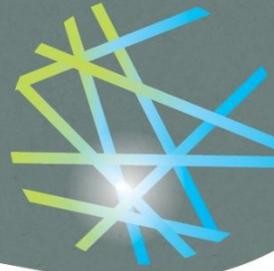


DRUG AND SPECIALIST  
COURTS REVIEW



# PART B

## CRIMINAL JUSTICE FRAMEWORK



November 2016

## 9 CRIMINAL JUSTICE FRAMEWORK – PRE-ARREST

### 9.1 INTRODUCTION

This chapter, and the three that follow, consider the various drug and alcohol related interventions currently available in Queensland at each stage of the criminal justice system: pre-arrest (this chapter), bail and pre-sentence (Chapter 10), at sentence (Chapter 11) and at the post-custodial stage (Chapter 12). Each chapter concludes with a series of recommendations to improve the effectiveness and efficiency of interventions at each stage in the system, with the aim of creating a more integrated response to drug- and alcohol-related offending.

### 9.2 QUEENSLAND POLICE ILLICIT DRUG DIVERSION PROGRAM

A great deal of drug-related offending is relatively minor and dealt with by police by means of a limited intervention designed to obviate the need for a court appearance and direct the person to an intervention that involves some form of education or advice regarding substance abuse.

In Queensland the Police Illicit Drug Diversion Program (Police Diversion Program) aims to offer people apprehended for a minor drugs offence an alternative to proceeding through the usual criminal justice processes to court.

A ‘minor drugs offence’ is defined under Schedule 6 of the *Police Powers and Responsibilities Act 2000* (PPRA) as an offence against sections 9, 10(1) or 10(2) of the *Drugs Misuse Act 1986* involving either: possessing not more than 50 grams of cannabis; and/or possessing a thing for use, or that has been used, for smoking cannabis; however, it excludes an offence if the possession is an element of an offence against the *Drugs Misuse Act 1986* involving production or supply of cannabis or trafficking in cannabis.

The statewide program aims to reduce the number of people appearing before the courts for possession of small quantities of cannabis, while also increasing access to assessments, education and treatment for drug users and an incentive to address their drug use early.

Under section 379 of the PPRA, sworn police in the state of Queensland are able to offer the Police Diversion Program to an individual who meets the eligibility criteria for a minor drugs offence. The program can be offered to a person who is arrested for, or is being questioned by a police officer about, a minor drug offence, provided they:

- have not committed another indictable (serious) offence in related circumstances (e.g. burglary of a home to obtain money to buy drugs);
- have not previously been sentenced to serve a term of imprisonment for identified serious drug offences (including trafficking and supply);
- have not previously been convicted of an offence involving violence against a person in relation to which the rehabilitation period under the *Criminal Law (Rehabilitation of Offenders) Act 1986* is yet to expire;
- admit to having committed the offence during an electronically recorded interview; and
- have not previously been offered the opportunity to complete the program.

The person is not eligible if the possession relates both to cannabis and another illicit drug (such as heroin or amphetamines).

The police requires the offender to attend a two-hour Drug Diversion Assessment Program (DDAP). Failure to attend may result in the defendant being charged with an offence of ‘contravene direction or requirement of a police officer’ under section 791 of the PPRA.

The Police Diversion Program commenced on 24 June 2001, and as of 30 June 2016, has referred more than 115,476 offenders. In 2015-16, 9,428 people were referred to a DDAP.

Based on data as at 30 June 2016:

- 115,476 referrals had been accepted;
- there had been 90,526 intervention completions; and
- 11,182 of referrals related to a person who identified as being Aboriginal and Torres Strait Islander.

### 9.3 DISCUSSION AND RECOMMENDATIONS

The Police Diversion Programs and its DDAP represent appropriate interventions for offenders charged with minor offences who pose a minimal risk to the community and who may or may not need much in the nature of treatment or education. They absorb a significant amount of police and provider resources.

There is a question as to whether QPS should have more intervention options in relation to low-level offenders and whether a referral to the DDAP is the least costly and effective means of dealing with such offenders. The data provided in section 7.4.4 indicate that Queensland utilises these forms of intervention at a far greater rate than other jurisdictions that employ a range of other measures in such circumstances.

The benefits of having a range of options to deal with minor forms of drug offending prior to court action being initiated include, for example, reduced costs associated with police and court involvement where people are formally charged with an offence, reducing people's formal involvement with the criminal justice system, ameliorating the effects of a criminal record on future employment and reduced demand on providers of such services.

The Review is aware that the NDARC is conducting research at a national level to assess the outcomes and cost-effectiveness of police diversion programs. This may inform Queensland's future responses to non-court alternatives to minor drug offences.

#### 9.3.1 Cautions

There are no legislative cautioning provisions in Queensland for adults,<sup>1</sup> although the cautioning of adults is permitted under policy in exceptional circumstances where the offender has special needs and it is considered to be in the public interest.<sup>2</sup> The circumstances identified in which the cautioning of adults may be appropriate under policy are where the person involved is over the age of 65 or is intellectually disabled or infirm to the extent that there is no real risk of repetition of the offence.<sup>3</sup> Other criteria that the policy requires to be satisfied before administering a caution include that the offence is of a type or nature that a court is likely to impose only a nominal penalty (e.g. unauthorised dealing with shop goods) or is trivial in nature, the offender admits the offence, has no criminal history for dishonesty and no substantial record for other offences, and consents to being cautioned for the offence.<sup>4</sup>

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<sup>1</sup> Compare this with the *Youth Justice Act 1992* (Qld), under which a police officer may, instead of bringing a child who is suspected of committing an offence before a court, administer a caution. The purpose of a caution is to divert the child from the courts' criminal justice system, *Youth Justice Act 1992* (Qld), s 14. The child must admit to committing the offence and consent to being cautioned. A child so cautioned is not liable to be prosecuted for the offence and the caution is not part of the child's criminal history, *Youth Justice Act 1992* (Qld), s 15.

<sup>2</sup> Queensland Police Service, *Operational Procedures Manual*, Issue 53 (July 2016), [6.5.1 – Cautioning adults who commit offences]. This provision relates specifically to offenders with special needs Section 377(4) of the *Police Powers and Responsibilities Act 2000* provides the general legislative power for this scheme.

<sup>3</sup> Queensland Police Service, *Operational Procedures Manual*, Issue 53 (July 2016), [6.5.1 – Cautioning adults who commit offences].

<sup>4</sup> Queensland Police Service, *Operational Procedures Manual*, Issue 53 (July 2016), [6.5.1 – Cautioning adults who commit offences].

The Police Diversion Program can also be conceptualised as a form of caution as the person is referred to participate in a DDAP with no further action taken if the person successfully completes the program.

In Victoria, under the Drug Diversion Program, which is aimed at non-violent illicit drug users who use, or are in possession of small quantities of illicit drugs, the police may offer a caution if the offender admits to the offence, though only two cautions may be issued. Similar to the Police Diversion Program, the Cannabis Cautioning Program requires the person to receive educational information and be referred for a cannabis education session. A caution in relation to a drug other than cannabis may require that the person undertake a clinical assessment and commence drug treatment.<sup>5</sup>

In NSW under the Cannabis Cautioning Scheme<sup>6</sup> police may issue a caution to an adult detected of committing a minor cannabis offence. The caution notice provides contact details for the Alcohol Drug Information Service that provides information about treatment, counselling and support services (NSWLRC, 2013, para 16.6).

Tasmania's Illicit Drug Diversion Initiative aims to offer early incentives for people to address their illicit drug use, in many cases before acquiring a criminal record. The program comprises three levels. Level one, 'Drug Caution', is for cannabis offences only and allows police officers the discretion to warn an individual of legal consequences of drug possession. Levels two and three are referred to as 'drug diversions'. Available for cannabis offences only, the second level program requires individuals to attend an education and brief intervention with a nominated alcohol and other drug provider. Level three includes cannabis and other illicit drugs (including pharmaceutical drugs being used illicitly). Individuals are referred to an alcohol and other drug provider for up to three sessions for assessment, counselling and treatment. Failure to comply with the requirements of a health intervention results in the individual being prosecuted for all minor drug offences.

Considering the resource requirements of Queensland's Police Diversion Program and the need to deploy resources where there is a higher degree of risk and need, we recommend that consideration be given to introducing a cautioning scheme for minor drug offences (possibly not limited to cannabis) with three levels of caution:

- 1 A simple caution
- 2 A caution with educational material (which may be delivered online)
- 3 A caution with a requirement to attend, or participate in a face to face or on-line educational program

Mechanisms would need to be in place to deal with offenders who fail to participate in the educational program component of the caution. This would be up to the discretion of the police officer but may include escalating the intervention by using an infringement notice or formally charging them with an offence.

Information on the advantages and efficacy of cautioning is provided at Section 8.4. Overall, analyses to date suggest that cautioning low-level drug offenders (both juveniles and adults) is likely to be a cheaper alternative to formal processing which does not worsen long-term criminal justice outcomes.

### 9.3.2 Infringement notices

Infringement notices, or on-the-spot fines, have long been available for a multitude of minor offences from parking offences to drink-driving-related offences. Under this procedure, an offender issued with a notice may expiate the offence by payment of the stipulated amount and is not required to appear in court, although they may contest the notice in court. No conviction is recorded against the offender's name.

In Queensland, Schedule 2 of the *State Penalties Enforcement Act 1999* defines an 'infringement notice offence' as an offence "other than an indictable offence or an offence against the person, prescribed under a regulation to be an offence to which this Act applies". While some offences under the *Drugs Misuse Act 1986* have been prescribed as offences in relation to which a penalty infringement notice can be issued, prescribing

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<sup>5</sup> See [http://www.police.vic.gov.au/content.asp?Document\\_ID=5059](http://www.police.vic.gov.au/content.asp?Document_ID=5059).

<sup>6</sup> See [http://www.police.nsw.gov.au/community\\_issues/drugs/cannabis\\_cautioning\\_scheme](http://www.police.nsw.gov.au/community_issues/drugs/cannabis_cautioning_scheme).

possession of a dangerous drug as an infringement notice offence, even where the quantity of drug concerned is small, would not currently be possible under existing law as these offences are classified as indictable offences.

In South Australia, an adult in possession of cannabis is dealt with under the Cannabis Expiation Notice Scheme (*Controlled Substances Act 1984* (SA), s 45A).<sup>7</sup> In the ACT, under the *Drugs of Dependence Act 1989* (ACT), s 171A a person who is reasonably suspected of committing a ‘simple cannabis offence’<sup>8</sup> may be issued with a notice requiring the person to pay a penalty of \$100. The NT *Misuse of Drugs Act* also allows a police officer to issue an infringement notice for some minor offences involving small quantities of cannabis.

Nearly two thirds (62%) of people sentenced by the Queensland courts for matters where an illicit drug offence is the principal offence are issued with a fine (ABS 2016b). Introducing infringement notices for minor drug offences expands the suite of options available to the police to respond to drug use in the community and potentially provides a response to minor drug offending consistent with that implemented by the court while saving court resources. Infringement notices also have the benefit of reducing a person’s exposure to the criminogenic effects of having contact with the criminal justice system.

However, there are number of concerns associated with the use of infringement notices. For example, the WA Cannabis Infringement Notice (CIN) scheme was repealed in 2010 due to its complex eligibility and compliance requirements, difficulties in its administration and its net-widening effect (Fetherston & Lenton 2007). This scheme was also characterised by lower than expected notice expiation and the police were reluctant to issue a CIN to repeat offenders (Swensen & Crofts 2010). Another study found that that the ACT infringement system was having a disproportionate effect on vulnerable populations, including those with serious AOD issues (report cited in Hughes et. al. 2013). The expansion of Criminal Infringement Notices (CINs) in NSW was also found to have a net-widening effect with evidence of CINs being used when a caution or no action would have been more appropriate (NSW Ombudsman 2009).

### 9.3.3 Consultation

Consultation with key stakeholders found support for the police having a broader range of options for minor drug offending, including by some who expressly supported the introduction of adult cautioning for minor drugs offences either instead of, or in addition to, the existing police diversion program.

In supporting the replacement of existing brief interventions with adult cautioning, QNADA cited a recent study which found that 72.6% of people who are diverted to attend a two-hour education and information session as a result of police and court diversion are not experiencing problems relating to their substance use (apart from their contact with the criminal justice system) (National Drug Law Enforcement Research Fund 2016, unpublished). On this basis, QNADA suggested, replacement of existing programs would create an opportunity to reinvest funding in more intensive treatment for people who need (and want) this. In addition to the negative consequences of contact with the justice system, QNADA also pointed to issues with the current police diversion scheme that it considered limited its effectiveness, including that: diversion can only be offered once; the scheme requires eligibility to be assessed by police; and it requires a person to admit guilt during an electronically recorded interview before it is offered (a legislative requirement under s 378 of the *Police Powers and Responsibilities Act 2000*).

However, issues identified with the use of infringement notices consistent with those raised in the literature included:

- the low expiation of notices which can result in accumulated SPER debt;
- the risk of net-widening; and

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<sup>7</sup> The South Australian scheme has been extensively evaluated (Ali et al 1999; Christie 1999; Lenton et al 1999; Donnelly 1999; Sutton and McMillan 1999).

<sup>8</sup> Namely an offence of cultivation of one or two cannabis plants.

