the Aboriginal Legal Service may have affected the number of Aboriginal offenders referred to the program.¹⁴³ Another possible reason is the lack of Aboriginal-specific treatment programs.¹⁴⁴

139. Two Victorian deputy chief magistrates commented, after visiting South Australia and Western Australia (the two jurisdictions without legislative support), that legislation by way of a specific Drug Treatment Order is the best option for drug courts: Barrow B & Popovic J, *Drug Courts Operating in Other States* (2001) 12.

140. Standing Committee on Legislation, *Sentencing Legislation Amendment and Repeal Bill 2002; Sentence Administration Bill 2002*, Transcript of Evidence, 5 March 2003 (Perth Drug Court Magistrate Julie Wager) 6. The Commission understands that most Perth Drug Court participants are subject to the program for 12 months. However, during preliminary consultations the Commission was told that some participants need longer: meeting with Sergeant Foster (26 February 2008).

141. Crime Research Centre, *Evaluation of the Perth Drug Court Pilot Project*, Final Report (2003) 80. As at 6 December 2007 the Victorian Drug Court had only three Aboriginal participants; however, the catchment area (Dandenong) has a small Aboriginal population: meeting with Scott MacDonald, Deputy Registrar Drug Court of Victoria (6 December 2007).

142. Crime Research Centre, *WA Diversion Program – Evaluation Framework (POP/STIR/IDP)*, Final Report for the Drug and Alcohol Office (2007) 29.

143. Crime Research Centre, *Evaluation of the Perth Drug Court Pilot Project*, Final Report (2003) 174. The Western Australian Drug and Alcohol Office has provided funding for four Aboriginal Diversion Service Officers in the metropolitan area to develop and promote diversion options for Aboriginal offenders: Crime Research Centre, *ibid* 152.

144. *Ibid* 174.

In order to increase Aboriginal participation in drug courts (and other programs) it has been stated that programs should be developed to address the needs and circumstances of Aboriginal people.¹⁴⁵ Further, more appropriate court processes could be adopted by having an Aboriginal-specific drug court.¹⁴⁶ In order to encourage Aboriginal participation, the Perth Drug Court has recently established a separate list once a week for Aboriginal participants.¹⁴⁷ The Aboriginal Legal Service is actively involved by representing offenders appearing on this day. The relevant brochure for Aboriginal drug court participants states that:

The courtroom at Drug Court looks different to other courtrooms. At Drug Court, the magistrate sits at a table with the offender and their family, as well as Aboriginal alcohol and drug workers, the police, the offender's lawyers and their assessment and treatment officer. Two Aboriginal community members will also sit with the magistrate and may tell the court about social and cultural issues that could be a problem for the offender.¹⁴⁸

As far as the Commission is aware these new processes for Aboriginal offenders have not yet been implemented; at this stage the Aboriginal drug court list operates in much the same way as the standard drug court. The Commission understands that alterations to the physical layout of the court will occur during the refurbishment of the Central Law Courts.

The Commission restates its strong support for Aboriginal courts in the Introduction to this Paper. The establishment of more Aboriginal courts in this state is an important initiative to reduce the unacceptable level of Aboriginal imprisonment and improve justice outcomes for Aboriginal people. While Aboriginal courts have the potential to deal with a variety of underlying problems, the Drug Court may be appropriate for some Aboriginal offenders who are dependent on illicit drugs. The Commission supports changes to the court process including 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.

Having said that, it is important to emphasise that many Aboriginal offenders are excluded because drug court programs target illicit drug use and accordingly, offenders with primary problems such as alcohol-dependency or solvent abuse are ineligible.¹⁴⁹ A study of Aboriginal offenders and

145. Pritchard E et al, *Compulsory Treatment in Australia* (Canberra: Australian National Council on Drugs, 2007) xix.

146. Crime Research Centre, *Evaluation of the Perth Drug Court Pilot Project*, Final Report (2003) 247.

147. Meeting with Magistrate Pontifex (20 February 2008).

148. Department of the Attorney General, *What is the Drug Court: Information for adult Aboriginal participants* (2008).

149. King M, 'Challenges Facing Australian Court Drug Diversion Initiatives' (Keynote address presented to the *Court Drug Diversion Initiatives* conference, Brisbane, 25–26 May

substance abuse found that alcohol and cannabis use was higher among Aboriginal offenders than for non-Aboriginal offenders. Further, Aboriginal prisoners and detainees were more likely to report alcohol-dependency than non-Aboriginal prisoners and detainees, and Aboriginal prisoners were more likely to have used inhalants than non-Aboriginal prisoners.¹⁵⁰

Alcohol

A frequently expressed concern is the lack of programs directed towards alcohol-dependent offenders.¹⁵¹ It has been stressed that alcohol-related offending is more prevalent than drug-related offending, especially in regional areas.¹⁵² As Freiberg questioned: 'how can illicit drug abuse treatment be justified when the alcohol problem remains unaddressed?'¹⁵³

The Victorian Drug Court enables participation of alcohol-dependent offenders.¹⁵⁴ The program requirements vary slightly: alcohol-dependent offenders are tested for alcohol five times per week in comparison to drug-dependent offenders who are tested for drug use three times per week. In addition, offenders may be randomly tested over the weekend for alcohol use.¹⁵⁵ The Northern Territory has established an Alcohol Court with the aim of reducing alcohol-dependency and related offending.¹⁵⁶ The Alcohol Court has the power to sentence alcohol-dependent adult offenders facing imprisonment to an Alcohol Intervention Order.¹⁵⁷ This order is a suspended sentence of imprisonment

with a requirement that the offender undergo alcohol treatment for up to 12 months.¹⁵⁸ The offender can be required to submit to breath or blood tests to determine if alcohol has been consumed during the order.¹⁵⁹ The offender's progress on the order is supervised and monitored by corrective services, alcohol court clinicians and the court. If the offender fails to comply with the conditions of the Alcohol Intervention Order, the court may order that the offender serve up to 14 days in custody or cancel the treatment component of the order and require that the offender serve all or part of the period of imprisonment.¹⁶⁰ As discussed below, there is a court intervention program in Queensland specifically targeting alcohol-dependent Aboriginal offenders.¹⁶¹

The main justification for excluding alcohol is resources. The Perth Drug Court simply does not have enough funding to cater for alcohol-dependent offenders. Other programs such as STIR are funded entirely through the Commonwealth IDDI and this funding is restricted to illicit drug issues. The Commission understands that including alcohol-dependent offenders in the drug court program would significantly increase program numbers and potentially reduce the spaces available for drug-dependent offenders. Certain drug court processes do not necessarily lend themselves to alcohol-dependency; it would be more difficult to justify imposing custody sanctions on participants for using a legal substance. Further, alcohol-related offending commonly involves violence but drug court program staff and treatment providers may not, for safety reasons, be prepared to supervise and treat certain violent offenders.

The Commission is of the view that alcohol-dependent offenders should have the opportunity to participate in appropriate court intervention programs. The need to provide alcohol court-based programs has been recognised by government. As one 'key strategy option' for intervening with offenders it has been stated that treatment for alcohol abuse should be included in police and court diversion programs.¹⁶² Rather than establishing a specialist alcohol program, the Commission is of the view that court intervention strategies for alcohol-dependent offenders are best achieved through flexible general programs (ie, programs addressing a variety of different problems)

2006) 5. See also Putt J et al, 'Indigenous Male Offending and Substance Abuse' (2005) 293 *Australian Institute of Criminology Trends and Issues* 6.

150. Putt J, Payne J & Milner L, 'Indigenous Male Offending and Substance Abuse' (2005) 293 *Australian Institute of Criminology Trends and Issues* 3-4.

151. See for example, Barnes L & Poletti P, *MERIT: A survey of magistrates* (Sydney: Judicial Commission of New South Wales, 2004) 30; Crime Research Centre, *WA Diversion Program – Evaluation Framework (POP/STIR/IDP)*, Final Report for the Drug and Alcohol Office (2007) 63; Pritchard E et al, *Compulsory Treatment in Australia* (Canberra: Australian National Council on Drugs, 2007) xv.

152. Barnes & Poletti, *ibid* 31.

153. Freiberg A, 'Australian Drug Courts' (2000) 24 *Criminal Law Journal* 213, 215.

154. *Sentencing Act 1991* (Vic) s 18Z. The New South Wales Youth Drug and Alcohol Court also allows alcohol-dependent young offenders to participate: The Children's Court of New South Wales, *Practice Direction No. 27* (16 May 2007).

155. Meeting with Scott MacDonald, Deputy Registrar Drug Court of Victoria (6 December 2007). As at 6 December 2007 there were 63 offenders subject to a Drug Treatment Order; five offenders were subject to the drug court program because of alcohol-dependency; and four offenders were involved because of both drug and alcohol issues.

156. *Alcohol Court Act 2006* (NT) s 3. There are two Alcohol Courts operating in the Northern Territory (Darwin and Alice Springs).

157. The Alcohol Court can only deal with offences within the magistrate's jurisdiction: *Alcohol Court Act 2006* (NT) s 5. An Alcohol Intervention Order can only be made if the offender has been convicted; a sentence of imprisonment would otherwise be appropriate; the offender is dependent on alcohol and that dependency contributed to the offending; and the offender satisfies all other eligibility requirements: s 18. The Alcohol Court can also impose a Prohibition Order for less serious offending where imprisonment is not warranted:

Northern Territory Government, *Fact Sheet 1: Alcohol Court Bill 2005*, 2.

