



STATUTORY REVIEW OF THE
SENTENCING ACT 1995 (WA)
Department of the Attorney General

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**Statutory Review of the
*Sentencing Act 1995 (WA)***

Table of Contents

1. Executive Summary
2. Introduction
 - a. Purpose of the Review
 - b. Scope of the Review
 - c. Process of the Review
3. Background
 - a. History of the Act
 - b. The *Sentencing Act 1995 (WA)*
4. Review of selected parts of the *Sentencing Act 1995 (WA)*
 - a. Part 2 – General matters
 - b. Part 3 – Matters preliminary to sentencing
 - c. Part 3A – Pre-sentence order
 - d. Part 5 – Sentencing options
 - e. Part 6 – Release of offender without sentence
 - f. Part 7 – Conditional release order
 - g. Part 8 – Fine
 - h. Part 9 – Community based order
 - i. Part 10 – Intensive supervision order
 - j. Part 11 – Suspended imprisonment
 - k. Part 12 – Conditional suspended imprisonment
 - l. Part 13 – Imprisonment
5. Ancillary issues
6. Summary and conclusion
7. References
8. Appendices
 - a. List of stakeholders
 - b. Issues and Questions Paper
 - c. Table: Standard non-parole periods *Crimes Act 1999 (NSW)*

1. Executive Summary

This review fulfils the requirement of s. 150 of the *Sentencing Act 1995* (WA) ('the Act'). The overarching purpose of this report is to determine, on balance, whether the policy objectives of the Act remain valid and whether the terms of the legislation remain appropriate for securing those objectives.

It is worthy of particular mention that since its commencement in 1995, there has been a distinct lack of significant issues or negative feedback arising from the operation of the Act. As such, the Department has taken an unhurried approach to conducting a thorough analysis of selected critical stakeholders' views in preparing this report. It must also be noted that this legislative review is *not* about the quantum of sentences which has attracted debate over the years, rather, it is the actual construction of sentences that form the basis of this review.

Not surprisingly, the majority of stakeholders expressed their satisfaction with most parts of the Act, and were particularly supportive of ensuring judicial officers maintain as much discretion as is required to adequately respond to individual offender situations. There were numerous issues that attracted significant comment that regrettably fall outside the ambit of this legislative review. Nevertheless, these issues that generally pertain to resourcing and administrative processes are noted for reader reference.

The sentencing options that have inspired the greatest impetus for change are in Fines, Community Based Orders and understandably, Imprisonment. Fines are clearly regarded as an effective sentencing option as they are used in over 80% of cases in the Magistrates Courts. This report highlights some fine options that could be improved by expanding flexibility in the imposition of fines. These include:

- a suspended fine option that could also be viewed as an equivalent to a Conditional Release Order with bond forfeiture;

- a partially suspended fine option that would be particularly appropriate for Indigenous offenders; and
- a stand-alone community work order as a direct alternative to a fine, where hours of work can be equated to a specific fine amount.

Furthermore, it may be worthwhile considering a process where fines can, as soon as they are imposed, be referred to the Fines Enforcement Registry so that time-to-pay arrangements can be entered into promptly.

Similarly, this report has identified the need to consider a more flexible approach to Community Based Orders (CBO), such as:

- investigating opportunities to engage community based organisations, such as Aboriginal corporations, and examining alternative solutions to marry CBO requirements with individual skill deficits;
- using a formalised graded approach to ensure a compliance regime that produces more obvious compliance outcomes;
- widening eligibility for a pre-sentence order (PSO) to include CBOs (as well as Intensive Supervision Orders and Suspended Imprisonment) so that in the event that the offender has completed a court ordered treatment program successfully, court may order an immediate spent conviction order.

At the far end of the sentencing hierarchy, the report indicates increased flexibility of conditions for suspending imprisonment, such as introducing partially suspended sentences, and electronic tagging that may offer a greater range of credible, rehabilitative and cost effective alternatives. These should be considered in preference to any proposal for periodic detention. Perhaps the most critical amendment to the legislation that has attracted the most debate in recent years, concerns returning minimum imprisonment sentences from six month to three months.

This report provides the Government with a basis for continual improvement to an Act which has served the State well, through its judicial officers for over fifteen years.

2. Introduction

The *Sentencing Act 1995 (WA)* plays a pivotal role in guiding judicial officers in the sentencing of offenders. It, together with the *Sentencing Administration Act 2003*, covers all aspects of sentencing and sentence administration in the state. In introducing this review, it is important to emphasize that since its commencement in 1995, there has been little negative feedback received about the current Act. The distinct lack of significant issues pertaining to the Act has furthermore resulted in an unhurried approach to its review.

A second distinction must be made by way of introduction and that is to explain the substance and limitation of this legislation. It must be abundantly clear that the *Sentencing Act 1995 (WA)* (the 'Act') is *not* about the quantum of sentences which, for many years, has attracted a great deal of community debate. Rather, this review concentrates on factors to be considered in sentencing, and the actual construction of sentences.

2a. Purpose of the Review

As mentioned above, the review is an explicit requirement of Section 150 of the *Sentencing Act 1995 (WA)*, inserted into the Act in 2006 by the *Parole and Sentencing Legislation and Amendment Act*. It aims to determine:

- whether the policy objectives of the legislation remain valid; and
- whether the terms of the legislation remain appropriate for securing those objectives.

2b. Scope of the review

The agency responsible for this review is the Department of the Attorney General. As mentioned earlier, the limitation of the focus is on ‘sentence construction’, and as there have been no fundamental problems with the Act, it was decided to confine viewpoints to a limited group of key stakeholders.¹ Judicial officers of all ranks, together with representatives from organisations such as the Prisoners Review Board, Department of Corrective Services Sentencing Management Unit, academics, the Law Society of WA etc, were identified as the critical stakeholders in a review of this type of Act.

2c. Process of review

Rather than using interviews and other open-ended processes, and for reasons stated earlier, a targeted approach for gaining feedback using an ‘Issues and Questions’ paper was used. The paper, prepared by the Policy team, was stimulated by a balanced and informed debate highlighting issues regarding key elements of the current *Sentencing Act 1995* (WA) and presenting equivalent legislations from other jurisdictions based on an environmental scan of sentencing initiatives in Australia and overseas. The narrative within the paper was explicit in that these sentencing options *did not* represent the views of the current government.

