

Chapter Six

Legal and Policy Issues



Contents

General	179
Legislative Framework	179
The need for legislative reform	179
The appropriate legislative framework	180
Administrative and Policy Issues	182
Separate court intervention programs unit	183
Offences excluded from court intervention programs	185
Violent offending	185
Bail	187
The Objectives of Bail	187
Pre-Plea Court Intervention Programs	187
Bail conditions	189
Post-Plea Court Intervention Programs	191
Breaching Bail	192
Superior Court Matters	192
Sentencing	194
The Purpose of Sentencing	194
Sentencing principles and relevant sentencing factors	195
Pre-Sentence Options	196
Deferral of sentencing	198
Pre-Sentence Orders	199
The role of a speciality court	199
The use of Pre-Sentence Orders in Western Australia	199
Pre-Sentence Orders and court intervention programs	200
Amending and enforcing Pre-Sentence Orders	200
Superior court matters	201
Excluded offences	202
Sentencing day	202
Sentencing Orders	203
Judicial monitoring	203
No sentence	204
Conditional suspended imprisonment	205
The role of a speciality court	205
Spent Convictions	206
Young Offenders	208
Diversion	208
Court Intervention Programs for Young Offenders	209

General

The Commission has examined a number of different court intervention programs in Western Australia and elsewhere. The Commission's views about specific programs are discussed in the preceding chapters. Overall, the Commission believes that court intervention programs are an effective way to achieve rehabilitation of offenders and prevent further offending. Therefore, court intervention programs should be viewed as an important component of the criminal justice system and should be supported by appropriate reform. Although there are various court intervention programs already operating in Western Australia, these programs have been established without any specific legislative support.¹ Further, there is no overriding policy framework: each program operates independently.²

LEGISLATIVE FRAMEWORK

The need for legislative reform

Bearing in mind the number of court intervention programs already operating within the Western Australian criminal justice system, it might be argued that legislative reform is unnecessary and current legislation is sufficient to enable their effective operation. Although this is true to some extent, there are instances where courts are required to push the boundaries of legislative interpretation to facilitate the operation of the program. For example, the Perth Drug Court imposes informal custody sanctions by using the provisions of the

Bail Act 1982 (WA) to revoke and reinstate bail.³ Further, current legislation may restrict the effective operation of some programs. For example, in the absence of a Pre-Sentence Order, a court can only defer sentencing for a maximum of six months.⁴ For those offenders who are not eligible to be placed on a Pre-Sentence Order (because they are not facing immediate imprisonment or are excluded under the legislative criteria) six months may not be long enough to enable the offender to effectively address the causes of offending behaviour and complete the program requirements.⁵

The major argument against legislative reform is that legislation may be too restrictive and could hinder the continued development of court intervention programs.⁶ Many of the current programs have been established through the innovative work of individual judicial officers and others working in the criminal justice system. Some might argue that legislation would prevent further innovation and unduly hamper existing programs.⁷ The Commission fully appreciates the need for flexibility; however, legislative reform can establish a flexible framework, which could enable programs to respond and adapt as required.⁸

In the absence of a clear legislative framework for court intervention programs, the effectiveness of these programs is largely dependent upon individuals.⁹ Some judicial officers and other individuals working in the criminal justice system may have differing views about the effectiveness or appropriateness of court intervention programs. In order to promote equality of justice, individual bias

1. In other Australian jurisdictions, court intervention programs have been established with specific supporting legislation. For example, in Victoria legislation was enacted creating separate divisions of the Magistrates Court before various court intervention programs commenced operation: *Magistrates Court Act 1989* (Vic) ss 4A–4Q. In New South Wales and Queensland specific legislation was enacted prior to each Drug Court commencing: *Drug Court Act 1998* (NSW); *Drug Court Act 2000* (Qld). The Commission is aware that the legislative provisions dealing with Pre-Sentence Orders and Conditional Suspended Imprisonment were enacted under the *Sentencing Act 1995* (WA) partly for the purpose of the Perth Drug Court; however, these provisions were enacted a number of years after the court commenced.

2. In contrast, the Victorian Attorney-General's *Justice Statement 2004–2014* refers to, among other things, the need to address the underlying causes of offending behaviour and states that an overall framework for problem solving approaches in the magistrates courts will be developed: Victorian Government, *Attorney General's Justice Statement : Summary* (2004) 11. The policy framework was published in 2006: Courts and Programs Development Unit, Department of Justice Victoria, *Policy Framework to Consolidate and Extend Problem-Solving Courts and Approaches* (March 2006). The aim of this policy framework is to 'consolidate and extend problem solving courts and approaches in the court system': 3.

3. See discussion under 'Rewards and Sanctions', Chapter Two.

4. *Sentencing Act 1995* (WA) s 16(2).

5. The Commission understands that in some instances courts delay the entering of a plea of guilty to enable offenders to undergo assessment and stabilisation before officially commencing the program. The period of six months does not start to run until the offender is convicted.

6. Northern Rivers University Department of Rural Health, *Evaluation of the Lismore MERIT Pilot Program*, Final Report (2003) 84.

7. According to Deputy Chief Magistrate Jelena Popovic this was the original view held by Victorian judicial officers and others involved in court intervention programs in that jurisdiction: Popovic J, 'Judicial Officers: Complementing Conventional Law and Changing the Culture of the Judiciary' (2003) 20 *Law in Context* 121, 133.

8. During preliminary consultations Chief Magistrate Heath supported the need for a broad legislative framework; operational details could then be dealt with by program guidelines or rules: meeting with Chief Magistrate Heath (26 March 2008).

9. See Courts and Programs Development Unit, Department of Justice Victoria, *Policy Framework to Consolidate and Extend Problem-Solving Courts and Approaches* (March 2006) 14.

should not prevent participation in court intervention programs. General legislative reform will increase the awareness of the benefits of court intervention programs for all judicial officers, lawyers and police.¹⁰ Further, legislation provides legitimacy for court intervention programs. It has been observed by Victorian Deputy Chief Magistrate Jelena Popovic that:

Judicial officers appear to prefer to make orders where they are specifically empowered to make them, rather than to make orders where there is nothing in the legislation specifically stopping them from making the orders.¹¹

Community support is also important. Legislative reform demonstrates to the community that the government supports court intervention programs; legislation can also make it clear that the principal goal of court intervention programs is the protection of the community. Otherwise, existing court intervention programs run the risk of being viewed as radical initiatives. As stated by the Victorian Department of Justice, a legislative framework is important to 'promote the objectives of [court intervention programs] and encourage systemic change'.¹² The Commission also supports legislative reform to provide sufficient and continued funding for programs. Future planning and development of court intervention programs is unlikely to occur in the absence of clear government and legislative support.

The appropriate legislative framework

As explained in Chapter One, court intervention programs operate in different ways. Some court intervention programs are separately constituted courts with separate legislation (eg, the New South Wales Drug Court and the Northern Territory Alcohol Court¹³) and some are declared as separate divisions of the Magistrates Court (eg, the Koori Court, the Drug Court, the Family Violence Court and the Neighbourhood Justice Centre Court in Victoria).¹⁴ Other court intervention programs are understood as separate courts but in fact operate with the same jurisdiction as any other magistrates court (eg, the Joondalup Family Violence Court and the Kalgoorlie-

Boulder Aboriginal Community Court). Some of these court intervention programs have specific additional powers under general legislation; for example, the Perth Drug Court is prescribed as a speciality court under the *Sentencing Act 1995* (WA).¹⁵ Many court intervention programs operate as dedicated weekly or periodic lists in certain general magistrates courts with local administrative (but not legislative) support (eg, the Magistrates Court Diversion Program in South Australia and the Intellectual Disability Diversion Program in the Perth Magistrates Court).¹⁶ Others operate as general programs available to a number of different courts, called upon if needed for a particular offender (eg, the Court Integrated Services Program in Victoria).¹⁷

The Commission is of the view that there should be a wide variety of different court intervention programs (including programs addressing specific problems such as drug or alcohol addiction or mental impairment and general programs addressing a variety of different problems).¹⁸ Importantly, not all court intervention programs will require a separate court with a dedicated judicial officer. Whether a particular program is considered to be a separate court will largely depend on demand – if there are enough participants in one jurisdiction and at one location a separate court with a dedicated judicial officer may be justified. Section 24(2) of the *Magistrates Court Act 2004* (WA) currently enables the Chief Magistrate to declare, for administrative purposes, a separate division of the Magistrates Court. The Commission understands that it may be necessary to create separate administrative divisions of the Magistrates Court for the purpose of assigning judicial officers and other staff to particular court intervention programs.¹⁹

However, the development, establishment and use of court intervention programs should not be dependent on whether programs are classified as separate courts. Any reform that focuses on establishing separate divisions within the Magistrates Court or establishing new courts will hamper the development of other programs. The Commission is strongly of the view that general programs available to all courts should be encouraged (because this increases the opportunity for all offenders to participate in court intervention programs and enhances equality of

10. The Commission was advised during its preliminary consultations that some defence counsel did not promote participation in the Perth Drug Court. This may be due to a lack of enthusiasm for the program or a lack of awareness of the benefits of the program: meeting with Tanya Watt, Office of the Director of Public Prosecutions (21 February 2008).

11. Popovic J, 'Judicial Officers: Complementing conventional law and changing the culture of the judiciary' (2003) 20 *Law in Context* 121, 133.

12. Courts and Programs Development Unit, Department of Justice Victoria, *Policy Framework to Consolidate and Extend Problem-Solving Courts and Approaches* (March 2006) 13.

13. The New South Wales Drug Court has the jurisdiction of both the Local and District Court: see *Drug Court Act 1998* (NSW) s 19. The Northern Territory Alcohol Court is governed by the *Alcohol Court Act 2006* (NT) and operates only at the magistrates court level.

14. These 'courts' all operate as separate divisions under the *Magistrates Court Act 1989* (Vic).

15. This gives the Perth Drug Court additional powers in relation to offenders subject to a Pre-Sentence Order or Conditional Suspended Imprisonment.

16. See discussion under 'South Australia – Magistrates Court Diversion Program' and 'Western Australia – Intellectual Disability Diversion Program', Chapter Three.

17. See discussion under 'Victoria – Court Integrated Services Program', Chapter Five.

18. See discussion under 'The Commission's Approach', Chapter One.

19. The Chief Magistrate has not yet declared any separate divisions under the *Magistrates Court Act 2004* (WA). One reason appears to be concern about the lack of specific legislative powers for the Perth Drug Court: meeting with Chief Magistrate Heath (26 March 2008).

justice).²⁰ These general programs should not have any lesser status within the criminal justice system than dedicated specialist courts such as the Perth Drug Court. Accordingly, the Commission believes that the best approach is to provide a flexible system for different programs to operate as required.

The Commission has considered the most appropriate way to provide for legislative reform. Limiting reform to the *Magistrates Court Act* would necessarily restrict the operation of court intervention programs to the magistrates' jurisdiction and limiting reform to the *Sentencing Act* would not enable offenders to participate in programs before a plea of guilty has been entered.²¹ Because the Commission is of the view that court intervention programs should be available at different stages of the criminal justice process and should be available to all jurisdictions,²² it has concluded that amendment of the *Criminal Procedure Act 2004* (WA) is the most appropriate way to provide for a general legislative framework for court intervention programs.²³ The *Criminal Procedure Act* applies to all criminal proceedings for adults in Western Australia.²⁴ This general legislative framework will enable the appropriate recognition of court intervention programs throughout the criminal justice system and facilitate their use and further development. The Commission's approach to young offenders and specific reforms to bail and sentencing legislation is separately discussed below.

20. See discussion under 'Equality Before the Law' and 'The Commission's Approach', Chapter One. The Commission notes that Chief Magistrate Heath expressed support during preliminary consultations for the establishment of general programs: meeting with Chief Magistrate Heath (26 March 2008).

21. Section 4 of the *Sentencing Act 1995* (WA) provides that the Act applies to persons who have been *convicted* of an offence.

22. See discussion under 'The Commission's Approach', Chapter One. The Commission explains in Chapter One and below that participation in court intervention programs should be available at any time before sentencing (including pre-plea and post-plea). Submissions are also sought about the appropriateness of post-sentence judicial monitoring: see Consultation Question 6.5.

23. In New South Wales legislative provisions dealing with 'Intervention Programs' are contained in Part 4 of the *Criminal Procedure Act 1986* (NSW). Section 345 of the Act provides that the objects of Part 4 include to provide a framework for the recognition and operation of intervention programs and to reduce reoffending by facilitating participation in such programs.

24. Section 5 of the *Young Offenders Act 1994* (WA) provides that to the extent that the provisions of the *Criminal Procedure Act 2004* (WA) are inconsistent with the provisions of the *Young Offenders Act*, the latter Act shall prevail.

PROPOSAL 6.1

General legislative framework for adult offenders: *Criminal Procedure Act 2004* (WA)

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

- Define a 'court intervention program' as a program prescribed under the *Criminal Procedure Regulations 2005* (WA). The following current programs should be prescribed: Perth Drug Court; Joondalup Family Violence Court; Rockingham Family Violence Court; Fremantle Family Violence Court; Midland Family Violence Court; Barndimalgu Court; Kalgoorlie-Boulder Aboriginal Community Court; Norseman Aboriginal Community Court; Geraldton Alternative Sentencing Regime; Supervised Treatment Intervention Regime (STIR); and Intellectual Disability Diversion Program (IDDP). Other court intervention programs, such as any pilot program proposed in this Paper, should also be prescribed before the program commences operation.²⁵
- Set out that the object of the Division is to provide a framework for the recognition and operation of court intervention programs.
- Provide that the principal objectives of court intervention programs are to protect the community, reduce reoffending, and rehabilitate offenders by facilitating participation in *court* supervised treatment and rehabilitation programs.
- Provide that nothing in this Division affects or limits the operation of other diversionary, rehabilitation or treatment programs.
- Provide that court intervention programs be available at various stages of the criminal justice process. Specifically, it should be provided that:
 - An offender may be eligible to voluntarily participate in a prescribed court intervention program before a plea of guilty is entered. If an offender has already been released on unconditional bail by a court or if a court has determined that bail can be dispensed

25. Any program that is unsuccessful or no longer considered necessary can be removed from the regulations. The Commission has sought submissions about whether a pilot community court should be established in Western Australia: see Consultation Question 5.2, Chapter Five. Because a community court is broader than a court intervention program (ie, it also deals with civil matters and contested criminal matters) any new community court would need to administratively establish a particular court supervised program for the purposes of the regulations.

with²⁶ the offender may participate in a prescribed court intervention program if eligible and assessed as suitable for participation. Failure to comply with the requirements of the program may result in termination from the program and if this occurs the offences will be dealt with in the usual manner.²⁷

- An offender may be eligible to participate in a prescribed court intervention program before a plea of guilty is entered and participation in the program may be a condition of bail.²⁸
 - An offender may be eligible to participate in a prescribed court intervention program after a plea of guilty has been entered but before sentencing for any period up to a maximum of 12 months.²⁹ Participation in the program may be a condition of bail.
 - An offender may be eligible to participate in a prescribed court intervention program if subject to a Pre-Sentence Order under s 33G of the *Sentencing Act 1995* (WA).³⁰
 - An offender may be eligible to participate in the Perth Drug Court if subject to the proposed Drug Treatment Order under the *Sentencing Act 1995* (WA).³¹
- Provide that, for the purpose of determining the offender's eligibility and suitability for participation in a prescribed court intervention program, a judicial officer may order that the offender reappear in court at a particular time and place.
 - Provide that for the purpose of determining whether the offender is complying with or has complied with the requirements of a prescribed court intervention program, a judicial officer may order that the offender reappear in court at a particular time and place.
 - Provide that assessment for and participation in any prescribed court intervention program be undertaken with the offender's informed consent.

26. Section 9 of the *Bail Amendment Bill 2007* (WA) (which was assented to on 31 March 2008) amends s 7A of the *Bail Act 1982* (WA) to provide that a judicial officer can dispense with the requirement for bail.

27. For those cases where it is determined that bail can be dispensed with, the matter could be adjourned to a subsequent court date for assessment purposes and for the purpose of judicial monitoring. If the offender was unsuitable or terminated from the program the matter would then be dealt with in the usual manner. If the offender failed to appear in court for either of these purposes a summons could be issued, if necessary, for the offender to appear.