158. *Alcohol Court Act 2006* (NT) s 20.

159. Northern Territory Government, *Fact Sheet 1: Alcohol Court Bill 2005*, 2.

160. *Alcohol Court Act 2006* (NT) s 28.

161. See discussion below under 'Queensland Indigenous Alcohol Diversion Program'.

162. Government of Western Australia, *Preventing Violence: The State Community Violence Prevention Strategy 2005 – A green paper policy framework for development* (2005) 53. The Commission notes that the Western Australian Drug and Alcohol Office is investigating funding options for alcohol diversion programs through the Office of Crime Prevention: Crime Research Centre, *WA Diversion Program – Evaluation Framework (POP/STIR/IDP)*, Final Report for the Drug and Alcohol Office (2007) 146 & 151.

or drug and alcohol programs available in a number of different courts (eg, STIR). Further, because these programs can potentially be expanded throughout the state they are more likely to attract and retain Aboriginal offenders. Thus in Chapter Five the Commission proposes the establishment of a general court intervention program.¹⁶³

Custodial treatment facilities

The adequacy of drug treatment facilities in custody is an important issue because some drug court participants remain in custody during the assessment stage; some remain in custody while waiting for a residential treatment place; and participants may spend time in custody during the program as a sanction. In addition, serious drug-dependent offenders who are ineligible for the drug court program or who are terminated for non-compliance will end up in prison.

There is no dedicated custodial drug treatment facility in Western Australia. There are, however, three units referred to by the Department of Corrective Services as 'drug free units': a unit at Albany prison with capacity for 60 prisoners; a unit at Wooroloo Prison with capacity for 25 prisoners; and a unit at Bandyup Prison with capacity for 32 prisoners. These units are designed to support prisoners who wish to remain drug free during their period of imprisonment.¹⁶⁴ The units are designed to attract non-drug-using prisoners or prisoners who have chosen to abstain from drug use.¹⁶⁵ They do not provide program support for prisoners who need assistance in remaining drug free. In order to stay in a drug free unit, prisoners must agree to submit to urinalysis and drug use usually results in removal from the unit.¹⁶⁶ An evaluation of the drug free units is expected to be completed by July 2008.¹⁶⁷

Acacia Prison (the only privately run prison in Western Australia) has a drug treatment unit and a drug support unit. The drug treatment unit (with accommodation for 18 prisoners) requires compulsory attendance at drug treatment programs for prisoners who have stopped using drugs, but the adequacy of these treatment programs has been questioned.¹⁶⁸ There is also a separate drug support unit within the prison for prisoners who are trying to stop using drugs.

163. See Proposal 5.1.

164. Christine Anderton, Operational Services and Management, Department of Corrective Services, telephone consultation (18 April 2008).

165. Department of Justice, *Justice Drug Plan 2003*, 15.

166. Detection of cannabis use may result in removal or possibly a referral to a program: Department of Justice, *Justice Drug Plan 2003*, 15.

167. Christine Anderton, Operational Services and Management, Department of Corrective Services, telephone consultation (18 April 2008).

168. Office of Inspector of Custodial Services, *Report of an Announced Inspection of Acacia Prison* (2003) 42–43; Office of Inspector of Custodial Services, *Report of an Announced Inspection of Acacia Prison* (2006) 36.

The current treatment options for Western Australian prisoners include pharmacotherapy (such as methadone) and a limited number of rehabilitation programs. In 2003 a plan to increase the availability of pharmacotherapy was announced.¹⁶⁹ By 2006 pharmacotherapy treatment was available in most Western Australian prisons with over 300 prisoners on treatment.¹⁷⁰ However, it has been observed that the initial plan included combined pharmacotherapy and counselling but the counselling stream lapsed.¹⁷¹ In 2007 the Chairman of the Prisoners Review Board stated that, despite the belief that prisons will rehabilitate offenders, the 'reality of the prison system at present means that many prisoners are unable to access appropriate rehabilitation programs'.¹⁷²

In 2003 the (former) Department of Justice identified a gap in the Western Australian prison system – it was stated that the department will investigate the option of a 'therapeutic community'.

A prison-based therapeutic community comprises a group of prisoners who live away from the mainstream and are involved in intensive drug treatment for up to one year.¹⁷³

Such options exist in other Australian jurisdictions. In Victoria, the Marngoneet Correctional Centre provides intensive treatment and offender management programs for up to 300 male prisoners who are considered to present a moderate to high risk of reoffending. The centre was opened on 3 March 2006. To be eligible prisoners must have a minimum of six months of their sentence to be served. The centre provides programs such as sex offender treatment programs; drug and alcohol treatment programs; and violent offender programs.¹⁷⁴ The centre has 'three neighbourhoods that function as therapeutic communities, where all prisoners participate as members of the neighbourhood community'.¹⁷⁵ One of these therapeutic communities is designated to address drug and alcohol problems.

169. As at 2003, pharmacotherapy in Western Australian prisons was limited. Methadone was used only for pregnant prisoners, prisoners who were HIV positive or prisoners who were already on a pharmacotherapy program upon admission. The (former) Department of Justice announced that methadone would be available to an extra 100 prisoners per year. Further a total of 50 prisoners per year would receive Buprenorphine (at the time only eight prisoners were prescribed this medication) and Naltrexone would be supplied to 80 prisoners per year (at the time it was not available to any prisoners): Department of Justice, *Justice Drug Plan 2003*, 14.

170. Office of Inspector of Custodial Services, *Thematic Review of Offender Health Services*, Report No. 35 (2006) 29.

171. *Ibid.*

172. Prisoners Review Board, *Annual Report* (2007) 9. In particular, concern was raised about program availability in regional prisons, at Bandyup Prison, for prisoners facing short sentences, and for Aboriginal prisoners: 21.

173. Department of Justice, *Justice Drug Plan 2003*, 15.

174. Victorian Department of Corrections, *Prison Profiles: Marngoneet Correctional Centre* available at <<http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Prisons/Prisons+in+Victoria>> accessed 28 April 2008.

175. Victorian Sentencing Advisory Council, *Suspended Sentences and Intermediate Sentencing Orders*, Final Report – Part 2 (2008) 149.

In New South Wales, the Compulsory Drug Treatment Correctional Centre (CDTCC) at Parklea was opened on 23 August 2006 following the enactment of the *Compulsory Drug Treatment Correctional Centre Act 2004* (NSW).¹⁷⁶ Unlike the Victorian model discussed above, prisoners serving their sentence at the CDTCC are monitored by the New South Wales Drug Court. The Drug Court orders eligible sentenced prisoners to attend the centre by imposing a Compulsory Drug Treatment Order (CDTO). The CDTCC has capacity for 70 adult male prisoners at any one time.¹⁷⁷ The CDTCC is aimed at 'hard-core' offenders with long-term drug dependency and a related life of crime and imprisonment.¹⁷⁸ The program will be formally evaluated after four years. After two years, if the program appears to be successful, it may be extended to female offenders.¹⁷⁹

A number of district and local courts¹⁸⁰ are empowered to refer offenders who have been sentenced to imprisonment to the New South Wales Drug Court for consideration of their eligibility for the CDTCC. Thus, the decision to imprison the offender is made before the question of eligibility for the centre is considered. In order to be eligible, the offender's sentence must require the serving of at least 18 months but no more than three years of full-time custody. Also, the offender must have been convicted in the last five years of at least two other offences that resulted in either a sentence of imprisonment (including suspended sentence), a community service order or a good behaviour bond and the offender must have a long-term illicit drug-dependency. The current offending must be related to that drug dependency and 'associated lifestyle'.¹⁸¹ Certain offences are excluded including homicide, sexual assault, sexual offences involving children, specified offences involving the use of a firearm and certain drug-trafficking offences. Offenders suffering from a serious mental health condition that causes violent behaviour or may prevent active participation in the drug treatment program are also excluded.¹⁸² The New South Wales Drug Court may make a CDTO if an eligible offender has been assessed as suitable

and there is available accommodation at the CDTCC within 14 days.¹⁸³

A CDTO has three stages. Stage one (closed detention) involves full time custody at the centre. During stage two (semi-open detention) the offender resides at the centre but attends external employment, training or social programs.¹⁸⁴ In stage three (community custody) the offender resides outside the centre at an approved place.¹⁸⁵ The Drug Court monitors the offender's progress on the order and can move the offender forwards or backwards from one stage to another.¹⁸⁶ The Commissioner for Corrective Services determines a personal plan for each offender and this plan (and any variation to it) must be approved by the Drug Court.¹⁸⁷ The legislation provides for sanctions and rewards to be imposed by the Commissioner for non-compliance or compliance with the personal plan.¹⁸⁸

As suggested by its name, the CDTO is 'compulsory' rather than voluntary; there is no right to appeal the order referring the offender to the Drug Court and there is no right to appeal the decision of the Drug Court to make a CDTO.¹⁸⁹ Nevertheless, when determining if the offender is suitable the Drug Court takes into account the offender's level of motivation and attitude.¹⁹⁰ It is unlikely that the Drug Court would impose a CDTO if the offender was not willing to engage in drug treatment because the eligibility criteria requires that a CDTO cannot be made if the offender's participation would damage the program or another person's participation in the program.¹⁹¹

In addition to the availability of CDTOs for drug-dependent offenders who must be sentenced to imprisonment, the New South Wales Drug Court has access to custodial detoxification facilities for its standard drug court participants. Eligible offenders are required to undergo detoxification and assessment at a dedicated drug court unit within the Metropolitan Remand and Reception Centre.¹⁹² The Parramatta Correctional Centre also has a dedicated

176. The CDTCC is approximately 40km north-west of the Sydney central business district. It is a separate stand-alone wing at the Parklea correctional centre: New South Wales, *Parliamentary Debates*, Legislative Council, 12 May 2004, 8769 (Mr J Della Bosca, Special Minister of State).