Over twenty stakeholders representing judicial officers, key justice departments and academics submitted feedback. Upon gathering this information and discussion points, a thematic analysis of results was undertaken utilising a balanced approach in tackling dissenting views. Whilst the Issues and Questions paper did not necessarily follow the sequential order of the Act, for ease of reference, readability and understanding, this report does.

¹ The full list of key stakeholders is appended.

3. Background:

3a. History of the Act

Prior to the introduction of the *Sentencing Act 1995 (WA)* and the *Sentence Administration Act 2003*, legislation governing sentencing was contained in the *Criminal Code Act 1913*, the *Offenders Community Corrections Act 1963* and the *Fines and Penalties Appropriation Act 1909*.

Development of the *Sentencing Act 1995 (WA)* between 1993 and 1995 was informed by:

- *Report on Parole, Prison Accommodation and Leave from Prison in WA* [The Palmer Report] 1979;
- *Report of the Committee of Inquiry into the Rate of Imprisonment* [The Dixon Report] 1981;
- *Review of the Criminal Code 1913* [Murray Report] (1987);
- *Report of the Joint Select Committee on Parole* [The Halden Report] 1991; and
- *Report of the Joint Select Committee on Parole* (1993); and
- *Review of Remission and Parole* [Hammond Report] (1998).

On 4 November 1996 the *Sentencing Act 1995 (WA)* and the (then) *Sentence Administration Act 1995 (WA)* commenced operation. These Acts and subsequent amendments have since introduced a raft of changes to sentencing in Western Australia including:

- abolition of 6 months or less prison sentences;
- introduced principles of sentencing into the Act, in particular the proportionality principle, “A sentence must be commensurate with the seriousness of the offence” (56(1)); and
- introduced aggravating and mitigating factors into the Act.

3b. Sentencing Act 1995 and Sentencing Administration Act 2003

The *Sentencing Act 1995 (WA)* provides for the sentencing of all persons convicted of an offence and offers a wide range of sentencing options for the courts. It deals with the construction of sentences and is the essential guide for sentencing for Judges, Magistrates, Justices of the Peace, Director of Public Prosecutions and Police Prosecutors and legal practitioners who deal with sentencing.

The *Sentence Administration Act 2003 (WA)* covers custodial terms, prisoner reports, parole and release, community corrections, and the Prisoners Review Board. In effect, it operationalises some of the provisions of the *Sentencing Act 1995 (WA)*.

Other legislation that interacts with these Acts includes:

- *Young Offenders Act 1994;*
- *Children's Court of Western Australia Act 1988;*
- *Magistrates Court of Western Australia Act 2004;*
- *District Court of Western Australia Act 1969;*
- *Supreme Court Act 1935;*
- *Criminal Code 1913;*
- *Fines, Penalties and Infringement Notices Enforcement Act 1994;*
- *Bail Act 1982;*
- *Prisons Act 1981; and*
- *Criminal Procedure Act 2004.*

4. Overview of the Parts of the Act

The **bold** entries indicate the parts of the Act that come under specific review.²

Part 1 – *Preliminary*

Part 2 – General matters

Part 3 – Matters preliminary to sentencing

Part 3A – Pre-sentence order

Part 4 – *The sentencing process*

Part 5 – Sentencing options

Part 6 – Release of offender without sentence

Part 7 – Conditional release order

Part 8 – Fine

Part 9 – Community based order

Part 10 – Intensive supervision order

Part 11 – Suspended imprisonment

Part 12 – Conditional suspended imprisonment

Part 13 – Imprisonment

Part 14 – *Indefinite imprisonment*

Part 15 – *Other orders forming part of a sentence*

Part 16 – Reparation orders

Part 17 – Other orders not forming part of a sentence

Part 18 – Amending and enforcing conditional release orders and community orders

Part 19 – Royal Prerogative of Mercy

Part 20 – Miscellaneous

² Parts of the Act that are *italicised* are not part of this review.

Part 2: General Matters

Division 1: Sentencing Principles

It is possible that the Principles of Sentencing do not clearly articulate the purposes that are being sought through the sentencing process. In considering a review of this section, information was gathered around the following key areas:

- a) Currency of the Principles;
- b) Purposes of sentencing;
- c) Imprisonment as a last resort;
- d) Significance of the Principles;
- e) Specifying factors that constitute 'aggravation' and 'mitigation';
- f) Simplifying the definition of 'aggravation' and 'mitigation';
- g) Drugs or alcohol as a circumstance of aggravation;
- h) Culpability and harm

a) Currency of the Principles

Stakeholders were asked if the current principles are still relevant today or whether they should be updated. A clear majority of stakeholders indicated that these principles remain adequate and no amendments are required. However, the sub-sections below indicate possible improvements that may provide added support and credence to the Principles.

Conclusion 1: This report indicates that the majority of stakeholders agreed that the current Principles of Sentencing are still relevant and do not warrant further review.

b) Purposes of Sentencing

In contrast to other Australian sentencing legislation, for example the *Young Offenders Act 1994 (WA)*, the *Sentencing Act 1995 (WA)* does not have a purpose or objectives section. In 2009 a Law Reform Commission of Western Australia

consultation paper on Court Intervention Programs³ proposed an amendment to the Act to set out the purposes of sentencing as follows:

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

In response to the need to set out the purposes of sentencing in the Act, stakeholders were divided. Those in favour suggested it would be useful and appropriate, but emphasised the importance of providing that no one purpose was paramount to another. Her Honour Chief Judge Antoinette Kennedy (now retired) supported their inclusion on the condition that, “the statement of purpose does not interfere with judicial discretion.”

The Director of Public Prosecutions (DPP) argued in favour of a hierarchical approach to prioritising the purposes of sentencing on the basis that the protection of the community is indeed the overarching purpose of sentencing, and that other purposes, i.e. punishment, deterrence, rehabilitation, prevention, denunciation, etc., are merely strategies which service this overall purpose, adding that it “may also assist in developing public understanding of when sentences other than imprisonment may be appropriate, including suspended imprisonment, which is not well understood by the public”.