28. See Proposal 6.3 below.

29. See Proposal 6.8 and Consultation Question 6.3 below.

30. See Proposal 6.9 below.

31. See Proposal 2.4.

- Provide that regulations in relation to the provision of reports and the sharing of information between agencies and individuals working in prescribed court intervention programs may be made, if necessary, under the *Criminal Procedure Regulations 2005* (WA).³²
- Provide that in relation to an offender who has been committed to the District Court or the Supreme Court, a magistrate may order that the offender reappear in the Magistrates Court before the first appearance in the District Court or the Supreme Court for the purpose of determining if the offender is complying with a prescribed court intervention program.³³

CONSULTATION QUESTION 6.1

Prescribed court intervention programs

The Commission invites submissions as to whether there are any other current court intervention programs operating in Western Australia that should be prescribed.³⁴

ADMINISTRATIVE AND POLICY ISSUES

The above proposal provides a broad legislative framework for court intervention programs in Western Australia so that court intervention programs can be used by any court from the time that an offender first appears in court until the end of the sentencing process.³⁵ The Commission acknowledges that legislative reform on its own is not sufficient. Court intervention programs cannot succeed without adequate funding, human and infrastructural resources, administrative support and extensive coordination between various government and non-government agencies. Currently, there is no systematic approach to court intervention programs in Western Australia.³⁶ The Commission believes that

32. In Chapter One the Commission invites submissions as to whether any legislative reform is required in relation to the sharing or disclosure of information between the various agencies and individuals involved in court intervention programs: Consultation Question 1.1.

33. See Proposal 6.4 below.

34. The Commission acknowledges that it may not be aware of all court intervention programs operating in Western Australia, especially those operating informally in regional areas.

35. The Commission also recognises that judicial monitoring may be beneficial post-sentence (ie, once the offender's participation in the court intervention program has ended) and invites submissions about whether post-sentence judicial monitoring is appropriate: Consultation Question 6.5.

36. For example, the Perth Drug Court operates without a coordinator. Court administration and judicial support for the Perth Drug Court are part of the Department of the Attorney General, but the Court Assessment and Treatment Service officers are part of the Department of Corrective Services.

court intervention programs would benefit from a coordinated policy and administrative framework. All court intervention programs are linked: they all have the aim of reducing offending by engaging offenders in court-supervised programs.

Separate court intervention programs unit

The Commission believes that the best way to facilitate a coordinated approach and ensure the necessary support for programs to operate effectively is to establish a separate unit to oversee the operation of all court intervention programs.³⁷ The establishment of a separate unit should not be viewed as creating another layer of bureaucracy because a coordinated approach is in fact likely to reduce costs and enable the sharing of resources. The Commission is proposing that one unit be responsible for all administrative and policy issues concerning court intervention programs, rather than a number of separate units or teams working independently of one another.

It has been observed that there is 'a trend toward the delivery of justice services through partnerships between agencies in order to address complex issues and client needs'.³⁸ This is an important feature of court intervention programs. The Commission believes that a separate unit will facilitate coordination between various government and non-government agencies. More specifically, a separate unit will enable the sharing of resources and knowledge. This will provide an effective way for existing court intervention programs to be improved and future programs to be developed.³⁹ This unit would be ideally placed to coordinate training for

all court intervention programs. In particular, the sharing of specialist knowledge is important for those involved in general court intervention programs. The Commission suggests that managers/coordinators of specialist programs should be involved in training general program staff.

In operational terms, a separate unit will provide a structure for cross-referrals and better access to services. For example, if an offender who is participating in the Perth Drug Court has a mental health issue, the Drug Court staff can access the knowledge and skills of the staff working in a mental impairment program. If an offender participating in a family violence program has issues such as homelessness and alcohol-dependency the staff working in the family violence program will have access to various agencies that can assist in this regard. If an offender is considered ineligible for one program, the close working relationship between the various programs may enable that offender to be referred to another more appropriate program.

This ideal level of collaboration will only be possible if there are representatives from all relevant agencies working in the unit. Representatives from government and non-government agencies should be seconded to work in this unit and if possible staff should provide their services across the board. For example, one or more representatives from the Department of Housing could be available for all court intervention programs to assist participants with housing and homelessness issues. In some cases, additional staff will need to work in specific locations. A representative from the Western Australia Police could work directly in the court intervention programs unit coordinating and assisting all police officers (including prosecutors) involved in specific court intervention programs. A representative from the Department of Education and Training could be employed to promote and oversee access to education and training for offenders. The representatives from each government department should have sufficient seniority to make effective operational decisions. The key to this type of arrangement is that all of the various agency representatives (both government and non-government) should be co-located in a central office.⁴⁰ Staff working directly on particular programs should be located where needed, but they should have direct access to the staff and services of the court intervention programs unit.

The Commission has considered where its proposed court intervention programs unit should be situated within government. The two government departments responsible for criminal justice issues are the Department of the Attorney General and the

For some court intervention programs the lead agency is the Department of Corrective Services (eg, Intellectual Disability Diversion Program) and for others, the lead agency is the Department of the Attorney General (eg, Aboriginal Kalgoorlie-Boulder Community Court).

37. In Victoria, the Programs and Strategy unit in the Department of Justice oversees the Koori Court, the Drug Court, the Family Violence Court, the Court Integrated Services Program and other diversion, early intervention and prevention programs. The unit is responsible for, among other things, developing and testing new programs; implementing policies and procedures; and determining 'best practice': see <<http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/About+Us/Our+Organisation/Business+Area+Profiles/JUSTICE+-+Programs+and+Strategy%2C+Courts+and+Tribunals+Unit>>. The Criminal Justice Interventions Unit within the Crime Prevention Division of the Attorney General's Department, New South Wales was established to support legislative amendments to the *Criminal Procedure Act 1986* (NSW) in relation to intervention programs. The Commission has been advised that the Criminal Justice Interventions Unit is responsible for policy advice in relation to intervention programs; contributing to the professional education of judicial officers and lawyers; and monitoring and reporting on programs: Bruce Flaherty, Manager, Criminal Justice Interventions Unit, New South Wales Attorney General's Department, email communication (19 March 2008).
38. Australian Government, Productivity Commission, *Report on Government Services 2008* (2008) C.1.
39. For a discussion of the importance of sharing knowledge and resources, see Wolf R, *Don't Reinvent the Wheel* (New York: Center for Court Innovation & the Bureau of Justice Assistance, 2007) 3–6.

40. The Victorian Department of Justice observed that co-location of agencies is necessary to ensure that there is a team-based approach to managing offenders: Courts and Programs Development Unit, Department of Justice Victoria, *Policy Framework to Consolidate and Extend Problem-Solving Courts and Approaches* (March 2006) 13–14.

Department of Corrective Services. The Courts and Tribunal Services division (of the Department of the Attorney General) is responsible for the provision of courts and court services. The newly established Policy Division of this Department is responsible for strategic policy across the entire department and, therefore, its role extends beyond programs and services delivered by courts.⁴¹

The Community and Juvenile Justice division within the Department of Corrective Services is responsible, among other things, for community-based justice services including the supervision and management of offenders subject to community-based sentences.⁴² The Offender Management and Professional Development division has a role in programs designed to reduce offending and is responsible for providing strategic policy advice.⁴³ Clearly both the Department of the Attorney General and the Department of Corrective Services have a key role to play in the operation and development of court intervention programs. However, the Commission believes that the court intervention programs unit should be established within the Courts and Tribunal Services division of the Department of the Attorney General because the distinguishing feature of court intervention programs is the role of the court (judicial monitoring).⁴⁴

PROPOSAL 6.2

Court Intervention Programs Unit

- That the Department of the Attorney General establish a Court Intervention Programs Unit within the Court and Tribunal Services Division.

41. Karen Ho, Director, Policy Division, Department of the Attorney General, telephone consultation (10 March 2008).

42. Department of Corrective Services, *Annual Report 2006–2007*, 24.

43. Ibid 25.

44. The Commission notes that the Mahoney Inquiry in 2005 recommended that the Western Australian government 'establish a specific body with a strategic policy function in relation to the criminal justice system' (Recommendations 57 & 58). It was recommended that this body should, among other things, conduct research into aspects of the criminal justice system and identify ways of reducing crime: Mahoney D, *Inquiry into the Management of Offenders in Custody and the Community* (Perth: Western Australian Government, 2005) [7.484]. The Commission understands that this recommendation has not been implemented. The role of crime prevention is predominantly overseen by the Office of Crime Prevention. A new Policy Division within the Department of the Attorney General has been established with a strategic policy function. The Department of the Attorney General, the Department of Corrective Services and the Western Australia Police are currently in the process of developing a Western Australian Diversion Strategy: Karen Ho, Director, Policy Division, Department of the Attorney General, telephone consultation (10 March 2008). The Policy Division will be taking a lead role in developing this strategy. The Commission does not consider that its proposed Court Intervention Programs Unit should be positioned within this new Policy Division because the proposed unit should be involved in both policy and operational matters.

- That a Director be appointed to be responsible for all administrative and policy matters within the Court Intervention Programs Unit.
- That a coordinator may be appointed for each prescribed court intervention program or, if appropriate, a coordinator may be appointed for a number of similar court intervention programs.
- That staff from relevant government departments and agencies (eg, the Department of Corrective Services, the Department of Health, the Department of Housing and Works, the Department for Indigenous Affairs, the Department for Child Protection; the Department for Communities, the Department of Education and Training, the Disability Services Commission, the Alcohol and Drug Office, the Office of Crime Prevention, the Western Australia Police, the Office of the Director of Public Prosecutions) be seconded to the Court Intervention Programs Unit.
- That the Court Intervention Programs Unit be allocated funding to secure seconded positions from relevant non-government agencies.⁴⁵
- That the Court Intervention Programs Unit allocate specific funding to Legal Aid (WA), the Aboriginal Legal Service (WA) and other community legal services to ensure that offenders participating in court intervention programs have adequate and effective legal assistance.⁴⁶
- That staff seconded to the Court Intervention Programs Unit be co-located in one central office to facilitate collaboration and effective service provision.
- That staff seconded to the Court Intervention Programs Unit be required to provide their services and be available to individual court intervention program staff who are not located in the same office.
- That the program coordinators of specialist programs (eg, Family Violence Courts, Aboriginal Courts, and the Perth Drug Court) provide training and other assistance to program staff working in any general court intervention programs.

45. Purely for illustrative purposes, such organisations might include the Western Australian Council of Social Service Incorporated (WACOSS); Western Australia Network of Alcohol and Other Drug Agencies (WANADA); individual rehabilitation and treatment services; the Salvation Army; St Vincent de Paul Society; or Shelter WA.

46. Even for those offenders who are able to engage a private lawyer for some part of the proceedings (eg, during the assessment stage or at final sentencing) it would be too expensive in most instances for a private lawyer to appear in court for each court review during the court intervention program.

Offences excluded from court intervention programs

Most court intervention programs have their own eligibility criteria which provide for excluded offences.⁴⁷ Some offences are excluded by jurisdictional limits⁴⁸ and others are excluded by policy decisions to restrict the program's availability. For instance, many programs exclude violent and sexual offences.

The Commission's proposals purposefully do not exclude any offences from the ambit of court intervention programs. The Commission believes that the choice of offences is best determined at the policy level and by program staff. The nature of the program and its targeted offender group are very important when deciding if any offences should be excluded. Obviously, family violence programs cannot exclude offences of violence. Programs that target high-risk offenders facing imprisonment (such as drug courts) may need to include more serious offences than programs targeting moderate offending behaviour. Some programs may even be appropriate for serious offences such as armed robbery or aggravated burglary.⁴⁹ Acceptance onto the program will depend largely on the likely outcome. If the offender must be sentenced to imprisonment then program participation would be inappropriate, but if the judicial officer is of the view that successful completion of the program may tip the balance and enable the offender to be released into the community then program participation may be appropriate.

The number of potential participants who are facing serious indictable charges (such as robbery or aggravated burglary) and who are likely to be

suitable for court intervention is relatively small. For this reason, it would not be cost-effective to establish separate court intervention programs in superior courts (the District Court or the Supreme Court).⁵⁰ In Chapter Five the Commission proposes that a pilot general court intervention program be established in Western Australia. It is envisaged that this program target a wide variety of underlying issues and that it should be available both pre- and post-plea.⁵¹ An offender who is facing a charge that must ultimately be dealt with by a superior court could commence participation in the general program (or indeed a specialist program) soon after he or she appears in the Magistrates Court and participation could continue up until the first appearance in the relevant superior court.⁵²

Violent offending

As stated above, the Commission does not consider that it should specify what offences are excluded from a particular program. This decision can only be realistically made by the program staff and policy-makers. For example, some treatment and service providers may not be prepared to offer their services to program participants if the participant is charged with a violent offence or has a prior record of violence.⁵³

Nevertheless, the Commission encourages a discretionary approach in this regard. If broad offence categories are excluded irrespective of the circumstances of the offence, many suitable participants may be excluded. The Commission notes that even where offences of violence are excluded some programs may allow an offender to participate if charged with an assault at the lower end of the scale of seriousness.⁵⁴ Bearing in mind the disproportionate number of Aboriginal people being dealt with by the criminal justice system, it is also important to take into account that many Aboriginal offenders will have a prior history of violence for matters such as resisting arrest or assaulting a police officer. In some cases these offences may have involved no actual bodily injury

47. For example, the Kalgoorlie-Boulder Aboriginal Community Court and the Norseman Aboriginal Community Court currently exclude sexual offences and breaches of violence restraining orders offences: Magistrate Kate Auty; Magistrate Greg Benn; Richard Stevenson, Regional Manager, Magistrates Courts Kalgoorlie; and Beverly Burns, Aboriginal Justice Officer, Kalgoorlie-Boulder Community Court, telephone consultation (10 March 2008).

48. For instance, a court intervention program that is restricted to matters within the magistrates court can only deal with offences within that jurisdiction (see eg discussion under 'Queensland Indigenous Alcohol Diversion Program', Chapter Two). In this regard, the Commission notes that the jurisdiction of summary courts in other states (such as Victoria and New South Wales) is broader than in Western Australia. For example, the magistrates courts in Victoria can deal with a number of offences that could only be dealt with in the District Court in Western Australia (eg, robbery, aggravated burglary and damage where the value of property is less than \$100,000: *Crimes Act 1958* (Vic) ss 75, 77 & 197 and the *Magistrates Court Act 1989* (Vic) Sch 4). In New South Wales, the Local Court has jurisdiction to deal with certain robbery offences: *Criminal Procedure Act 1986* (NSW) Sch 1.

49. It has been observed that the Drug Court may be appropriate for young drug-dependent offenders who commit armed robberies at the lower end of the scale of seriousness: Crime Research Centre, *Evaluation of the Perth Drug Court Pilot Project* (Perth: Department of Justice, 2003) 224. See also Malcolm D, 'The Application of Therapeutic Jurisprudence to the Work of Western Australian Courts' (Paper presented at the 3rd International Conference on Therapeutic Jurisprudence, Perth, 7–9 June 2006) 7.

50. In Chapter One the Commission explains why court intervention programs are usually developed by and operated in the magistrates courts: see discussion under 'Statement Three: Broad access to court intervention programs', Chapter One.

51. See discussion under 'General Court Intervention Programs', Chapter Five and Proposal 5.1.

52. See further discussion below under 'Superior Court Matters'.

53. One rationale for excluding violent offences and/or sexual offences is the risk to other participants and treatment providers: see Taplin S, *New South Wales Drug Court Evaluation: A process evaluation* (Sydney: NSW Bureau of Crime Statistics and Research, 2002) 22; Barnes L & Poletti P, *MERIT: A survey of magistrates* (Sydney: Judicial Commission of New South Wales, 2004) 29. This was also mentioned at a meeting with Scott MacDonald, Deputy Registrar Drug Court of Victoria (6 December 2007).

54. Note that s 18Z of the *Sentencing Act 1991* (Vic) provides that the Drug Court can deal with offences if satisfied that actual bodily harm was of a minor nature. See also Pritchard E et al, *Compulsory Treatment in Australia* (Canberra: Australian National Council on Drugs, 2007) xvi.

and occurred against a background of over-policing and discriminatory practices.⁵⁵ An evaluation of the New South Wales Drug Court noted that Aboriginal offenders were often excluded because they have a history of alcohol-related violent offending:

One team member commented that the most gentle and placid Aboriginal client will always have 'assault police' or 'resist arrest' convictions on their records, which excludes them.⁵⁶

Thus the Commission cautions against blanket exclusions and encourages program developers and staff to ensure that the eligibility criteria do not inadvertently exclude offenders who would otherwise benefit from participation in the program and who do not pose any significant risk to program staff.⁵⁷

55. See LRCWA, *Aboriginal Customary Laws*, Discussion Paper, Project No. 94 (2005) 235.

56. Taplin S, *New South Wales Drug Court Evaluation: A process evaluation* (Sydney: NSW Bureau of Crime Statistics and Research, 2002) 25.