- the risk of compounding disadvantage given that those most at-risk of substance misuse will be among those least likely to expiate notices.

Some key stakeholders also questioned the use of cautioning with non-mandatory participation in education as it was unlikely to have a therapeutic effect.

**Recommendation 1**      **Expanded pre-arrest and post-arrest options for minor drug offences**

Consideration should be given to expanding the current range of options to deal with minor drug offences prior to court action, including:

1. the introduction of an adult cautioning scheme for minor drug offences (possibly not limited cannabis) with three levels of caution:
  - (a) a simple caution;
  - (b) a caution with educational material which may be delivered online; and
  - (c) a caution with a requirement to attend, or participate in a face-to-face or online educational program.
2. the introduction of penalty infringement notices for a broader range of minor illicit drug offences than those for which they are currently available.

# 10 CRIMINAL JUSTICE FRAMEWORK – BAIL AND PRESENTENCE

## 10.1 BAIL

Bail is a legal disposition that allows a person arrested for an offence to be released into the community pending the final disposition of the case at trial. Its principal purposes are to ensure that the alleged offender will appear in court to determine their guilt or innocence, will not interfere with witnesses, will not commit further offences and will be safe in the interim (Freiberg and Morgan 2004). Conditions may be attached to a grant of bail to ensure that these purposes are achieved.

The period that an alleged offender spends on bail pending the hearing of their case can provide them with an opportunity to participate in programs that are intended to address underlying problems that may have contributed to the offending behaviour, although such conditions require the offender's consent. Bail is not a sentencing disposition: the alleged offender has not been found guilty of any offence and any condition should not be punitive or excessively intrusive.<sup>9</sup>

There are presently a number of bail-based interventions, programs or referral pathways available to the Queensland Magistrates Court, their use being dependent upon the location of the court, the nature of the offending or the offence.

There are two referral programs, that is, programs that provide a mechanism for alleged offenders to be referred to treatment or other services that are provided by external organisations:

- QICR
- QMERIT

Where Aboriginal and Torres Strait Islander defendants are charged with an offence, they may be referred to a Murri Court to be further dealt with.<sup>10</sup> Where defendants are the subject of proceedings related to domestic and family violence, they may be dealt with in the DFV Court.<sup>11</sup>

There is one direct intervention or program to which an alleged offender can be directed, the Drug and Alcohol Assessment and Referrals (DAAR) program.<sup>12</sup>

## 10.2 REFERRAL PATHWAYS

### 10.2.1 Queensland Integrated Court Referrals & Queensland Court Referral

#### 10.2.1.1 Description and operation

Queensland Integrated Court Referrals (QICR) provides an opportunity for defendants to engage with service providers through short-term bail-based referrals and longer-term treatment and rehabilitation post-sentence to address the underlying causes of their offending behaviour.

By linking defendants with appropriate treatment and support services, and using the influence of the court to monitor and encourage progress, QICR aims to reduce recidivism and improve defendants' physical and psychological health and quality of life.

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<sup>9</sup> See section 2.6

<sup>10</sup> See Brief Discussion of Murri Court below at section 13.4.

<sup>11</sup> See section 5.2.9

<sup>12</sup> See section 5.2.6

Where problematic substance use, mental illness, impaired decision-making capacity or homelessness or at risk of homelessness are assessed as likely contributors to offending, the court may grant bail (*Bail Act 1980*) with a condition that the defendant participates in QICR.

At the point of sentencing, if the court considers that the defendant may benefit from participation in QICR post-sentence, it may make participation and engagement in activities contained in their QICR engagement plan a condition of either a probation order or recognisance order, in accordance with the provisions of the *Penalties and Sentences Act 1992*.

In circumstances where a defendant fails to participate in QICR when it is imposed as a condition of bail, their matters are remitted back to the Magistrates Court to proceed in the usual way. If QICR is a condition of a recognisance or other community based order made post-sentence, appropriate action is taken in accordance with the powers the court has in relation to breach of a relevant order. This may result in the order being revoked and the defendant resentenced for the original offence.

The Queensland Court Referral (QCR) program preceded, and is very similar to, the QICR program.

In 2014–15, 188 defendants were referred to QCR and 72% of these referrals were accepted.

#### 10.2.1.2 Consultations

Defendants agreeing to participate in QICR are referred to a Case Assessment Group (CAG) comprised of organisations that assess whether they are able to offer service to defendants to meet their identified needs. In consultations, some stakeholders raised concerns that the actual process of referral and follow up with defendants was cumbersome and onerous for their organisations.

### **10.2.2 Queensland Magistrates Early Referral into Treatment Program (QMERIT)**

#### 10.2.2.1 Description and operation

QMERIT is a bail-based referral program for defendants with illicit drug use issues. QMERIT operates in the Maroochydore and Redcliffe Magistrates Courts only. The program is a pre-plea diversion program that is not dependent on the person's guilt or innocence.

The program engages defendants charged with an offence relating to illicit drug use with drug rehabilitation services that may be imposed through bail conditions. QMERIT aims to assist suitably motivated drug offenders to overcome their illicit drug use issues and end their associated criminal behaviour through court supervised treatment programs. Failure to comply with the program can result in the person being terminated from the program and, if imposed as a condition of bail, may result in the conditions being varied or bail revoked.

At the conclusion of the program, the court calls upon the defendant to enter a plea (if not previously entered) and proceeds to sentence the defendant in accordance with the *Penalties and Sentences Act 1992*. Successful completion or the extent of unsuccessful completion of the program is a matter that the court may take into account in sentencing the defendant with a view to consideration of mitigation of penalty.

In 2014–15, 265 people were referred to QMERIT and 70% of these referrals (185) were accepted. It is estimated that 43% of accepted referrals resulted in program completion. The majority of QMERIT referrals were men (74%) aged 17 years or over (98%).

About half of QMERIT participants complete the program successfully, with 52% of closed treatment episodes ceasing due to completed treatment or program expiation. Some closed treatment episodes did not result in program completion and were closed due to imprisonment/some other criminal justice sanction (4%), without notice (9%) or with mutual agreement (8%).

Queensland Health data also indicate that most treatment relating to QMERIT is provided in the community. In 2014–15, only 4% of closed QMERIT treatment episodes took place in a residential treatment setting and 95% took place in a non-residential treatment facility.

Cannabis and amphetamines were the principal drugs of concern for the QMERIT program in 2014–15. Over half (58%) of closed QMERIT treatment episodes involved cannabis as the principal drug of concern and just under one third (30%) involved amphetamines as the principal drug of concern. A small number of treatment episodes (2%) involved heroin or alcohol as the principal drug of concern.

These data suggest that the QMERIT program targets different types of drug users than those involved in the DAAR program (which largely responds to alcohol and some cannabis use).

#### 10.2.2.2 Consultation

The QMERIT Program has a primary illicit drugs focus with priority placed on the stabilisation of the defendant's addiction and improved social functioning. The program was reported to offer a 'one stop shop' for defendants with illicit drug use issues that addresses not only their illicit drug use but also other individual needs, such as accommodation, mental health and child safety issues.

One of the strengths of QMERIT identified by those consulted was that it has dedicated case managers employed by Queensland Health who work pro-actively with the defendant throughout the program.

Whilst Magistrates Courts Practice Direction No 1 of 2016 Queensland Magistrates Early Referral Into Treatment (QMERIT) Program, guides the operation of QMERIT, comments indicate that there are some apparent differences between the philosophy and operation of the program as it operated at the existing two court locations (Redcliffe and Maroochydore). Differences mentioned include the use of urine tests to check for drug use and of a specific bail condition requiring offenders to participate in residential rehabilitation programs.

### 10.3 BAIL-BASED INTERVENTION PROGRAMS

#### 10.3.1 Legislative framework

The *Bail Act 1980* empowers a court to impose a condition on bail that the defendant participate in an intervention program designed to address the underlying causes of the person's offending behaviour. A court may also impose participation in QMERIT and QICR programs as a condition of bail.

Section 11(9) of the *Bail Act 1980* (Qld) provides that:

Without limiting a court's power to impose a condition on bail under another provision of this section, a Magistrates Court may impose on the bail a condition that the defendant participate in a rehabilitation, treatment or other intervention program or course, after having regard to—

- (a) the nature of the offence; and
- (b) the circumstances of the defendant, including any benefit the defendant may derive by participating in the program or course; and
- (c) the public interest.

Section 11AB provides that:

- (1) This section applies to a court authorised by this Act to grant bail for the release of a person.
- (2) If the person consents to completing a DAAR course, the court may impose a condition for the person's release that the person complete a DAAR course by a stated day.
- (3) In deciding whether to impose the condition, the court must have regard to the following—
  - (a) the nature of the offence in relation to which bail is proposed to be granted;
  - (b) the person's circumstances, including any benefit the person may derive by completing a DAAR course;
  - (c) the public interest.

(4) However, subsection (2) does not apply if—

- (a) the person has completed 2 DAAR courses within the previous 5 years; or
- (b) the person is under 18 years; or
- (c) section 11A applies [release of a person with an impairment of the mind].

(5) This section does not limit the conditions the court may impose under section 11 [conditions of release on bail.

DAAR course means a course provided to a person by an approved provider in which—

- (a) the person's drug or alcohol use is assessed; and
- (b) the person is given information about appropriate options for treatment and may be offered counselling or education.

### **10.3.2 Drug and Alcohol Assessment and Referrals**

Initially introduced as part of the Safe Night Out Strategy, a package of reforms to better respond to alcohol-fueled violence, a DAAR course is a bio-psychosocial assessment and brief intervention delivered to clients where their drug or alcohol use is associated with their offending behavior. It is designed to identify any alcohol- or drug-related issues that need to be addressed, whilst providing an opportunity for the client to receive information and access to further treatment if desired.

A DAAR course condition can be imposed either as a condition of bail or as part of a recognisance order post-sentence, and is available on a statewide basis.

In 2015-16, 565 defendants were assessed for DAAR. Of these, 528 orders were completed. This amounted to 710 sessions, taking rescheduled appointments into consideration.

In 2014–15, 394 defendants were referred to the DAAR program, with 96% of these referrals being accepted (378) and 68% of accepted referrals (256) resulting in a completed program. Most referrals were male defendants (81%). Although Queensland is characterised by a substantially higher use of information and education treatment modality than is apparent nationally, comparison between the number of DAAR and Court Diversion Program referrals suggests that the use of this type of treatment is largely driven by the Court Diversion Program.

Information on DAAR participant characteristics evident in DJAG data is consistent with QH data. According to these data, 79% of closed DAAR treatment episodes in 2014–15 related to men and the average age of people provided with treatment was 30 years. These data also indicated that the majority of closed treatment episodes (85%) involved a non-Indigenous client and that most of the referrals to DAAR were from the QPS (76% of closed treatment episodes).

Alcohol was the most common principal drug of concern for the majority of people attending a DAAR intervention (77% of closed treatment episodes), although cannabis use was also evident being the principal drug of concern for 16% of closed treatment episodes. No treatment episodes related to heroin or heroin-type substances as a principal drug of concern and about 4% of treatment episodes related to amphetamine use as a principal drug of concern. This compares with total Queensland alcohol and other drug treatment services data that shows that alcohol was the principal drug of concern for 36% of closed treatment episodes and cannabis was the principal drug of concern for 34% of closed treatment episodes.

Queensland Health data also indicate that completion of the DAAR program also involved a referral to another agency to support any identified health issues – especially those relating to alcohol and/or illicit drug use. Most of these referrals involved a referral to a medical practitioner or hospital (80%). Some closed treatment episodes involved a referral to a residential alcohol and other drug treatment service (4%) and 9% of closed treatment episodes resulted in a referral to other health services (such as sexual health services).

### 10.3.3 Evaluations

Bail-related drug intervention programs operate in most Australian states. The Australian program for which the strongest evidence exists for its effectiveness in reducing reoffending and more generally improving health outcomes is the NSW Magistrates Early Referral into Treatment (MERIT) program, including the regional version of the program and the Alcohol-MERIT program.<sup>13</sup>

The MERIT program has proven its effectiveness in regional areas and has been successfully extended to include alcohol-dependent offenders in its remit. It has not, however, shown itself to be particularly strong with female offenders or offenders of Aboriginal and Torres Strait Islander descent. As these groups have proven to be especially difficult to target successfully at all stages of the intervention continuum, particular attention is needed to develop interventions that are both gender sensitive and culturally appropriate.

## 10.4 ADJOURNMENTS

Under the *Drugs Misuse Act 1986* (Qld), s 122A, where a person has been charged with a minor drug offence and has pleaded guilty to that offence, the court may, if the person is eligible under the *Police Powers and Responsibilities Act 2000* (Qld), s 379:

- offer the offender an opportunity to attend a 2 hour DDAP; or
- order the person to attend and complete a DDAP as directed by a police officer.

This provision allows the court to adjourn proceedings to a date fixed by the court and allows for judicial monitoring of the offender's progress on the order.

Under the *Penalties and Sentences Act 1991* (Qld), s 24 a court may adjourn the sentencing of an offender to a time and place ordered by a court, on a recognisance, on condition that the person appear before the court to be sentenced. An offender may be called upon to take steps to restore or reinstate property or compensate a victim,<sup>14</sup> but there are no specific provisions that would permit the court to attach conditions relating to the offender's underlying problems.