³ Law Reform Commission WA, 2009, *Court Intervention Programs: Consultation Paper*, Project No. 96, (Recommendation 11: p43) available online at <http://www.lrc.justice.wa.gov.au/>

Opposing the amendment, Mr Richard Bayly suggested, “the purpose of sentencing is already incorporated in the principles of Sentencing and to legislate the purpose would be of little benefit”, while Hon. Chief Justice Wayne Martin posited, “the amendment proposed in the LRC Consultation paper is an unnecessary codification of the present law.”

Conclusion 2: On balance, there appears to be little need to introduce a ‘Purpose of Sentencing’ section to the Act, and if one is included, this report suggests that no specific purpose be paramount to others.

c) The principle of imprisonment as a last resort

There was strong stakeholder support for explicitly stating that imprisonment should be a sentence of last resort, similar to that in Section 7(h) of the *Young Offenders Act 1994*. The Chief Justice, the Aboriginal Legal Service of WA (ALSWA) and The Law Society of Western Australia, all indicated that it is an important principle and should be expressly stated. On the other hand, the DPP argued that this concept is already present in Sections 6(4) and 39(3) of the current Act and that its inclusion as a separate principle “may lead to confusion and potential inconsistencies in application”. Most other legislation in Australia does not have such a specific principle.

In support of the inclusion of such a principle, the Department for Corrective Services (DCS) indicated the need to particularly emphasise Aboriginal offenders:

...similar to that of the Canadian principles which states: ‘...all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders’.

Conclusion 3: On balance, this report concludes that the fundamental intent of the principle of ‘imprisonment as a last resort’ is already implicit in Sections 6(4) and 39(3), and therefore there is no need to have it explicitly stated.

d) Significance of the Principles

Stakeholder views on whether special significance should be attached to Section 6: Principles of Sentencing were varied. The Hon Chief Justice Wayne Martin advised that “the principles of sentencing are fundamental to the sentencing process, and are deserving of special significance”. However Government agencies and the Legal Profession did not share this view. They recommended that no more significance than is already indicated in the wording and meaning of Section 6: Principles of Sentencing is necessary and did not advocate any change.

Conclusion 4: On balance, this report concludes that the current wording of the Act adequately reflects the significance of the Principles of Sentencing, and there appears to be little reason to recommend any change.

e) Specifying factors that constitute ‘aggravation’ and ‘mitigation’

Aggravating factors are factors which in a court’s opinion increase the culpability of the offender. The *Sentencing Act 1995* (WA) clarifies that an offence is not aggravated by an offender not pleading guilty to the offence or if an offender has a criminal record. Mitigating factors include an early plea of guilty and other factors which in the court’s opinion, decrease the culpability of the offender or decrease the extent to which the offender should be punished.⁴

Interestingly, the *Criminal Code 1913* defines ‘circumstances of aggravation’ slightly differently, depending on the situation (for example, Section 80i, Part V and Part XXXI). There are arguments to suggest that where definitions are more explicitly

⁴ Note: The Government, pursuant to an election commitment, is currently investigating the discounting of sentences in respect of early guilty pleas. As such, this review will not specifically address issues in this area.

codified there will be less confusion about what constitutes aggravating and mitigating circumstances.

Courts currently exercise full discretion in the consideration of these factors in accordance with sections 7 and 8 of the *Sentencing Act 1995 (WA)*, as well as decisions of the Court of Appeal. In contrast, in the United States of America, through a matrix or grid sentencing, aggravating and mitigating circumstances are quantified and applied in a formulaic way in sentencing.

The majority of stakeholders did not support a more specific definition of aggravating and mitigating factors. For example, former Chief Judge of the District Court, Her Hon Judge Antoinette Kennedy stated:

It would be impossible to legislatively identify the myriad of circumstances that may provide mitigation or aggravation in relation to an offence and an offender and factors that are aggravating or mitigatory will often reflect current community values.

The ALSWA reinforced this position:

That given the myriad of different circumstance before a court, it would be inappropriate to limit the court in its consideration of what is an aggravating or mitigating factor, specifying the effect that mitigating or aggravating features may have on a sentence unnecessarily fetters the judicial sentencing discretion.

Stakeholders also proposed an option of 'standard non-parole periods (refer to Part 13 (d) on page 60 of this report) as a possible compromise between full discretion on those matters and the tight controls imposed by a sentencing matrix or grid.

Conclusion 5: On balance, this report concludes that the current definitions of aggravating and mitigating factors in Sections 7 and 8 of the *Sentencing Act 1995 (WA)* are adequately specific and allow appropriate consideration and use of discretion in all of the relevant factors particular to each case.

f) Simplifying the definition of ‘aggravation’ and ‘mitigation’

On the issue of simplifying the definitions of aggravating and mitigating factors as per the UK Sentencing Advisory Panel consultation paper⁵, stakeholders offered little support. For example, the DPP commented that the UK proposal “runs the risk of narrowing the range of aggravating factors too much” and “by adopting the UK proposal [it] would limit the discretion of the court and reduce the court’s flexibility to take into account important factors which may increase the culpability of the offender in the circumstances”. The ALSWA agreed, adding that:

[t]he range of aggravating and mitigating circumstances is potentially very wide and therefore should not be circumscribed in the legislation. Any attempt to do so would place an unnecessary and appropriate limitation on the applicability of the section.

Conclusion 6: The Issues paper raised ‘simplification’ as an issue which could be considered, but overwhelmingly, stakeholders agreed that there is no need to further simplify definitions of aggravating and mitigating circumstances as they are adequately specific in the Criminal Code and allow important sentencing discretion weighing up relevant factors particular to each case.

g) Drugs or alcohol as a circumstance of aggravation or mitigation

Stakeholder feedback was generally not supportive of specifically identifying the ingestion of drugs or alcohol as a circumstance of aggravation, on the grounds that it would limit judicial discretion and, in any event, is already legislatively recognised as such, in s. 28 of the *Criminal Code 1913*.