57. See also 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) 30, where it was stated that eligibility criteria excluding offences involving 'significant violence' are preferable to excluding all violent offences because the judicial officer can assess safety issues and allow those offenders with a low risk of violent offending to participate in court intervention programs.

Bail

THE OBJECTIVES OF BAIL

If a person is arrested and charged with an offence (the accused), the police and/or the court must decide whether to release the accused on bail or whether to remand the accused in custody until the charge is finally dealt with. If an accused is granted bail he or she must sign a bail undertaking – a written promise to appear in court at a particular time and place. If necessary, additional requirements may be imposed. For example, an accused may be required to deposit a sum of money or may be required to obtain a surety. A surety is a promise by a third party to pay a specified sum of money if the accused fails to appear in court when required. Further, conditions about the conduct of the accused while subject to bail can be imposed.

The *Bail Act 1982* (WA) does not explicitly refer to the objectives of bail. However, the objectives of bail can be inferred from the legislative provisions. Importantly, the factors to be taken into account when deciding if bail should be granted include whether the accused may, if not held in custody, fail to appear in court; commit an offence; endanger the safety, health or welfare of any person; or interfere with witnesses or otherwise obstruct the course of justice. If there is a risk that the accused may fail to appear in court, commit an offence, endanger any person or obstruct the course of justice, the decision maker must consider whether any conditions could be imposed to reduce that risk.¹

Therefore, the principal objective of bail is to ensure the proper administration of justice. However, the protection of the community by preventing crime is also an important objective of bail.² It is clear that reducing the likelihood of reoffending is linked to the overall objective of ensuring the proper administration of justice. If offenders commit further offences while subject to bail they may be more likely to abscond

and fail to appear in court. The commission of further offences against a victim or witness may also prejudice the criminal justice process.³ Even so, it is generally accepted that crime prevention as a goal in itself is a legitimate objective of bail.

Obviously, the most effective way of ensuring court attendance and preventing crime would be to remand all accused in custody. However, the objectives of bail must be balanced with the principle that an accused—who is presumed innocent—should not be deprived of his or her liberty unless necessary. It is for this reason that bail legislation enables conditions to be imposed upon an accused. The use of appropriate bail conditions in relation to the conduct of the accused on bail can reduce the risk of reoffending or failing to appear in court.

Because court intervention programs aim to prevent crime by addressing the underlying causes of offending behaviour, they have a legitimate place within the bail system. If the underlying causes of offending behaviour are not addressed, an accused on bail is more likely to reoffend and more likely to ignore the bail obligations.⁴ For example, a drug-dependent person is more likely to appear in court if he or she is receiving treatment and a homeless person is more likely to appear in court if he or she is assisted in finding appropriate accommodation. In fact, participation in court intervention programs may be more effective than many traditional bail conditions.

PRE-PLEA COURT INTERVENTION PROGRAMS

As explained in Chapter One, some court intervention programs are available before a plea of guilty is entered.⁵ The benefit of pre-plea programs is that offenders can access appropriate treatment and services at an early stage of the criminal justice process. However, facilitating participation in pre-plea court intervention programs via bail legislation should be approached with caution. The need for a cautionary approach stems from the principle that all accused are presumed innocent until proven

1. In assessing the risk and determining if the accused should be granted bail, the decision maker must take into account the following matters: the nature and seriousness of the offence; the character, previous convictions, antecedents, associations, home environment, background, place of residence and financial position of the accused; the history of any previous grants of bail; and the strength of the evidence against the accused: *Bail Act 1982* (WA) Sch 1, Pt C, cl 3.

2. Bail legislation in most Australian jurisdictions includes the risk of reoffending as a relevant factor when assessing whether bail should be granted or when assessing whether any conditions should be imposed upon an accused: *Bail Act 1992* (ACT) s 20; *Bail Act 1980* (Qld) s 11(2); *Bail Act 1978* (NSW) s 32; *Bail Act 1985* (SA) s 10; *Bail Act 1977* (Vic) s 5(2). See also Victorian Law Reform Commission (VLRC), *Review of the Bail Act*, Final Report (2007) 122.

3. This is particularly relevant for family and domestic violence matters.

4. See Patrick J, 'Pre Plea Therapeutic Intervention by the Courts' (Paper presented at the 3rd International Conference on Therapeutic Jurisprudence, Perth, 7–9 June 2006) 4.

5. See discussion under 'Statement Three: Broad access to court intervention programs', Chapter One.

guilty.⁶ Before conviction, an accused should not be sentenced or punished in any way. Pre-plea court intervention programs can involve intensive treatment, restrictions on liberty and the requirement to comply with various obligations. In some respects, these programs are similar to (and sometimes more onerous) than traditional community-based sentencing orders.⁷

Moreover, it has been argued that participation in pre-plea programs (such as the Magistrates Early Referral into Treatment program in New South Wales or the Court Referral and Evaluation for Drug Treatment program in Victoria)⁸ is inconsistent with the objectives of bail. Freiberg and Morgan stated that the objectives of bail are primarily 'process-oriented' rather than 'performance-based' – in other words, as stated above, the focus of bail is on ensuring the efficient administration of justice.⁹

The Commission is of the view that participation in pre-plea court intervention programs is not necessarily punitive. If participation in pre-plea court intervention programs is necessary to meet the objectives of bail this is no different in principle to other traditional bail conditions. Many bail conditions limit the autonomy of an accused.¹⁰ For example, an accused may be required to comply with a home detention or curfew condition, surrender his or her passport or stay away from a particular location. In some cases, accused may be remanded in custody; custody is far more 'punitive' than participation in rehabilitation or treatment programs.¹¹

However, the difficulty arises in those cases where participation in a court intervention program is not necessary in order to meet the objectives of bail.¹²

While early intervention may be beneficial to the accused and to the community, it may be unfair in some instances to stipulate that compliance with the requirements of a particular court intervention program is a condition of bail. A failure to comply with a condition of bail leaves the accused at risk of arrest and subsequent revocation of bail.¹³ Therefore, the Commission is of the view that there should be a distinction between cases where participation in a court intervention program is legitimately required to meet the objectives of bail and those cases where it is not. In both cases, the opportunity to participate must exist, but only in the former case should participation in the program be ordered as a condition of bail.

The Commission acknowledges that this approach is potentially inconsistent with some pre-plea court intervention programs operating in Australia. For some programs the accused must be considered suitable for release on bail before being accepted onto the program.¹⁴ It has been observed in relation to one such program (the Court Referral and Evaluation for Drug Treatment program) that accused who fail to comply with the program are usually not remanded in custody – instead the bail condition to comply with the program is simply removed.¹⁵ Similarly, the Commission was told that participants who breach bail conditions imposed as part of the Western Australian Supervised Treatment Intervention Regime are not generally remanded in custody – if there is significant non-compliance they are terminated from the program and sentenced in the usual manner.¹⁶ Magistrate Jane Patrick from Victoria contends that there is risk that judicial officers are 'being less than honest' when imposing bail conditions in circumstances where there is no

6. The VLRC has recently undertaken a reference on bail and concluded that the 'distinction between bail and sentence must be maintained' because an accused on bail is presumed innocent: VLRC, *Review of the Bail Act*, Final Report (2007) 122.

7. See Freiberg A & Morgan N, 'Between Bail and Sentence: The conflation of dispositional options' (2004) 15 *Current Issues in Criminal Justice* 220, 229–33. However, it should be noted that community work is not a feature of pre-plea programs because community work is considered punishment.

8. These programs are discussed under 'Other Drug and Alcohol Court Intervention Programs', Chapter Two.

9. Freiberg A & Morgan N, 'Between Bail and Sentence: The conflation of dispositional options' (2004) 15 *Current Issues in Criminal Justice* 220, 222. The VLRC noted that one way around this issue is to add a legislative provision under the bail legislation to explicitly provide that special conditions on bail can be imposed for the purposes of 'rehabilitation, treatment or support while on bail': VLRC, *Review of the Bail Act*, Consultation Paper (2005) 105.

10. Edney R, 'Bail Conditions as a Mitigating Factor in Sentencing' (2007) 31 *Criminal Law Journal* 101, 103.

11. The VLRC recently concluded that participation in programs as a condition of bail is appropriate so long as such participation clearly relates to the objectives of bail and the accused consents to participate in the program. The VLRC recommended that the bail legislation should provide that bail conditions can only be imposed to reduce the likelihood that the accused will fail to attend court; commit an offence while on bail; endanger the safety or welfare of the public; or interfere with witnesses or otherwise obstruct the course of justice: VLRC, *Review of the Bail Act*, Final Report (2007) 123, Recommendation 94.

12. During preliminary consultations Chief Magistrate Heath expressed concern about the use of bail conditions where

such conditions are not necessary to achieve the objectives of bail: meeting with Chief Magistrate Heath (26 March 2008).

13. Section 54 of the *Bail Act 1982* (WA) empowers a police officer to arrest without warrant an accused (and bring that accused to court to show cause why bail should not be varied or revoked) if the police officer has reasonable grounds to believe that the accused 'is, or has been, or is likely to be in breach of any condition of his bail undertaking' imposed under Sch 1, Pt D, cl 2. A condition to comply with the requirement of a court intervention program would fall under this provision. Under s 55 of the *Bail Act 1982* (WA) if a judicial officer is satisfied that the accused is in, has been or is likely to be in breach of a bail condition, the judicial officer can revoke bail and remand the accused in custody or revoke bail and grant fresh bail to the accused. If the judicial officer is not satisfied that the accused has breached or is likely to breach the bail condition then the accused is released on his or her existing bail undertaking. It has been observed that lawyers may not refer their clients to programs if participation is a condition of bail because non-compliance can lead to bail-related offences: 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) 31.

14. See further discussion of the STIR program in Western Australia, the MERIT program in New South Wales, the CREDIT program in Victoria and the QMERIT program in Queensland under 'Other Drug and Alcohol Court Intervention Programs', Chapter Two.

15. Patrick J, 'Pre Plea Therapeutic Intervention by the Courts' (Paper presented at the 3rd International Conference on Therapeutic Jurisprudence, Perth, 7–9 June 2006) 12.

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

sanction for failing to comply.¹⁷ In other words, if a judicial officer simply varies bail by removing the condition to comply with the requirements of the program then the condition was unnecessary *for the purposes of bail* to start with.

It would be fairer to allow an accused who has already been released on unconditional bail to participate in a court intervention program without setting a specific bail condition to comply with the requirements of the program. If a court has already determined that unconditional bail is appropriate it would not be consistent with the objectives of bail legislation to then reverse that decision and require that the accused comply with the program as a condition of bail. Magistrate Patrick stated that pre-plea participation in court intervention programs should be encouraged (because early participation in programs is beneficial for the individual and for the community);¹⁸ however, bail conditions should not be overused for this purpose.¹⁹ Similarly, it has been contended that 'early intervention, non-sentencing schemes should be encouraged, provided that their punitive impact is limited'.²⁰

In the absence of bail conditions, judicial officers may be concerned that there is no authority for the court to direct the accused to comply with the requirements of the court intervention program. While the bail system arguably provides a degree of authority for the court to intervene and supervise an accused, the Commission believes that judicial supervision can still be achieved through voluntary participation. The incentive for an accused who is already subject to unconditional bail is the prospect of a better sentencing outcome or it may be a genuine desire to deal with his or her underlying problems.²¹ In such cases the matter could be adjourned to a subsequent court date for the purpose of an assessment to participate in the program and, if the accused is accepted onto a program, the matter could be further adjourned for the purpose of judicial monitoring. The only direct consequence for failing to comply with the court intervention program would be possible termination from the program.²²

17. Patrick J, 'Pre Plea Therapeutic Intervention by the Courts' (Paper presented at the 3rd International Conference on Therapeutic Jurisprudence, Perth, 7–9 June 2006) 12.

18. Ibid 2–3. See also VLRC, *Review of the Bail Act*, Consultation Paper (2005) 104. During preliminary consultations Chief Magistrate Heath noted that enabling pre-plea participation in programs is important because the crisis point of arrest is a stage when many offenders will be highly motivated to engage in treatment and programs: meeting with Chief Magistrate Heath (26 March 2008).

19. Patrick, *ibid*.

20. Freiberg A, *Pathways to Justice: Sentencing review 2002* (Melbourne: Department of Justice, 2002) 2.

21. Patrick J, 'Pre Plea Therapeutic Intervention by the Courts' (Paper presented at the 3rd International Conference on Therapeutic Jurisprudence, Perth, 7–9 June 2006) 12–13.

22. Supporters of therapeutic jurisprudence might argue that bail legislation should be changed so that bail conditions can be imposed solely for the purpose of helping an accused deal with his or her underlying problems. However, therapeutic jurisprudence maintains that therapeutic interventions should not override traditional legal rights. Therefore, the Commission

On the other hand, an accused may be in custody because bail has been refused or because bail conditions (such as a surety) cannot be met. For such an accused, a condition to comply with a court intervention program may be appropriate because suitability for participation in the program tips the balance and enables the accused to be released on bail. In this context, the risk of arrest and revocation of bail in the event of non-compliance with the program is justified. Likewise, if an accused is already on bail with traditional conditions (such as reporting to a police station, a curfew requirement or a condition not to consume alcohol) the court could legitimately substitute those conditions for a condition requiring the accused to comply with a court intervention program. Just as the failure to report to a police station may lead to arrest and revocation of bail, a failure to comply with the court intervention program may equally give rise to these consequences. In summary, the Commission has concluded that bail conditions requiring an accused to comply with a court intervention program should only be imposed if such a condition is needed to meet the objectives of bail.

Bail conditions

The Commission has examined the statutory schemes for intervention programs in other jurisdictions with a view to deciding the best way to provide legislative support for participation in court intervention programs as a condition of bail. The Queensland scheme enables a court to impose a bail condition requiring an accused to participate in a prescribed program.²³ However, in that jurisdiction the accused's bail cannot be revoked solely on the basis that the accused has breached or is likely to breach such a condition. The only power of the court in these circumstances is to vary the bail requirements, including the power to remove the particular condition.²⁴ The Queensland regime makes it clear that failure to comply with a prescribed program does not give rise to any punitive consequences: the accused cannot be charged with breaching bail and cannot have bail revoked. The only negative consequence is that the accused may be terminated from the program and he or she will lose the benefit of successful compliance being taken into account at sentencing. While the Queensland scheme protects some accused from unjustified sanctions for failing to comply with a court intervention program, it does

is of the view that unnecessary bail conditions should not be imposed for the purpose of facilitating participation in court intervention programs. For further discussion see 'Therapeutic Jurisprudence', Introduction and 'Statement Four: Legal and procedural safeguards', Chapter One.

23. *Bail Act* (Qld) s 11(4). Under the *Bail (Prescribed Programs) Regulation 2006* (Qld) the following programs are prescribed: Homeless Persons Court Diversion Program; Cairns Alcohol Remand Rehabilitation Program; Queensland Magistrates Early Referral into Treatment Program; and Queensland Indigenous Alcohol Diversion Program.

24. *Bail Act 1980* (Qld) s 30(6).

not enable courts to revoke bail if continued liberty on bail would be inappropriate.

Section 21B of the *Bail Act 1985* (SA) provides that a court may impose a condition of bail that the accused undertakes an intervention program.²⁵ Failure to comply with the program *may* be regarded as a breach of a condition of the bail agreement.²⁶ If an intervention program manager considers that the person has failed to comply with the requirements of the program and the failure to comply suggests that the person is unwilling to participate further, the intervention program manager must refer the matter to court and the court must determine if the failure to comply is a breach of bail.²⁷ In summary, the South Australian regime takes a discretionary approach to breaches of intervention programs during the bail process. Breaching the requirements of a program (if the person has been released on bail to undertake the program) may constitute an offence and the court has discretion to revoke bail. Similarly, the New South Wales legislation enables a court to impose a bail condition to participate in an intervention program.²⁸ As is the case in South Australia, failure to comply with any bail condition *may* result in arrest and revocation of bail. But these schemes do not distinguish between those accused who would have been released on unconditional bail irrespective of participation in a court intervention program and those accused who would not.