In a number of jurisdictions, a court may, before the taking of a plea of guilty or on a plea, conditionally adjourn proceedings to allow the offender to undergo assessment, treatment, education, training programs or other intervention programs. Courts generally have broad discretionary powers to adjourn proceedings conditionally.

In Victoria under the *Criminal Procedure Act 2009* (Vic), s 59 where the accused acknowledges responsibility for the offence to the court, and both the prosecution and defence consent, the court may adjourn the proceeding for up to 12 months to enable the offender to participate in a diversion program. A diversion program may contain a number of conditions such as those requiring the offender to apologise to the victim, make a donation or compensation, undertake voluntary work, an anger management course, a defensive driving course, drug and alcohol awareness, counselling or treatment programs or other conditions relating to the offender's behaviour. It is thus broader than the DDAP intervention.

## 10.5 DISCUSSION AND RECOMMENDATIONS

Queensland's pre-sentence, bail-based or bail-related programs present as a fragmented and uncoordinated set of initiatives commenced at different times, opportunistically funded, operating at courts where resources happened to be located rather than being strategically placed, with various legal foundations, target groups and intervention programs. They are in need of rationalisation to ensure that programs are delivered equitably

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<sup>13</sup> Further information on QMERIT can be found at Appendix E 'Mapping Queensland's diversionary and specialist court interventions describes Queensland's current range of court-based interventions'.

<sup>14</sup> Penalties and Sentences Act 1991 (Qld), s 25.

across Queensland, are consistently funded and resourced and conform to the principles articulated in Chapter 2.

For example, while some programs, such as QMERIT, offer a high level of case management and support to people with alcohol and other drug issues, with a treatment duration that is consistent with best practice (a minimum of 90 days), case management is only a feature of programs such as QCR and QICR to the extent that the service provider or providers working with the clients assume this role as part of the provision of support. This can largely be attributed to the different levels of funding and reach of these programs, with QMERIT operating only out of the Maroochydore and Redcliffe Magistrates Courts from funding provided to Health and Hospital Services by the Department of Health. Whereas QICR is to operate in up to seven court locations and out of a budget of \$535,759 for 2016–17, which is intended to fund staffing costs for DJAG staff and program facilitators, brokerage for services as required and other program costs, including administrative expenses. As the QICR program relies on service providers to support the program through existing funding, establishment of the program in new court locations irrespective of need, requires a willing service sector and sufficient capacity in those services to support those referred.

### 10.5.1 Intervention programs

There are a number of substantially similar schemes that provide low-level interventions in Queensland, targeting offenders who are low risk and need. These are:

- the Police Diversion Program, which refers alleged offenders into the DDAP;<sup>15</sup>
- the DAAR program, which refers offenders who are on bail to a DAAR course or as a condition of a recognisance order on sentence, in which a person’s alcohol and other use is assessed and the person is given information about appropriate options for treatment and may be offered counselling or education;<sup>16</sup> and
- the Court Diversion Program, which refers offenders who enter into a recognisance order into a Drug and Alcohol Education Session (DAES) under the *Penalties and Sentences Act, 1992*. This session is similar to the DDAP.<sup>17</sup>

In total, in 2015-16 over 15,000 brief interventions were delivered to offenders.

In terms of delivery, we believe that there are opportunities to investigate new and potentially more cost efficient modes of delivery. Currently some of these programs are offered face-to-face or via phone. Other forms of technology and methods of delivery, such as validated self-administered instruments, should be considered.

Due to the essential similarity of the programs, albeit that they are provided by different organisations and available at different stages of the criminal justice system, we recommend that there be a rationalisation of the DDAP, the DAAR course and DAES to provide one consistent brief intervention program for low-level offenders. Referrals into this program could come from police, pre-arrest, courts, as part of a bail, adjournment or deferral of sentence procedure or as a condition of a recognisance.

Information on the advantages and efficacy of brief interventions is provided at Section 8.5. Overall, analyses to date suggest that brief interventions appear to be a promising option for mild-to-moderate drug users however more intensive interventions still yielded greater outcomes than brief interventions, albeit at higher cost.

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<sup>15</sup> In 2015-16, 9,428 offenders were referred by police into the DDAP.

<sup>16</sup> See Bail Act 1980 (Qld), s 11AB(6); Penalties and Sentences Act 1992 (Qld), s19(2B)

<sup>17</sup> In 2015-16, 5,769 defendants were assessed for the Court Diversion Program from which 5,310 recognisance orders were made.

**Recommendation 2 Rationalising existing brief intervention programs for alcohol and other drug-related issues**

- 5.1** There should be a review and rationalisation of the low-level intervention programs to provide one consistent brief intervention program for low-level offenders.
- 5.2** Referrals into this program could come from police, pre-arrest, courts, as part of a bail, adjournment or deferral of sentence procedure or as a condition of a recognisance.
- 5.3** More efficient and effective modes of delivery should be considered, such as validated self-administered instruments and programs.
- 5.4** While the current arrangements that allow these brief intervention programs to be offered on multiple occasions should be retained, the following principles should apply:
- (a) if a brief intervention involves a specific non-individualised program of activities and educational exercises, there is likely to be little benefit in offering the same program twice;
  - (b) if the brief intervention is individualised, for example involving motivational interviewing and identifying current and future risks of relapse, then this may be offered on multiple occasions; and
  - (c) if the return to brief intervention signals an escalation of drug use, then a brief intervention may no longer be appropriate.

### 10.5.2 Deferral of sentence

‘Deferral of sentencing is a power that allows the court to postpone the sentencing of an offender for a specified time, generally to allow the offender to address the underlying causes of their offending behaviour, to facilitate the offender’s rehabilitation or to allow the offender to take part in activities aimed at addressing the impact of the offending behaviour on the victim... This is not a sentencing disposition but a pre-sentencing option that ‘has the potential to allow the courts to deal with a wide range of less serious cases where the court needs time to consider the outcome or public or private treatment or other interventions, or the outcome of restorative justice conferences’ (TSAC Phasing out of Suspended Sentences Report 2016, p. 109).

The power to defer sentence is available in Victoria, NSW, South Australia, the ACT and WA and is under consideration in Tasmania.<sup>18</sup>

Legislation governing deferral of sentence generally sets out the purposes of deferral. These purposes include allowing the court to assess the offender’s capacity for, and prospects of rehabilitation, to allow the offender to demonstrate that rehabilitation has taken place, to allow the offender to participate in a program or programs aimed at addressing the underlying causes of offending or for any other purpose. Other purposes may include restorative justice programs. A program may be designated generally in legislation as an ‘intervention program’ which may then be specified in subordinate legislation.

The benefits of permitting a court to defer sentencing are that it allows it more time to assess the appropriate sentence to be imposed upon an offender, it gives the offender an opportunity to demonstrate their rehabilitation, it allows an offender’s condition to be stabilised and it provides for restorative justice procedures to be used (TSAC 2016, pp. 110-111). The maximum period of deferrals is one to two years depending upon the jurisdiction.

King et al. (2014, p. 205) observe:

Adjournment, deferral and similar powers provided to the courts to enable them to judicially monitor the progress of defendants under a conditional sentence have been criticised for delaying proceedings and imposing unnecessary administrative burdens on the court system. Many judicial officers prefer to deal with cases only once and dispose of them quickly, particularly in high volume courts. However, the evidence that judicial monitoring and targeted and well-timed interventions can be beneficial both for offenders and for the criminal

<sup>18</sup> *Sentencing Act 1991 (Vic)*, s 83A; *Crimes (Sentencing) Act 2005 (ACT)*, Chapter 8; *Crimes (Sentencing Procedure Act) 1999 (NSW)*, s 11; *Sentencing Act 1995 (WA)*, ss 16 and 17; Sentencing Amendment Bill 2016 (Tas).

justice system outweighs the inconveniences that are caused by multiple appearances that a therapeutic approach requires.

### 10.5.3 Consultation

Although many stakeholders saw merit in deferred sentencing, there was not strong support for legislative power to defer sentences in Queensland. There are practical disadvantages to deferred sentencing such as the effect on performance and reporting as well as ensuring the sentencing magistrate is available to hear the sentence some time later. Deferring a sentence and allowing a defendant to complete an intervention program creates an expectation that they will avoid a harsher penalty such as imprisonment. This may not be the case and therefore concerns were raised during consultations that deferred sentencing should not be used if the person will be sentenced to imprisonment. Deferred sentencing to complete an intervention program that may be taken into consideration upon sentence may also create an inducement to plead guilty.

The largest concern amongst stakeholders was the impact that deferred sentencing may have on victims and the availability of witnesses. Victims are currently frustrated with the delays experienced in court, and deferred sentencing further delays court outcomes. It is important to manage the expectations of victims and ensure they are kept informed throughout the court process.<sup>19</sup>

### 10.5.4 A generic and integrated assessment and referral process

We have observed above that QICR, QCR and QMERIT operate at a limited number of sites in the state, under different referral and service models and legal frameworks. As we have also documented, the number of offenders with problematic substance use throughout the state is growing and not confined to any particular area.<sup>20</sup> The range of services and service providers across the state varies widely. In our view, what is required is a new legal and service framework that will better support the future needs of Queensland's court users and address underlying issues associated with offending. What is required is the development of a comprehensive new integrated court assessment and referral program that could operate in those courts with sufficient resources to support such a program. Such a program would not only support offenders with substance abuse problems but offenders with mental health, domestic violence, housing instability and employment problems.

To provide such a framework we recommended that consideration be given to the introduction of a generic integrated assessment and referral process based on the Victorian Court Integrated Services Program (CISP), which is said to represent one of the best of such programs. The CISP adopts many of the principles identified in the literature as best practice in addressing drug-related offending: it provides a coordinated, team-based approach to assessment and treatment, linking people with services such as alcohol and other drug treatment, crisis accommodation, disability services and mental health support, providing a holistic, wrap-around approach to addressing offenders' multiple and complex needs.

The CISP model recognises and addresses the complexity of issues often present with drug-related offenders, and streams offenders into different program levels to target people at different levels of risk and need. This matching of intervention level with individual need is a foundational principle for interventions to address drug-related offending. Gelb describes the scheme as follows (Gelb Appendix C):

[CISP] is currently operating in four Magistrates' Courts in both metropolitan and regional areas (the Latrobe Valley, Melbourne, Mildura and Sunshine).

The CISP aims to:

- provide short term assistance before sentencing for accused with health and social needs;
- work on the causes of offending through individualised case management support;

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<sup>19</sup> See section 1.6 discussing restorative justice and the rights of victims.

<sup>20</sup> See chapter 3. **Error! Reference source not found.**

- provide priority access to treatment and community support services; and
- reduce the likelihood of re-offending.

### Target population

The program is aimed at medium- to high-risk people who can be helped via treatment and/or support. Eligibility criteria include:

- the accused must be charged with an offence;
- the accused person's history of offending or current offending indicates a likelihood of further offending;
- the matter before the court warrants intervention to reduce risk and address needs; and
- the accused has:
  - physical or mental disabilities or illnesses;
  - drug and alcohol dependency and misuse issues; or
  - inadequate social, family and economic support that contributes to the frequency or severity of their offending.

CISP is available regardless of whether a plea has been entered and regardless of whether the person intends to plead guilty. People are eligible if they have been brought before the court on summons or bail. While referrals may be made by several parties in the court, 75% of referrals have been found to be made by clients' legal representatives.

### Operation

The CISP provides a multi-disciplinary team-based approach to assessment and referral, with the level of support based on the assessed needs of the individual. Medium- and high-risk participants receive case management for up to four months and there are specific services for Koori clients, such as the Koori Liaison Officer program.

A case management plan is developed with each person that details referrals and linkages into treatment and support. A case manager is assigned to review progress on the program, and the court may also decide to monitor progress. In this case, CISP staff report back to the court throughout the program.

### Evaluation

An effectiveness evaluation found that CISP had achieved its targets, successfully matched the intensity of intervention to the risks and needs of its clients and had achieved a high rate of referral to treatment and support services. In terms of outcomes, CISP clients reported improvements in health and well-being and, compared with offenders at other court venues, CISP completers had a significantly lower rate of reoffending (Ross 2009). An economic evaluation found that CISP offered good value for money (PricewaterhouseCoopers 2009).<sup>21</sup>

Key evaluation findings were as follows:

- Approximately 6 in 10 participants completed the program successfully. The most important factors in predicting non-completion were whether the offender was in custody at the time of being assessed for CISP, whether CISP was made a condition of bail, and the offender's level of accommodation stability at the time of CISP entry, all of which increased chances of program completion (Ross 2009).

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<sup>21</sup> As with all Benefit-cost-analyses (BCAs), the CISP BCA is subject to data gaps, data quality issues and reliance on proxy data. The accuracy of BCA results depends on the underpinning assumptions used to generate the BCA and the identification of a suitable comparison cohort. It is noted that the CISP applied a 10% reduction in recidivism. However, the CISP evaluation found that this reduction was not achieved until around 700 days after program completion (Ross 2009). The extent to which the 10% reduction in recidivism is applied is not apparent in reported BCA workings.