177. Offenders sentenced to a CDTO will serve part of their sentence in the community, so the total number of offenders sentenced to CDTO will be greater than 70 at any one time: see <http://www.dcs.nsw.gov.au/offender_management/offender_management_in_custody/Correctional_Centres/compdrug.asp> accessed 16 January 2008.

178. New South Wales, *Parliamentary Debates*, Legislative Council, 12 May 2004, 8769 (Mr J Della Bosca, Special Minister of State). See also *Crimes (Administration of Sentences) Act 1999* (NSW) s 106B.

179. *Ibid.*

180. *Drug Court Act 1998* (NSW) s 18B; *Drug Court Regulations 2005* (NSW) reg 7A.

181. *Drug Court Act 1998* (NSW) s 5A.

182. *Drug Court Act 1998* (NSW) s 5A.

183. *Drug Court Act 1998* (NSW) s 18D.

184. The offender must spend at least six months on stage one and at least six months on stage two.

185. *Crimes (Administration of Sentences) Act 1999* (NSW) s 106D.

186. Once the CDTO is completed the Drug Court determines if the offender will be released on parole, but once released the Drug Court is no longer involved in supervising the offender on parole: *Crimes (Administration of Sentences) Act 1999* (NSW) s 106T.

187. *Crimes (Administration of Sentences) Act 1999* (NSW) ss 106F(2) & 106G(2).

188. *Crimes (Administration of Sentences) Act 1999* (NSW) ss 106I & 106J. The Commissioner also has the power to move an offender backwards to a previous stage in certain circumstances but the Drug Court must review such a decision within 21 days: ss 106M & 106P.

189. *Drug Court Act 1998* (NSW) ss 18B(5) & 18D(4).

190. *Drug Court Act 1998* (NSW) s 18E(2).

191. *Drug Court Act 1998* (NSW) s 18D.

192. See <http://www.lawlink.nsw.gov.au/lawlink/drug_court/ll_drugcourt.nsf/pages/adrgcrt_aboutus#6> accessed 1 May 2008.

wing for drug court participants who are serving custodial sanctions throughout the drug court program.¹⁹³ It has been observed that the availability of a drug treatment unit is critical to the success of any drug court program because it provides a safe and therapeutic place for detoxification.¹⁹⁴

The need for a secure drug detoxification facility has been recognised in Western Australia.¹⁹⁵ Further, during preliminary consultations the Commission was told that requiring offenders to serve custodial sanctions within a normal prison environment is not necessarily appropriate. The treatment regime is effectively put on hold and in some instances participants may be exposed to drugs in prison.¹⁹⁶ And a normal prison environment is not necessarily suitable for those participants who need 'time out' from the rigorous drug court program.¹⁹⁷ It has been stated that a drug court cannot operate effectively without a discrete custodial prison unit for 'assessment, detoxification, and sanctions'.¹⁹⁸ The Commission invites submissions about the viability of establishing a custodial drug treatment centre in Western Australia, in particular from those organisations and individuals involved in the Perth Drug Court and Western Australian prisons.

CONSULTATION QUESTION 2.3

Custodial drug treatment options

The Commission invites submissions about the following matters:

- whether a compulsory drug treatment correctional facility should be established in Western Australia and, if so, whether the *Sentencing Act 1995 (WA)* should provide for a compulsory drug treatment order for those serious drug-dependent offenders who are ineligible for the Perth Drug Court because they must be sentenced to imprisonment; and
- whether there should be a dedicated custodial unit or facility for Drug Court participants who require detoxification in a secure setting, who have been remanded in custody during the assessment stage of the program or for the serving of custodial sanctions during the program.

193. See <http://www.dcs.nsw.gov.au/offender_management/offender_management_in_custody/Correctional_Centres> accessed 1 May 2008.

194. Barrow B & Popovic J, *Drug Courts Operating in Other States* (2001) 20.

195. Airey M & Wiese J, 'How the WA Pilot Drug Court is Progressing: A lawyer's perspective' (2001) 28 (10) *Brief* 12, 13.

196. Drug Court program staff, consultation (21 February 2008).

197. Meeting with Magistrate Pontifex (26 February 2008).

198. Barrow B & Popovic J, *Drug Courts Operating in Other States* (2001) 4.

Evaluations

Overall, evaluations of drug courts in Australia have been positive. However, many drug court evaluations (both in Australia and overseas) are criticised for 'methodological flaws'.¹⁹⁹ One aspect lacking in some evaluations is the failure or inability to compare criminal justice outcomes for drug court participants with an appropriate comparison group.²⁰⁰ Further, evaluations are usually conducted during or after the pilot stage and as a result long-term recidivism analysis is rare. In this regard, the Commission notes that outcomes are likely to be improved over a longer period because any initial 'teething problems' will have been rectified.²⁰¹

It has been observed that the best practice is to engage independent evaluators during the planning stages of any new program.²⁰² In addition, in order to undertake effective and rigorous evaluations, there must be an appropriate statistical database. The deficiency in data collection has been identified as a problem for many Australian drug courts²⁰³ and the lack of funding for the development of such a database in Western Australia has been drawn to the Commission's attention.²⁰⁴ The Victorian Department of Justice's policy for all 'problem-solving' programs is that funding must be given to enable appropriate data collection for evaluation purposes.²⁰⁵ The Commission agrees that there should be ongoing evaluations of the Drug Court, and specific funding should be allocated to enable sufficient data collection for this purpose. It is also essential to conduct long-term evaluations to establish the effectiveness of drug court programs in reducing offending after a significant period has elapsed after completing the program.²⁰⁶

199. Indermaur D & Roberts L, 'Finding Alternatives to Imprisonment' (2005) 86 *Reform* 28, 30. See also Lawrence R & Freeman K, 'Design and Implementation of Australia's First Drug Court' (2002) 35 *Australian and New Zealand Journal of Criminology* 63, 66; Wundersitz J, *Criminal Justice Responses to Drug and Drug-Related Offending: Are they working?* Australian Institute of Criminology, Technical and Background Paper No. 25 (2007) 111.

200. Wundersitz J, *ibid* 103.

201. *Ibid* 111.

202. Courts and Programs Development Unit, Department of Justice Victoria, *Policy Framework to Consolidate and Extend Problem-Solving Courts and Approaches* (March 2006) 17. This was done in New South Wales. The evaluation of the New South Wales Drug Court was planned in three parts: a cost-effectiveness study; a study in relation to the health and wellbeing of participants; and a study monitoring the operation of the court. A fourth component (a process evaluation) was subsequently added: Freeman K, 'Evaluating Australia's First Drug Court: Research challenges' (Paper presented at the *Evaluation in Crime and Justice – Trends and Methods* conference, Canberra 24–25 March 2003) 2–3.

203. Indermaur D & Roberts L, 'Drug Courts in Australia: The first generation' (2003) 15 *Current Issues in Criminal Justice* 136, 145.

204. Meeting with Magistrate Pontifex (26 February 2008); see also King M, 'Perth Drug Court Practice' (2006) 33(11) *Brief* 27, 29.

205. Courts and Programs Development Unit, Department of Justice Victoria, *Policy Framework to Consolidate and Extend Problem-Solving Courts and Approaches* (March 2006) 19.

206. Wundersitz J, *Criminal Justice Responses to Drug and Drug-Related Offending: Are they working?* Australian Institute of

THE COMMISSION'S PROPOSAL FOR A DRUG TREATMENT ORDER

The Commission has concluded that drug courts should be supported by clear but flexible legislative provisions. The Commission proposes that a pre-sentence Drug Treatment Order be enacted under the *Sentencing Act*. Initially, the availability of this order should be restricted to the Perth Drug Court (and superior courts); however, by providing for a Drug Treatment Order (rather than a separately constituted drug court) it will be easy to extend the power to impose a Drug Treatment Order to other courts in the future.²⁰⁷ Extending drug court programs to other locations is one way of increasing access to court mandated drug treatment. It has been stated that 'drug use is not confined to one geographical area' and as many offenders as possible should have access to drug court style intervention.²⁰⁸ Of course, increasing the availability of Drug Treatment Orders to other courts will depend on adequate resources; the availability of local drug treatment services and programs; and the willingness and ability of judicial officers to supervise and monitor drug-dependent offenders.

PROPOSAL 2.4

Drug Treatment Order

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

- for the primary objectives of a Drug Treatment Order; that is, to rehabilitate offenders by providing judicially supervised drug treatment; to reduce drug-dependency and to reduce drug-related crime;
- that a Drug Treatment Order can only be imposed by a prescribed court (and initially the only prescribed courts are to be the Perth Drug Court, the Supreme Court and the District Court);
- that any court can refer an offender to the Perth Drug Court for assessment and determination of the offender's eligibility and suitability for a Drug Treatment Order;
- that if an offender has been charged with a superior court matter, the Perth Drug Court is to determine if the offender is suitable for a Drug Treatment Order; however, the final

Criminology, Technical and Background Paper No. 25 (2007) 111.