The Commission considers that—even for those cases where participation in a court intervention program is legitimately ordered as a condition of bail—failure to comply with such a bail condition should not automatically result in arrest or revocation of bail. The judicial officer should have discretion to take into account all of the circumstances, including the nature and reasons for the failure to comply with the program. This is consistent with the traditional approach to breaching bail conditions under the *Bail Act*. For example, an accused who fails to report to a police station will not automatically be remanded in custody; the court will consider the individual circumstances and the risk to the community.

The Commission has concluded that the bail legislation must provide that for an accused who is already on unconditional bail (or for a case where it has been determined that bail can be dispensed with) participation in a court intervention program cannot be ordered as a condition of bail. In all other

cases, courts should have the discretion to impose a bail condition to comply with a particular court intervention program. The Commission believes that this proposal provides the correct balance between the rights of an accused and the need to facilitate and encourage participation in court intervention programs.²⁹

Arguably, because the *Bail Act* currently empowers a court to impose any bail condition considered desirable, a court could impose a condition to participate in a court intervention program. The *Bail Act* provides that the decision maker may impose any conditions on bail for the purpose of ensuring that the accused attends court; does not commit an offence on bail; does not endanger the safety of any person; or does not interfere with witnesses or otherwise obstruct the course of justice.³⁰

However, there are other provisions under the *Bail Act* that may possibly restrict the types of conditions that can be imposed for rehabilitation purposes. For example, if a judicial officer is of the opinion that the accused should be counselled for a behavioural problem (not defined) or should attend a course or program to assist with the behavioural problem, the judicial officer may impose a condition requiring the accused to ‘attend a prescribed person to be counselled’ or ‘attend a prescribed course or programme’.³¹

A more general power exists in relation to drug or alcohol abuse. If a judicial officer is of the opinion that an accused is ‘suffering from alcohol or drug abuse and is in need of care or treatment either on that account, or to enable him to be prepared for his trial, the judicial officer may’ impose any condition which ‘he considers desirable for the purpose of ensuring that the accused receives such care or treatment, including that he lives in, or from time to time attends at, a specified institution or place in order to receive such care or treatment’.³²

As mentioned above, bail legislation in other jurisdictions expressly empowers a court to impose bail conditions for the purpose of participation in

25. An intervention program is defined under s 3 as a program that provides supervised treatment, rehabilitation, behaviour management and/or access to support services that is ‘designed to address behavioural problems (including problem gambling), substance abuse or mental impairment’.

26. *Bail Act 1935* (SA) s 21B(4).

27. *Bail Act 1935* (SA) s 21B(6).

28. *Bail Act 1978* (NSW) s 36A. Under s 346 of the *Criminal Procedure Act 1986* (NSW) an intervention program is defined as a declared intervention program, which includes circle sentencing, conferences and the traffic intervention program: see *Criminal Procedure Regulations 2005* (NSW).

29. See Proposal 6.3 below.

30. *Bail Act 1982* (WA) Sch 1, Pt D, cl 2.

31. *Bail Act 1982* (WA) Sch 1, Pt D, cl (2b). According to reg 11(1) of the *Bail Regulations 1988* (WA), a ‘prescribed person’ is a registered psychologist as defined in the *Psychologists Registration Act 1976* (WA) and is employed in, or providing services under, contract to the department. A prescribed course/program refers to the following departmental programs: Anger Management Program (Skills Training for Aggression Control); Domestic Violence Program; and Warminda Program (Chance of Going Straight). The Warminda Program is an intensive residential program for young people aged 16–21 years and lasts for at least three months. Offenders can only be referred by a juvenile justice officer or corrections officer and they can be referred before sentence or before release from custody. It appears from the second reading speech that this provision was primarily aimed at enabling the perpetrators of domestic violence to be directed into treatment early in order to reduce any continuing danger to the alleged victim: Western Australia, *Parliamentary Debates*, Legislative Assembly, 27 October 1998, 2674 (Mr Prince, Minister for Police).

32. *Bail Act 1982* (WA) Sch 1, Pt D, cl (4).

specified programs.³³ These provisions operate in addition to the general power to impose bail conditions under the legislation. The Commission is of the view that in order to remove any doubt and to facilitate participation in court intervention programs as early as possible, the *Bail Act* should be amended to provide that conditions can be imposed requiring an accused to comply with a prescribed court intervention program.

PROPOSAL 6.3

Bail conditions

- That Schedule 1, Part D, clause 2 of the *Bail Act 1982* (WA) be amended to provide that a judicial officer may impose a condition that an accused comply with the requirements of a prescribed court intervention program³⁴ (including a condition that the accused comply with any requirements necessary to enable an assessment to be made in relation to the accused's suitability to participate in the prescribed court intervention program) provided that such a condition is desirable to ensure that the accused:
 - appears in court in accordance with his bail undertaking;
 - does not, while on bail, commit an offence; or
 - does not endanger the safety, welfare or property of any person.
- That Schedule 1, Part D, clause 2 of the *Bail Act 1982* (WA) be amended to provide that a condition that an accused comply with the requirements of a prescribed court intervention program (as set out above) cannot be imposed before conviction in relation to an offence 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.

POST-PLEA COURT INTERVENTION PROGRAMS

Once an offender has pleaded guilty to an offence, there is no issue of principle preventing a court from imposing a bail condition requiring the offender to comply with a court intervention program. It has

33. See eg *Bail Act 1992* (ACT) s 25(4); *Bail Act 1978* (NSW) s 36A; *Bail Act 1980* (Qld) s 11(4); *Bail Act 1985* (SA) s 21B. The VLRC has stated that the best way to facilitate bail support programs is to have general and flexible bail conditions such as a condition to comply with all of the requirements of a specified program: VLRC, *Review of the Bail Act*, Final Report (2007) 122.

34. A prescribed court intervention program is defined in Proposal 6.1.

been stated that there 'is no question that courts have the authority legally and ethically to implement such interventions when sentencing'.³⁵

Currently, the *Bail Act* provides that bail after conviction can only be granted if the judicial officer is satisfied that there is a strong likelihood of imposing a non-custodial sentence or there are exceptional reasons why the offender should not be kept in custody (and bail would otherwise be appropriate under the general provisions of the bail legislation).³⁶ This provision could preclude some offenders from participating in court intervention programs following conviction. For example, the Perth Drug Court operates post-plea and targets offenders facing imprisonment. Such an offender can only be granted bail to participate in the Perth Drug Court if participation in the program is categorised as an exceptional reason. It is arguable that, with the continuing development of court intervention programs, participation in these programs will not continue to be regarded as exceptional.³⁷

This potential problem has already been recognised by the government. The *Bail Amendment Act 2007* (WA)³⁸ repeals clause 4 and replaces it with the following provision:

Subject to clauses 3A and 3C, the grant or refusal of bail to an accused, other than a child, who is in custody waiting to be sentenced or otherwise dealt with for an offence of which the accused has been convicted shall be at the discretion of the judicial officer in whom jurisdiction is vested, and that the discretion shall be exercised having regard to the questions set out in clause 1 as well as to any others which the judicial officer considers relevant.

The Explanatory Memorandum states that this amendment enables 'factors such as the offender's bail history on the relevant charge, the likelihood of a non-custodial sentence and whether or not the accused is undergoing or has been accepted onto a recognised therapeutic programme' to be considered.³⁹ It was also observed that the current law discourages early pleas of guilty. It was stated that the amendment 'accommodates the use of post-conviction bail to facilitate various sentence diversion programs that are becoming more common, and encourages early pleas of guilty by removing the presumption against post-conviction bail'.⁴⁰

35. Patrick J, 'Pre Plea Therapeutic Intervention by the Courts' (Paper presented at the 3rd International Conference on Therapeutic Jurisprudence, Perth, 7–9 June 2006) 2–3.

36. *Bail Act 1982* (WA) Sch 1, Pt C, cl 4.

37. Categorising participation in the Drug Court as an exceptional circumstance was queried in the first evaluation of the Perth Drug Court: Crime Research Centre, *Evaluation of the Perth Drug Court Pilot Project* (Perth: Department of Justice, 2003) 195.

38. This Act was passed on 31 March 2008, but had not commenced at the time of writing.

39. *Bail Amendment Bill 2007*, 43, Explanatory Memorandum.

40. *Ibid.* See also LRCWA, *Review of the Criminal and Civil Justice System*, Final Report, Project No. 92 (1999) (recommendation 285).

The Commission believes that this amendment is broad enough to enable participation in court intervention programs to be the basis for a grant of bail following conviction for an offence. The Commission has proposed above that participation in a prescribed court intervention program can be a condition of bail if considered desirable to ensure, among other things, that the offender does not commit an offence while on bail. Therefore, the Commission's preliminary view is that no further amendments are required to the *Bail Act* to facilitate post-conviction participation in court intervention programs. Nonetheless, the Commission invites submissions as to whether any further reform is required.

CONSULTATION QUESTION 6.2

Post-conviction participation in court intervention programs

The Commission invites submissions about whether any amendments to the *Bail Act 1982* (WA) are required to enable participation in court intervention programs post-conviction but before sentencing.

BREACHING BAIL

It is currently an offence to fail to comply with certain, but not all, of the requirements of bail. It is an offence to fail to appear at court when required without reasonable cause.⁴¹ It is also an offence to fail to comply with a bail condition imposed for the purpose of ensuring that the accused does 'not endanger the safety, welfare or property of any person' or a condition imposed to ensure that the accused 'does not interfere with witnesses or otherwise obstruct the course of justice'.⁴² These types of conditions are referred to as 'protective conditions'.

Breaching a condition of bail imposed for the purpose of ensuring that the accused attends court or a condition of bail imposed for the purpose of ensuring that the accused does not commit an offence while subject to bail does not constitute an offence. A condition to comply with the requirements of a court intervention program would generally fall within this category. The Commission does not consider that any changes are necessary in this regard; failure to comply with a bail condition in relation to participation in a court intervention program should not constitute an offence. If it were otherwise, there would be a strong disincentive to participate. The power of a court to revoke bail in appropriate cases

41. *Bail Act 1982* (WA) s 51(1). If an accused has a reasonable cause for failing to appear in court, the accused will still be guilty of an offence if he or she fails to attend court as soon as practicable after failing to appear: s 51(2).

42. *Bail Act 1982* (WA) s 51(2a).

is sufficient to provide for the protection of the public and the administration of justice.

However, there are some instances where a protective condition is necessary. Offenders engaged in family violence court intervention programs are often required to refrain from contact with the victim or a witness. Such a condition is imposed for the purpose of ensuring the safety of the victim or witness and, accordingly, it is proper that the accused be charged with an offence if the condition is breached. Such a condition should be imposed separately and in addition to a general condition to comply with a family violence court intervention program.

The Commission understands that some of the requirements of the Perth Drug Court are specified as protective conditions. These are generally residential conditions and curfew conditions. If Perth Drug Court participants breach these conditions they are liable to be charged with the offence of breaching bail.⁴³ Further, a breach of a protective condition of bail is classified as a serious offence under the *Bail Act*.⁴⁴ In Chapter Two, the Commission questions whether this practice is consistent with the provisions of the legislation because arguably they are imposed to prevent offending rather than protect witnesses or other persons.⁴⁵ The Commission proposes a new pre-sentence Drug Treatment Order which, among other things, includes the power to impose custody sanctions for non-compliance. The Commission believes that this order will provide the Perth Drug Court with the appropriate tools to deal with relapses and non-compliance without resorting to a strained interpretation of the *Bail Act*.⁴⁶

SUPERIOR COURT MATTERS

All criminal charges for adults commence in the Magistrates Court. Certain more serious charges must ultimately be dealt with in a superior court (the District Court or the Supreme Court). As mentioned above, in order to enable court intervention programs to be available for superior court matters, the Commission proposes that a general court intervention program should be established. This will enable court intervention to be used as needed for superior court matters. In addition, there may be other court intervention programs operating in the magistrates' jurisdiction that could be used for certain superior court offences. In practical terms, participation in the program could commence while the offender is still appearing in the Magistrates Court and could continue during the period between

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

44. This means that if the offender was already on bail for another serious offence (or subject to an early release order for a serious offence) he or she will be required to show exceptional circumstances in order to be released on bail again.

45. See discussion under 'Protective Bail Conditions', Chapter Two.

46. See Proposal 2.4.

being committed to the superior court and the first appearance in the superior court. There may be a number of weeks or months between entering the fast track plea and appearing for sentence and there is no reason that participation in the program should not commence as soon as possible.⁴⁷ The only issue is whether the magistrate administering the court intervention program in the magistrates court can require the offender to reappear in the Magistrates Court for the purpose of judicial monitoring after the matter has already been committed to the superior court.

A magistrate who commits an offender to appear in a superior court has jurisdiction to grant bail for the first appearance in the superior court.⁴⁸ Bail can be set with a condition that the offender comply with a prescribed court intervention program and a further condition that the offender appear before the Magistrates Court for the purpose of considering whether the offender is complying with the program.⁴⁹ However, a failure to appear in the Magistrates Court would not constitute an offence of breaching bail because the requirement to appear was a condition of bail, but not part of the undertaking to appear in court. The Commission is of the view that it should be made clear that despite an offender being committed to a superior court, the magistrate has the power to order that the offender reappear in the Magistrates Court for the purpose of considering whether an offender is complying with the requirements of a court intervention program.⁵⁰ The Commission believes that this will facilitate earlier pleas of guilty to offences that must be heard in the superior courts. Otherwise, some offenders may delay entering a plea of guilty to ensure that they can participate fully in a court intervention program before sentencing takes place. Early pleas of guilty reduce costs and reduce the trauma to victims and witnesses from uncertainty about the likely outcome of the proceedings.⁵¹

PROPOSAL 6.4

Superior court matters: committal for sentence

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 the Magistrates Court for the purpose of considering if the offender is complying with a prescribed court intervention program at any time before the offender's first appearance in the superior court.

47. The Commission understands that the usual period between entering a fast-track plea and appearing for sentence in the District Court is about two months: meeting with Chief Magistrate Heath (26 March 2008).

48. *Bail Act 1982* (WA) Sch 1, Pt A, cl 3.

49. Currently, for Drug Court participants who have been committed to a superior court, the Drug Court magistrate sets bail with a condition to comply with all of the requirements of the Drug Court. These conditions include the requirement to appear before the Drug Court: meeting with Magistrate Pontifex (26 February 2008). Thus, the requirement to appear in the Drug Court is a *condition* of bail rather than the actual bail undertaking. This would mean that if the Drug Court participant failed to appear in the Drug Court that failure to appear would not constitute the offence of breaching bail. The Commission understands that, in practice, most Drug Court participants also have summary charges and are therefore bailed to appear before the Drug Court in any event.

50. This option was supported during preliminary consultations: meeting with Chief Magistrate Heath (26 March 2008).

51. The Commission discusses the role of the magistrates court in monitoring compliance with Pre-Sentence Orders that have been imposed by a superior court below, see 'Pre-Sentence Orders and Court Intervention Programs'.

THE PURPOSE OF SENTENCING

The traditional purposes of sentencing are punishment (retribution), deterrence, incapacitation, denouncement and rehabilitation.¹ These purposes (in particular, deterrence, incapacitation and rehabilitation) have a common overriding goal – to reduce crime and protect the community.² Deterrent penalties are imposed to discourage the offender and others from committing future crimes. Incapacitation protects the community by preventing an offender from committing offences (for example, incarceration, curfews or license disqualification). Denouncement aims to educate others about unacceptable behaviour. And finally, the concept of rehabilitation involves reforming the offender so that he or she no longer poses a risk to the community. Nonetheless, these sentencing purposes are not always compatible – they act as ‘guideposts to the appropriate sentence but sometimes they point in different directions’.³

Court intervention programs are designed to achieve rehabilitation of offenders and, therefore, they clearly fit within the scope of traditional sentencing aims. Further, the Commission emphasises that deterrence and incapacitation are not necessarily as successful at achieving long-term community protection as *effective* rehabilitation strategies. The usefulness of deterrence (both general and specific) has been repeatedly called into question. General deterrence aims to deter other potential offenders from committing crimes. It has been stated that the possibility of being arrested by the police is a far stronger deterrent than any likely penalty.⁴ In relation to specific deterrence, the high rate of recidivism among prisoners does not support the view that imprisonment deters.⁵ Further, deterrence

(both general and specific) is ineffective for mentally impaired or drug and alcohol affected offenders. Such offenders are not in a position to rationally weigh up the potential consequences of their offending behaviour.