⁵ Available online at <http://www.sentencing-guidelines.gov.uk/docs/Consultation%20paper%20on%20overarching%20principles%20of%20sentencing.pdf>

The DPP was resolute in stating that the use of drugs or alcohol voluntarily ingested should not in any circumstances be regarded as a mitigating factor. Further, the DPP suggested that if drug and/or alcohol ingestion was to be specified as a circumstance of aggravation, the legislation should explicitly provide for a higher penalty to ensure consistency (e.g. Aggravated Burglary).

This view point is substantiated further in the *Road Traffic Act 1974*. Specifically identifying the ingestion of drugs or alcohol as a circumstance of aggravation under Section 59 which prescribes that:

[i]f a person (the 'driver') is involved in an incident occasioning the death of, or grievous bodily harm to, another person and the driver was, at the time of the incident, driving a motor vehicle while under the influence of alcohol, drugs, or alcohol and drugs to such an extent as to be incapable of having proper control of the vehicle, the driver is deemed to have committed the offence in circumstances of aggravation.

The legislation prescribes that:

[t]he driver, if convicted under this section, is liable to a fine of any amount and to imprisonment for 20 years, if the person has caused the death of another person or, a fine of any amount and 14 years if the person has caused grievous bodily harm. However, in situations where drugs or alcohol are not deemed to be aggravating circumstances, (i.e. other dangerous driving such as speeding), the driver is liable to a fine of any amount and to imprisonment for 10 years and 7 years respectively.

Conclusion 7: Many judicial stakeholders believed that ingestion of drugs should not be specifically defined as either an aggravating or mitigating circumstance. Nevertheless there are now a number of precedents, e.g. *Road Traffic Act*, for ingestion of drugs to be defined as a circumstance of aggravation. Whilst there are differences between the road traffic law and criminal law, there could be merit in considering the introduction of proved ingestion of prohibited drugs as a circumstance of aggravation.

h) Culpability and harm

Stakeholders provided feedback as to whether concepts of ‘culpability’ and ‘harm’ should be included in the *Sentencing Act 1995 (WA)*. The question of separately identifying ‘culpability’ and ‘harm’ arises from its introduction into the *Criminal Justice Act 2003 (UK)* at s. 143(1) which reads:

In considering the seriousness of any offence, the court must consider the offender’s culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused.⁶

It goes on to identify the four levels of criminal culpability, whereby the offender:

1. Has the *intention* to cause harm, with the highest culpability when an offence is planned. The worse the harm intended, the greater the seriousness;
2. Is reckless as to whether harm is caused, that is, where the offender appreciates at least some harm would be caused but proceeds giving no thought to the consequences even though the extent of the risk would be obvious to most people;
3. Has knowledge of the specific risks entailed by his actions even though he does not intend to cause the harm that results; and
4. Is guilty of negligence.

Stakeholders were unanimous in their opposition to such concepts being specifically identified in the *Sentencing Act 1995 (WA)*. For example, Mr Richard Utting asked the question, “[w]hy should we adopt a failed policy from the UK?”, and Hon. Wayne Martin who argued, “issues of culpability and harm are already taken into account within the general sentencing discretion.”

Other stakeholders agreed that sentences routinely take into account the degree of culpability and the harm caused when deciding on an appropriate sentence.

⁶ *Criminal Justice Act 2003 (UK)*; s. 143(1)

Conclusion 8: On balance this report suggests that there is no need to specifically stipulate culpability and harm in the Act or guidelines as they are already taken into account within general sentencing discretion.

Part 3: Matters preliminary to sentencing

Division 4: Victim Impact Statements (VIS)

The *Sentencing Act 1995* (WA) enables the victim of an offence to provide the court with the particulars of any injury, loss, or damage suffered by the victim as a direct result of the offence by way of Victim Impact Statements. Stakeholders were invited to comment on the role of victims in sentencing and provided responses that fall into the following categories:

- a) Definition of 'victim';
- b) Disclosing content of VIS to defence counsel prior to sentencing;
- c) Support for victims to submit a VIS;
- d) Use of VIS in court.

a) Definition of 'victim'

Although the term 'victim' is defined under ss. 13 and 116⁷ of the *Sentencing Act 1995* (WA), stakeholders argued that the Act does not adequately recognise secondary victims, for example when an assault on a victim results in death, or when the victim is a child. One stakeholder also recommended expanding the definition to include people who suffer mental and emotional distress as a direct result of an offence as 'victims'. The DPP Prosecutions posited that:

⁷ Definition of 'victim' in s.13 of the Act: (a) person who, or body that has suffered injury, loss or damage as a direct result of the offence, whether or not that injury, loss or damage was reasonably foreseeable by the offender; (b) where the offence results in a death, any member of the immediate family of the deceased. Definition of 'victim' in s.116 of the Act: a person who or which has suffered loss of or damage to his, her or its property as a direct or indirect result of the offence

A more serious problem with VIS is evident when the result of the offence is a death, and the offender is found guilty of an offence leading to the death, but not criminally responsible for the death itself. Obvious examples are one punch cases where the offender is acquitted of homicide, but convicted of another crime, for example, assault occasioning bodily harm. In such cases, VIS that detail the impact of the death on the secondary victims are strictly inadmissible (*Hooper v. The Queen* (2003) WASCA 179; (2003) WAR 264) and some judges have refused to accept them causing needless distress to family members. The DPP is aware that other judges have, in fact accepted them, referred to them sensitively as part of sentencing, but been careful to ensure that the sentence does not miscarry as a result. Some amendment to the Act would be beneficial to allow for statements from secondary victims to be allowed, as it is strictly improper for a prosecutor to even tender such a VIS.

Conclusion 9: This report acknowledges the situations raised by the DPP and suggests there may be merit in amending the *Sentencing Act 1995* (WA) to enable secondary victim statements to be admissible to the court.

In cases where a child is the victim, the DPP also noted that it is not uncommon for parents to supplement a child's statement where a child is the victim. However, according to Ms Kay Benham, former Director of Court Counselling and Victim Support Services, such a statement was ruled inadmissible. She therefore recommended that whilst a child's right to make a statement be retained, a parent should be able to add important information for the court to take into account. Furthermore, in these circumstances she proposed that parents have a right to submit their own statement.