- CISP made an average of 3.3 referrals to treatment and support services per participant in 2007 and 5.1 referrals in 2008 (Ross 2009).
- Sentence outcomes were influenced by whether or not offenders completed the CISP program. CISP completers were less likely to receive a custodial sentence than non-completers (9.3% versus 1.4%) (Ross 2009).
- Successful completion of CISP was taken into account at sentencing and CISP completers received an average of 8.0 days of imprisonment per client, while people in the control group received an average of 40.6 days imprisonment.
- Post-sentence order compliance was slightly higher among CISP completers (49%) than the control group (45%). This difference was not statistically significant (Ross 2009).
- CISP completers were less likely to reoffend. Half (50%) of CISP completers were classed as reoffenders compared with 64% of a control group. This difference was statistically significant (Ross 2009).
- CISP completers took longer to reoffend than the control group. However, differences were not statistically significant (Ross 2009).
- The majority of recidivist CISP completers committed a less serious offence than their CISP referral offence (PricewaterhouseCoopers 2009).
- there were differences in pre- and post- program SF-12 Physical Health Component Scores (which increased from 50 to 54) and Mental Health Component Scores (increasing from 38 to 45) (Ross 2009).
- Low housing stock meant that accommodation issues were rarely stabilised for CISP clients (Ross 2009).
- The economic analysis estimated that the benefit-cost-ratio ranged from 1.7 to 5.9. Benefits included avoided costs of sentencing, avoided costs of imprisonment, avoided costs of crime and avoided costs of order breach. The benefits of the CISP were estimated to exceed costs of the program if the 10% reduction in recidivism was maintained by participants for at least two years (PricewaterhouseCoopers 2009).

The CISP effectiveness evaluation also:

- referred to the range of program service approaches operating in the Victorian courts (including CREDIT/Bail Support, the Neighbourhood Justice Centre (NJC), drug court, Koori Court and the Family Violence Courts) and proposed that these approaches be reviewed with a view to creating a single court support function to underpin a range of clinical, support, referral, supervision and case management services to court clients;
- suggested that the CISP should not be made accountable for treatment goals beyond its direct control, instead program goals should be more concerned with the effectiveness of the referral process and maintaining clients' engagement with treatment programs; and
- noted that magistrates believed that a program such as CISP is integral to the delivery of therapeutic jurisprudence (Ross 2009).

The CISP model may well be applicable to the Queensland context as it attempts to create a cohesive approach to the provision of interventions to address drug-related offending. In the Queensland court system, such a 'court support services function' could be the primary point of contact for drug-related offenders, coordinating and facilitating early assessment that streams individuals into appropriate intervention pathways. Staff in this functional area could then coordinate the movement of offenders through the system, including providing linkages to service providers and organising appearances to report back to the magistrate. Within this functional area, a series of specialist roles could be developed, such as offender assessment, case management and perhaps victim counselling.

The total combined annual budget for CISP together with the Victorian CREDIT and current Bail Support Programs is \$6.9 million, which includes funding for 41 FTEs across 11 courts. The program is in the process of being extended to include an additional 13 FTEs at a total cost of \$2.3 million. These staff will be placed at existing program locations and a further three courts.

Similarly, Victorian Magistrate Pauline Spencer has written of an Integrating Court Framework that has been developed in Victoria by the Department of Justice as a strategic planning tool, but which has not yet been endorsed by the Department (as at 2012: Spencer 2012, p. 95). This framework provides that such a program would:

- undertake a triage process to identify, at the earliest opportunity, court participants who:
  - may benefit from being connected to community-based services and help connect them to these services and/or may benefit from referrals to legal services available through Victoria LAQ or community legal centres; and
  - may be suitable and eligible for court-based (offender) programs, family violence and sexual assault support or victim services and to connect people to these for assessment/intake (or subsequent referral to community-based services);
- consider the needs of victims to navigate through court processes and provide better links to family violence, sexual assault and victim support services in the community;
- utilise magistrate-led problem-solving approaches in the courtroom where appropriate;
- provide specialist support services located at the court and through funded outreach to assist accused people and victims of crime;
- obtain information on how to address underlying problems leading to a person repeatedly offending or being highly likely to re-offend from relevant services and through training and professional development;
- use a collaborative and less adversarial process and adopt a team-based approach between legal aid, police, corrections, court staff and community agencies and services to work with an offender to address the underlying causes of their offending; and
- monitor and review the program of offenders, whether on bail, pre-sentence or post-sentence in appropriate cases.

It is recommended that consideration be given to creating a single referral and support scheme (Queensland Integrated Assessment and Referral Program [QIARP]) that addresses a range of problems faced by offenders including drugs, alcohol, mental health, impaired decision making, housing, employment and others in Queensland.

The QIARP would replace QICR, QCR and QMERIT. Based on the Victorian CISP program, QIARP could build on the existing QICR model to include the engagement of court managers employed by the court. The interventions delivered as part of the existing programs could be retained to be funded and delivered under the new program.

The proposed QIARP, like CISP, could operate pre-plea and should be relatively brief, preferably no more than 16 weeks.

Stakeholders indicated strong support for a CISP model in Queensland. Specific mention was made for CISP to make referrals to general practitioners, who are currently under-utilised. Referrals to general practitioners are important for early intervention and particularly for Aboriginal and Torres Strait Islander offenders.

**Recommendation 3 A single generic integrated court assessment, referral and support program for Queensland**

**Consideration be given to the introduction of a generic integrated assessment, referral and support scheme to be named the Queensland Integrated Assessment and Referral Program (QIARP) based on the Victorian CISP that aims to address a range of problems faced by offenders including drugs, alcohol, mental health issues, impaired decision making capacity, housing, employment and other issues. This would replace the existing QICR program and bring other programs, such as QMERIT, under the one program framework.**

Interventions delivered as part of the existing programs under this model could be retained to be funded and delivered under the new program. The proposed QIARP, like CISP, could operate pre-plea and should be relatively brief, preferably no more than 16 weeks, but could continue for longer if required.

Where an extensive period is required for assessment, referral, treatment or rehabilitation and for a range of other purposes, courts, including the District Court, could be provided with a statutory power to defer sentence for up to 12 months.

Based on the Victorian experience, the QIARP model could build on the existing QICR model to include the engagement of suitably qualified court case managers employed by the court. The role of these officers could include to:

- conduct initial screening of eligibility and comprehensive assessments;
- work with participants to develop individual case management plans that link participants into treatment and other support services and to meet regularly with those participants;
- as part of the case management of the participant, coordinate and negotiate delivery of a range of services, including accommodation, alcohol and other drug treatment, mental health, disability, family violence and other relevant services;
- compile reports for courts on the progress of participants and, where required, give advice to, and evidence in, court;
- maintain strong linkages with the community services sector and other key stakeholders;
- work collaboratively within a multi-disciplinary team on issues relevant to the management of participants and develop and maintain a working relationship with other court programs; and
- provide education and professional development to judicial officers and court staff in relation to relevant issues experienced by court users.

The model would allow in-house court-based assessments to be undertaken and other assessment providers to be engaged, as necessary, to conduct specialised assessments (e.g. neuropsychological reports). Some forms of brief interventions, such as motivational interviewing, could also be delivered by the team.

In larger locations (e.g. Brisbane), a number of case managers could be recruited to address specialist areas of expertise, such as alcohol and other drugs, mental health and disability, and to support Aboriginal and Torres Strait Islander clients, as is the case in Victoria. This team could be built over time, subject to available funding.

In smaller centres, a single case manager might be employed to provide support to participants.

Participants on the program could be subject to regular judicial monitoring.

The level of service provision (e.g. judicial monitoring and level of case management) could be determined based on a needs assessment.

Once established, this program and the services delivered under it could also support specialist courts, such as the Southport DFV Court and Murri Court.

### **10.5.5 A continuum of pre-sentence legal options**

We have identified a number of points along the criminal justice continuum to this point at which various forms of intervention can occur from pre-arrest, to arrest, to bail to consideration of sentence. In conformity with the principles outlined in Chapter 2 we believe that these interventions should be proportionate and parsimonious so that the degree of intervention reflects the seriousness of the offence alleged or proven, the purpose of the proceeding, the nature and extent of the risk that the offender poses and their risk to the community.

The proposed QIARP, which can operate pre-plea and with or without bail, should be relatively brief, preferably up to around 16 weeks. Similarly, bail-related programs should be of around this length.

Where a longer period is required for assessment, referral treatment or rehabilitation, the courts could employ their common law or statutory power to adjourn proceedings for these purposes for a period up to, for example, six months. They would be granted power to impose conditions upon the adjournment or the bail option could be used.

Where an extensive period is required for assessment, referral to treatment or rehabilitation and for a range of other purposes as outlined above<sup>22</sup> courts, including the District Court, should be provided with a statutory power to defer sentence for up to 12 months.

### 10.5.6 Interventions

In this Review we have distinguished assessment and referral programs from substantive measures that provide education, rehabilitation, treatment or behaviour change programs that are provided by health services, both public and private. In our view, at present, there is a degree of confusion between referral programs and substantive intervention programs. Where an intervention program is one that requires a person to participate in a specific and identifiable program that is intended to address their underlying behavioural problem or problems,<sup>23</sup> that program should be specifically identified, approved and legislatively supported.

Programs such as the DAES and the DAAR are examples of stand-alone intervention programs.<sup>24</sup> Some Queensland intervention programs have been statutorily recognised.<sup>25</sup>

We recommend that in relation to drug- and alcohol-related intervention programs (or any criminal justice program that is not a condition of sentence), a general, authorising provision be enacted that creates the framework for an intervention program.

The details of such programs could be spelled out in regulations and deal with such matters as:<sup>26</sup>

- the offences in respect of which an intervention program may be conducted;
- eligibility to participate in an intervention program;
- the nature and content of the measures constituting an intervention program;
- the purposes and objectives of an intervention program, and the principles guiding an intervention program;
- assessment of the suitability of a person to participate in an intervention program, or of a person's capacity or prospects for participation in an intervention program;
- the conduct of investigations and the preparation of reports as to a person's suitability, capacity or prospects for participation in an intervention program;
- the provision of reports as to a person's suitability, capacity or prospects for participation in an intervention program;

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<sup>22</sup> See section 10.5.2

<sup>23</sup> Compare this with a generic assessment and treatment intervention such as CISP

<sup>24</sup> However, they may also provide a referral mechanism to another intervention program, which creates a degree of confusion.

<sup>25</sup> See e.g. *Domestic and Family Violence Protection Act 2012* (Qld), s 75 with respect to Men's Perpetrator Behaviour Change programs. For a list of such approved programs see <https://www.qld.gov.au/community/documents/getting-support-health-social-issue/approved-providers-and-intervention-programs.pdf/>

<sup>26</sup> See e.g. *Criminal Procedure Act 1986* (NSW), s 347. A number of intervention programs have been identified in the *Criminal Procedure Regulation 2010* (NSW) including circle sentencing, forum sentencing and the traffic offender intervention program.

- the persons, bodies or organisations who may participate in an intervention program or intervention plan (in addition to the offender or accused person);
- the role of particular persons, bodies or organisations in the conduct of an intervention program or intervention plan;
- restrictions or conditions on participation in an intervention program (including legal representation of offenders or accused persons who participate in an intervention program);
- the development and implementation of intervention plans arising out of an intervention program, including restrictions or conditions on intervention plans;
- procedures for notification of courts or other persons, bodies or organisations of a decision of a person not to participate in, or to continue to participate in, an intervention program or intervention plan;
- the content and keeping of records in connection with an intervention program or intervention plan;
- the monitoring and evaluation of, or research into, the operation and effect of an intervention program or intervention plan;
- the issuing of guidelines with respect to the conduct or operation of an intervention program or intervention plan;
- authorising the participation of persons who are in custody in an intervention program or intervention plan; and
- any other matter relating to the conduct or operation of an intervention program or intervention plan.

Adopting such a procedure would bring a degree of rigour to the design, introduction, operation and evaluation of intervention programs that is missing from current practices. In the present context, namely substance abuse, an intervention program could be determined by an Interagency Consultative Committee comprised of magistrates and mental health, alcohol and other drug services, police, corrections, prosecutions, legal and victims’ representatives.

Under this proposed structure, a Gazetted Intervention Program could be attached to the PPRA, s 379, or made a condition of bail, adjournment or deferral of sentence. Programs could be added or removed depending upon their availability, efficacy or efficiency.

#### 10.5.7 Consultation

There was strong support from stakeholders for the establishment of approved intervention programs and for them to be evidence-based with a clear program logic outlining their purposes and objectives. It was considered that such a process would give judicial officers confidence in making referrals to approved programs, knowing that they have been through an accreditation process.

#### 10.5.8 Recommendation

**Recommendation 4** Need for a general, authorising provision to be enacted that creates the framework for an intervention program relating to problematic substance use

To ensure that programs used are evidence-based and that they can be used at a number of points in the criminal justice system, consideration should be given to:

- the establishment of approved intervention programs that might be Gazetted on the recommendation of an Interagency Consultative Committee comprised of magistrates and mental health, alcohol and other drug services, police, corrections, prosecutions, legal and victims’ representatives; and
- provision to attend approved intervention programs being attached to section 379 of the *Police Powers and Responsibilities Act 2000*, or made a condition of bail, adjournment, deferral of sentence or recognisance. Programs could be added or removed depending upon their availability, efficacy or efficiency.