Incapacitation by way of incarceration is usually temporary. A substantial period of imprisonment may punish and though it will prevent the offender from committing offences during the period of imprisonment, it will be unlikely to rehabilitate most offenders. Only offenders who commit extremely serious offences (such as murder) and serious habitual criminals can and should be indefinitely detained. In all other cases, a prisoner will eventually be released into the community at the end of his or her prison term. If the offender’s underlying problems have not been adequately addressed the risk of future offending will be significant.

In contrast to other Australian jurisdictions, the purposes of sentencing are not set out in the *Sentencing Act 1995* (WA) (‘the *Sentencing Act*).⁶ In 2006 the Australian Law Reform Commission observed that including the purposes of sentencing in legislation ‘would promote transparency in the sentencing process’ and better inform the community.⁷ It has also been noted that public confidence in the sentencing process can be improved if sentencing judges explain in their reasons the link between sentencing goals and the actual sentence imposed.⁸ A clear legislative statement of the purposes of sentencing will encourage such an approach. Further, the Commission considers that an express statement of the purposes of sentencing will ensure that rehabilitation is viewed as a legitimate and important objective of sentencing. A useful model is s 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW). It provides that:

The purposes for which a court may impose a sentence on an offender are as follows:

- (a) to ensure that the offender is adequately punished for the offence,

1. See ALRC, *Same Crime, Same Time: Sentencing of federal offenders*, Report No. 103 (2006) [4.1]–[4.3]. These sentencing purposes are included in a number of legislative sentencing schemes: see *Crimes Sentencing Act 2005* (ACT) s 7; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; *Sentencing Act 1995* (NT) s 5; *Penalties and Sentences Act 1992* (Qld) s 9(1); *Sentencing Act 1991* (Vic) s 5.
2. Freiberg A, *Pathways to Justice: Sentencing review 2002* (Melbourne: Department of Justice, 2002) 33.
3. *Veen (No 2)* (1988) 164 CLR 465, 476–77 (Mason CJ, Brennan, Dawson and Toohey JJ) as cited in ALRC, *Same Crime, Same Time: Sentencing of federal offenders*, Report No. 103 (2006) [4.42].
4. Warner K, Tasmanian Law Reform Institute, *Sentencing*, Issues Paper No. 2 (2002) 49–51. See also ALRC, *ibid* [4.8].
5. Warner, *ibid* 53. In Chapter One, the Commission refers to the high proportion of adult prisoners in Western Australia who reoffend upon release: see discussion under ‘Recidivism’, Chapter One.

6. See eg *Crimes Act 1900* (ACT) ss 341, 342; *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 3A & 5; *Sentencing Act 1995* (NT) s 5; *Penalties and Sentences Act 1992* (Qld) s 9; *Criminal Law (Sentencing) Act 1988* (SA) ss 10,11; *Sentencing Act 1991* (Vic) s 5.
7. ALRC, *Same Crime, Same Time: Sentencing of federal offenders*, Report No. 103 (2006) [4.33].
8. Indermaur D, ‘Public Attitudes, The Media and the Politics of Sentencing Reform’ (Paper presented at the *Sentencing: Principles, Perspectives and Possibilities* conference, Canberra, 10–12 February 2006) 10.

- (b) to prevent crime by deterring the offender and other persons from committing similar offences,
- (c) to protect the community from the offender,
- (d) to promote the rehabilitation of the offender,
- (e) to make the offender accountable for his or her actions,
- (f) to denounce the conduct of the offender,
- (g) to recognise the harm done to the victim of the crime and the community.⁹

The Commission considers that this legislative statement of the purposes of sentencing is simple, modern and appropriate. The Commission proposes that a similar provision should be enacted in Western Australia.

PROPOSAL 6.5

Sentencing purposes

- That the *Sentencing Act 1995* (WA) be amended to provide that the purposes of sentencing are:
 - to impose punishment;
 - to protect the community;
 - to rehabilitate the offender;
 - to deter the offender and others from committing offences;
 - to denounce the conduct of the offender;
 - to prevent the offender from committing further offences;
 - to make the offender accountable for his or her conduct; and
 - to recognise the harm done to the victim and the community.
- That the *Sentencing Act 1995* (WA) provide that the order in which these purposes are listed does not indicate that one purpose is more or less important than another.

9. In the Australian Capital Territory the list of relevant sentencing factors also includes whether the offender has agreed to participate in restorative justice under the *Crimes (Restorative Justice) Act 2004* (ACT). The sentencing purposes include the harm done to the victim and the community and the need to make the offender accountable for his or her actions: see *Crimes Sentencing Act 2005* (ACT) ss 7 & 33(1) (x). The ALRC has recommended that restoration be specified as a sentencing purpose: ALRC, *Same Crime, Same Time: Sentencing of federal offenders*, Report No. 103 (2006) [4.27]. In the Introduction to this Paper the Commission explains that restorative justice is beyond the scope of this reference and, accordingly, the Commission has not considered legislative changes that support a coordinated approach to restorative justice programs: see discussion under 'Restorative Justice', Chapter One.

Sentencing principles and relevant sentencing factors

The *Sentencing Act* provides that a 'sentence imposed on an offender must be commensurate with the seriousness of the offence'. This statement recognises the principle of proportionality. The seriousness of an offence is determined by taking into account

- (a) the statutory penalty for the offence;
- (b) the circumstances of the commission of the offence, including the vulnerability of any victim of the offence;
- (c) any aggravating factors; and
- (d) any mitigating factors.¹⁰

It is further provided that:

A court must not impose a sentence of imprisonment on an offender unless it decides that —

- (a) the seriousness of the offence is such that only imprisonment can be justified; or
- (b) the protection of the community requires it.¹¹

Apart from a limited definition of aggravating and mitigating factors¹² the *Sentencing Act* does not otherwise provide for relevant sentencing factors. In contrast, most Australian jurisdictions include a list of sentencing factors incorporating specific circumstances in relation to the offence, the offender and the victim.¹³ It has been observed that these types of statutory lists reflect the principle of individualism.¹⁴ This principle maintains that a sentence should be appropriate taking into account all of the individual circumstances of the case.¹⁵ Court intervention programs also approach offenders individually – they seek to address the offender's underlying problems and structure treatment and intervention based upon their specific needs and problems. The Commission believes that effective participation in court intervention programs can be encouraged by a clearer statement of the relevant sentencing factors in the legislation.¹⁶

10. *Sentencing Act 1995* (WA) s 6.

11. *Sentencing Act 1995* (WA) s 6 (4).

12. *Sentencing Act 1995* (WA) ss 8 & 9.

13. *Crimes Sentencing Act 2005* (ACT) s 33; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A; *Sentencing Act 1995* (NT) s 5; *Penalties and Sentences Act 1992* (Qld) s 9(2); *Criminal Law (Sentencing) Act 1988* (SA) s 10; *Sentencing Act 1991* (Vic) s 5; *Crimes Act 1914* (Cth) s 16(2).

14. Colvin E et al, *Criminal Law in Queensland and Western Australia: Cases and materials* (Sydney: LexisNexis Butterworths, 2005) [31.5].

15. *Ibid.*

16. The Commission made a recommendation in relation to sentencing factors in its final report on Aboriginal customary laws. It recommended that the *Sentencing Act* be amended to include as a relevant sentencing factor, the cultural background of the offender. However, the Commission acknowledged that such a provision on its own would look out of place. It suggested that the *Sentencing Act* should contain an extensive, but not exhaustive, list of relevant sentencing factors: LRCWA, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report, Project No. 94 (2006) 172–73 (recommendation 36). An exhaustive list of relevant sentencing factors would be

In addition to providing a clear statement of relevant sentencing factors, the Commission is of the view that sentencing legislation should ensure that offenders are not disadvantaged in any way for agreeing to participate in a court intervention program. It is important that participants are not sentenced more severely as a result of failure to comply with a program.¹⁷ In Queensland an offender's successful completion of a rehabilitation, treatment or other intervention program or course is included as a relevant sentencing factor.¹⁸ In New South Wales, the sentencing legislation specifies that when sentencing an offender who has taken part in an intervention program the court must consider anything done in compliance with the program. This requirement applies even if the offender did not actually complete the program.¹⁹ The South Australian legislation provides that an offender's 'achievements' during participation in an intervention program are relevant to sentence. However, failure to participate or poor performance in an intervention program (whether by choice or because there were no available programs) is expressly stated to be not relevant to sentencing.²⁰ The Commission proposes that the *Sentencing Act* be amended to provide that compliance with a prescribed court intervention program is relevant to sentencing but that failure to comply with a program is not a relevant sentencing factor.

PROPOSAL 6.6

Sentencing factors

- That the *Sentencing Act 1995* (WA) be amended to provide for a non-exhaustive list of relevant sentencing factors.
- That the statutory list of sentencing factors includes anything done by the offender in compliance with a prescribed court intervention program.
- That the *Sentencing Act 1995* (WA) be amended to expressly provide that failure to participate in (whether by choice or lack of opportunity) or failure to successfully complete a prescribed court intervention program is not a relevant sentencing factor.

inappropriate because it is impossible to anticipate in advance every issue that may be relevant to sentencing.

17. This was emphasised in preliminary consultations: meeting with Chief Magistrate Heath (26 March 2008).

18. *Penalties and Sentences Act 1992* (Qld) s 9(2)(o).

19. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 24(c).

20. *Criminal Law (Sentencing) Act 1988* (SA) s 10(5).

PRE-SENTENCE OPTIONS

Court intervention programs operate at different stages of the criminal justice process. In some instances participation is available before a plea is entered (eg, the Court Integrated Services Program in Victoria); some programs operate post-plea but pre-sentence (eg, the Supervised Treatment Intervention Regime in Western Australia); and others operate post-sentence (eg, the Drug Courts in New South Wales, Queensland and Victoria).

It could be argued that participation in court intervention programs should be post-sentence because in many cases the requirements of the program are just as (if not more) onerous than traditional sentencing orders. This is particularly the case for drug courts where offenders may be required to reside in residential rehabilitation facilities; appear in court and attend counselling weekly; and submit to urinalysis three times a week.²¹ Because of the intensive nature of many court intervention programs, post-sentence options may also avoid duplication of community justice resources. Community corrections officers may be involved in the supervision and treatment of offenders during a court intervention program and they are then subsequently required to continue supervision and treatment if the offender is placed on a community-based sentence. Post-sentence options are also less likely to distort statistics and data in relation to sentencing outcomes. If an offender complies with a court intervention program for 12 months before sentencing and is placed on a Community Based Order for a further 12 months, the sentencing outcome will be recorded as a 12-month Community Based Order. This does not accurately reflect the requirements imposed on the offender as a consequence of the offence.

On the other hand, there is a very practical reason for pre-sentence options. Before sentencing occurs an offender can be placed on bail and required to comply with bail conditions such as a residential condition or a curfew condition. Post-sentence options do not operate in conjunction with bail. Therefore, for post-sentence options the police are not able to monitor these types of conditions. The responsibility for monitoring such conditions would fall on community corrections. In the context of the Perth Drug Court the Commission has been told that it is essential that police are involved in monitoring residential and curfew conditions.²²

21. The Barndimalgu Court in Geraldton is also very intensive. The Commission has been advised that some offenders might be required, each week, to meet with their case manager, attend a rehabilitation program, submit to urinalysis and attend an Aboriginal counselling group: Magistrate Sharratt, Geraldton Magistrates Court, telephone consultation (5 March 2008).

22. Meeting with Tanya Watt, Office of the Director of Public Prosecutions (21 February 2008); meeting with Sergeant Julia Foster (26 February 2008); meeting with Magistrate Pontifex (26 February 2008).

Further, it appears from the Commission's preliminary consultations that pre-sentence options are preferable because they provide a greater incentive for participants to meaningfully engage in the process and comply with all of the requirements. Once a sentence is imposed, there is a risk that the offender will do the least amount possible to avoid a breach; however, with a pre-sentence option the offender has a greater incentive to do well and impress the judicial officer because a sentence has not yet been imposed.²³

Participation in court intervention programs pre-sentence is also likely to enhance sentencing decisions. A pre-sentence court intervention program enables the offender to demonstrate his or her prospects of rehabilitation before a final decision is made. In *O'Brien*,²⁴ Heenan J considered two options: whether the offender should be placed on a Pre-Sentence Order to be supervised by the Perth Drug Court or whether the offender should be sentenced to Conditional Suspended Imprisonment. He concluded that the pre-sentence option was preferable because:

It has the advantage of allowing a supervised trial period of up to two years without abandoning all other sentencing options. Sentencing can [then] occur, either at the end of the period or, in the event of notable failure of the supervised regime for want of compliance or otherwise, at an earlier point in time. This approach allows a court to balance the need for rehabilitation against the need to protect the community and, if an offender does not commit fully to the programme or defaults in compliance with it, the offender may still receive a traditional sentence which may include prison.²⁵

As recently observed by the Sentencing Council of Victoria, a pre-sentence option 'provides the offender with an opportunity to establish with the court his or her rehabilitative potential in real terms, rather than relying entirely on reports, which can only ever provide an educated guess about an offender's likely future behaviour'.²⁶

For the above reasons, the Commission has concluded that participation in court intervention programs should occur pre-sentence.²⁷ Most court intervention programs already operate this way.

23. Meeting with Magistrate Pontifex (26 February 2008); meeting with Chief Magistrate Heath (26 March 2008).

24. [2007] WASCA 292.

25. Ibid [58]. See also *Trindall* [2002] NSWCCA 364 [60] where it was stated that a sentencing court '[o]ften experiences difficulty when sentencing an offender in determining the offender's prospects of rehabilitation and whether the foreshadowed rehabilitation will occur. In many instances it will be of great assistance to the sentencing judge if there is an adjournment to enable the offender to demonstrate that rehabilitation has taken place or is well on the way'.

26. Sentencing Advisory Council of Victoria, *Suspended Sentences and Intermediate Sentencing Orders* (2008) 274.

27. The Commission has taken into account the possibility that judicial monitoring and supervision of offenders post-sentence may attract criticism based on a perceived breach of the *Kable* incompatibility principle: see discussion under 'Constitutional Issues', Chapter One. See also discussion under 'Pre-Sentence vs Post-Sentence', Chapter Two.

After completion of the program the court must then decide the appropriate sentence. Nonetheless the Commission recognises that participation in court intervention programs may be onerous and intensive, and is concerned that pre-sentence options may skew the sentencing outcome. For this reason, the Commission proposes that the recording of sentencing outcomes include that the offender has participated in a prescribed court intervention program. For example, if an offender completed a 12-month court intervention program and was then sentenced to a six-month Community Based Order, the sentencing outcome could be recorded as 'CBO (6 months) – completed Perth Drug Court program (12 months)'. This outcome should also appear on the offender's criminal record.

PROPOSAL 6.7

Recording of sentencing outcome

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.

Because different programs will target different types of offenders and different levels of offending behaviour it is vital that courts have flexibility in sentencing. In some cases, it may be appropriate to impose no further punishment and, in others, the offender may require continuing supervision and support. For some offenders the offence(s) may be so serious that a term of suspended imprisonment is appropriate even though the offender has completed an extensive program.

While *participation* in court intervention programs should occur pre-sentence, the Commission notes that some offenders and the community may benefit from continued judicial monitoring of offenders post-sentence. In this regard, it is important to bear in mind the difference between judicial monitoring and judicial involvement in case management. In the former case, the offender appears in court for the judicial officer to determine if the offender is complying with the program and the judicial officer may offer encouragement and praise or condemnation if necessary. In the latter case, a judicial officer may be part of a case management team and directly involved in the day-to-day management of an offender's treatment and rehabilitation program. The Commission recognises that post-sentence judicial monitoring may be a useful tool in some cases and seeks submissions about this option below.²⁸

28. See Consultation Question 6.5.

Deferral of sentencing

Pre-sentence participation in court intervention programs can only take place if sentencing is deferred for a sufficient period of time. Currently, unless a Pre-Sentence Order is appropriate,²⁹ a sentencing court can only defer or adjourn sentencing for a maximum period of six months from the date of conviction. The main purpose for the current provision is 'to ensure that a person who is found guilty is sentenced expeditiously and not held as an unsentenced prisoner'.³⁰

The period of six months may not be sufficient for some court intervention programs, especially because it can take a number of weeks for the offender to be assessed as suitable and accepted onto the program. Because the period of six months does not start to run until the offender is convicted, the current six-month limitation may encourage some offenders to delay entering a plea of guilty. In fact, some court intervention programs specify that an indication of an intention to plead guilty is sufficient to allow participation in the program. This is one way of circumventing the statutory limitation.