207. Under s 3A of the *Sentencing Act 1997* (Tas) a drug treatment sentencing order which incorporates aspects of drug court procedures is available in any Tasmanian magistrates court.

208. Tasmania, *Parliamentary Debates*, Legislative Assembly, 4 July 2007, 26-113 (Mr Kons, Minister for Justice and Workplace Relations).

decision as to whether a Drug Treatment Order should be imposed is to be made by the applicable superior court;

- that if a superior court imposes a Drug Treatment Order, the Perth Drug Court is to supervise and monitor the offender's progress on the order and can vary the order at any time, but only the superior court that imposes the order can cancel the order.
- that in order to be eligible for a Drug Treatment Order it must be highly likely that the offender would otherwise be sentenced to a term of immediate imprisonment;
- that an offender subject to a suspended sentence of imprisonment at the time of the current offence(s) is eligible for a Drug Treatment Order;
- that in order to be eligible for a Drug Treatment Order the offender must have an illicit drug-dependency;
- that a Drug Treatment Order cannot be made without the consent of the offender and the offender cannot consent unless he or she has first been fully informed of the consequences of non-compliance and the requirements of the program and been given the opportunity for legal advice;
- that before the offender consents, the prescribed court must 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;
- that sentencing can be deferred until the Drug Treatment Order is completed or cancelled and that sentencing cannot occur later than two years after the Drug Treatment Order is made;
- for clearly defined roles for each member of the case management team including reference to professional obligations and responsibilities;
- for the various conditions that can be imposed when making a Drug Treatment Order (eg, a requirement to report any change of address; a requirement to seek permission to leave the state; a condition to reside at a particular address; a condition to undergo residential drug treatment; a condition to undergo drug treatment or counselling; a condition to attend an educational or training program; a condition to submit urine samples for analysis; a condition to abide by a curfew; a condition to report to a case-worker; and a condition to attend court);

- that if a prescribed court makes a Drug Treatment Order it can grant the offender bail;
- that a Drug Treatment Order can be extended provided that the maximum duration is two years;
- for a non-exhaustive list of rewards that can be given by the prescribed court if satisfied on the balance of probabilities that an offender has complied or is complying with the conditions of the Drug Treatment Order;
- for a non-exhaustive list of sanctions that can be imposed by the prescribed court if satisfied on the balance of probabilities that an offender has not complied or is not complying with the conditions of the Drug Treatment Order;
- that the list of sanctions include the power to order that the offender be imprisoned for a set maximum number of days and further, that an offender has the right to appeal against the imposition of any period of imprisonment;
- for the criteria to be established before a Drug Treatment Order can be cancelled;
- that a Drug Treatment Order can be varied or amended at any time by the Perth Drug Court provided that all parties have had a reasonable opportunity to be heard;
- that when the Drug Treatment Order is cancelled (either because it has been completed or terminated) the court must, when sentencing the offender, take into account anything done by the offender in compliance with the order but it must not take into account failure to comply with the order;
- that the final sentence imposed at the end of the Drug Treatment Order must not be greater than the indicated sentence;
- that when sentencing the offender the court has discretion to take into account any custody sanctions served in prison during the order;
- that the final sentence can be appealed in the same way as any other sentence or order imposed as a consequence of conviction; and
- that after two years, the effectiveness of the new Drug Treatment Order is to be independently evaluated.

CONSULTATION QUESTION 2.4

Drug Treatment Orders

The Commission invites submissions as to whether there are any other matters that should be included within the proposed Drug Treatment Order.

Other drug and alcohol court intervention programs

Apart from drug courts, there are numerous other court intervention programs in Australia targeting drug and/or alcohol related offending. On the whole, they are significantly less intensive than drug court programs and are usually aimed at less serious offending and less serious drug and alcohol problems. Although judicial monitoring is an important feature of these programs, the judicial officer is not usually actively involved in case management. It has been stated that, unlike drug courts, other programs do 'not require a fundamental shift in the way the court conducts its business'.¹ Only a handful of programs are described in this section; it is not intended to be a comprehensive account of all Australian drug and alcohol court intervention programs. Rather, the following description serves as background for the consultation issues.

WESTERN AUSTRALIA – SUPERVISED TREATMENT INTERVENTION REGIME

The Supervised Treatment Intervention Regime (STIR) commenced in November 2003.² The program is available in six regional magistrates courts and, as mentioned above, it is administered by the Perth Drug Court for offenders in the metropolitan area. The STIR program is designed for offenders with less serious offending and less severe drug problems than those who participate in the Drug Court; however, it targets serious offending and more serious drug problems than are dealt with in police/court diversion programs.

Program operation

STIR aims to facilitate drug treatment; provide ongoing supervision and support participants during the program; and make appropriate referrals to support services during and at the conclusion of the program.³ Unlike many other drug and alcohol court intervention programs, reducing reoffending is not a

stated objective of STIR; the program's focus is the diversion of offenders into drug treatment.⁴

Offenders usually participate in the STIR program for three to four months.⁵ During the program, participants are required to undergo drug treatment and submit to regular urinalysis. They are also required to report to a community corrections officer and appear in court. In the metropolitan area, participants are supervised by Court Assessment and Treatment Service officers (rather than standard corrections officers) working through the Drug Court.

In order to be eligible for STIR the offender must be on bail. The offender must plead guilty and the offences must be of such a nature that the likely penalty would be a Community Based Order or an Intensive Supervision Order. The program is not available for offenders facing imprisonment. The offender must have an illicit drug problem and be prepared to participate in drug treatment.⁶ Sexual offences, drug trafficking offences, serious violent offences and offences carrying a mandatory sentence of imprisonment are excluded.⁷

The STIR program accepts referrals from magistrates, defence counsel, prosecutors, or community corrections officers. A plea of guilty has to be entered before the offender can be assessed for suitability by a STIR project officer.⁸ If the offender is accepted onto the program, the case is adjourned and the offender is placed on bail to comply with the program. Bail conditions often include the requirement to undergo urinalysis.⁹ The offender is regularly monitored by the court (usually once a month).

1. Wundersitz J, *Criminal Justice Responses to Drug and Drug-Related Offending: Are they working?* Australian Institute of Criminology, Technical and Background Paper No. 25 (2007) 13.
2. Hughes C & Ritter A, *A Summary of Diversion Programs for Drug and Drug-Related Offenders in Australia* (Sydney: National Drug and Alcohol Research Centre, 2008) 70.
3. Crime Research Centre, *WA Diversion Program – Evaluation Framework (POP/STIR/IDP)*, Final Report for the Drug and Alcohol Office (2007) 58.

4. Western Australian Drug and Alcohol Office, *Supervised Treatment Intervention Regime: Information for participants*, available at <<http://www.dao.health.wa.gov.au/Publications/tabid/99/DMXModule/427/Default.aspx>> accessed 23 April 2008.
5. Hughes C & Ritter A, *A Summary of Diversion Programs for Drug and Drug-Related Offenders in Australia* (Sydney: National Drug and Alcohol Research Centre, 2008) 69.
6. Western Australian Drug and Alcohol Office, *Supervised Treatment Intervention Regime: Information for participants*, available at <<http://www.dao.health.wa.gov.au/Publications/tabid/99/DMXModule/427/Default.aspx>> accessed 23 April 2008. See also Crime Research Centre, *WA Diversion Program – Evaluation Framework (POP/STIR/IDP)*, Final Report for the Drug and Alcohol Office (2007) 58.
7. Crime Research Centre, *ibid* 58.
8. Western Australian Drug and Alcohol Office, *Supervised Treatment Intervention Regime: Information for participants*, available at <<http://www.dao.health.wa.gov.au/Publications/tabid/99/DMXModule/427/Default.aspx>> accessed 23 April 2008.
9. Crime Research Centre, *WA Diversion Program – Evaluation Framework (POP/STIR/IDP)*, Final Report for the Drug and Alcohol Office (2007) 64.

Judicial monitoring is not as intensive as it is for drug court participants – drug court participants appear in court more often and at each court review they are subject to more involved interaction with the judicial officer.¹⁰ Nonetheless, it has been observed that the magistrate is ‘seen as central to the success of the STIR program’.¹¹ The inclusion of judicial monitoring is the main element which distinguishes STIR from court diversion programs. Further, participants are encouraged and supported by a case management team involving the magistrate, a community corrections officer, a STIR worker, the police prosecutor and the defence lawyer. The team meets monthly during the program to review the offender’s progress. The same observations mentioned above in relation to case reviews conducted in the Drug Court are potentially applicable to these meetings.

Powers of the court and program outcomes

The program’s evaluators noted that STIR is underpinned by a treatment philosophy.¹² The program does not actively seek to offer legal incentives for participation. Unlike the Drug Court, there is no indicated sentence at the start of the program. Nevertheless, successful completion of the program may result in a reduced penalty. As noted above, the STIR program accepts offenders who would otherwise be sentenced to a Community Based Order or an Intensive Supervision Order. Those who successfully complete the program are likely to receive a Community Based Order or a fine. Thus, it appears that there is a degree of sentence reduction for successful compliance. Non-compliance may result in termination from the program and, if so, sentencing occurs in the usual manner.¹³

VICTORIA – CREDIT/BAIL SUPPORT PROGRAM

The Court Referral and Evaluation for Drug Intervention and Treatment (CREDIT) program is one of Australia’s earliest court intervention programs. It was established in 1998 in response to increased drug-related crime. The program is available pre-plea and this reflects its primary aim to reduce drug-related offending by providing early intervention. The CREDIT program was merged with the Bail Support Program (BSP) in December 2004.¹⁴

10. Meeting with Magistrate Pontifex (26 February 2008).
11. Crime Research Centre, *WA Diversion Program – Evaluation Framework (POP/STIR/IDP)*, Final Report for the Drug and Alcohol Office (2007) 67.
12. *Ibid* 138.
13. *Ibid* 59.
14. The Bail Support Program commenced in 2001 and aimed to link offenders with appropriate supports (such as accommodation, supervision and treatment) in order to increase the chance of being granted bail and increase the chance of successfully complying with the requirements of bail once the offender was released: see Victorian Department of Justice, *Guide to Court Support and Diversion Services* (February 2007) 4.