Conclusion 10: Consistent with the status of children, particularly those under sixteen, and the fact that a statement from a parent was ruled inadmissible recently, it is suggested that there may be merit in allowing supplementary statements by parents or legal guardians of children to be submitted to the judge.

b) Disclosing content of VIS to defence counsel prior to sentencing

Many stakeholders identified a number of issues in relation to the process of providing a victim impact statement to the court via the provisions of ss. 24, 25 and 26 of the Act. The former Director of Court Counselling and Victim Support Services and the former Chair of the Victims Reference Group suggested changes to either the *Sentencing Act 1995 (WA)* or the *Criminal Procedures Act 2004* in relation to disclosure of material contained in a victim impact statement, citing:

...there have been some instances where defence counsel have obtained copies of the victim impact statement prior to sentencing and have used this information to question the creditability of the victim... It is suggested that legislative changes are required to the *Sentencing Act 1995 (WA)* so that the victim impact statements cannot be disclosed to the accused or the defence counsel prior to sentencing, unless it can be demonstrated that there is material evidence in the statement that is directly relevant to the charge. And then only that material that is relevant to the charge be disclosed...

Hon Cheryl Edwardes, former Chair of the Victims of Crime Reference Group clarified the position with “[m]aterial should not be considered relevant to the charge unless it bears on the circumstances of the offence and is not relevant merely because it bears upon the demeanour or credibility of the victim”.

The DPP also supported partial disclosure stating that “[s]ome limitation is placed on the disclosure of a VIS, or appeals arising from them, so that they are limited to VIS that are directly relevant to matters of issue and not to character or general credibility”.

Conclusion 11: Based on feedback in relation to this issue, this report is supportive of applying some legislative limits to the ability of defence to have copies of the Victim Impact Statement prior to sentencing.

c) Support for victims to submit a VIS

Whilst not strictly a legislative issue, the process and frequency of victim impact statements being presented to the court attracted significant criticism from stakeholders who were generally in favour of enabling greater support for victims wishing to submit a victim impact statement. Chief Justice, Hon Wayne Martin conceded, “[t]he impression from the Bench is that such reports are presented on a fairly ad hoc basis”. Former Chief Judge Hon Antoinette Kennedy added:

It is therefore disappointing that victim impact statements are not received more often in the course of the sentencing process. The DPP provides victim impact statements to the judge. Some judges do not consider this to be appropriate... It is the view of some judges that the lawyer from the DPP should not have ownership of a victim impact statement and that a victim impact statement should be provided to the court by an independent officer so that the court is confident that it will receive the statement in time. The DPP is the prosecuting authority. The DPP should not be seen as the advocate for victims in the sentencing process.

The former Chair of the Victims of Crime Reference Group suggested that the prosecuting agency should refer the victim to an appropriate victims service for assistance in preparing the victim impact statement. However, Chief Justice Hon Wayne Martin expressed concerns that this may lead to separate representation of victims at the time of sentence:

It could well result in a “bidding war” and raise unjustified expectations as to the likely sentence. What is required is for victims to be provided with the full opportunity to express their views and to see that those views have been taken into account.

Conclusion 12: Discussion on this topic concerned the proper application of s. 24 of the *Sentencing Act 1995* (WA) and the role that the DPP plays as a necessary intermediary between the victim and the court. This report concludes that s. 24 is clear in providing for a victim to give a statement to the court and demonstrates the intent that this should occur. Whilst it is argued that the *process* of putting Victim Impact Statements before the court may require further consideration, this is an administrative matter and beyond the scope of this legislative review.

d) Use in Court

Following on from this, the former Director of Court Counselling and Victim Support Services suggested (as per the provisions of s. 25(1) of the *Sentencing Act 1995 (WA)*) that provision be made for the victim impact statement to be read in court:

In practice this usually occurs by request to the court and at the discretion of the judicial officer. It is felt that should the victims in any case that has resulted in death or total permanent incapacity wish to read their statement to the court, the court should be obliged to allow them to do so.

Hon Cheryl Edwardes, former Chair of the Victims of Crime Reference Group, agreed, further suggesting:

A victim of a criminal offence should be able to make a victim impact statement to the court sentencing the person found guilty of the offence, and unless the court orders otherwise, that statement should be considered by the court in determining the sentence of the offence, in accordance with ss. 14, 25 and 26 of the *Sentencing Act 1995 (WA)*.

Conclusion 13: Stakeholder concerns about cases involving death of the primary victim are valid. However, in response to stakeholder suggestions that courts should be 'obliged' to allow victims or secondary victims to read statements to the court, it is necessary to highlight the fact that the Act (s. 24.1) as written, does not preclude this from happening. Whilst this report maintains that the use of the word 'obliged' may impinge on the integrity of the court, consideration could be given to introducing a presumption in favour of a victim's statement being heard in court.

Part 3: Matters Preliminary to sentencing (cont.)

Division 5: Mediation

Division 5 of the *Sentencing Act 1995 (WA)* deals with offender/victim mediation in the form of mediation reports which the court can request and receive. Currently the DCS and others provide mediation and associated reports to the courts pursuant to the Act. Stakeholders were invited to comment on the extent of their use and

whether they could be enhanced. Responses largely fall into the following categories:

- a) Use of mediation reports in court;
- b) Aboriginal communities;
- c) Role of the victim in sentencing.

a) Use of mediation reports in court

Stakeholders indicated that whilst mediation may be appropriate for non-serious offences involving property (theft or damage), it is not the case for offences involving violence, due to the victim unlikely to want to engage with the perpetrator in any way. Judicial officers confirmed that whilst offender/victim mediation is used on a regular basis in the Magistrate's Court, it is rarely used in the superior criminal courts.

Former Chief Judge of the District Court, Her Honour Antoinette Kennedy, argued that superior courts should play a greater role in restorative justice. She suggested:

Offender/victim mediation may allow the offender to demonstrate remorse to such an extent that the imposition of an immediate term of imprisonment is no longer the only appropriate action. Offender/victim mediation would also allow the victim to have a greater voice in the court and give the victim the assurance that the offender is aware that a crime has been committed and that a person has suffered as a result of the crime. Offender/victim mediation should be extended so that it is a part of the sentencing process in the District Court.