Some jurisdictions allow sentencing to be deferred for longer than six months. In New South Wales and South Australia courts can defer sentencing for the express purpose of facilitating participation in various intervention programs. The time limit in New South Wales is 12 months. In contrast, the 'ordinary' time limit in South Australia is 12 months, but this period can be extended if the offender is participating in an intervention program and a longer period is required to enable the offender to complete the program and achieve rehabilitation.³¹

In its final report on Aboriginal customary laws the Commission recommended that s 16(2) of the *Sentencing Act* be amended to provide that sentencing can be adjourned for up to a maximum of 12 months.³² The principal reason for this

recommendation was to facilitate appropriate diversionary options for Aboriginal people; the current period of six months was considered too short. The Commission received support for this recommendation from both the Department of the Attorney General and the Department of Corrective Services. The only opposition came from the Western Australia Police who argued that extending the period in which sentencing could be deferred may add to the stress suffered by victims.

The Commission believes that in the context of court intervention programs extending the current six-month limit will encourage earlier pleas of guilty. Presently, some offenders may delay entering a plea in order to maximise their opportunity to demonstrate rehabilitation before sentencing.³³ From the victim's perspective it is preferable for the offender to enter a plea of guilty as soon as possible. Further, if offenders are able to participate in appropriate programs for longer than six months, this may enable more effective engagement in restorative justice programs involving victims. As former Drug Court Magistrate Julie Wager noted 'if people have four months to, say, get a house, get clean, go and study and meeting their victim, it is all too much'.³⁴

The Commission has received overwhelming support during its preliminary consultations to extend the period in which sentencing can be deferred to 12 months.³⁵ It appears that the operation of some programs is hindered by the current limitation. The Commission believes that the period of 12 months is sufficient bearing in mind that those offenders facing a term of immediate imprisonment can be placed on a Pre-Sentence Order for up to two years. Nevertheless, the Commission invites submissions as to whether there should be the power to extend the deferral of sentencing beyond 12 months and, if so, in what circumstances.

29. A Pre-Sentence Order can be imposed for up to two years but only if the offence warrants an immediate term of imprisonment: see discussion below under 'Pre-Sentence Orders'.

30. Standing Committee on Legislation, *Sentencing Legislation Amendment and Repeal Bill 2002 and the Sentence Administration Bill 2002*, Report No. 18 (2003) 33.

31. See *Crimes (Sentencing Procedure Act) 1999* (NSW) s 11; *Criminal Law (Sentencing) Act 1988* (SA) s 19B(3). In the Australian Capital Territory, there is a deferred sentencing order (up to 12 months) so that an offender can be given an opportunity to address the causes of his or her criminal behaviour: *Crimes Sentencing Act 2005* (ACT) s 27.

32. LRCWA, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report, Project No. 94 (2006) 185–86, recommendation 40. Freiberg has recommended that the power to defer sentencing be extended to 12 months in Victoria: Freiberg A, *Pathways to Justice: Sentencing review 2002* (Melbourne: Department of Justice, 2002) 182–83. See also Sentencing Advisory Council of Victoria, *Suspended Sentences and Intermediate Sentencing Orders* (2008) xxxiv. Currently, in the Victorian magistrates courts sentencing can be deferred for up to six months for offenders aged 18 or more but under the age of 25 years: *Sentencing Act 1991* (Vic) s 83A. The one exception is

the Neighbourhood Justice Centre Court which has legislative power to adjourn sentencing for six months for all adult offenders: *Magistrates Court Act 1989* (Vic) s 4Q(3).

33. Sentencing Advisory Council of Victoria, *Suspended Sentences and Intermediate Sentencing Orders* (2008) xxxiv.

34. Standing Committee on Legislation, *Sentencing Legislation Amendment and Repeal Bill 2002; Sentence Administration Bill 2002*, Transcript of Evidence, 5 March 2003 (Julie Wager, SM Perth Drug Court) 6.

35. Meeting with Magistrate Gluestein (10 January 2008); meeting with Catie Parsons, Legal Aid (20 February 2008); meeting with Hildreth Glendinning, Family Violence Service, Joondalup Magistrates Court (12 February 2008); meeting with Valerie Thatcher, Court Assessment and Treatment Services and Ian Donaldson, Department of Corrective Services (21 February 2008); meeting with Tanya Watt, Office of the Director of Public Prosecutions (21 February 2008); meeting with Magistrate Pontifex (26 February 2008); Magistrate Sharratt, telephone consultation (5 March 2008); Magistrate Kate Auty, Magistrate Greg Benn, Richard Stevenson, Regional Manager, Magistrates Courts Kalgoorlie and Beverly Burns, Aboriginal Justice Officer, Kalgoorlie-Boulder Community Court, telephone consultation (10 March 2008); meeting with Magistrate Martin Flynn (11 March 2008); meeting with Chief Magistrate Heath (26 March 2008); Evan King-Macskasy, Family Violence Service Coordinator, Department of the Attorney General, email communication (9 June 2008).

PROPOSAL 6.8

Deferral of sentencing

- That s 16(1) of the *Sentencing Act 1995* (WA) be amended to provide that a court may adjourn the sentencing of an offender to allow an offender to be assessed for and participate in a prescribed court intervention program.
- That s 16(2) of the *Sentencing Act 1995* (WA) be amended to provide that the sentencing of an offender must not be adjourned for more than 12 months after the offender is convicted.

CONSULTATION QUESTION 6.3

Deferral of sentencing

The Commission invites submissions as to whether a court should have the power to adjourn sentencing for the purpose of enabling participation in a prescribed court intervention program under s 16 of the *Sentencing Act 1995* (WA) for longer than 12 months and, if so, in what circumstances.

Pre-Sentence Orders

Pre-Sentence Orders (PSO) were introduced in Western Australia in August 2003. These orders can be imposed by any Western Australian sentencing court. A PSO can be imposed for up to two years for offenders to address the causes of their offending behaviour. The order can only be given if the offender is facing a term of immediate imprisonment and the court is of the view that if the offender complies with the PSO it may not send the offender to jail.³⁶ If a court imposes a PSO, the sentencing is deferred for the duration of the order and the offender is bailed to appear in court on the sentencing day.

The requirements of a PSO are similar, although not identical, to the requirements of post-sentencing options such as Community Based Orders and Intensive Supervision Orders. A PSO can include a program requirement, a supervision requirement or a curfew requirement.³⁷ One difference between a PSO and traditional community-based sentencing orders is that community work is not available under a PSO. Another significant difference is that under a PSO the offender may be ordered to reappear in court at regular intervals so that the judicial officer can determine if the offender is complying with the requirements of the order.³⁸ Thus, the concept of

36. *Sentencing Act 1995* (WA) s 33A(3).

37. *Sentencing Act 1995* (WA) s 33E.

38. *Sentencing Act 1995* (WA) s 33C.

judicial monitoring is recognised in the legislation. While there are specific provisions applying to speciality courts (discussed below) judicial monitoring is an available option for any court.³⁹

The role of a speciality court

There are specific provisions empowering a speciality court to make certain orders in relation to a PSO. In particular, a speciality court can impose requirements in relation to the assessment of offenders; treatment; educational and vocational programs; and residential and curfew conditions.⁴⁰ Currently, the only speciality court under the *Sentencing Act* is the Perth Drug Court.⁴¹ Because of its distinctive features and processes, the Commission has concluded that a specific pre-sentence Drug Treatment Order is required for the Perth Drug Court.⁴² Accordingly, it is unnecessary to consider reforms to the provisions of the *Sentencing Act* dealing with PSOs for the purpose of the Drug Court. However, PSOs are used by other courts.

The use of pre-sentence orders in Western Australia

Statistics provided by the Department of the Attorney General indicate that from the beginning of September 2003 until 15 February 2008 there were 892 PSOs imposed by Western Australian magistrates courts. Of these, 253 were imposed by the Perth Drug Court (28%). Thus, the PSO is used often by general magistrates courts.⁴³ On the other hand, it does not appear that PSOs are commonly used by the superior courts unless the matter is being managed by the Perth Drug Court.⁴⁴

39. The Commission notes that PSOs are used by the Kalgoorlie-Boulder Community Court and the Norseman Community Court and staff working in these courts stated that the involvement of Aboriginal Elders or respected persons is effective in terms of monitoring compliance with the conditions of the order. Usually, offenders are required to reappear in court once a month while subject to the PSO: 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).

40. *Sentencing Act 1995* (WA) ss 33G & 33H.

41. Regulation 4A of the *Sentencing Regulations 1996* (WA) provides that for the purposes of 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* 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).

42. See discussion under 'The Need for Specific Legislation', Chapter Two and Proposal 2.4.

43. Mr Bruce Mohan, Manager Business Intelligence, Courts Technology Group, Department of the Attorney General, email communication (22 February 2008).

44. Meeting with Tanya Watt, Office of the Director of Public Prosecutions (21 February 2008). The Commission was told that in 2007 there were 37 PSOs imposed by the District Court.

The PSO (both within the Perth Drug Court and generally) appears to be achieving higher compliance rates than other court orders. For example, almost 73% of all PSOs in 2007 were successfully completed compared to only 53% of all other court orders. The compliance rate of PSOs imposed by the Drug Court was even higher – almost 85% were successfully completed.⁴⁵ The Commission is not aware of recidivism rates for offenders placed on PSOs; however, the fact that more PSOs are successfully completed than other court orders supports the Commission's view that participation in court intervention programs before sentencing takes place is likely to be more effective than post-sentence options.

Pre-Sentence Orders and court intervention programs

The Commission believes that the PSO will be the most useful option for court intervention programs dealing with offenders who are potentially facing a term of immediate imprisonment.⁴⁶ Under a PSO, a court can impose a number of different conditions and also use bail conditions where necessary. Importantly, for high-risk offenders a PSO can be ordered for up to two years. In order to enable PSOs to be effectively used by all court intervention programs, the Commission considers that the reference to 'speciality courts' in Part 3A of the *Sentencing Act* should be deleted and instead the legislation should refer to prescribed court intervention programs. Thus, the ability to monitor and manage offenders subject to a court intervention program will not be dependent upon being prescribed as a separate speciality court. As the Commission has explained elsewhere, many effective court intervention programs operate as general programs available to a number of different courts and some operate as dedicated periodic lists.

45. Adrian de Graaf, Acting Team Leader Statistics, Performance and Statistics, Strategic and Executive Services, Department of Corrective Services, email communication (4 March 2008). The statistics provided by the Department of Corrective Services did not distinguish between PSOs imposed by the Perth Drug Court and PSOs imposed by other courts; however, the information did provide separate statistics for PSOs supervised by the Court Assessment and Treatment Service (CATS). As far as the Commission is aware CATS officers are only involved in Drug Court matters. In 2006, 77% of all PSOs were successfully completed compared to 54.5% of all other court orders. The compliance rate for Drug Court PSOs was almost the same as the general PSO rate. For 2004 and 2005 PSOs also outperformed all other court orders. The Commission acknowledges that the number of PSOs imposed is relatively small compared to the number of all other court orders; for example, in 2007 there was a total of 259 PSOs and a total of 5373 other court orders.

46. Some magistrates consulted by the Commission expressed support for pre-sentence orders: Magistrate Kate Auty and Magistrate Greg Benn, telephone consultation (10 March 2008). However, Magistrate Sharratt expressed concern about the inflexible nature of a PSO: Magistrate Steve Sharratt, telephone consultation (5 March 2008). The Commission makes proposals below that are designed to increase the flexibility of PSOs.

PROPOSAL 6.9

Pre-sentence orders

That all references to a 'speciality court' in Part 3A of the *Sentencing Act 1995* (WA) be deleted and replaced with the phrase 'a court administering a prescribed court intervention program'.⁴⁷

Amending and enforcing Pre-Sentence Orders

The Commission has concluded that simply replacing references to 'speciality court' with references to a 'court administering a prescribed court intervention program' will not be sufficient to enable effective participation in court intervention programs. The current legislative provisions in relation to amending and enforcing PSOs are not flexible enough to enable judicial officers to respond effectively and quickly to changes in the offender's circumstances.

An application to amend a PSO can only be made by the offender or by a community corrections officer with the prior approval of the Chief Executive Officer (Corrections). The application must be made in accordance with the regulations.⁴⁸ In the Magistrates Court and the Children's Court the application must be made in an approved form and the hearing of the application must be at least seven days after the application is lodged with the court. In a superior court, the application must be made in accordance with the rules of that court. A court can only amend a PSO if satisfied that the circumstances of the offender were wrongly presented to the court at the time the order was made or have otherwise changed so that the offender will not be able to comply with the requirements of the PSO or it is no longer appropriate that the offender is subject to a PSO.⁴⁹

The Commission believes that in order to ensure effective judicial monitoring (and case management where appropriate) courts should be able to amend the conditions of a PSO at any subsequent review of the case. Provided that all parties are present and have had an opportunity to consider the matter, a court administering a court intervention program should be able to amend the conditions of a PSO without the need for a formal application to be lodged at the court. The Commission proposes that s 33M of the *Sentencing Act* be amended to provide that a court administering a prescribed court intervention program can amend the requirements of the PSO at any time, provided that all parties have been given a reasonable opportunity to make submissions concerning any proposed change to the

47. This proposal will also require consequential amendments to the *Sentencing Regulations 1996* (WA).

48. *Sentencing Act 1995* (WA) s 33M; *Sentencing Regulations 1996* (WA) regs 4B & 4C.

49. *Sentencing Act 1995* (WA) s 33N.

order. Further, the Commission proposes changes to the criteria to be established before a PSO can be amended.

PROPOSAL 6.10

Amending a PSO

- That s 33M of the *Sentencing Act 1995* (WA) be amended to provide that a court administering a prescribed court intervention program can amend the requirements of a Pre-Sentence Order at any time provided that all parties have been given an opportunity to be heard; and
- That s 33N of the *Sentencing Act 1995* (WA) be amended to provide that a court administering a court intervention program can amend the requirements of a Pre-Sentence Order if satisfied that the amendment is necessary for the effective rehabilitation of the offender or to reduce the risk that the offender reoffends during his or her participation in the prescribed court intervention program.

Currently, a court can only deal with a breach of the requirements of a PSO (other than reoffending) if the Chief Executive Officer (Corrections) issues a warrant to have the offender brought before the court. In practice, some of the requirements of a court intervention program will be set as a condition of bail and some will be set as part of a PSO. Any failure to comply with bail conditions can be dealt with expeditiously. In the context of court intervention programs the Commission is of the view that a court should be able to respond to breaches quickly – in some cases it will mean that the conditions of the order should be changed, in other cases it may be necessary to cancel the order. Of course, some breaches will require no action. The Commission proposes that a court administering a court intervention program should be able to respond to breaches without the need for any formal application or warrant for the offender's arrest.

PROPOSAL 6.11

Breaching a PSO

That s 33O of the *Sentencing Act 1995* (WA) be amended to provide that if a court administering a prescribed court intervention program is satisfied that the offender has been, is, or is likely to be in breach of any requirement of the pre-sentence order, the court may amend or cancel the Pre-Sentence Order.

Superior court matters

In order to facilitate the use of court intervention programs as widely as possible, the Commission has proposed that a magistrates court be able to monitor an offender's compliance on a court intervention program after an offender has been committed to a superior court but before the offender's first appearance in that superior court. This will enable the offender to continue to participate in the program while he or she is waiting to appear in the superior court. Once the offender appears in the superior court, the superior court judicial officer might then impose a PSO. In some instances, it may be appropriate for the magistrates court that was originally administering the program to continue to monitor the offender's compliance. This will be particularly relevant for programs that operate with a dedicated magistrate on a particular day and time because all staff will be available at one time.

Section 33C of the *Sentencing Act* provides that a court that imposes a PSO may also order that the offender reappear before the court prior to the sentencing day to determine if the offender is complying with the order. The Commission proposes that s 33C should be amended to provide that if a superior court imposes a PSO on an offender who has been or is participating in a prescribed court intervention program it may also order that the offender reappear before the magistrates court that is administering the program.