The objectives of CREDIT/BSP include providing early access to drug treatment; providing access to accommodation, welfare, legal and other community supports; monitoring offenders; reducing custodial remands; and reducing the risk of re-offending.¹⁵ An evaluation of the CREDIT program, conducted prior to its merger with the BSP, found that 80% of participants successfully completed the program.¹⁶

Program operation

CREDIT/BSP is available in a number of Victorian magistrates courts (Broadmeadows, Dandenong, Ringwood, Heidelberg, Frankston, Geelong and Ballarat).¹⁷ The program lasts for approximately three to four months and provides a range of services for offenders who are subject to bail. These services include treatment and support; referral to drug rehabilitation programs; referral to government and non-government support services; and financial assistance with crisis accommodation and medication.¹⁸ CREDIT/BSP also has access to 20 properties for accommodation of program participants. HomeGround (a non-government housing support organisation) is contracted to assist with housing support; budgeting; and independent living skills.¹⁹ Participants are required to report regularly to their case manager throughout the program.

Eligibility criteria

The program’s eligibility criteria require that the person has an illicit drug problem and is willing to address that problem by engaging in appropriate treatment.²⁰ Alcohol-dependent offenders who do not also have a drug-dependency are ineligible.

In order to be placed on the program, the person must be eligible for release on bail. Consequently, it has been observed that an offender’s willingness to participate in the program is not relevant when deciding if the offender should be released on bail. In other words, the offender should not be assessed for suitability to participate in the program until a decision has been made that it is appropriate to release the offender on bail.²¹ Nonetheless, it appears that there is a degree of inconsistency between magistrates as to how this rule is applied in practice. The evaluators noted that some magistrates seemed

15. *Ibid*.
16. Alberti S et al, *Court Diversion Program Evaluation: An overview report* (Vol 1, 2004) 12.
17. Victorian Department of Justice, *Guide to Court Support and Diversion Services* (February 2007) 5. The Court Integrated Services Program (CISP) operates as an alternative to the CREDIT/BSP in addition to three magistrates courts: see discussion under ‘Court Integrated Services Program’, Chapter Five.
18. Victorian Department of Justice, *Guide to Court Support and Diversion Services* (February 2007) 5–6.
19. *Ibid* 6.
20. King J et al, *Court Diversion Program Evaluation: Process evaluation and policy and legislative review* (Vol 2, 2004) 54.
21. McGlone D, ‘Drug Courts: A departure from adversarial justice’ (2003) 28 *Alternative Law Journal* 136, 137.

to decide the question of bail first but others based the decision to grant bail on the offender's suitability for the program.²²

A plea of guilty is not necessary because the program explicitly aims to provide early intervention by offering treatment and support as soon as possible after arrest. Initially the CREDIT program did not allow people charged with violent offences to participate. The evaluation of that program in 2004 noted that many staff did not believe that violent offences should lead to automatic exclusion.²³ It appears that there is now some discretion in relation to violent offending – the program protocol provides that if the participant is charged with violent offences (or if there are any safety concerns) the case manager will advise service providers.²⁴ Also an offender who is currently engaged in drug treatment (as part of a community-based sentence or as a requirement of parole) is not eligible to participate in CREDIT/BSP.²⁵

Referral and court process

Offenders can be referred to CREDIT/BSP by the police soon after arrest (so long as their charges will be heard in a participating court). Referrals can also be made by a magistrate, a lawyer, court staff, the family, or the offender can self-refer.²⁶ It appears that, at least up until September 2003, the majority of referrals were made by lawyers and magistrates.²⁷ After undergoing an assessment by program staff, a report is prepared for the magistrate. The magistrate retains discretion to accept or reject a recommendation that the person is suitable. If the person is accepted onto the program, his or her bail may include a condition to comply with the requirements of CREDIT/BSP.²⁸

Participants typically appear before a magistrate once during the program for an interim review but some may appear more often.²⁹ At the review the magistrate monitors the participant's progress and 'provides encouragement and praise (where warranted)' and the magistrate can make any variations to

the program requirements if necessary.³⁰ Because CREDIT/BSP does not operate in a dedicated court at a particular time, and it is available to any magistrate in the participating courts, the same magistrate is not always involved from the commencement of the process until sentencing takes place.³¹

Powers of the court and program outcomes

Once the program is completed a report is provided to the sentencing magistrate. CREDIT/BSP operates without any specific legislative powers, but general sentencing principles enable the court to take into account an offender's successful compliance on the program. An evaluation report states that failure to comply with the program cannot be used to 'penalise' the offender but 'satisfactory participation can be a mitigating factor for consideration when the Magistrate sentences the participant'.³² The vast majority of sentences imposed at the end of the program were non-custodial. A total of 8% of participants were sent to prison; most of these prison sentences were imposed on non-completers.³³ Bearing in mind that the majority of program participants have extensive offending histories,³⁴ the imposition of non-custodial sentences suggests that successful participants are receiving considerable mitigation in sentencing.

NEW SOUTH WALES – MAGISTRATES EARLY REFERRAL INTO TREATMENT

The Magistrates Early Referral into Treatment Program (MERIT) began as a pilot program in 2000 with the aim of 'breaking the drug-crime cycle'.³⁵ Its stated objectives are to reduce illicit drug use, reduce drug-related crime, protect the community and provide more effective sentencing.³⁶ Following a positive evaluation it was extended across the state and is now available in 60 local courts in New South Wales.³⁷ When the MERIT program commenced it was available to 3% of all people charged with offences in the Local Court; by 2005 the program was available to 77% of all people charged with Local Court matters.³⁸

22. King J et al, *Court Diversion Program Evaluation: Process evaluation and policy and legislative review* (Vol 2, 2004) 79. The Commission considers the appropriate use of bail conditions in Chapter Six: see 'Bail'.

23. Alberti S et al, *Court Diversion Program Evaluation, An overview report* (Vol 1, 2004) 13.

24. Jo Beckett, Program Manager, CISP and CREDIT/BSP, email communication (14 December 2007). Case managers can only provide information to service providers after the participant has signed an authority to release information.

25. Wundersitz J, *Criminal Justice Responses to Drug and Drug-Related Offending: Are they working?* Australian Institute of Criminology, Technical and Background Paper No. 25 (2007) 14.

26. Victorian Department of Justice, *Guide to Court Support and Diversion Services* (February 2007) 6.

27. King J et al, *Court Diversion Program Evaluation: Process evaluation and policy and legislative review* (Vol 2, 2004) 60.

28. Ibid 56.

29. Alberti S et al, *Court Diversion Program Evaluation: An overview report* (Vol 1, 2004) 10.

30. King J et al, *Court Diversion Program Evaluation: Process evaluation and policy and legislative review* (Vol 2, 2004) 56.

31. Ibid 56–57.

32. Alberti S et al, *Court Diversion Program Evaluation: An overview report* (Vol 1, 2004) 10.

33. Ibid 12.

34. See King J et al, *Court Diversion Program Evaluation: Process evaluation and policy and legislative review* (Vol 2, 2004) 85.

35. Matruggio T, *MERIT: A program overview from 2000–2006* (New South Wales Department of Attorney General, 2007) 1.

36. Bolitho J et al, *The Magistrates Early Referrals Into Treatment (MERIT) Program: Evaluation and real world challenges* (Paper presented at the *Delivering Crime Prevention* conference, Sydney 21–22 November 2005) 2.