The DPP did not favour the use of mediation, particularly in superior courts. Not only do victims refrain from requesting mediation, but requests for mediation from the bench are rarely raised. Likewise, defence counsel rarely raise it due to the sentencing benefit it provides to the offender. However, these concerns could be addressed by:

...including greater detail in the reports about the extent to which the offender discussed the case with the victim; any agreements reached between the two; what the victim got out of the process; whether the offender appeared genuinely interested in mediation with the victim; any

other process put in place for the offender to right their wrongs against the victim, etc. giving the process itself greater weight by imposing ongoing obligations (e.g. a requirement/agreement for the offender to pay a victim's medical bills) instead of simply being a process involving one short discussion and an apology; making it clear that mediation is not a sentence; and if no sentence is to be handed down following mediation, clearly stating the reasons why this is the case.(Joe McGrath, DPP).

Conclusion 14: Stakeholder feedback suggests that there is a degree of mediation suitable and relevant to superior courts. Whilst there is scope for pre-sentence mediation to be brought to the attention of the judge, there does not appear to be any merit in legislating for this to happen specifically in the superior court jurisdictions.

b) Aboriginal communities and mediation

In relation to offender/victim mediation in Aboriginal communities, Peter Collins from the ALSWA suggested:

If properly resourced and administered, offender/victim mediation could add significant value in Aboriginal communities where the offender and victim are from the same family, tribal grouping or are otherwise known to each other.

He also mentioned that the current regime of offender/victim mediation is inaccessible to Aboriginal offenders, especially those in remote areas.

Conclusion 15: The issue of the availability of offender/victim mediation in remote Aboriginal communities is essentially a resource matter and is unlikely to involve specific legislative support.

c) Involvement of victims in the sentencing process

Section 29B of the *Criminal Law (Sentencing Act) 1988* (SA) provides that the South Australian Full Court can establish or review sentencing guidelines on its own initiative or on application by the Attorney General, DPP or Legal Service Commission. More importantly, in relation to the topic of a victim's role in sentencing, is that, pursuant to s. 29B(2), the Commissioner for Victim's Rights is entitled to appear and be heard in proceedings.

Stakeholders were invited to comment on the South Australian sentencing process that sees greater victim representation in establishing or reviewing sentencing guidelines. The majority of stakeholders opposed the introduction of any legislation modelled on s. 29B of the South Australian Act. They suggested that the current 'Guideline Judgements' section of the *Sentencing Act 1995* (WA) (i.e. s. 143) is adequate and the Court of Appeal can, if required, request submissions or the appearance of any relevant party.

Interestingly the DPP considered there may be some merit in amending the current legislation to provide a greater degree of flexibility for the Court of Appeal in setting a proceeding which may result in a guideline judgement. Currently s. 143, and in particular, s. 143(2) states that a guideline judgement may only be given, reviewed or varied "in any proceeding considered appropriate by the court". The DPP suggested that relevant parties should be able to make an application to the Court of Appeal for a guideline sentence to be established or reviewed without such application being bound to a proceeding of the court.

However, according to Chief Justice Hon Wayne Martin, this raises additional problems whereby the effect of such a proposal would be to make the process more inflexible rather than less. In this scenario, if the court determined a guideline, then the only way the guidelines could be reviewed or varied would be by way of another hearing.

Conclusion 16: On balance, this report concludes that there is adequate scope and flexibility in s. 143 to enable victim representation in the process of arriving at a guideline judgement. However, there is merit in introducing, as routine protocol, a process that seeks the view of the Victims of Crimes Reference Group as the single representative body.

Part 3A: Pre-sentence order (PSO)

The Pre-sentence Order (PSO) sentencing option was introduced under the *Sentencing Legislation Amendment and Repeal Act 2003* with the intention, amongst other things, of facilitating the operation of the Perth Drug Court as a specialist court. The PSO can be imposed if the court considers that:

- the seriousness of the offence(s) warrants the imposition of a term of imprisonment;
- a PSO would allow the offender to address his or her offending behaviour and any factors which contributed to that behaviour; and
- if the offender were to comply with the PSO the court might not impose a term of imprisonment.

There is some debate as to whether it is a sentencing option *per se* given its location outside of the sentencing hierarchy and its name – *pre-sentence order*. However it is beyond the scope of this report to explore whether or not the PSO is indeed a sentence option in great detail. Therefore the questions stakeholders were invited to comment on included:

- a) The effectiveness of PSO as an option in dealing with an offender;
- b) PSO and sentence with no conviction;
- c) Perceived contradictions of the PSO;

a) Effectiveness of Pre-sentence orders

In response to the Issues paper, most stakeholders responded positively to the question “are Pre-Sentence Orders an effective sentencing option?” Comments to improve the PSO option included reviewing a number of the impositions of s. 33A with a view to expanding the use of these orders for offenders subject to a term of suspended imprisonment or on parole. His Honour Judge Denis Reynolds suggested that the effectiveness of PSOs would be greatly enhanced if “the limitation that they can only be imposed if the seriousness of the offence warrants imprisonment [was] removed”. Judge Reynolds went on to suggest that “(r)emoval of this limitation

would give courts the discretion to use this type of order in any case considered appropriate for the benefit of the community and the offender”. This logic was shared by a number of other stakeholders.

Conclusion 17: It appears as though restricting pre sentence orders (PSO) to ‘offences that warrant imprisonment’ reduces the effectiveness of these orders. As a result, consideration should be given to allow PSOs to be applied where a court is contemplating Community Based Orders (CBO), Intensive Supervision Orders (ISO) or imprisonment. This is on the basis that the court is a specialty court.

b) Sentence with no conviction

Stakeholders were asked to comment on whether successful completion of a PSO could result in a sentence but with no conviction recorded as an incentive to complete a treatment program set by the court. A number of stakeholders opposed this suggestion on the grounds that currently PSOs can only be imposed when the offence warrants imprisonment. However, this view could change if PSOs were not so limited. The general view of a number of stakeholders was that the courts acknowledgement of the successful completion of a PSO should be in the nature of the sentence imposed.

However, it was argued that if the restrictions on the imposition of a PSO were relaxed, as argued earlier, it could be possible for a spent conviction order to be made. Former Chief Judge, Hon Antoinette Kennedy, suggested “(u)ltimately if the case is an exceptional one then all sentencing options would remain open to the sentencing judge including the option of an imposition of a fine or community based order thereby allowing the Judge to impose a spent convictions order”.