# 11 CRIMINAL JUSTICE FRAMEWORK – SENTENCING DISPOSITIONS

## 11.1 RELEASE ON RECOGNISANCE

A court may order an offender complete a DAAR course or attend a drug assessment and education session or participate in the QICR program upon sentencing the offender to a recognisance order under section 19 *Penalties and Sentences Act 1992* (Qld).

*Penalties and Sentences Act 1992* (Qld), s 19(1)(b) provides that a court may make an order that the offender be released if the offender enters into a recognisance on the condition that the offender must:

- (a) be of good behaviour; and
- (b) appear for conviction and sentence if called on at any time during such period (not longer than 3 years) as is stated in the order.

In making an order under subsection (1)(b), the court may impose any additional conditions that it considers appropriate (*Penalties and Sentences Act 1992*, s 19(2)). An additional condition that may be imposed by the court is for the offender to participate in the QICR program.

*Penalties and Sentences Act 1992* (Qld), s 19(2A) provides that a court may impose a condition on a recognisance order that the offender who has been charged with an eligible drug offence<sup>27</sup> must attend a drug assessment and education session by a stated date (a drug diversion condition) if—

- (a) the court is a drug diversion court [defined as a court prescribed under a regulation, being each Magistrates Court and each Childrens Court constituted by a magistrate]<sup>28</sup> and
- (b) the offender is an eligible drug offender<sup>29</sup>; and
- (c) the offender consents to attending a drug assessment and education session.

Furthermore, *Penalties and Sentences Act 1992* (Qld), s 19(2B) provides that without limiting subsection (2) or (2A), if the offender consents to completing a DAAR course, the court may impose a condition (a DAAR condition) that the offender complete a DAAR course by a stated day.

Under our proposed scheme, *Penalties and Sentences Act 1992* (Qld), s 19(2A) would be amended to provide that a court could order that an offender undertake a prescribed intervention program, suitable for that individual's needs. This mechanism provides courts and administrators with greater flexibility as the nature of the intervention program can be changed by regulation rather than by amendment to the Act itself.

We would also suggest that, rather than participation in the QICR program being a condition of a recognisance order, reference be confined to a prescribed intervention program, of which QICR may be one if it meets the prescribed criteria.

## 11.2 PROBATION ORDERS

Under *Penalties and Sentencing Act 1992* (Qld) ss 90 and 91, a court may make a probation order whether or not it records a conviction.

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<sup>27</sup> Defined in *Penalties and Sentences Act 1992* (Qld), s 15D

<sup>28</sup> *Penalties and Sentences Act 1992* (Qld), s 15B.

<sup>29</sup> Defined in *Penalties and Sentences Act 1992* (Qld), s 15C.

A probation order must contain a number of general requirements, including that the offender must take part in counselling and satisfactorily attend other programs as directed by the court or an authorised corrective services officer during the period of the order (*Penalties and Sentencing Act 1992* (Qld), s 93(1)(d)).

A court may add an additional requirement that the offender: (*Penalties and Sentencing Act 1992* (Qld), s 94

- (a) submit to medical, psychiatric or psychological treatment; and
- (b) comply, during the whole or part of the period of the order, with the conditions that the court considers are necessary—
  - (i) to cause the offender to behave in a way that is acceptable to the community; or
  - (ii) to stop the offender from again committing the offence for which the order was made; or
  - (iii) to stop the offender from committing other offences.

Participation in QICR may be required as a condition of a probation order.

### 11.3 INTENSIVE CORRECTION ORDER

Under *Penalties and Sentences Act 1992* (Qld), s 112 if a court sentences an offender to a term of imprisonment of one year or less, it may make an intensive correction order (ICO).

An ICO must contain a number of general requirements, including that the offender:

- (a) must take part in counselling and satisfactorily attend other programs as directed by the court or an authorised corrective services officer during the period of the order (*Penalties and Sentencing Act 1992* (Qld), s 114(1)(d)).
- (b) must, during the period of the order, if an authorised corrective services officer directs, reside at community residential facilities for periods (not longer than 7 days at a time) that the officer directs (*Penalties and Sentencing Act 1992* (Qld), s 114(1)(f)).

A court may add an additional requirement that the offender (*Penalties and Sentencing Act 1992* (Qld), s 115)

- (a) submit to medical, psychiatric or psychological treatment; and
- (b) comply, during the whole or part of the period of the order, with the conditions that the court considers are necessary—
  - (i) to cause the offender to behave in a way that is acceptable to the community; or
  - (ii) to stop the offender from again committing the offence for which the order was made; or
  - (iii) to stop the offender from committing other offences.

### 11.4 PROGRAMS FOR PROBATION ORDERS AND INTENSIVE CORRECTION ORDERS

Queensland Corrective Services advises that offenders are currently supervised at a level consistent with the result of their RoR-PPV or RoR-PV. Supervision levels include low, standard, enhanced, intensive and extreme.

In formulating offender case plans for community-based offenders, Probation Officers primarily refer offenders to external organisations (e.g. Queensland Health Alcohol, Tobacco, and Other Drugs Service (ATODS) and NGOs for support services and to address their criminogenic and non-criminogenic issues. Offenders with substance use issues may also be subject to urinalysis.

Queensland Corrective Services offers a limited range of structured group work programs to offenders to address problematic substance use issues.

The current suite of alcohol and other drug programs offered includes:

- short psycho-educational programs (8 hours);
- psycho-educational programs (16-20 hours);

- ‘Criminal Conduct and Substance Abuse: Pathways to Self-Discovery and Change’ Program (120 total hours including 50 hours ‘challenges to change’); and
- Moral Reconciliation Therapy program.

The average ‘custodial stay’ of 130 days for prisoners and poor retention rates in community-based programs make it difficult for QCS to provide intensive CBT-based programs.

## 11.5 CONSULTATION

Consultation was undertaken on the effectiveness of current sentencing orders available in Queensland. There were mixed views on the use of probation orders. Some stakeholders considered probation orders to be ineffective because they are sufficiently focused, as were the drug court orders. Magistrates had limited confidence that specific conditions attached to orders were actually observed or delivered as there is no court monitoring of the order.

Some consultees remarked that while the structure of the order is unproblematic, what was missing was the service provision to support the offender while they are on the order.

The use of the ICO is very limited and stakeholders indicated that the 12-month order is too short. As with probation orders, there were some concerns about the level of supervision of the defendant and referral to programs to address the underlying causes of their offending. As a result, court-ordered parole is being used as an intermediate order with imprisonment as the default. This has resulted in net-widening for offenders who would otherwise have been placed on a community-based order.

Stakeholders noted that people who were once eligible for drug court are now placed on probation, court-ordered parole or imprisoned with no support to address their alcohol and other drug dependency and other associated issues. Concerns were raised that Queensland Corrective Services do not have the funding and resources to supervise, support and case manage the offender and ensure that appropriate programs are completed.

Some legal stakeholders supported a better range of sentencing options being available, including a robust sentencing order in the Supreme and District Court as well as the Magistrates Court. A current problem in the District Court is the delay in hearing breach matters, which may take up to six to 12 months if the offence is first heard in the Magistrates Court. There is no swift and certain punishment for breaches of community-based orders ordered in the Supreme and District Court.

There was also support by some magistrates consulted to see a return to the making of specific orders about the courses, treatments and/or programs that offenders should complete rather than making a general order for Queensland Corrective Services to determine what is suitable for the offender.

## 11.6 A MORE COMPREHENSIVE COMMUNITY-BASED ORDER

There appear to be two fundamental problems in the use of the probation and intensive correction orders. The first relates to the structure of the orders and the second relates to the delivery of services.

In relation to the first, there is a need for a more detailed and structured order that provides a similar framework for alcohol and other drug offenders whose offences are less serious, and whose risk is lower, than those offenders who would be appropriate for a Drug Treatment Order (DTO). In relation to the second, it is essential that appropriate treatment services be provided to people on community-based orders.

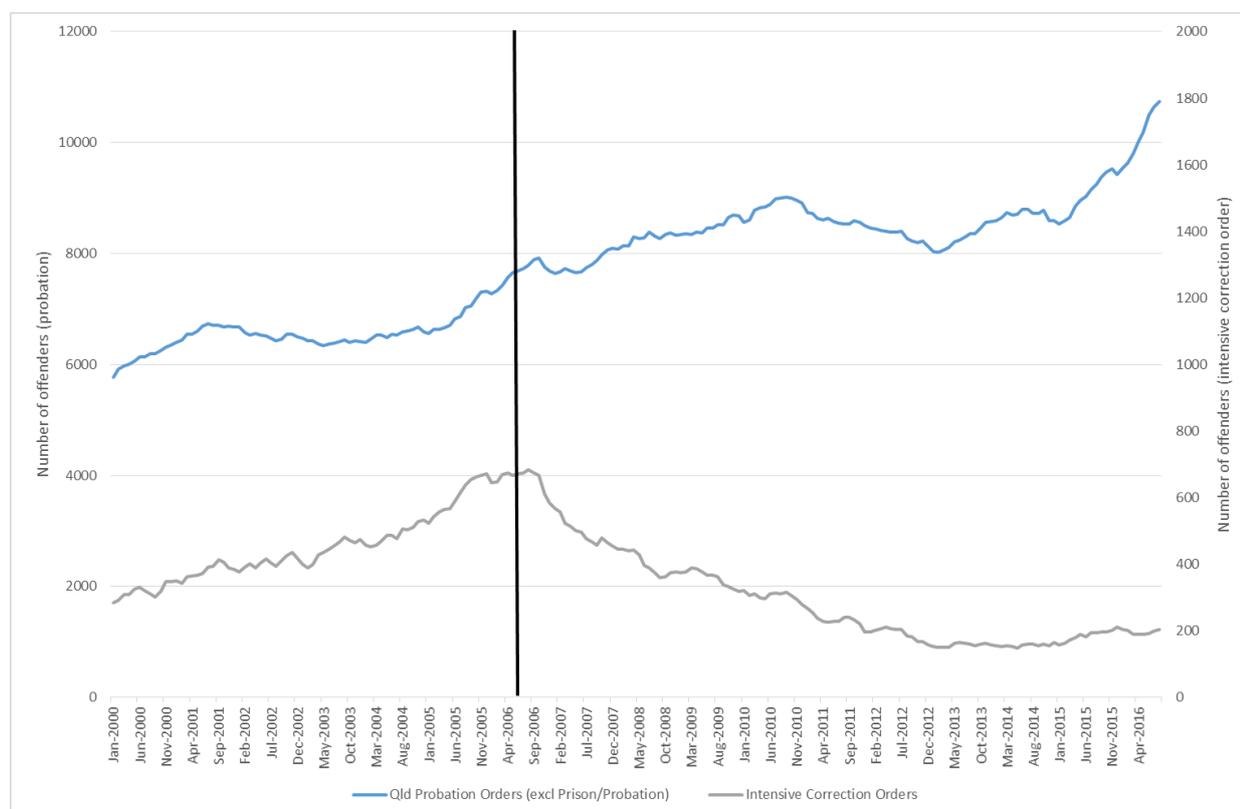
DTOs will be reserved for the most serious offenders and resource limitations will mean that at best only some 100-150 people will be on these orders at any one time. In June 2016 there were 18,919 persons on some form of community corrections order in Queensland (ABS 2016 June Quarter). They far outnumber the 5,495 prisoners in custody at that time and will continue to be the major sentencing option for offenders, even if a DTO regime is introduced. Community corrections are thus of major significance in the management of offenders, many of whom have substance abuse problems and who need a moderate level of intervention.

The number of offenders on probation and intensive correction orders (as their most serious order) between January 2000 and August 2016 is shown in Figure 1. This shows a decline in the use of intensive correction orders after the introduction of court-ordered parole in August 2006. This decline followed a period of growth.

The majority of offenders supervised in the community are on probation orders. Overall there has been a rise in the number of offenders on probation (as their most serious order) since 2000, with some decline between 2010 and 2012, and substantial growth after 2015.

The number of offenders on intensive correction orders is very small when compared with the use of probation orders. For example, there were just under 200 offenders on an intensive correction order (as their most serious order) on 30 June 2016, compared with around 10,500 offenders on probation orders (as their most serious order).

**Figure 1: Number of distinct offenders on probation and intensive correction orders (as most serious order), January 2000 to August 2016, Queensland**



Source: QCS administrative data

Note: Number of offenders represents the number of offenders on the last day of the month.

Both probation orders and intensive correction orders provide the courts and correction officers with a limited range of powers over offenders. With the focus of this Review on both alcohol and other drug offenders, it may be useful to consider whether these orders should be expanded in scope.

Victoria has introduced a broad-based order, the community correction order (CCO), which replaced the community-based order and the combined custody and treatment order. Tasmania has committed to introducing a similar order that replaces its probation and community service orders with an omnibus order similar to Victoria's.

Such an order may contain special conditions such as:

- the offender undergo assessment and treatment for alcohol or drug dependency as directed by a corrections officer;

- the offender submit to testing for alcohol or drug use as directed by a corrections officer;
- the offender submit to medical, psychological or psychiatric assessment or treatment as directed by a corrections officer;
- the offender is subject to judicial monitoring;
- alcohol exclusion is imposed on the offender;
- a curfew is imposed on the offender;
- non-association; and
- place restrictions.

The advantage of a more detailed order such as this is that it provides a court with a wider range of conditions that can be tailored to each individual offender. While it is not accompanied by the full range of drug court resources such as a drug court team, it does provide an option for judicial monitoring, which is similar in effect to the role of a drug court magistrate.