This proposal will only enable effective monitoring of compliance if the magistrates court is able to immediately commit the offender to the superior court if the offender has breached the PSO. Under the current legislation if a magistrates court convicts an offender of an offence that was committed during a PSO that was imposed by a superior court, the magistrates court can commit an offender to the relevant superior court to be dealt with for the breach.⁵⁰ However, if the offender fails to comply with the requirements of the PSO (as distinct to reoffending) the matter can only be returned to the superior court if the Chief Executive Officer (Corrections) issues a warrant to have the offender arrested and brought before the superior court that imposed the PSO.⁵¹ Accordingly, the Commission proposes that a court administering a prescribed court intervention program should be able to commit an offender (in custody or on bail) to the superior court that imposed the PSO if satisfied that the offender has been, is, or is likely to be, in breach of any requirement of the PSO.

50. *Sentencing Act 1995* (WA) s 33O.

51. *Sentencing Act 1995* (WA) s 33P. During consultations the Commission was told that it would be useful if the Drug Court could commit an offender that had breached the requirements of a PSO imposed by a superior court rather than rely on the issuing of a warrant by the Chief Executive Officer: meeting with Magistrate Pontifex (26 February 2008).

PROPOSAL 6.12

Pre-sentence orders imposed by a superior court

- That s 33C of the *Sentencing Act 1995* (WA) be amended to provide that if a superior court imposes a Pre-Sentence Order on an offender who has been or is participating in a prescribed court intervention program, the superior court *may* order that the offender reappear in the magistrates court that is administering the court intervention program so that that court can ascertain whether the offender is complying with the order.
- That s 33P of the *Sentencing Act 1995* (WA) be amended to provide that a court administering a prescribed court intervention program may commit an offender to the superior court that imposed the Pre-Sentence Order if satisfied that the offender has been, is, or is likely to be, in breach of any requirement of the order.

Excluded offences

A PSO is not available if the current offence(s) was committed during an early release order⁵² or during a period of suspended imprisonment or if the penalty for the offence is mandatory.⁵³ An offender who has breached a suspended sentence of imprisonment is likely to be facing an immediate jail term. The Commission has been told that this exclusion is inappropriate, especially for the Perth Drug Court. This is particularly the case where the breaching offence is substantially different to the offence for which the offender was placed on the suspended sentence.⁵⁴ For example, an offender might have been placed on a suspended sentence for driving under disqualification and is now in court for drug-related offences such as possession of drugs, stealing and fraud. Such an offender may clearly benefit from involvement in a court intervention program to address their drug addiction and other problems. On the other hand, it was suggested to the Commission that this exclusion is an appropriate way to limit the number of offenders participating in the Perth Drug Court (and arguably other court intervention programs) because such offenders have already been given a chance by the court to avoid an immediate prison sentence.⁵⁵ However, offenders subject to a suspended sentence may have been given an opportunity to avoid an immediate term of

52. This means orders such as parole, home detention, work release or a re-entry release order.

53. *Sentencing Act 1995* (WA) s 33A.

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

55. Meeting with Tanya Watt, Office of the Director of Public Prosecutions (21 February 2008).

imprisonment but they have not necessarily been given the opportunity to address their offending behaviour.

PROPOSAL 6.13

Eligibility for a Pre-Sentence Order

That s 33A(2a)(b) of the *Sentencing Act 1995* (WA) be repealed to enable an offender who was subject to a suspended sentence of imprisonment at the time of committing the current offence(s) to be eligible for a Pre-Sentence Order.⁵⁶

CONSULTATION QUESTION 6.4

Eligibility for a Pre-Sentence Order

The Commission invites submissions as to whether any other changes are required to the current eligibility criteria for Pre-Sentence Orders as set out in s 33A of the *Sentencing Act 1995* (WA).

Sentencing day

Section 33K(1) of the *Sentencing Act* provides that a 'court sentencing an offender who has been subject to a PSO ... *must* take into account the offender's behaviour while subject to the PSO'.⁵⁷ The Commission is concerned that this provision is inconsistent with its general proposal that any compliance with a court intervention program is a relevant sentencing factor.⁵⁸ The Commission is of the view that unsuccessful compliance with a PSO should not be taken into account in sentencing. An offender should not be penalised for trying, albeit unsuccessfully, to address the causes of his or her offending behaviour. Accordingly, the Commission proposes that s 33K be amended.

PROPOSAL 6.14

Taking into account compliance with a PSO at sentencing

That s 33K of the *Sentencing Act 1995* (WA) be amended to provide that a court sentencing an offender who has been subject to a PSO must take into account anything done in compliance with the requirements of the PSO.

56. The Commission proposes that offenders who were subject to a suspended sentence of imprisonment at the time of the current offence(s) should also not be automatically excluded from the operation of the Perth Drug Court: see Proposal 2.2.

57. Emphasis added.

58. See Proposal 6.6.

SENTENCING ORDERS

As mentioned above, the Commission has concluded that participation in court intervention programs should occur pre-sentence and it has made various proposals to achieve this end. At the completion of any court intervention program the offender will still need to be sentenced.

The *Sentencing Act* contains a number of different sentencing orders. These orders are listed in s 39(2) as a hierarchy of options.⁵⁹ They are:

- no sentence;
- a Conditional Release Order (CRO)
- a fine;
- a Community Based Order (CBO);
- an Intensive Supervision Order (ISO);
- suspended imprisonment;
- Conditional Suspended Imprisonment (CSI); or
- a term of imprisonment.

The Commission encourages a flexible approach to sentencing offenders who have completed a court intervention program. All sentencing options should be considered and the options imposed should depend on the circumstances of the case including the extent of rehabilitation achieved, the ongoing needs of the offender and the seriousness of the offence. The Commission makes proposals below in relation to specific sentencing options.

Judicial monitoring

The concept of judicial monitoring is currently recognised under the *Sentencing Act* for two post-sentence options. Section 50 of the *Sentencing Act* provides that a court may order an offender who has been sentenced to a Conditional Release Order to reappear 'so that the court can ascertain whether the offender has complied' with the order. A conditional release order cannot be imposed if the court considers that the offender requires supervision from a community corrections officer. Further, a speciality court may order that an offender who has been sentenced to CSI reappear in court at specified times for the court to 'ascertain whether the offender is complying with the sentence'.⁶⁰

The provision for judicial monitoring enables judicial officers to provide encouragement to offenders in their rehabilitation efforts and provide an additional incentive for offenders to comply with court orders. It also has the potential to improve the accountability of various justice agencies by providing a regular 'check' on what arrangements are being or have been

made in relation to the offender.⁶¹ The Commission is of the preliminary view that it would be beneficial for courts to have the option of requiring any sentenced offender to reappear in court for the judicial officer to consider how the offender is complying with the particular sentencing order. The Commission is not suggesting that judicial monitoring should replace supervision by a community corrections officer; depending on the sentencing order imposed judicial monitoring may be useful in addition to community corrections supervision.⁶² Further, the Commission would not expect judicial monitoring to be commonplace post-sentence – it would be particularly relevant for those offenders who have been subject to a court intervention program and where the judicial officer has built up a rapport with the offender and believes that continued monitoring will be beneficial.⁶³

However, the Commission recognises that post-sentence supervision and management of offenders is traditionally an executive, rather than a judicial, function. In Chapter One, the Commission discusses potential constitutional issues concerning judicial involvement in the supervision of offenders, and notes that the risk of state provisions infringing constitutional limitations, or being inapplicable to federal offences, may be greater if the judicial involvement occurs after sentence. Because there is, at least in theory, the possibility of a challenge to the legality of judicial involvement in supervising

61. Post-sentence judicial monitoring is included in the *Criminal Justice Act 2003* (UK) for offenders sentenced to a community order in the North Liverpool Community Justice Centre or by the Salford Community Justice Initiative. This provision is a pilot scheme. Judicial officers observed that the power to bring the offender back for a review was very effective in terms of providing an incentive for offenders and keeping a check on the offender's progress. Others involved in the Salford Community Justice Initiative were concerned that the power was overused and duplicated monitoring by probation officers: Brown R & Payne S, *Process Evaluation of the Salford Community Justice Initiative*, (UK: Ministry of Justice, 2007) 35.

62. It has been suggested that the judicial monitoring of offenders subject to community-based sentences would be inappropriate because it is the role of community corrections officers to case manage sentenced offenders: Standing Committee on Legislation, *Sentencing Legislation Amendment and Repeal Bill 2002*; *Sentence Administration Bill 2002*, Transcript of Evidence, 11 February 2003 (Jacqueline Tang, General Manager, Community and Juvenile Justice Division, (former) Department of Justice) 16.

63. Magistrate Auty suggested to the Commission that it would be useful to be able to formally require offenders subject to a CBO or an ISO to reappear in the Kalgoorlie-Boulder Aboriginal Community Court for monitoring: Magistrate Kate Auty; Magistrate Greg Benn; Richard Stevenson, Regional Manager, Magistrates Courts Kalgoorlie; and Beverly Burns, Aboriginal Justice Officer, Kalgoorlie-Boulder Community Court, telephone consultation (10 March 2008). South Australian Deputy Chief Magistrate Andrew Cannon has suggested that judicial monitoring of offenders post-sentence would be appropriate as a 'logical development of court involvement in rehabilitation': 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) 136. It has been also been suggested that post-sentence judicial monitoring may improve confidence in sentencing orders: Sentencing Advisory Council of Victoria, *Suspended Sentences and Intermediate Sentencing Orders* (2008) 239–40.

59. Section 39(3) of the *Sentencing Act* provides that a court must not use a sentencing option in subsection (2) unless satisfied that it is not appropriate to use any of the options listed before that option.

60. *Sentencing Act 1995* (WA) s 84O.

offenders post-sentence, the Commission seeks submissions about the viability of post-sentence judicial monitoring.⁶⁴ There may be other policy issues which make judicial involvement in supervising the execution of sentences, after the court's sentencing function is complete, inappropriate.

CONSULTATION QUESTION 6.5

Judicial monitoring post-sentence

The Commission seeks submissions about whether it would be appropriate for the *Sentencing Act 1995* (WA) to be amended to provide that if a court sentences an offender to a Conditional Release Order, a Community Based Order, an Intensive Supervision Order, Suspended Imprisonment or Conditional Suspended Imprisonment the court may order that the offender reappear in court at a particular date and time so that the court can ascertain whether the offender has complied or is complying with the order.

No sentence

Under s 46 of the *Sentencing Act* an offender can be released without sentence if the court considers that the circumstances of the offence are trivial or technical and—because of the offender's character; antecedents; age; health and mental condition; or any other relevant matter—the court considers that 'it is not just to impose any other sentencing option'. Thus this option is only available if the circumstances of the offence are trivial or technical.⁶⁵

In contrast, the *Young Offenders Act 1994* (WA) gives the Children's Court discretion to impose no punishment on a young offender if the young offender is being dealt with for no more than two offences.⁶⁶ Further, the Children's Court has discretion (irrespective of the number of offences) to impose no punishment if satisfied that the young offender (or a responsible adult) has provided an appropriate undertaking or that the young offender has or will be sufficiently punished for the offence.⁶⁷ The Children's Court can adjourn sentencing until such time as the punishment has been carried out or the undertaking has been fulfilled.⁶⁸

The power to impose no sentence, or order any further punishment, for adult offenders is wider in certain other Australian jurisdictions.⁶⁹ In other words, the power to order no sentence is not restricted to only those cases where the offence is considered trivial. The Commission believes that participation in court intervention programs will be facilitated if courts have discretion to impose no further punishment after successful completion of the program. It is important to emphasise that the requirements of certain court intervention programs may be more onerous and intensive than the requirements of traditional sentencing orders such as a CBO or an ISO. Depending upon the circumstances of the case and the seriousness of the offence, it may be appropriate that the offender is released without any further obligations after successfully completing the program. Therefore, the Commission is of the view that s 46 of the *Sentencing Act* be amended to enable a sentencing court to impose no further punishment on the basis that an offender has successfully complied with a prescribed court intervention program.⁷⁰

The Commission appreciates that the impediment to this approach is that the recording of the sentencing outcome may appear skewed. For example, if an offender completed an intensive program for a moderately serious offence, the outcome of 'no sentence' would not reflect the gravity of the criminal conduct. The Commission proposes above that the process for recording the sentencing outcome (for both the court's records and the police record of convictions) must ensure that completion of a prescribed court intervention program is recorded as part of the outcome.⁷¹ For example, the result for a particular offence may read 'no sentence under s 46 of the *Sentencing Act* – completed Intellectual Disability Diversion Program (6 months)'.

Importantly, this approach will enable community justice resources to be matched where they are needed rather than imposing community-based sentences only for the purpose of ensuring that sentencing outcomes reflect the seriousness of the offence. Further, it will provide a real incentive to offenders who are not facing imprisonment to comply and make every effort to address their offending behaviour.

64. See further discussion under 'Constitutional Issues: Judicial independence', Chapter One.

65. In *Riggall* [2008] WASCA 69 [54]–[55] it was held that because the phrase 'circumstances of the offence' was used rather than just 'the offence', it is possible for an offender to meet the criteria under s 46 of the *Sentencing Act 1999* (WA) even if the offence category is serious but the actual circumstances of the offence under consideration are trivial or technical.

66. *Young Offenders Act 1994* (WA) s 66.

67. *Young Offenders Act 1994* (WA) s 67.

68. *Young Offenders Act 1994* (WA) s 68.

69. See eg *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10A; *Sentencing Act 1995* (NT) ss 9, 10, & 12; *Penalties and Sentences Act 1992* (Qld) ss 17–19; *Sentencing Act 1991* (Vic) ss 70–73.

70. The Commission received support for the option of imposing no further punishment during preliminary consultations: Magistrate Sharratt, telephone consultation (5 March 2008); Magistrate Kate Auty, Magistrate Greg Benn, Richard Stevenson, Regional Manager, Magistrates Courts Kalgoorlie and Beverly Burns, Aboriginal Justice Officer, Kalgoorlie-Boulder Community Court, telephone consultation (10 March 2008).

71. See Proposal 6.7.

PROPOSAL 6.15

No sentence

That s 46 of the *Sentencing Act 1995* (WA) be amended to provide that a court sentencing an offender may impose no sentence if it considers that

- the circumstances of the offence are trivial or technical; or the offender has successfully completed a prescribed court intervention program; and
- having regard to —
 - the offender’s character, antecedents, age, health and mental condition; and
 - any other matter that the court thinks is proper to consider,that it is not just to impose any other sentencing option.

Conditional suspended imprisonment

CSI is a term of imprisonment suspended for a set period of time with specific conditions. This sentencing option became available in Western Australia in 2006. Currently, CSI can only be imposed by the Supreme Court, District Court, Children’s Court or the Perth Drug Court.⁷² The Commission notes that, although the option of CSI was primarily designed for the Perth Drug Court, it was anticipated that the availability of CSI may be extended to other speciality courts such as family violence courts or Aboriginal courts.⁷³

The conditions that can be imposed upon an offender subject to CSI are similar to the conditions that can be attached to other community-based sentences. In addition to a number of standard obligations, the offender must be subject to at least one of the following requirements: a programme requirement, a supervision requirement or a curfew requirement.⁷⁴

The role of a speciality court

The main difference between CSI and other community-based sentences is the provision for a specific role for speciality courts. A speciality court can make orders in relation to the standard obligations of CSI⁷⁵ and can make specific orders that would ordinarily be made by a community corrections officer in relation to the rehabilitation of the offender.⁷⁶

72. *Sentencing Regulations 1996* (WA) reg 6B.

73. Western Australia, *Parliamentary Debates*, Legislative Assembly, 24 August 2004, 5473 (Mr Jim McGinty, Attorney General).

74. *Sentencing Act 1995* (WA) ss 83–84D.

75. For example, in relation to the requirement to report to a community corrections officer and the requirement to notify a community corrections officer of a change of address: *Sentencing Act 1995* (WA) s 83.

76. *Sentencing Act 1995* (WA) ss 84A.