37. See <<http://www.merit.org.au>> accessed 6 May 2008. In New South Wales, magistrates courts are called local courts.

38. Matruggio T, *MERIT: A program overview from 2000–2006* (New South Wales Department of Attorney General, 2007) 1.

The evaluation of the pilot program at Lismore concluded that those participants who completed the MERIT program were less likely to reoffend and, if they did reoffend, they took longer to offend than those participants who did not complete the program.³⁹ The program was also considered to be cost-effective: it was estimated that for every \$1 spent on the program \$2.41 was saved.⁴⁰ From its inception to 31 December 2006, the MERIT program received a total of 12,209 referrals and accepted 7,387 offenders onto the program (60.5%). Over the six-year period, approximately 59% of participants completed the program; however, completion rates have gradually increased over time: 47% of participants completed the program in 2001 and by 2005 the completion rate had risen to 67%.⁴¹

Program operation

The MERIT is a pre-plea program available in the Local Court. Offenders who are charged with indictable matters that must be dealt with in the District Court cannot participate.⁴² The program usually lasts for 12 weeks but it can be extended if necessary.⁴³ It is aimed at offenders with significant drug problems; it appears that the program has attracted offenders with moderate to serious criminal histories: over the first 20 months, 96% of participants had prior criminal convictions and 60% had previously been sentenced to imprisonment.⁴⁴

Like all court intervention programs, MERIT is underpinned by a 'partnership approach'.⁴⁵ Agencies involved in the program include the Attorney General's Department, the Health Department, local courts, the police, the Legal Aid Commission and treatment providers. A MERIT team case manages participants throughout the program; often daily supervision is required in the beginning stages.⁴⁶ Participants are offered a wide variety of treatment options including detoxification, pharmacotherapy, residential rehabilitation, individual and group

counselling, case management and general welfare support.⁴⁷

Eligibility criteria

The MERIT program is only available to adults who are charged with drug-related offences and who have a 'demonstrable and treatable illicit drug problem'.⁴⁸ Further, the applicable Local Court Practice Note states that the drug problem must be serious.⁴⁹ A plea of guilty is not required prior to participation in the program because the program is intended to provide early intervention, although a plea of guilty can be made at any time.⁵⁰ However, an issue raised by magistrates involved in the program is the difficulty in ascertaining whether the offending behaviour is related to the drug problem in the absence of a plea of guilty.⁵¹

The program is described as voluntary and for this reason there is a policy that participants must be eligible for release on bail (and give written and informed consent to participate in the program). Despite this, the Local Court Practice Note states that offenders can be remanded in custody while waiting for the outcome of an assessment to participate in the program.⁵² The evaluation of the pilot MERIT program noted the inconsistency between this statement and the requirement that a participant must otherwise be eligible for bail; it was recommended that the Practice Note be clarified.⁵³

Offenders are precluded from participating in the program if they are charged with, or have outstanding, violent or sexual offences or if they are on other court-ordered treatment programs.⁵⁴ The Local Court Practice Note states that offences involving 'significant violence' are excluded.⁵⁵ This suggests that some minor assaults may not be excluded in practice.

39. Northern Rivers University Department of Rural Health, *Evaluation of the Lismore MERIT Pilot Program*, Final Report (2003) 32.
 40. Ibid 80.
 41. Matruggio T, *MERIT: A program overview from 2000–2006* (New South Wales Department of Attorney General, 2007) 1–2.
 42. *MERIT Fact Sheet* <[http://www.lawlink.nsw.gov.au/lawlink/cpd/merit.nsf/vwFiles/MERIT_Factsheet.pdf/\\$file/MERIT_Factsheet.pdf](http://www.lawlink.nsw.gov.au/lawlink/cpd/merit.nsf/vwFiles/MERIT_Factsheet.pdf/$file/MERIT_Factsheet.pdf)> accessed 6 May 2008.
 43. Chief Magistrate P Staunton, *Magistrates Early Referral into Treatment (MERIT) program*, Local Court Practice Note No. 5 (20 August 2002) 2.
 44. Scantleton J et al, *MERIT: A cooperative approach addressing drug addiction and recidivism* (Paper presented at the 2nd International Conference on Drug Strategy, Perth, May 2002) 1.
 45. Ibid 2.
 46. Scantleton J et al, *MERIT: A cooperative approach addressing drug addiction and recidivism* (Paper presented at the 2nd International Conference on Drug Strategy, Perth, May 2002) 4.

47. *MERIT Fact Sheet* <[http://www.lawlink.nsw.gov.au/lawlink/cpd/merit.nsf/vwFiles/MERIT_Factsheet.pdf/\\$file/MERIT_Factsheet.pdf](http://www.lawlink.nsw.gov.au/lawlink/cpd/merit.nsf/vwFiles/MERIT_Factsheet.pdf/$file/MERIT_Factsheet.pdf)> accessed 6 May 2008.
 48. Barnes L & Poletti P, *MERIT: A survey of magistrates* (Sydney: Judicial Commission of New South Wales, 2004) 13. Like many court intervention programs, if alcohol-dependency is the primary problem offenders are ineligible: *MERIT Fact Sheet*, *ibid*.
 49. Chief Magistrate P Staunton, *Magistrates Early Referral into Treatment (MERIT) program*, Local Court Practice Note No. 5, 20 August 2002, 2.
 50. Ibid 1.
 51. Barnes L & Poletti P, *MERIT: A survey of magistrates* (Sydney: Judicial Commission of New South Wales, 2004) 30.
 52. Chief Magistrate P Staunton, *Magistrates Early Referral into Treatment (MERIT) program*, Local Court Practice Note No. 5, 20 August 2002, 2. This Practice Note is non-binding: Northern Rivers University Department of Rural Health, *Evaluation of the Lismore MERIT Pilot Program*, Final Report (2003) 82.
 53. Northern Rivers University Department of Rural Health, *ibid* xi.
 54. Barnes L & Poletti P, *MERIT: A survey of magistrates* (Sydney: Judicial Commission of New South Wales, 2004) 13.
 55. Chief Magistrate P Staunton, *Magistrates Early Referral into Treatment (MERIT) program*, Local Court Practice Note No. 5, 20 August 2002, 2.

Referral and court process

Like CREDIT/BSP, referrals to the MERIT program can be made directly by the police. In addition, referrals are made by lawyers and magistrates or offenders can self-refer.⁵⁶ Following a referral, potential participants are interviewed by a case-worker to assess the extent of their drug problem and, if they appear suitable, determine the appropriate treatment regime.

Once accepted, participants are placed on bail with a condition to comply with the program. Throughout the program, the magistrate receives regular reports about the offender's progress.⁵⁷ The frequency of court reviews is determined by the magistrate based on the recommendations of the MERIT team. For difficult cases, more intensive and regular judicial monitoring is used.⁵⁸ The role of the magistrate has been described as a 'core element' of the program because the magistrate provides encouragement, guidance and supervision. However, unlike drug court magistrates, the MERIT magistrate is not directly involved in treatment issues.⁵⁹ Although there is no dedicated magistrate running the program at each location, whenever possible the same magistrate is involved from start to finish.⁶⁰

Powers of the court and program outcomes

The MERIT program does not operate with any specific legislative powers. At the completion of the program, a report from the MERIT team is provided to the court. When sentencing an offender, successful participation is taken into account. The pilot program's evaluators compared the final sentences imposed with the likely sentences that would have been imposed if the offender had not participated in the program (by asking magistrates what they would have given) and it was found that offenders who completed the program received significant mitigation.⁶¹

Further, participants who complete the program receive less severe sentences than those who do not complete the program. Only 1% of successful

participants were sentenced to imprisonment compared to 38% of unsuccessful participants.⁶² The most common sentencing outcome for successful participants is a good behaviour bond (with or without supervision) followed by a suspended sentence (with or without supervision).⁶³

QUEENSLAND – QUEENSLAND INDIGENOUS ALCOHOL DIVERSION PROGRAM

The Queensland Indigenous Alcohol Diversion Program (QIADP) targets Aboriginal people who are dependent on or high-risk users of alcohol.⁶⁴ The QIADP is a three-year pilot program; it commenced in July 2007 and was fully operational by October 2007.⁶⁵ The Queensland government has provided \$36 million over four years to develop and establish the pilot program.⁶⁶ The QIADP is described as a whole-of-government project involving various government agencies and non-government organisations. It also actively seeks to respect Aboriginal culture by employing Aboriginal staff; working closely with Aboriginal community justice groups and other organisations; developing culturally appropriate programs; and providing relevant 'cultural competency training'.⁶⁷ It has been observed that the QIADP has support from Aboriginal Elders and organisations such as the Aboriginal and Torres Strait Islander Legal Service.⁶⁸ The program has two streams: a criminal justice stream and a child safety stream.⁶⁹ Only the criminal justice stream is discussed here because it fits within the Commission's definition of a court intervention program.⁷⁰

62. Ibid.

63. Matruglio T, *MERIT: A program overview from 2000–2006* (New South Wales Department of Attorney General, 2007) 1–2.

64. Queensland also has a drug court intervention program (QMERIT) which is similar to the New South Wales MERIT program. QMERIT commenced in 2006 and is available in the Magistrates Courts in Maroochydore and Redcliffe: for further details see Judge Marshall Irwin, Chief Magistrate, *Queensland Magistrates Early Referral into Treatment (QMERIT) Program*, Practice Direction No. 2 of 2008 (24 January 2008).

65. The evaluation of the program will be completed by the end of 2009: see <<http://www.atsip.qld.gov.au/partnerships/qiadp/about/>> accessed 5 May 2008.

66. Premier Peter Beattie, *\$36 Million Indigenous Alcohol Diversion Program*, Ministerial Media Statement (21 December 2006).

67. See <<http://www.atsip.qld.gov.au/partnerships/qiadp/about/>> accessed 5 May 2008.

68. Magistrate Osborne (Presentation to the Third National Indigenous Justice CEO Forum, Brisbane, 21–22 November 2007) 3: see <http://www.indigenousjustice.gov.au/resources/2007_NIJF/05_osborne.pdf> accessed 18 June 2008.

69. The criminal justice stream accounts for approximately 80% of the program's operation. The child safety stream is available to parents of children who have been assessed as in need of care and protection: Queensland Government, *Indigenous Alcohol Diversion Program: Your health, your future* (2007) 2.

70. Ibid 4.

56. *MERIT Fact Sheet* available at <[http://www.lawlink.nsw.gov.au/lawlink/cpd/merit.nsf/vwFiles/MERIT_Factsheet.pdf/\\$file/MERIT_Factsheet.pdf](http://www.lawlink.nsw.gov.au/lawlink/cpd/merit.nsf/vwFiles/MERIT_Factsheet.pdf/$file/MERIT_Factsheet.pdf)> accessed 6 May 2008.