This Review has not been asked to review the operation of the *Penalties and Sentences Act* generally and it is inappropriate for us to develop a case for a completely new order to replace the probation order and the intensive correction order. In the latter case, it is evident that the order is infrequently used due to time and other limitations.

The case for a broader order is made by both the Victorian and Tasmanian Sentencing Advisory Councils. In Victoria, the assessment and treatment conditions are used in 80% of all orders in the Magistrates' Court.

In our view, judicial officers should be provided with a broader range of sentencing options for alcohol- and drug-related offences in the moderate range, in particular, ones that may allow for judicial monitoring, in line with the evidence of its importance and efficacy in the therapeutic jurisprudence literature. This is also consistent with our view that these principles and practices should be mainstreamed for both practical and theoretical reasons.<sup>30</sup> Either more, or more appropriate, conditions should be added to probation and intensive correction orders or a new order could be created.

## 11.7 PROBATION FOLLOWING IMPRISONMENT

An offender who has been sentenced to imprisonment for not longer than one year may be placed on a probation order for not less than nine months or more than three years (*Penalties and Sentences Act 1992* (Qld), s 92).

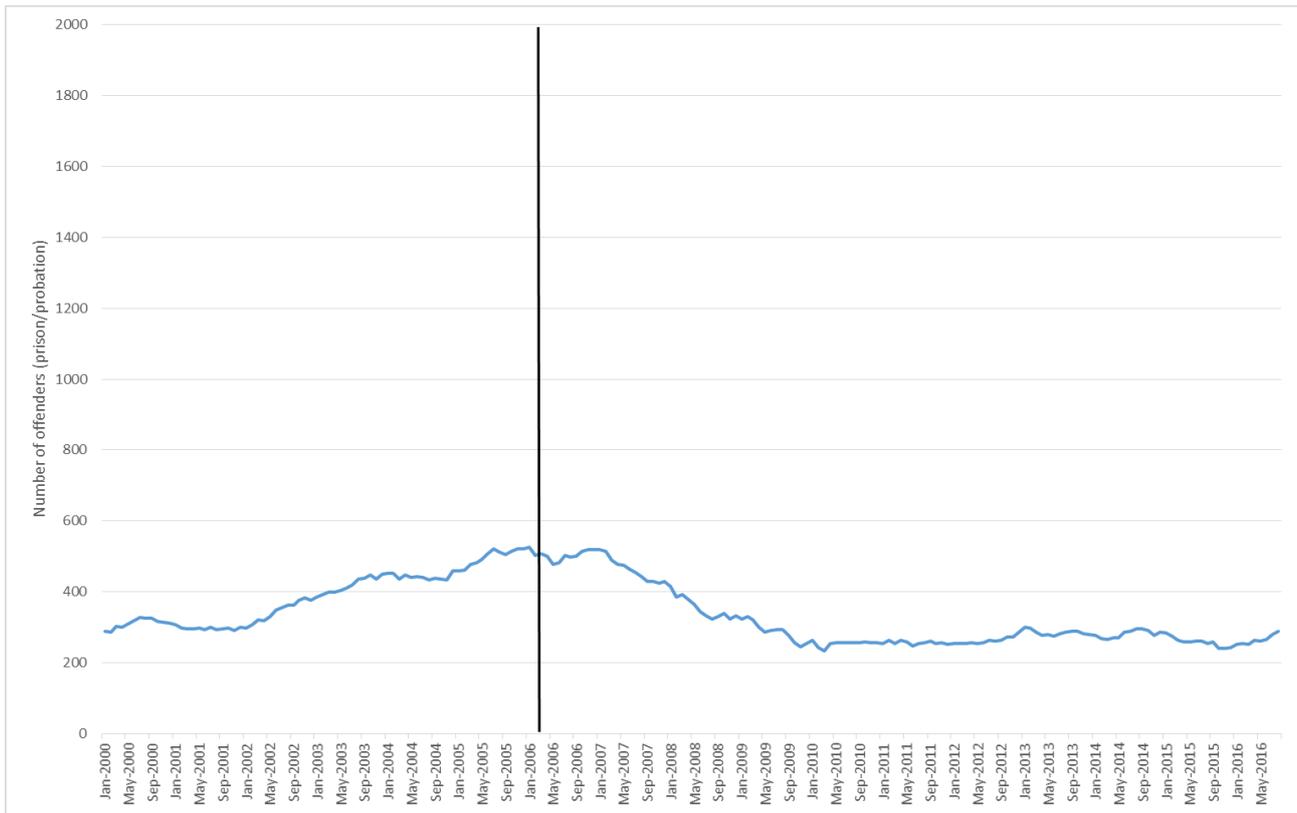
The conditions of a probation order following imprisonment are the same as those where probation is not linked to imprisonment. This order has some similarities with partly [conditionally] suspended sentences that operate or have operated in other jurisdictions and allow for a period of imprisonment to be followed by a form of supervision possibly less onerous than parole.

The number of offenders on prison/probation as their most serious order supervised by QCS between January 2000 and August 2016 is shown in Figure 2. Similar to intensive correction orders, prison/probation orders represent a small proportion of total orders and their use has been in decline since the introduction of court-ordered parole. There were 265 offenders on prison/probation on 30 June 2016.

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<sup>30</sup> See section 1.5.

**Figure 2: Number of offenders sentenced to prison/probation (as most serious order), January 2000 to August 2016, Queensland**



Source: QCS administrative data.

Note: Number of offenders represents the number of offenders on the last day of the month.

There is a question as to whether this additional form of ‘combined’ or mixed sanction is needed in these terms. In Victoria, and soon in Tasmania, the CCO can be combined with a custodial sentence of up to two years. From 2017, the maximum period of imprisonment will be one year. In Victoria the CCO can, in the higher courts, be imposed for a period equivalent to the statutory maximum period of imprisonment for that offence. From 2017, the maximum length of a CCO will be five years in the higher courts. In the Magistrates’ Court the maximum period of the CCO combined with imprisonment is three years. In Tasmania the maximum period will also be three years.<sup>31</sup> The ‘combined’ sentence has proved to be very popular with the courts, providing them with a mix of sentencing purposes (punishment, rehabilitation, incapacitation and deterrence) and with control over the fate of the offender. In Victoria, short terms of imprisonment followed by parole (i.e. imprisonment of one to two years) have almost disappeared to be replaced by imprisonment followed by a CCO. In these circumstances release is determined by the court, not the parole board, which is left with the responsibility of dealing with more serious offenders.

If the present provisions in Queensland are being under-utilised or inappropriately used, one option is to abolish them altogether. Another option is to revise the scope of the probation order to make it more useful for post-release supervision for substance abusing offenders. A third option is to adopt the Victorian and Tasmanian options of a combined imprisonment plus CCO.

<sup>31</sup> A number of very serious offences such as murder, rape, persistent sexual abuse of a child under 16 and, trafficking large commercial quantities of drugs of dependence will not be eligible for a CCO after 2017.

## 11.8 EVALUATIONS OF SENTENCING INTERVENTIONS

Few evaluations have been undertaken of specific approaches in a given jurisdiction, although analyses of recidivism following different sentence types has generally shown that the most severe sentences – imprisonment in particular – have the worst reoffending outcomes. Without robust evaluations, it is difficult to state definitively if specific approaches are effective at reducing reoffending.

When considering court-based interventions, a number of key features of successful programs may be identified. These include:

- early assessment of offenders to ensure the most appropriate intervention pathway is followed –
- clear and broad eligibility criteria that allow streaming of people based on their assessed risk, needs and responsivity;
- the inclusion of alcohol as an eligible primary drug of concern for drug intervention programs;
- strong collaboration and communication between specially-trained magistrates, alcohol and other drug service providers and other relevant stakeholders at the local level;
- an adequate period of treatment that allows time for behaviour change while not inducing treatment fatigue;
- high-quality case management to assist in addressing clients' broader social and health issues; and
- availability of a range of treatment options.

Even with interventions of varying intensity, these features remain relevant and can be tailored to suit specific operational requirements. For example, both treatment duration and case management supervision levels can be adjusted based on the operation of the specific intervention and its offender profiles. There is thus scope for flexibility in matching program design to local environments, while still adhering to the broad principles of successful court-based interventions.

## 11.9 RECOMMENDATIONS

### Recommendation 5      Review of sentencing orders

Consideration should be given to providing judicial officers with a broader range of sentencing options for alcohol and other drug related offences in the moderate to high range, in particular, ones that may allow for judicial monitoring. The elements of such an order might include:

- standard conditions such as not committing an offence, reporting requirements, notification of change of address, not leaving the State without permission and compliance with a reasonable direction;
- at least one special condition which may include:
  - undertake medical treatment or other rehabilitation;
  - not enter licenced premises;
  - community service work;
  - abstain from association with particular people;
  - abide by a curfew;
  - stay away from nominated places or areas;
  - payment of a bond; and
  - be monitored and reviewed by the court to ensure compliance with the order.
- case management and supervision by a corrections officer;
- the suitability of the order and the special conditions required for the offender are assessed by a corrections officer and a pre-sentence report provided to the court; and
- the option for a term of imprisonment to be served prior to the commencement of the order.

Further detailed consideration to the form of such an order could be undertaken through a reference to the Queensland Sentencing Advisory Council once operational.

# 12 CRIMINAL JUSTICE FRAMEWORK – POST CUSTODIAL ORDERS

## 12.1 INTRODUCTION

In Queensland, offenders sentenced to an immediate term of imprisonment are generally released to parole either by means of a court order (known as ‘court-ordered parole’) or a decision made by a parole board (known as ‘board ordered parole’).

The purposes of parole are to supervise and support the reintegration of offenders into the community and through supervised release, to reduce the risk that offenders will commit further offences on their release into the community.

The availability of court-ordered parole is particularly relevant to the reinstatement of a drug court as clients who may have otherwise been subject to court-ordered parole may have the choice of instead opting for participation in the drug court and, conversely, offenders sentenced to a Drug Treatment Order may withdraw from the program in preference to court-ordered parole which they may regard as a less onerous option.

## 12.2 COURT-ORDERED PAROLE

Under section 160B of the *Penalties and Sentence Act 1992* (Qld), courts are required to fix a date for an offender to be released on parole provided:

- the term of imprisonment imposed is no longer than 3 years;
- the sentence does not include a term of imprisonment imposed for a sexual offence or for a serious violence offence (which for shorter sentences of under 5 years means that the offender has not been convicted on indictment of an offence that involves serious violence or resulted in serious harm to another person which the court has declared is a conviction for a serious violent offence in accordance with s 161A and 161B(4) of the Act); and
- the offender has not had a court-ordered parole order cancelled under the *Corrective Services Act 2006*, ss 205 or 209 during the offender’s period of imprisonment.

Under section 160G of the *Penalties and Sentences Act 1992*, a sentencing court has discretion as to what day is fixed as the date that the offender is to be released to parole. For example, a court may fix the parole release date to be:

- the same date as sentencing; or
- a date occurring during the period of imprisonment; or
- on the last day of the sentence.

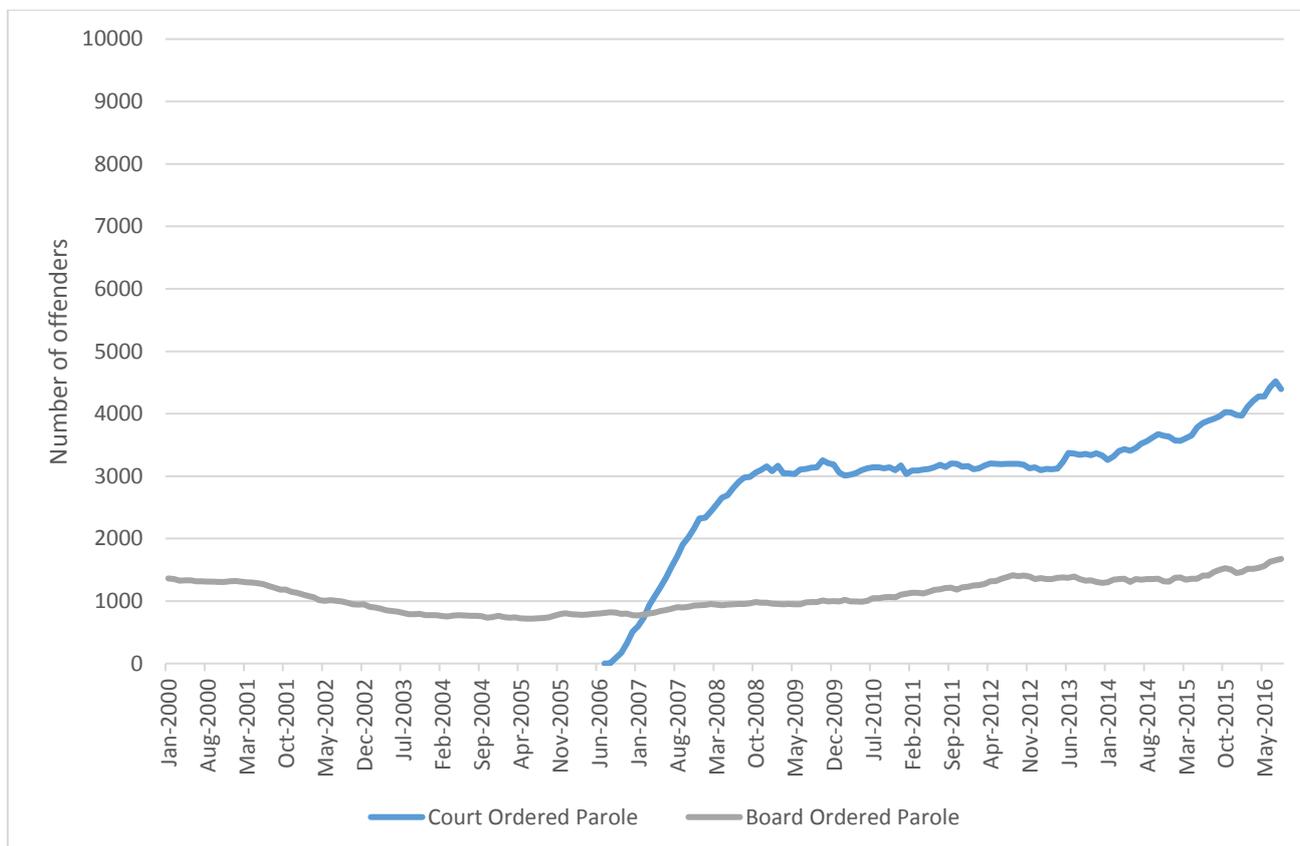
An offender must be released to parole on the date fixed by the court, unless remanded in custody for further charges. If the court fixes the date of sentence as the parole release date, the offender is immediately subject to a court ordered parole order.