Conclusion 18: Consideration should be given to specifically allowing the court to order an immediate spent conviction in the event that the offender has completed a court ordered treatment program successfully, provided the eligibility for a PSO is widened to include CBOs, ISOs and suspended imprisonment.

c) Contradictions of Pre-sentence orders

Stakeholders were presented with research findings of Freiberg and Morgan (2004)⁸ which raises several concerns with structure of PSOs. For example, they argue that the PSO replicates existing non-custodial sentencing options, increases offender contact with the justice system when a PSO is followed by a community order, and increases the potential for inconsistency when the final sentencing Magistrate may not be the same as the Magistrate who ordered the program.

Most stakeholders indicated that the PSO is most suitable in court intervention treatment courts (Drug Courts for example). As with other sentencing options, many stakeholders suggest that the PSO is only as effective as the services that support it, and identify the limited services for supervised bail availability, not to mention the additional demand PSOs place on the DCS. In this latter regard, DCS suggested that the actual issuing of warrants following breach should be transferred to the court, with the court reacting to a basic report provided by DCS officers.

Regarding the positioning of the PSO in the general hierarchy of sentence options, the DCS argued:

...modifications to sentencing options/penalties [since commencement have resulted in] complex sentencing options which are not necessarily used at the appropriate level of the hierarchy. For example, pre-sentence orders are not included in the sentencing hierarchy despite the fact that the Court must first

⁸ Freiberg, A. & N. Morgan, 2004, 'Between bail and sentence: the conflation of dispositional options', *Current Issues in Criminal Justice*, Vol15, No. 3, pp. 220-233

make a determination that imprisonment is an appropriate option in that particular case, and then apply a pre-sentence order.

Former Chief Judge, Hon. Antoinette Kennedy, succinctly summed up the views of many stakeholders regarding perceived contradictions:

There will always be difficulties and contradictions in the implementation of legislation that has been introduced principally to cater for the needs of specialist courts that use judicial case management but that it also be available as a sentencing option in the general adversarial courts.

Conclusion 19: On balance, this report concludes that the PSO has proved a useful legislative tool to enable court intervention programs to treat offenders with specific treatment needs directly related to their offending. However, there is merit in allowing them to be used more flexibly and consideration could be given to allowing the courts to grant an immediate spent conviction for those offenders who successfully complete the treatment program.

Stakeholders did not indicate that they are concerned with potential inconsistencies (as alluded to by Freiberg & Morgan) whereby a Magistrate at the beginning of a PSO may be different from that at the end. Nevertheless, a possible solution may be in improving the information flow between different Magistrates. However, this does not require a legislative solution.

Part 5: Sentencing options

Stakeholders were invited to comment on the validity and appropriateness of Section 39 of Part 5 of the *Sentencing Act 1995* (WA) which outlines the sentencing options courts may impose upon a “natural person”. Comments were analysed under the following headings:

- a) Overall sentencing hierarchy;
- b) Non-custodial sentences;
- c) Indigenous offenders.

a) Overall sentencing hierarchy

Whilst Legal Aid WA and the Criminal Lawyers Association of Western Australia suggested that more sentencing options should be developed, Chief Justice Hon. Wayne Martin's comments reflected the views of a number of other stakeholders. He maintained, "the problem with any additional sentencing options of a non-custodial nature is that the range of present options is not yet properly resourced."

The DCS recommended a review to simplify the sentencing hierarchy to effect more community based options. DCS added:

The middle order offences are the sentences that appear to be most common for the court to escalate up the hierarchy or impose supervision orders, with conditions which are inappropriate for the offender who inevitably breaches; as such these are the most troublesome for the Department. This has an impact on the ability to administer the offender's sentence effectively.

Conclusion 20: On consideration of stakeholder feedback, there does not appear to be a significant need to change the overall sentencing hierarchy, although stakeholders like DCS believe the individual elements, for example Community Based Orders and Intensive Supervision Orders, which make up the hierarchy, could be made significantly more flexible.

b) Non-custodial sentences

On the topic of other non-custodial sentencing options, particularly those appropriate for Indigenous offenders in remote areas, many stakeholders agreed the current non-custodial sanctions in the *Sentencing Act 1995* (WA) are appropriate. However they also agreed that there is a need to expand the programs which support them.

c) Sentencing of Aboriginal Offenders

It is widely known that Western Australia has the highest rate of imprisonment of Indigenous persons in the country. The question put to stakeholders was whether consideration should be given to having provisions similar to section 9C of the *Criminal Law (Sentencing) Act 1988* (SA) which states that prior to any court

sentencing an Aboriginal defendant, it may, with the defendant's consent, convene a sentencing conference and take into consideration views expressed at that conference. It is clear that this is an option available to the court and if it does take place the judicial officer is not bound by the views of those attending the conference.

Most stakeholders, including a number of judicial officers, expressed support for provisions similar to those described above being put into Western Australian legislation. The Chief Justice of Western Australia Hon Wayne Martin stated:

The requirement of a sentencing conference prior to the sentencing of any Aboriginal defendant would be a very sensible way to address the current overrepresentation of such offenders in the prison system. In many instances, it would also facilitate involvement by members of the offender's community in the ultimate outcome.

The former Chief Judge of the District Court Hon Antoinette Kennedy, added:

Sentencing conferences, particularly in remote areas where community corrections officers and resources are so scarce, will likely provide Judges with useful information relating to the offender, particularly cultural issues and information in relation to programs and services established for the offenders either formally or within the offender's particular community.

Furthermore, the President of the Children's Court, Hon Denis Reynolds, agreed that it would greatly assist courts if Aboriginal elders informed them on cultural issues as "...it needs to be about the provision of culturally appropriate programs for Aboriginal people, designed, managed and delivered by Aboriginal people for Aboriginal people".

However, whilst the DPP was "...not opposed to the introduction of initiatives that allow for consultation with community representatives...", he did caution that:

(c)riminal law should be seen to apply equally to all Western Australians, taking into account individual circumstances. So, whilst it is highly relevant for the court to take into account an offender's cultural background in sentencing, the DPP considers it undesirable to provide the development of

what could be seen to be differentiation in the application of the law in relation to a particular racial or cultural group.