57. Chief Magistrate P Staunton, *Magistrates Early Referral into Treatment (MERIT) program*, Local Court Practice Note No. 5, 20 August 2002, 2.

58. Scantleton J et al, *MERIT: A cooperative approach addressing drug addiction and recidivism* (Paper presented at the 2nd International Conference on Drug Strategy, Perth, May 2002) 3.

59. Linden J, *Magistrates Early Referral into Treatment Program (MERIT)* (Judicial Commission of New South Wales, 2003).

60. Scantleton J et al, *MERIT: A cooperative approach addressing drug addiction and recidivism* (Paper presented at the 2nd International Conference on Drug Strategy, Perth, May 2002) 3.

61. Northern Rivers University Department of Rural Health, *Evaluation of the Lismore MERIT Pilot Program*, Final Report (2003) 31.

Program operation

The main objectives of the program are to improve Aboriginal health and reduce the numbers of Aboriginal people coming into contact with the criminal justice system. In the criminal justice stream it is intended that these objectives will be met by reducing alcohol abuse and related reoffending.⁷¹

The QIADP operates in three areas: Townsville and Palm Island; Cairns and Yarrabah; and Rockhampton and Woorabinda. There are a total of 104 places available for the criminal justice stream.⁷² After its first three weeks the program had 13 participants.⁷³ By October 2007 the Townsville Magistrates Court had accepted 36 referrals to the program and at that time there were 21 participants. Townsville has capacity for 40 participants and it was expected that full capacity would be reached by February 2008.⁷⁴

The program generally lasts for 20 weeks and has two main phases: an 'intensive treatment phase' and a 'rehabilitation and recovery phase'. Some offenders will undergo detoxification (at residential treatment facilities, in hospital or at home) prior to the intensive treatment phase. This phase, which lasts for approximately 8–12 weeks, involves individual and group counselling. The rehabilitation and recovery phase includes cultural healing, group counselling, parenting programs, family violence programs and anger management. If a participant's usual place of residence is not suitable the program provides supported accommodation.⁷⁵

An important component of the program is voluntary aftercare for up to 12 months. Participants are offered continued support to prevent relapse such as ongoing counselling and assistance with issues such as training, employment and accommodation.⁷⁶ In this regard, it has been observed that successful participants may return to the 'problematic environment which fuelled their addiction'.⁷⁷ The provision of after care may assist in preventing relapse; however, it has been suggested that spouses and other family members should be eligible for participation in some circumstances.⁷⁸

71. See <<http://www.atsip.qld.gov.au/partnerships/qiadp/about/>> accessed 5 May 2008.

72. Queensland Government, *Indigenous Alcohol Diversion Program: Your health, your future* (2007) 2.

73. Beattie P (Premier) & Pitt W (Minister for Communities, Disability Services, Aboriginal and Torres Strait Islander Partnerships) *Queensland Pilots Program to Target Alcohol Abuse*, Joint Media Statement (22 July 2007).

74. Magistrate Osborne (Presentation to the Third National Indigenous Justice CEO Forum, Brisbane, 21–22 November 2007) 3: see <http://www.indigenousjustice.gov.au/resources/2007_NIJF/05_osborne.pdf> accessed 18 June 2008.

75. *Ibid* 2.

76. Queensland Government, *Indigenous Alcohol Diversion Program: Your health, your future* (2007) 3.

77. Magistrate Osborne (Presentation to the Third National Indigenous Justice CEO Forum, Brisbane, 21–22 November 2007) 5: see <http://www.indigenousjustice.gov.au/resources/2007_NIJF/05_osborne.pdf> accessed 18 June 2008.

78. *Ibid*.

Eligibility criteria

The QIADP is only available to adult Aboriginal people who are charged with an offence that can be dealt with by a magistrate and who are eligible for bail. Participants must be dependent on alcohol or exhibit high-risk alcohol use (eg, binge drinking). The offending behaviour must be related to alcohol use but offences involving significant violence, assaults against children and sexual offences are excluded.⁷⁹ A plea of guilty is not required; the program is available both pre-plea and post-plea.

In order to be accepted onto the program the offender must agree to participate, accept the program's disclosure requirements, and be assessed as having a treatable alcohol problem.⁸⁰ Eligibility is also restricted to those Aboriginal people who normally reside in one of the pilot locations although some non-residents may be accepted if they have a strong connection to the area and are able to reside in the location while the program is being completed.⁸¹

Offenders with a dual diagnosis (mental impairment and substance abuse) are eligible, subject to their overall suitability, to participate in the program. Similarly, offenders with illicit drug problems are not excluded but depending on the severity of their drug problem, they may be recommended for alternative programs such as the Drug Court.⁸²

Referral and court process

The program accepts referrals from magistrates, police, lawyers and family. Offenders can also self-refer. If an offender meets the basic eligibility requirements, the court will order an assessment report in relation to suitability and to prepare an individual treatment plan.⁸³

Under s 11(4) of the *Bail Act 1980* (Qld) participants can be required to comply with the QIADP as a condition of bail.⁸⁴ However, failure to comply with the requirements of the program does not constitute an offence of breaching bail and cannot lead to revocation of bail.⁸⁵ Therefore, the only consequence of failing to comply with the program is possible termination and the loss of any mitigation that may arise in sentencing.⁸⁶

79. See <<http://www.atsip.qld.gov.au/partnerships/qiadp/documents/cjs-eligibility-criteria.pdf>> accessed 5 May 2008.

80. *Ibid*.

81. See <<http://www.atsip.qld.gov.au/partnerships/qiadp/faq/>> accessed 5 May 2008.

82. See <<http://www.atsip.qld.gov.au/partnerships/qiadp/faq/>> accessed 5 May 2008.

83. Magistrate Osborne (Presentation to the Third National Indigenous Justice CEO Forum, Brisbane, 21–22 November 2007) 2: see <http://www.indigenousjustice.gov.au/resources/2007_NIJF/05_osborne.pdf> accessed 18 June 2008.

84. The *Bail (Prescribed Programs) Regulation 2006* (Qld) prescribes a number of programs for the purposes of s 11(4) including the QIADP and the QMERIT program.

85. *Bail Act 1980* (Qld) ss 29(2)(c) & 30(6).

86. For a detailed discussion of the Commission's approach to bail conditions, see 'Bail', Chapter Six.

Generally, participants are required to appear in court fortnightly for case reviews. Depending on the participant's progress, less frequent case reviews may be ordered.⁸⁷ For each case review, the participant's case-worker will prepare a report for the court.⁸⁸ A magistrate from Townsville has explained that a team meeting is held before each court sitting to discuss the participant's progress on the program. Generally these meetings are attended by the magistrate, the police prosecutor, defence counsel, Aboriginal Elders, representatives from Queensland Health, and a representative from the participant's supported accommodation.⁸⁹

Powers of the court and program outcomes

Although the QIADP is available before a plea of guilty is entered the expected outcome for successful participants is a reduced sentence. At sentencing a final report, prepared by the participant's case-worker, will be presented to the court. Section 9(2) (o) of the *Penalties and Sentences Act 1992* (Qld) provides that a sentencing court must take into account the offender's successful completion of a rehabilitation, treatment or other intervention program. If a participant is terminated from the program, the matter will be dealt with in the usual manner. Termination does not preclude future participation in the program.⁹⁰

The Queensland sentencing legislation also requires a court to consider submissions made by a representative of an Aboriginal community justice group in the offender's community (including submissions about programs in which the community justice group is involved).⁹¹ As mentioned above, the QIADP aims to involve community justice groups in the delivery of alcohol treatment programs. During sentencing proceedings for QIADP participants, community justice group representatives may make submissions to the court about the participant's progress on the program at sentencing.⁹²

87. Magistrate Osborne (Presentation to the Third National Indigenous Justice CEO Forum, Brisbane, 21–22 November 2007) 2: see <http://www.indigenousjustice.gov.au/resources/2007_NIJF/05_osborne.pdf> accessed 18 June 2008.

88. Queensland Government, *Indigenous Alcohol Diversion Program: Your health, your future* (2007) 3.

89. Magistrate Osborne (Presentation to the Third National Indigenous Justice CEO Forum, Brisbane, 21–22 November 2007) 3: see <http://www.indigenousjustice.gov.au/resources/2007_NIJF/05_osborne.pdf> accessed 18 June 2008.

90. Magistrate Osborne (Presentation to the Third National Indigenous Justice CEO Forum, Brisbane, 21–22 November 2007) 3: see <http://www.indigenousjustice.gov.au/resources/2007_NIJF/05_osborne.pdf> accessed 18 June 2008.

91. *Penalties and Sentences Act 1992* (Qld) s 9(2)(p).

92. Members of a community justice group can also make submissions about an offender's suitability for the program and the development of a treatment plan: See 'Frequently Asked Questions' at <<http://www.atsip.qld.gov.au/partnerships/qiadp/faq/>> accessed 5 May 2008.

Consultation issues – other drug and alcohol court intervention programs

BENEFITS OF DRUG/ALCOHOL COURT INTERVENTION PROGRAMS

Like drug courts, other court intervention programs address drug-dependency and aim to reduce drug-related offending. Drug courts target high-risk offenders facing imprisonment and hence divert offenders from prison. Alternative programs addressing drug and alcohol dependency enable earlier intervention than drug courts, and can increase access to court supervised drug and alcohol treatment by a wider range of offenders.