An offender on court ordered parole is subject to the standard conditions of a parole order which also apply to parole orders made by a parole board. The standard conditions of a parole order under section 200(1) of the *Corrective Services Act 2000* (Qld) are that the person who is subject to the order must:

- be under the chief executive’s supervision until the end of the period of imprisonment;
- carry out the chief executive’s lawful instructions;
- give a test sample if required to do so;
- report to, and receive visits, as directed;
- notify every change in address or employment within 48 hours of the change; and
- not commit an offence.

The number of offenders on court ordered parole (as most serious order) between August 2006 and August 2016 is shown in Figure 3. The courts favored sentences of immediate imprisonment with court-ordered parole over other types of orders (such as prison/probation and intensive correction orders) and its use increased rapidly after its introduction in 2006 until stabilising at the end of 2008. The use of court ordered parole then increased again after mid-2014. This latter increase coincides with the relatively high growth in the number of offenders (especially where an illicit drug offence is the principal offence) coming into contact with the criminal justice system reported in Chapters 3 and 4.

**Figure 3: Number of offenders on court ordered parole and board ordered parole (as most serious order), August 2006 to August 2016, Queensland**



Source: QCS administrative data.

Note: Number of offenders represent the number of offenders on last day of month.

Most offenders sentenced to imprisonment will serve court ordered parole and a large proportion of these offenders do not serve time in custody. For example, in 2015–16, 44% of offenders sentenced to court ordered parole did not serve any time in custody (either on remand or under sentence) and were released to parole straight from court.<sup>32</sup> There is a question whether these offenders would have received a sentence of imprisonment if the provisions for court-ordered parole did not exist, that is, whether this sanction has led to sentence escalation. The average length of stay in custody for those offenders who do serve time in custody (either on remand or under sentenced) before being released to parole is four months.<sup>33</sup>

On average, 8 per 100 court ordered parole orders were suspended by QCS each month in 2015–16. The main reason for order suspension was the determination that the offender posed an unacceptable risk of committing a further offence. However, the majority of offenders on court ordered parole are not suspended

<sup>32</sup> QCS administrative data prepared by QCS.

<sup>33</sup> QCS administrative data prepared by QCS.

and therefore are not returned to custody under order suspension. The average number of times an offender is returned to custody under a suspension of court ordered parole was 0.55 for those offenders completing their order, 1.15 times for those failing their order and 0.36 times for those successfully completing their order.<sup>34</sup> QCS estimate that 20% of court ordered parole suspensions in 2015–16 result in the order’s cancellation.<sup>35</sup>

### 12.2.1 Consultation

Feedback received during consultations on the review suggested that when court ordered parole was introduced, some offenders who had agreed to participate in the Drug Court self-terminated from the program in the hope their participation would be taken into account in sentencing and that they would likely receive a sentence of imprisonment with court ordered parole (which can commence on the date of sentence). Although these offenders assumed that the requirement of court ordered parole would be far less onerous, it was recognised that this could result in poorer outcome for these offenders who lost priority access to services and the high level of support offered under the Drug Court program, as well as facing significant repercussions for breach.

It was generally agreed that while counter-productive to the goals of the program, court-ordered parole should continue to be available to offenders whose drug dependency has contributed to their offending as an alternative to participation in the Drug Court. On terminating from the program, there was also support for court-ordered parole being available to these offenders on the basis of equity and fairness.

## 12.3 PAROLE BOARD ORDERED PAROLE

In addition to the standard parole conditions, a parole order granted by a parole board may also contain additional conditions that a parole board reasonably considers necessary to ensure the prisoner’s good conduct or to stop the prisoner committing an offence (*Corrective Services Act (Qld)*, s 200(2)). For example, the parole board can attach conditions imposing a curfew for the prisoner, specifying where the person must live or relating to their employment or participation in a particular program, or requiring them to give a test sample. There are no identified special conditions relating to treatment, albeit that the general provision supporting additional conditions being attached would allow such conditions to be attached.

Although the number of offenders on board ordered parole is not as high as the number of offenders of court ordered parole, the number offenders on court ordered parole and board ordered parole both increased by 15% between 2014–2015 and 2015–16 (see Figure 3). Although the number of offenders on board ordered parole is not as high as the number of offenders of court ordered parole, the number offenders on court ordered parole and board ordered parole both increased by 15% between 2014–2015 and 2015–16 (see Figure 3). Although the number of offenders on board ordered parole is not as high as the number of offenders of court ordered parole, the number offenders on court ordered parole and board ordered parole both increased by 15% between 2014–2015 and 2015–16 (see Figure 3).

## 12.4 RECOMMENDATIONS

A separate review of the parole system in Queensland has recently been commissioned by the Honourable Annastacia Palaszczuk MP, Premier and Minister for the Arts and the Honourable Bill Byrne MP, Minister for Police, Fire and Emergency Services and Minister for Corrective Services and is due to report later this year. The review, which is being led by Mr Walter Sofronoff QC, is examining all facets of the parole system in Queensland, including the operation of court-ordered and parole ordered parole.

As discussed in Chapter 3 just under two-thirds (65%) of offenders sentenced to imprisonment are assessed as having a high risk of substance misuse, compared to around half (51%) of all offenders sentenced to

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<sup>34</sup> QCS administrative data prepared by QCS.

<sup>35</sup> QCS administrative data prepared by QCS.

probation. Alcohol and other drug issues also often co-occur with other criminogenic risk factors, such as mental health issues and housing and employment instability.

As the operation of parole is outside scope of the review, we do not make any specific recommendations in this regard apart from suggesting that the service levels provided to offenders subject to parole supervision be sufficient to meet an offender's assessed risk and need and additional resourcing be considered to support this outcome.

A closer level of equivalency between the treatment and supervision provided to high risk, high needs offenders subject to either court ordered or board ordered parole should theoretically provide less of an incentive for offenders to opt out of the Drug Court program where they will receive additional levels of support. It should also promote greater community safety through the rehabilitation of offenders who are sentenced and managed outside of the Drug Court program. However, the interaction between the proposed DTO and court-ordered parole is likely to remain problematic.

**Recommendation 6** Offenders with problematic drug use issues subject to parole supervision are provided with levels of treatment that are commensurate with their assessed risk and needs

Consideration should be given to:

- the enhancement of parole supervision to ensure the equivalency in treatment and supervision requirements with intensive orders such as the former IDRO, where indicated based on an offender's assessed risk and needs; and
- the provision of additional resourcing to enable offenders on parole to receive appropriate alcohol and other drug treatment to meet their assessed need.

# 13 CRIMINAL JUSTICE FRAMEWORK – MEETING THE NEEDS OF ABORIGINAL AND TORRES STRAIT ISLANDER OFFENDERS

## 13.1 OVERREPRESENTATION OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE IN THE CRIMINAL JUSTICE SYSTEM

Aboriginal and Torres Strait Islanders are overrepresented in all areas of the criminal justice system (including as victims of crime) and this overrepresentation continues to increase. For example, Aboriginal and Torres Strait Islanders accounted for 25% of the Queensland prisoner population in 2005, growing to 30% in 2011 and 32% in 2015.<sup>36</sup> In 2015, there were 13 times more Aboriginal and Torres Strait Islanders per head of population in custody than non-Indigenous people (AIHW 2016a).

As part of the Review's efforts to minimise the impact of the criminal justice system on Aboriginal and Torres Strait Islander offenders, this chapter examines Queensland's responses to Aboriginal and Torres Strait Islander drug- and alcohol-related offending and recommends the expansion of culturally-appropriate programs, interventions and sentencing orders.

## 13.2 THE INVOLVEMENT OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE IN DIVERSION PROGRAMS

While a person's contact with or progression through the justice system can be reduced through diversion programs, Aboriginal and Torres Strait Islander people have lower participation and completion rates in diversion programs, particularly among those who access mainstream programs (AIHW 2013). Research has also shown higher re-offending rates than their non-Indigenous counterparts following their participation in and completion of a mainstream diversionary program (Joudo 2008; Potas et al. 2003).

Access is also a contributory factor in the underrepresentation of Aboriginal and Torres Strait Islander offenders in diversion programs. This can relate both to barriers created by strict program eligibility criteria as well as geographical disadvantage, as specialist programs are often not located in areas in which many Aboriginal and Torres Strait Islander offenders reside.

Eligibility criteria often require a defendant to plead guilty to an offence, are targeted at individuals with a limited criminal history and have restrictions in relation to the type and severity of the offence(s) committed. Thus, eligibility criteria can unwittingly create the most significant barriers to Aboriginal and Torres Strait Islander people accessing mainstream diversion programs (AIHW 2013, p.12). In the former drug court in Queensland, for example, the referral of Indigenous offenders (approximately 10 percent of all referrals) was lower than anticipated in all five courts (Payne 2008), but in particular in the northern courts of Cairns and Townsville (Payne 2005). At the time of evaluation, the application of eligibility criteria that inadvertently prohibited many Indigenous offenders from participating on the drug court program – including violent offending histories, alcohol abuse, and residential status – was one of the factors contributing to the lower than expected referral rates.

Other factors cited by the Australian Institute of Health and Welfare (AIHW) as contributing to the lack of access to or use of mainstream diversionary programs by Aboriginal and Torres Strait Islander people include:

- inadequate understanding of the legal system and its diversionary processes;
- refusal of bail, therefore making people ineligible to participate;
- living in a community that does not have a relevant program;

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<sup>36</sup> Aboriginal and Torres Strait Islanders represented 3.6% of Queensland's total population in 2011 (ABS, Census of Population and Housing, 2011, Indigenous profile).

- difficulty accessing regional programs due to lack of transport, the distances involved and/or road closures during the wet season;
- limited support for the program by magistrates, lawyers and other court staff;
- poor communication and engagement by police, magistrates and solicitors with the offender;
- cultural issues such as the age and sex of the counsellor; and
- inconsistent use of discretion by authorities to divert a defendant.

### 13.3 INDIGENOUS COURTS

Indigenous courts were developed as a way of providing culturally appropriate and meaningful criminal justice responses to offenders of Aboriginal or Torres Strait Islander background. Versions of these courts have been implemented in the US, Canada, New Zealand and a number of jurisdictions in Australia, including the Koori Court in Victoria (in Magistrates' Court, Childrens Court and County Court jurisdictions), the Nunga Court in South Australia's Magistrates Court, and the newly reinstated Murri Court in Queensland's Magistrates Court. There are also various circle sentencing approaches and community courts in other jurisdictions.

### 13.4 MURRI COURT, QUEENSLAND

In 2016, Murri Court has been reinstated in Rockhampton, Brisbane, Caboolture, Cairns, Cherbourg, Cleveland, Inala, Mackay, Mount Isa, St George, Toowoomba, Townsville, and Wynnum Magistrates Courts.

The Murri Court is a culturally appropriate court process that respects and acknowledges Aboriginal and Torres Strait Islander culture and provides an opportunity for members of the Aboriginal and Torres Strait Islander community (including Elders and victims) to participate in the court process.

A pre-sentence bail-based diversion, the Murri Court enables eligible defendants to address the underlying contributors to their offending. When proceeding to sentence the defendant in accordance with the *Penalties and Sentences Act 1992* (Qld) or the *Youth Justice Act 1992* (Qld), the magistrate is able to take the successful completion of the program into consideration in mitigation.

While the Murri Court accepts defendants with alcohol and other drug issues, the court does not have a specific alcohol and other drug focus.

In 2014–15, 466 Aboriginal and Torres Strait Islander defendants were referred to the Indigenous Sentencing List (ISL) (predated the reinstatement of the Murri Court) and 78% of these referrals (365) were accepted. The average age of defendants referred to the ISL was 31 years and the majority were men (77%).