Importantly, a speciality court may order that the offender reappear in court at specified times for the court to ‘ascertain whether the offender is complying with the sentence’.⁷⁷ However, a speciality court is only empowered to make these specific orders if it was the court that imposed CSI or if the speciality court had committed the offender to a superior court and the superior court (that imposes CSI) orders that the speciality court provisions apply.⁷⁸

The only current speciality court under the *Sentencing Act* is the Perth Drug Court. Although principally designed for the purposes of the Drug Court,⁷⁹ CSI is now rarely used by that program. The reasons include the lack of flexibility in dealing with breaches and variations to the order⁸⁰ and the lack of power to impose appropriate sanctions for failing to comply with the requirements of the drug court program.⁸¹

Because the Commission has concluded that court intervention programs are best facilitated via pre-sentence options and because it has proposed a specific pre-sentence Drug Treatment Order for the purposes of the Drug Court, the provisions of the *Sentencing Act* dealing with CSI orders and speciality courts are no longer necessary or desirable. Therefore, the Commission proposes that these provisions be repealed.

77. *Sentencing Act 1995* (WA) s 84O.

78. *Sentencing Act 1995* (WA) s 84N.

79. Western Australia, *Parliamentary Debates*, Legislative Council, 23 September 2004, 6430–31 (Mr Peter Foss).

80. Under s 84H of the *Sentencing Act* only the offender or a community corrections officer can apply to amend or cancel CSI. In contrast, the usual Drug Court procedure allows any member of the Drug Court team, including the police prosecutor, to ask for changes to the program requirements or to apply for the offender to be terminated from the program. Section 84H of the *Sentencing Act* also provides that an application to amend or cancel CSI must be made in accordance with the regulations. The requirements under the regulations include that the application must be made in an approved form; that the application cannot be made without the approval of the Chief Executive Officer (corrections); and that the hearing of the application must be at least seven days after the application is lodged at the court: *Sentencing Regulations 1996* (WA) reg 10. Further, a court can only amend or cancel CSI if satisfied that the offender’s circumstances were wrongly presented to the court or that the offender’s circumstances have changed so that the offender is unable to comply with the requirement of the CSI order: *Sentencing Act 1995* (WA) s 84I. These provisions clearly do not support flexible and immediate responses as required by the Drug Court. The Commission notes that s 84O of the *Sentencing Act* provides that a speciality court may amend a requirement of a CSI order on a review date but it is not clear if this provision is in addition to the ordinary powers to amend CSI or merely empowers a court to amend the order if the ordinary legislative requirements have been met. The provisions of the *Sentencing Act* dealing with breaches of CSI are also restrictive. Breach proceedings can only be instigated by the Chief Executive Officer (corrections). The 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 order or make no order in relation to CSI: *Sentencing Act 1995* (WA) s 84L.

81. Meeting with Magistrate Pontifex and Magistrate Stewart (20 February 2008); meeting with Catie Parsons, Legal Aid (20 February 2008); meeting with Tanya Watt, Office of the Director of Public Prosecutions (21 February 2008). See further discussion under ‘Perth Drug Court: Program operation’, Chapter Two.

PROPOSAL 6.16

Conditional Suspended Imprisonment

That all references to a 'speciality court' in Part 12 of the *Sentencing Act 1995* (WA) be repealed.⁸²

Spent Convictions

Under s 45 of the *Sentencing Act* a court sentencing an offender can make a spent conviction order. A spent conviction order can only be made if the court also orders no sentence; or imposes a CRO, a fine or a CBO.⁸³ Thus, if a sentencing court determines that a more severe penalty is required a spent conviction order will not be possible.

The effect of a spent conviction order is governed by the *Spent Convictions Act 1988* (WA). Subject to a number of exceptions,⁸⁴ it is unlawful to discriminate against an offender on the basis of a spent conviction and the offender is not required to disclose a spent conviction for any purpose.⁸⁵ However, the making of a spent conviction order will be known by the court and can be taken into account if the offender is being sentenced for a subsequent offence.⁸⁶ The *Spent Convictions Act* enables an offender to apply for a spent conviction if a period of ten years has elapsed without any further offending. It has been observed that the purpose of this scheme is to facilitate rehabilitation.⁸⁷

The power to order a spent conviction at the time of sentencing is in addition to this general scheme. However, this power is limited because a court cannot make a spent conviction order unless three conditions are met: the offender must be unlikely to commit such an offence again; the offence must be either trivial or the offender must have previous good character; and the court must consider that the offender 'should be relieved immediately of the adverse effect that the conviction might have on the offender'. Even so, the satisfaction of these criteria do not automatically lead to a spent conviction order being made.

In *Tognini*⁸⁸ it was held that the power to make a spent conviction order under the *Sentencing Act* 'should be regarded as being of an exceptional character'.⁸⁹ In addition to the statutory criteria, a sentencing court is required to consider the seriousness of the offence and the offender's personal circumstances. It was further stated that the court should consider whether, from the point of view of the offender's rehabilitation and the interests of the community, the offender should be relieved of the adverse consequences of a conviction. Generally, this may be the case if a conviction would prevent the offender from following a particular career or adversely affect his or her prospects for employment. It was stated that:

[I]t may simply be that it can be seen that to relieve the offender of the adverse effects of the conviction will positively aid that person's rehabilitation in a way which may be seen to best accord with the interests of the community. The court may be aided to reach that conclusion if it thinks that there is no pressing public interest in being able to continue to have access to the fact of conviction as part of the process of securing the protection of the community.⁹⁰

The goal of rehabilitation is common to both spent conviction regimes and court intervention programs. However, the current criteria for making a spent conviction order are, in the Commission's opinion, unduly restrictive. For many offenders participating in court intervention programs the nature of the offending will be too serious to justify the making of a spent conviction order. However, some court intervention programs deal with less serious offending. While successful completion of a court intervention program may demonstrate to the court that the offender is unlikely to commit such an offence again, participants in court intervention programs may find it difficult to demonstrate previous good character or show that the offence is trivial.⁹¹ The Commission believes that participation in court intervention programs can be encouraged by expressly providing that successful completion of the program is a relevant factor when deciding if a spent conviction order should be made.

82. This proposal will also require consequential amendments to the *Sentencing Regulations 1996* (WA).

83. *Sentencing Act 1995* (WA) s 39(2).

84. Exceptions under the *Spent Convictions Act 1988* (WA) include police officers, prison officers, licensed security officers and certain positions within the Department of Education and Training and the Department of Corrective Services.

85. *Harper v Page* [2004] WASCA 267, [14].

86. *Webb v Savage* [2007] WASCA 103 [22].

87. *Webb v Savage* [2007] WASCA 103 [22].

88. [2000] WASCA 31.

89. *Ibid* [27].

90. *Ibid* [28].

91. For example, an offender may have a prior record for one type of offending (eg, traffic or public order offences) but be facing court for a different offence, such as stealing or possession of drugs). Even if an offender had no prior record, the presence of underlying problems, such as drug addiction, may impact upon the offender's ability to satisfy the court that he or she previously had good character.

PROPOSAL 6.17

Spent convictions

That s 45(1) of the *Sentencing Act 1995* (WA) be amended to provide that under s 39(2), a court sentencing an offender is not to make a spent conviction order unless —

- it considers that the offender is unlikely to commit such an offence again; and
- having regard to —
 - the fact that the offence is trivial;
 - the previous good character of the offender; or
 - the fact that the offender has successfully completed a prescribed court intervention program

it considers the offender should be relieved immediately of the adverse effect that the conviction might have on the offender.

Young offenders

The overriding purpose of the Commission's proposals in relation to adults is to facilitate effective rehabilitation of offenders via court-supervised programs. While the aim of rehabilitation is obviously just as important—and traditionally has been regarded as more important—for young offenders, it is essential to recognise the difference between the juvenile justice system and the adult justice system. Children are treated differently under the criminal law because it is accepted that children are less responsible and accountable for their actions. This principle is reflected in a number of ways: children under 10 years of age cannot be held criminally responsible for an offence and children who are 10 years but less than 14 years of age cannot be held criminally responsible unless it is proven that they knew that what they were doing was wrong.¹ The existence of a separate Children's Court also reflects the view that young offenders need to be treated differently.² Further, the focus in sentencing young offenders is rehabilitation.³

As stated by the Western Australian Court of Appeal in *WO*,⁴ there is a 'long established understanding that the community is best protected, in relation to young offenders, by determined efforts to effect their rehabilitation'.⁵ It was noted by the court that one difference between considering the prospects for rehabilitation for adult offenders compared to young offenders is that adult offenders are expected to take steps towards their own rehabilitation whereas young offenders are reliant to some extent on the assistance and support of parents and relevant agencies.⁶

Section 7 of the *Young Offenders Act 1994* (WA) provides for the general principles of juvenile justice. Many of these principles support the view that

rehabilitation is the primary goal of juvenile justice.⁷ The principles contained in s 7 that directly relate to rehabilitation are that:

- young offenders should be dealt with in a manner that encourages acceptance of responsibility;
- detention should be used as a last resort and, if required, detention should only be for as short a time as is necessary;
- detention of young offenders should be in a facility that avoids exposure to adult offenders;
- punishment of young offenders should encourage social responsibility and socially acceptable development;
- a young offender should be dealt with in an appropriate time frame bearing in mind a young person's sense of time;
- when dealing with a young offender the age, maturity and cultural background should be taken into account; and
- young offenders should be dealt with in a way that strengthens the young person's family.

DIVERSION

The principles of juvenile justice and the provisions of the *Young Offenders Act* also strongly support diversion from the criminal justice system. Section 7(g) of the *Young Offenders Act* provides that non-judicial proceedings should be encouraged where possible. As stated in *WO*⁸ by the Court of Appeal:

There is in the Act a very strong emphasis on the diversion of young offenders from the courts, and there are available ways of dealing with young offenders which either would not require a court attendance or which would not result in anything resembling a conventional sentence.⁹

Part 5 of the Act provides for two diversionary options: cautioning and juvenile justice teams. The express purpose of cautioning is to divert young offenders away from the criminal justice system.

1. *Criminal Code* (WA) s 29.

2. The Hon Wayne Martin, Chief Justice of Western Australia (Address to the Rotary District 9450 Conference, *Protecting the Future: Youth and the justice system*, Perth, 31 March 2007) 7.

3. Division 9 of the *Young Offenders Act 1994* (WA) deals with certain serious repeat offenders. For the purpose of this Division it is provided that the primary consideration is the protection of the community (s 126). This suggests that in all other cases, the protection of the community is not the primary consideration.

4. *WO* [2005] WASCA 94.

5. *Ibid* [52].

6. *Ibid* [53]. In this regard the Commission notes that for offenders suffering from problems such as mental impairment, drug and/or alcohol dependency, and homelessness this observation is unrealistic. These types of offenders have clearly been unable to voluntarily access support services in the community to address these issues.

7. See *WO* [2005] WASCA 94, [50]. Further the objectives of the legislation include to 'enhance and reinforce the roles of responsible adults, families, and communities' in the rehabilitation of young offenders and to integrate young offenders into the community: *Young Offenders Act 1994* (WA) ss 6(d)(iii) & 6(e).

8. [2005] WASCA 94.

9. *Ibid* [45].

The principle behind juvenile justice teams is that young offenders who do not have a 'well-established pattern of offending' should be dealt with in a way that avoids exposure and contact with other offenders and negative influences.¹⁰

Juvenile justice teams consist of a coordinator and a police officer and may also include the victim, a responsible adult, an education officer, and a representative from offender's community if the offender is from an ethnic or minority group or a representative from an approved Aboriginal community.¹¹ The decision made by a team must be unanimous and if not the offences will be referred to back to the police or to the court.¹² The team approach resembles aspects of some court intervention programs – consensus decision-making, informal processes and a more direct role for the offender.¹³

The Commission agrees that diversionary options should be encouraged for young offenders and emphasises that the juvenile justice system already provides for a more collaborative approach when dealing with underlying causes of offending behaviour. Even where court proceedings are required the court process is different to the process in traditional adult courts. It has been suggested that proceedings in children's courts share common practices with court intervention programs.¹⁴ For example, a juvenile justice officer sits at the bar table and directly addresses the judicial officer about the young offender's circumstances if required. Court reports about the offender are routinely provided and address the offender's background, family circumstances, problems and other social issues. However, this does not mean that court intervention programs are inappropriate for young offenders.

10. *Young Offenders Act 1994* (WA) s 24.

11. *Young Offenders Act 1994* (WA) s 37.

12. *Young Offenders Act 1994* (WA) s 38.

13. Former Drug Court Magistrate Julie Wager has stated that the Children's Court Drug Court is aimed at serious young offenders and this is appropriate because juvenile justice teams already operate in a similar way to the Drug Court: Standing Committee on Legislation, *Sentencing Legislation Amendment and Repeal Bill 2002; Sentence Administration Bill 2002*, Transcript of Evidence, 5 March 2003 (Julie Wager SM, Perth Drug Court) 15.

14. See Crime Research Centre, *Evaluation of the Perth Drug Court Pilot Project*, Final Report (2003) 31–32, where it was observed that the drug court approach is similar to the approach used in juvenile justice. It has been noted that some commentators consider juvenile drug courts unnecessary because Children's Courts in Australia already focus on rehabilitation and strengthening of families: 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) 7. In the United States it has been observed that juvenile courts have similar aims to problem-solving courts: Butts J, 'Introduction: Problem-solving courts' (2001) 23 *Law & Policy* 121. It has also been observed that therapeutic jurisprudence principles 'were from the outset more discernibly enshrined in the practice of the juvenile jurisdiction': King M & Piggott L, 'Mirroring the Stages of Change in the Establishment of Problem Solving Courts' in Reinhardt G & Cannon A (eds), *Transforming Legal Processes in Court and Beyond* (Melbourne: Australian Institute of Judicial Administration, 2007) 167.

COURT INTERVENTION PROGRAMS FOR YOUNG OFFENDERS

As far as the Commission is aware the only court intervention program specifically designed for young offenders is the Children's Court Drug Court.¹⁵ As discussed in Chapter Two, the Children's Court Drug Court deals with a relatively small number of offenders. This appears to be primarily due to insufficient resources.¹⁶ The Drug Court program for young offenders is generally 12 months; while this may be necessary to deal with the drug addiction it is a very long period of time for a young person. As a result, the Children's Court Drug Court tends to deal with young offenders who are facing a significant custodial sentence – otherwise there is little incentive to participate.¹⁷ Bearing in mind the emphasis on diversionary options for young offenders, the Commission believes that court intervention programs for young offenders should be directed to those facing a significant period of custody.

The Commission has considered the current juvenile justice legislation and is of the preliminary view that no significant legislative reform is required. The Children's Court has wide powers to defer sentencing and is able to impose a variety of different sentencing options at the completion of a pre-sentence court intervention program, including no further punishment. Nevertheless, for the same reasons that apply to adults, it is important in terms of government and community support to provide a general legislative framework. The Commission suggests that its proposal in relation to a general framework under the *Criminal Procedure Act 2004* (WA) could be reproduced under the *Young Offenders Act* with an express qualification that diversionary options should be used in preference to court proceedings including participation in any prescribed court intervention program. In terms of administrative and policy support, any prescribed court intervention program for young offenders could also come under the umbrella of the proposed Court Intervention Programs Unit.¹⁸

The Commission is particularly interested in receiving submissions from relevant individuals and agencies that work in the area of juvenile justice as to whether any further legislative or other reform is required to facilitate the use of court intervention programs in the Children's Court. In Chapter Five the Commission proposes that a general court intervention program be established in Western Australia and that this

15. The Commission also understands that the Kalgoorlie-Boulder Aboriginal Community Court and the Norseman Aboriginal Community Court deal with young Aboriginal offenders.

16. There is only one CATS officer for the Children's Court Drug Court.

17. See discussion under 'The Children's Court Drug Court', Chapter Two.

18. See Proposal 6.2.

program should be piloted in both the adult and children's jurisdictions.¹⁹ The Commission believes that a general program, which can address a number of different problems, will be more cost-effective than a series of specialist programs (with relatively low numbers) in the Children's Court. Nevertheless, the Commission is keen to hear the views of those working in the juvenile justice system about whether any other court intervention programs should be developed for young offenders.

CONSULTATION QUESTION 6.6

Court intervention programs and young offenders

The Commission invites submissions as to the following matters:

- Whether the *Young Offenders Act 1994* (WA) should provide for a general framework for court intervention programs based upon the Commission's proposal for adults under the *Criminal Procedure Act 2004* (WA).²⁰
- Whether any further legislative reform in relation to young offenders is required to facilitate the use of court intervention programs in the Children's Court for appropriate cases.
- Whether any specific court intervention programs, other than the general court intervention program proposed by the Commission in Chapter Five, be established to deal with serious young offenders.

19. See Proposal 5.1.

20. See Proposal 6.1.