Increasing access to programs

Realistically, drug courts cannot deal with all drug-dependent offenders.¹ Some drug-dependent offenders commit such serious offences that it would be inappropriate to postpone any sentence of imprisonment to provide an opportunity for rehabilitation. Other drug-dependent offenders commit less serious offences that do not justify imprisonment; the drug court program would be disproportionately onerous for this category of offenders. The Commission is of the view that drug-dependent offenders with less serious offences should continue to be targeted by the STIR program. This means that offenders who are not facing imprisonment are able to access court supervised treatment. On this basis, STIR should be extended to as many locations as possible.

Assuming sufficient resources and treatment places, the Perth Drug Court could potentially deal with all metropolitan drug-dependent offenders who are facing imprisonment. However, there is no drug court option for offenders who reside in regional locations. Currently, the STIR program is available in some regional courts; however, this program targets less serious offending. In Chapter Five the Commission proposes that a general court intervention program be established and that it should initially be trialled in one regional location. Subject to successful evaluation, this program could be expanded statewide.² The

1. Freiberg A, 'Australian Drug Courts' (2000) 24 *Criminal Law Journal* 213, 227. The CREDIT program in Victoria was initially considered more appropriate than establishing a drug court because it could be accessed more widely; Freiberg A, 'Drug Courts: Sentencing response to drug use and drug-related crime' (2002) 27 *Alternative Law Journal* 282, 282. Victoria now has a drug court, the CREDIT program and the CISP program.

2. See Proposal 5.1.

benefit of this approach is that regional courts will have access to court intervention strategies for a wide range of underlying problems (including drug- and alcohol-dependency) and can target different types of offenders including high-risk offenders facing imprisonment. In regional locations it is preferable to have one program instead of a number of separate specialist programs; specialisation is unlikely to be cost-effective in locations with smaller population levels. Further, under the Commission's proposal for a new Drug Treatment Order, there is potential to expand the drug court style of intervention to nominated regional magistrates courts in the future.

Early intervention

Drug courts invariably require a plea of guilty. This means that the program cannot commence until an offender has made the decision to enter a plea of guilty and such a decision should not normally be made without legal advice and the opportunity to consider certain material in relation to the charge. The drug and alcohol court intervention programs discussed above that exist in Victoria, New South Wales and Queensland operate pre-plea. In other words, offenders can commence the program before a plea is entered (and can continue the program after a plea is entered). These programs promote early intervention and recognise that during the early stages of the criminal process an offender may be very motivated to change. In contrast, the STIR program requires that a plea of guilty be entered. Therefore, intervention is delayed or offenders may feel pressured to enter a plea of guilty before they have had sufficient time to consider their legal position.

Pre-plea programs usually require that the offender complies with the requirements of the program as a condition of bail. In Chapter Six the Commission emphasises that bail conditions requiring an offender to comply with a court intervention program should not be set unless such a condition is desirable to meet the objectives of bail. The Commission proposes that a condition to comply with the requirements of a court intervention program cannot be imposed before conviction if the accused has already been released on unconditional bail by a court or if a court has determined that bail can be dispensed with.³ For this group of offenders, the incentive

3. See discussion under 'Pre-plea Court Intervention Programs', Chapter Six & Proposal 6.3

for compliance is the possibility of a reduced sentence. The Commission proposes in Chapter Six that anything done in compliance with a court intervention program is a relevant sentencing factor.⁴ Although non-compliance may result in termination from the program, this group of offenders should not be subject to any other adverse consequences. The Commission's proposal in Chapter Six, that failure to successfully complete a court intervention program is not a relevant sentencing factor, ensures that non-compliance with a court intervention program cannot be held against an offender.⁵

Avoiding 'net-widening'

It has been observed that there is a risk that diversionary and other intervention programs (including drug courts) will increase the numbers of people being dealt with by the formal criminal justice system or increase the level of intensity or depth of involvement in the system (net-widening).⁶ The availability of appropriate alternatives to drug court programs reduces the risk of net-widening because drug courts are not tempted to accept drug-dependent offenders who are not facing imprisonment in order to enable court supervised drug treatment to occur. The Commission believes that its proposal outlined above minimises the risk of net-widening by ensuring that only offenders facing imprisonment are dealt with by the Drug Court and other offenders are dealt with by the STIR program. In order to avoid net-widening it is also essential that court intervention programs do not impose unnecessary bail conditions and that program compliance is adequately reflected in the final sentence. The Commission makes proposals to achieve these ends in Chapter Six.

OPERATIONAL ISSUES

Eligibility criteria

Consistent with promoting wider and earlier access to drug and alcohol court intervention programs, the Commission is of the view that the eligibility criteria for the STIR program should not require that a plea of guilty be entered. Nevertheless, the Commission appreciates that the STIR program staff and magistrates administering this program may have concerns about how such a proposal would change the operation of the current program. The Commission invites submissions as to whether it would be appropriate to enable participation in the STIR program before a plea of guilty has been entered.

4. See Proposal 6.6.

5. Proposal 6.6.

6. Crime Research Centre, *WA Diversion Program – Evaluation Framework (POP/STIR/IDP)*, Final Report for the Drug and Alcohol Office (2007) 25. See also Indermaur D & Roberts L, 'Drug Courts in Australia: The first generation' (2003) 15 *Current Issues in Criminal Justice* 136, 139; Cappa C, 'The Social, Political and Theoretical Context of Drug Courts' (2006) 32 *Monash University Law Review* 145, 160.

CONSULTATION QUESTION 2.5

Eligibility criteria

The Commission invites submissions as to whether it is appropriate to enable participation in the Supervised Treatment Intervention Regime before a plea of guilty has been entered.

The Commission is also concerned about the lack of court intervention programs for alcohol-dependent offenders. One solution is to include alcohol-dependency in the STIR program's eligibility criteria; however, this will be ineffective if resources for alcohol treatment are not also provided. The Commission also recognises that alcohol-related offending is a particular problem for Aboriginal communities and is impressed by the establishment of a specific Aboriginal program for alcohol-dependent offenders in Queensland. The Commission invites submissions about the best way to increase the availability of court intervention strategies for alcohol-dependent offenders.

CONSULTATION QUESTION 2.6

Court intervention programs addressing alcohol-dependency

The Commission invites submissions about the following matters:

- what is the most appropriate way to increase the availability of court intervention programs for alcohol-dependent offenders; and
- whether Western Australia should establish a specific alcohol court intervention program for Aboriginal offenders.

Program length

Other than drug courts, most drug and alcohol court intervention programs last for a period of three to four months. Under current Western Australian legislation the maximum period in which sentencing can be deferred is six months. So, if an offender pleads guilty sentencing must take place no later than six months after the plea has been entered. The Commission proposes in Chapter Six that the power to defer sentencing be extended to 12 months.⁷ This does not mean that every offender will be sentenced 12 months after conviction – it simply provides flexibility for court intervention programs to operate beyond the six-month limit if necessary. The Commission is of the view that this proposal will be of particular benefit for drug and alcohol court intervention programs such as STIR. While the drug

7. Proposal 6.8.

court program is not appropriate for offenders facing non-custodial sentences, such offenders may still have very serious and long-term drug-dependency. Extending the program duration may be necessary for some offenders in order to ensure that rehabilitation can be achieved.

Adequate resources

As frequently stated in this Paper, expanding court intervention programs throughout the state obviously requires more resources. Programs cannot operate effectively and meet their objectives without sufficient treatment programs and services for participants. Further, programs such as STIR (which are available in a number of different courts) create an additional burden for judicial officers.⁸ Unlike dedicated drug court magistrates, other magistrates have many different court commitments. Court intervention requires active involvement by the judicial officer and regular court appearances for monitoring; sufficient time must be available for these purposes.

In addition, programs such as STIR may increase the workload of others such as prosecutors, defence counsel and community corrections officers. Community corrections officers involved in the STIR program have reported that their work has increased as a consequence of supervising participants and providing reports to the court.⁹ However, the evaluators of the STIR program noted that because participants would otherwise have been placed on a Community Based Order or an Intensive Supervision Order, community corrections officers would have been supervising these offenders in any event.¹⁰

In order to reduce the potential impact on community corrections resources (and to ensure that final sentences are not disproportionate) the sentences imposed at the end of the STIR program should take into account program compliance and achievements. For example, if an offender would otherwise have been sentenced to a 12 month community-based sentence, successful completion of the STIR program should result in something much less (eg, a Conditional Release Order or a community-based sentence for six months). The Commission proposes in Chapter Six that anything done in compliance with a court intervention program is a relevant sentencing factor; this proposal is designed to ensure that participants are given credit for complying with court intervention programs.¹¹

The Commission believes that expanding the STIR program to accommodate more offenders in more locations and limiting the Drug Court to more serious offenders facing imprisonment provides Western Australia with two easily defined levels of court intervention for drug-dependent offenders.

See Chapter Six for the Commission's proposals regarding the legislative and policy framework for all proposed court intervention programs, including drug courts and other drug and alcohol court intervention programs discussed in this chapter.

8. Crime Research Centre, *WA Diversion Program – Evaluation Framework (POP/STIR/IDP)*, Final Report for the Drug and Alcohol Office (2007) 63.

9. *Ibid.*

10. *Ibid.* Meeting with Lynton Piggott, Program Manager, Courts Drug Diversion Program, Department of the Attorney General (26 February 2008).

11. See Proposal 6.6.