### 13.5 QUEENSLAND INDIGENOUS ALCOHOL AND DIVERSION PROGRAM (QIADP)

The Queensland Indigenous Alcohol Diversion Program (QIADP) was a voluntary treatment program for Aboriginal and Torres Strait Islander peoples who appeared in either the Magistrates Court for alcohol related offences, or the Childrens Court for child protection matters where alcohol use played a part.

A three-year pilot of QIADP commenced in July 2007 in three locations (Cairns, including Yarrabah; Townsville, including Palm Island; and Rockhampton, including Woorabinda) and eventually ceased operation in December 2012.

QIADP involved various Queensland government departments and agencies, including QH, QPS and QCS.

Participants were referred to the program through the criminal justice or the child protection systems. The program had two streams:

- criminal justice stream: alcohol and other drug treatment was offered to Aboriginal and Torres Strait Islander people charged with criminal offences while they were on bail, and operated as a bail-based diversionary program; and
- child safety stream: alcohol and other drug treatment and support was offered to Aboriginal and Torres Strait Islander parents involved in the child protection system.

An evaluation of the criminal justice stream undertaken by Success Works in 2010, found that QIADP achieved its objectives in relation to:

- improved health and social outcomes for participants;
- reduced levels of alcohol consumption;
- reduced levels of offending;
- improved parenting capacity; and
- diverting offenders from higher level penalties.

However, because of limitations associated with the evaluation and it being conducted during the early implementation stage, a conclusion could not be made regarding the longer-term outcomes of the program.

A subsequent recidivism study undertaken by the Specialist Courts and Diversion branch of QPS yielded mixed results. Some of the positive findings included:

- reductions in the frequency of offending, including all offences and alcohol-related offending;
- reductions in non-arrest contacts with police;
- declines in the seriousness of offending, including all offences; and
- declines in alcohol-related offending.

The greatest reductions typically occurred while participants were on the program. Other results suggested that recidivism reductions were not fully maintained once participants exited the QIADP. Overall, it was concluded that QIADP was having a small but measurable impact on the offending behaviour of participants.

An additional finding was that alcohol was not the only issue contributing to negative behaviour (e.g. domestic violence) and that QIADP needed to address a defendant's issues in a holistic manner. The success of the QIADP was also dependent on the existence of appropriate services in the community to address offending behaviour. This is worthy of note in the future design of court-based programs for Aboriginal and Torres Strait Islander people.

QIADP was not included in the programs and specialist courts to be reinstated under the current government.

### **13.6 KEY FINDINGS: INDIGENOUS COURTS**

Evidence has shown that programs that most effectively reduce reoffending are those that address the underlying criminogenic needs of offenders, such as substance abuse, poor impulse control and unemployment. As Indigenous sentencing courts are not designed with this purpose, it is perhaps not surprising that they do not have a significant effect on reoffending. Indeed, 'consideration should perhaps be given to combining circle sentencing with other programs (e.g. CBT, alcohol and other drug treatment, remedial education) that have been shown to alter the risk factors for further offending' (Fitzgerald 2008).

Notwithstanding the lack of evidence for Indigenous courts reducing recidivism, all the qualitative analyses in various evaluations have shown that 'Indigenous sentencing courts provide a more culturally appropriate sentencing process that encompassed the wider circumstances of defendants' and victims' lives, and facilitated the increased participation of the offender and the broader Indigenous community in the sentencing process' (Marchetti 2009). As these outcomes reflect the stated aims of Indigenous sentencing courts, they should thus be considered effective, at least by these measures.

The following may be seen as critical elements of Indigenous sentencing courts:

- increased dialogue and participation, including interaction between the offender and the magistrate, to enhance perceptions of procedural justice and ensure that sentences are fair and appropriate;
- a skilled and committed magistrate to ensure a culturally appropriate process; and

- the involvement of the Indigenous community in the sentencing process via Elders and Respected Persons in order to generate accountability between offenders, victims and the wider community.

Given the focus of Indigenous sentencing courts on goals that are broader than simply reducing reoffending, expectations of the impact of these courts must be both tempered and realistic.

### **13.7 ALCOHOL AND OTHER DRUG INTERVENTIONS FOR ABORIGINAL AND TORRES STRAIT ISLANDER OFFENDERS**

Alcohol is well known as a common precursor to offending amongst Aboriginal and Torres Strait Islander people, with indications that it could be a factor in up to 90 per cent of all Indigenous contacts with the justice system (Hazlehurst 1987, cited in Forensic and Applied Psychology Research Group 2005). Additionally, Aboriginal and Torres Strait Islander offenders are more likely to report being under the influence of alcohol at the time of the offence or arrest and Indigenous male offenders are more likely to be dependent on alcohol than non-Indigenous male offenders (Putt, Payne & Milner 2005).

These findings highlight the importance of implementing strategies to address harmful substance use as a means of diverting Aboriginal and Torres Strait Islander people away from the criminal justice system and into education and treatment.

An evaluation undertaken by Deloitte Access Economics (2012) of the pre-sentencing diversion of offenders into Aboriginal and Torres Strait Islander community-based, residential alcohol and other drug treatment also studied costs of the program in the context of imprisonment, recidivism, usage of mental health services and drug use and mortality among those who relapsed. This and a number of other studies (see Success Works 2010) of the effectiveness of Indigenous-specific alcohol and substance use reduction programs have generally reported improved outcomes for Indigenous clients and their communities.

### **13.8 CULTURALLY APPROPRIATE TREATMENT OPTIONS**

The over-representation of Aboriginal and Torres Strait Islanders in the criminal justice system necessitates the clear articulation of strategies that improve equity and, where possible, positively target specific cultural needs.

Identifying culturally sensitive and Indigenous-specific services is a challenge in the development of any court diversion programs. However, it is important that these services not only meet best practice treatment guidelines for the alcohol and other drug sector, but also engage in best practice principles specific to the provision of services to Aboriginal and Torres Strait Islander populations. Unfortunately, there is still limited evidence available in Australia about what constitutes good practice for Indigenous-specific alcohol and other drug treatment programs, due in large part to the lack of quality program evaluation. Of that research which does exist, the conclusions are drawn principally from research into non-Indigenous treatment programs or Aboriginal and Torres Strait Islander crime prevention programs more broadly.

In a review conducted by the National Drug Research Institute (Strempel et al. 2004), the elements of best practice across a range of Aboriginal and Torres Strait Islander alcohol and other drug projects were examined. In their conclusion, 'best practice' projects were identified as those that, in addition to using proven treatment and intervention methods, also demonstrated:

- effective management structures and procedures;
- a commitment to staff training and the provision of ongoing opportunities for professional development;
- utilisation of multi-strategy and collaborative approaches to connect with other service providers; and
- strong leadership and funding that was adequate and certain.

Also important is the need for programs to be culturally safe (Williams 1999). The concept of cultural safety can be defined as:

*“...more or less—an environment, which is safe for people; where there is no assault, challenge or denial of their identity, of who they are and what, they need. It is about shared respect, shared meaning, shared knowledge and experience, of learning together with dignity, and truly listening” (Williams 1998: 2).*

For a program or service to be culturally safe it requires:

- respect for culture, knowledge, experience, obligations;
- no assault on a person's identity;
- clients to be treated with dignity;
- clearly defined pathways to empowerment and self-determination;
- culturally appropriate service delivery/environment;
- the right to promote, develop and maintain own institutional structures, distinctive customs, traditions, procedures and practices;
- recognition of more than one set of principles or way of doing things;
- access to organisational and communication skills, financial resources, administration support, appropriately trained and resourced staff, and political resources, which are prerequisites for effective participation in the system of the 'dominant culture';
- commitment to the theory and practice of cultural safety by personnel and trained staff;
- debunking the myth that all Indigenous people are the same;
- working with where people are at and not where you want them to be; and
- recognition of the individual right for persons to make their own mistakes (Williams 1999, pp. 6–7).

Similarly, international literature from the United States, Canada and New Zealand suggests that a strong focus on spirituality and culture is good practice in Aboriginal and Torres Strait Islander residential treatment programs (e.g. Adamson et al. 2010; Health Canada 2010; Nebelkopf & Wright 2011; Paki 2010).

Principles of good practice can also be drawn from other areas of community-based service delivery for Aboriginal and Torres Strait Islander communities, including crime prevention. Past research has shown that projects delivered in regional and remote Aboriginal and Torres Strait Islander communities need to:

- involve local Aboriginal and Torres Strait Islander persons in the development of the project, including Elders and other respected persons from the community;
- promote the project within the wider community and work to build community support and where possible, involvement;
- involve Aboriginal and Torres Strait Islander personnel in the delivery of project activities and where this is not possible, ensure staff are provided with appropriate and adequate cultural awareness and sensitivity training;
- adopt an holistic approach to Aboriginal and Torres Strait Islander health and well-being, which takes into consideration the range of societal, cultural, community, family and individual factors that may impact upon a person's behaviour;
- be sensitive to the traditional value systems and practices of the particular community in which they are being implemented and adapt the mode of delivery accordingly;
- meet the needs of Aboriginal and Torres Strait Islander people at risk of becoming involved in crime by providing specific content;
- engage the participant's family and community in programs and services;
- develop strategies to overcome language and literacy barriers;

- consider eligibility criteria where programs are open to both Aboriginal and Torres Strait Islander and non-Indigenous participants to ensure that Aboriginal and Torres Strait Islander people can access the program;
- work to build the capacity of local communities to continue to develop and implement initiatives to improve community safety;
- establish and strengthen relationships with Aboriginal and Torres Strait Islander persons who are able to mentor others;
- be supported by good governance at the organisation, community and government levels;
- have ongoing government support including human, financial and physical resources; and
- include measures of performance that go beyond reductions in crime and victimisation rates (Cunneen 2001; Robinson et al. 2009; SCAG 2009; SCRGSP 2009).

### 13.9 CONSULTATION

The review consulted with the Aboriginal and Strait Torres Islander Legal Service (ATSILS) and Indigenous Justice Officers from Far North Queensland regarding the low referral rates of Aboriginal and Torres Strait Islander defendants to court diversion programs (with the exception of Murri Court), the barriers faced by Aboriginal and Torres Strait Islander defendants accessing such programs, the appropriate cultural intervention programs and service provision models, and program models that would address the identified issues.

Comments and suggestions included that:

- ‘Services not sentences’ is the primary issue that would impact upon offending behaviour and alcohol and other drug use in Aboriginal and Torres Strait Islander communities. The funding of culturally appropriate services was considered essential to avoid programs simply ‘window dressing’.
- The availability of culturally sensitive treatment programs may play an important role in the willingness of drug-dependent Aboriginal and Torres Strait Islander offenders to engage with an intensive drug rehabilitation program.
- The community must have confidence and be comfortable with the service providers to which Aboriginal and Torres Strait Islander defendants are referred.
- The needs of Aboriginal and Torres Strait Islander people need to be dealt with holistically.
- As Murri Court is a ‘known brand’, legal representatives have more confidence in referring Aboriginal and Torres Strait Islander defendants to this program versus other diversion programs about which there is a perception that referrals may be ‘setting the client up to fail’.
- The engagement of supportive family was emphasised especially in maintaining the motivation of the defendant and in assisting with relapse-prevention strategies.
- A single case manager working with the offender and co-ordinating other service delivery is absent from current court diversion programs and is regarded as an important element in engaging Aboriginal and Torres Strait Islander people. The court process was described as constituting only 5 per cent of the event, whilst the other 95 per cent of the order is case management and rehabilitation.
- There could be a dovetailing of court diversion programs under the auspices of the Murri Court with the same Elders and community members being involved across all programs. This may make mainstream diversion programs more palatable to the Aboriginal and Torres Strait Islander community, while the ongoing involvement of Elders could act as a motivator for the defendant.
- In some locations, the Community Justice Groups work closely and effectively with Aboriginal and Torres Strait Islander defendants providing support and organising appropriate referral pathways.
- In relation to Drug Court specifically, twice weekly reporting to the court was regarded as too onerous and too costly in terms of transport for some Aboriginal and Torres Strait Islander defendants. Under the former Drug Court, there was a view that Aboriginal and Torres Strait Islander defendants were deemed ineligible for reasons, such as low IQ, that may not have been valid.

## 13.10 RECOMMENDATION

**Recommendation 7** Programs, interventions and sentencing orders should appropriately meet the needs of Aboriginal and Torres Strait Islander offenders.

To ensure that programs, interventions and sentencing orders appropriately meet the needs of Aboriginal and Torres Strait Islander offenders, it is recommended that consideration be given to:

- clear articulation of strategies that improve equity and, where possible, positively target specific cultural needs;
- identification of community-controlled or Indigenous specific services, or mainstream services that deliver culturally safe, competent, appropriate and responsive to Aboriginal and Torres Strait Islander people;
- best practice principles specific to the provision of Aboriginal and Torres Strait Islander services are adopted;
- ensuring that programs are ‘culturally safe’ and participants and their identity are respected;
- the inclusion of Aboriginal and Torres Strait Islander staff to assist in the motivation, support and retention of Aboriginal and Torres Strait Islander offenders in court-based interventions;
- developing linkages between Murri Court and other court based interventions;
- making any new sentencing orders, with supervision and intervention, equally available to the Murri Court including orders with a judicial monitoring component; and
- incorporating elements of the Murri Court into the Drug Court to make it a culturally safe environment, such as the participation of Elders.