The ALSWA believed that it should be mandatory, rather than an option, for the court to consider an offender's Aboriginality in sentencing. "Such an amendment would mean that sentences imposed on Aboriginal offenders would reflect the unique issues which confront most Aboriginal offenders appearing in Western Australian Courts".

The South Australian legislation that uses 'sentencing conferences' for Aboriginal offenders is similar to the Aboriginal Community Sentencing Court which is currently operating on an extended trial basis in Kalgoorlie. This Court operates within existing law and should the option of sentencing conferences be extended beyond Kalgoorlie, there would be no need for specific legislation. This issue could be revisited when the results of a second evaluation of the trial Kalgoorlie Community Court will be available.

Conclusion 21: Whilst most stakeholders were supportive of sentencing conferences to ensure cultural relevance of sentencing options, the current trial court operating along these lines does so under existing sentencing provisions. In addition, the issues paper canvassed whether stakeholders could conceive of a new order which could particularly apply to the intermediate sentencing of Indigenous offenders and which could be effectively supervised in regional and remote areas. Regrettably, no such 'miracle' solution was proposed. Rather, stakeholders tended to support better resourcing for existing non-custodial orders and a more flexible approach such as the partially suspended sentence (see Part 11 (d)).

Part 6 – Release of offender without sentence

Currently s. 46 of the *Sentencing Act 1995* (WA) allows the court to impose no sentence if the circumstances of the offence are trivial or technical, with due consideration for the offender's character, antecedents, age, health and other

relevant matters. In general, stakeholders supported the retention of s. 46, with some stakeholders voicing support for removing the condition that the offence is 'trivial'. **The President of The Magistrates Society of WA, Mr Bayly**, said that:

...it may be appropriate to have the option to release without sentence for offences even if not trivial or technical if, for example, the accused is a first-time offender, or if the accused has already been given a penalty for a closely related offence.

Conclusion 22: Nearly all stakeholders supported retention of this provision, and in particular, the retention of a discretion on the part of the courts to issue a spent conviction. The report supports the broader stakeholder view that as this is a response right at the bottom of the hierarchy, so it should be reserved for what the courts consider trivial.

Part 7 – Conditional release order

In the hierarchy of sentences, a Conditional Release Order (CRO) is placed between no sentence and fines. Straightforward requirements can be imposed via the CRO to secure the unsupervised good behaviour of the offender, including the imposition of a bond. Stakeholders were invited to comment on how CROs are being utilised and if they could be issued in more circumstances, for example, in lieu of fines where capacity to pay is limited.

There was general agreement that CROs are not utilised to their fullest extent when indeed they could be, with several stakeholders suggesting CROs resemble good behaviour bonds. One stakeholder claimed:

The Act would be improved by creating a good behaviour bond where the penalty for breach was the forfeiture of the specified sum. CROs would then be better used as a release on condition to come back for re-sentence if the conditions are breached.

The President of the Children's Court, the Hon Judge Denis Reynolds, agreed that CROs are not utilised extensively but added, "on a case by case basis the Courts have appropriately imposed CROs and have appropriately not imposed CROs when

assessing the seriousness of the particular offence and exercising the sentencing discretion under the Act.”

Using CROs in lieu of fines, where capacity to pay is limited, was generally viewed favourably by stakeholders. However, Hon. Chief Justice Martin said:

...courts are not well equipped to determine capacity to pay at the time of imposing a fine...(this) would have to be determined administratively post sentence...(when) there could be provision allowing substitution of a CRO, or alternatively a work order.

Furthermore, the DCS cautioned that in cases where Aboriginal offenders are sentenced to a CRO, inappropriate conditions may result in a minor breach and the potential to become more involved in the criminal justice system. Whilst this could be avoided, they argued it would add to the complexity of orders and difficulty in administering them.

Conclusion 23: Most stakeholders argued that more could be made of CROs, especially if, for example, they involved the imposition of a bond which would be forfeited on breach. It could be argued that this is tantamount to a suspended fine. On balance, this report suggests that CROs, placed appropriately between non sentence and a fine, should remain as is. The question of suspended fines will be dealt with below (see Part 8 (b)).

Stakeholders were also invited to comment on whether legislation should allow for ‘clean street time’ when re-sentencing, in the event that an offender breaches the conditions of their CRO. There was little stakeholder support for specific legislation in this regard. Rather they argued that, in re-sentencing, the court has the discretion to take individual circumstances of the breach into account.

Conclusion 24: It appears that ‘clean street time’, among other individual circumstances, is already taken into consideration by most judges when re-sentencing offenders who breach their CRO.

Part 8 – Fine

Fines currently make up over 80% of all sentencing outcomes, making them clearly the most favoured and appropriate outcome for the majority of criminal matters in the Magistrates Courts.⁹

Stakeholders were invited to comment on the following items, covering both the current fines legislation and processes, as well as fines initiatives in other states and countries: These comments pertained to:

- a) effectiveness of the fines system;
 - o capacity to pay,
 - o mandatory minimum fines,
 - o motor driver's licence suspension,
- b) partially suspended fines; and
- c) unit fines or other fine options.

a) Effectiveness of the fines system

Despite fines being the preferred sentencing option, many stakeholders argued that the fines system is not operating effectively, and point to administrative issues and resource constraints as the main causes. One stakeholder said:

[The fines system is] effective for those who offend rarely but for frequent offenders it is meaningless. It simply allows the offender to be given a non-custodial option that cannot be breached.¹⁰

The process of determining an offender's ability to pay fines, and the impact of suspending driver's licences in metropolitan versus regional areas, attracts particular scrutiny from stakeholders. Her Hon. Justice Narelle Johnson (now retired) suggested:

Unless payment is strictly enforced, the imposition of a fine will not have the intended impact on the offender... [If] the offender is unable or realistically unlikely to pay a fine because of his financial circumstances, or already has

⁹ The enforcement of fines through the *Fines, Penalties and Infringement Notices Act 1994* (WA) and Fines Enforcement Registry is not within the ambit of this review.

¹⁰ Stakeholder has requested to remain anonymous.

significant levels of outstanding fines, an alternative sentencing option must be used.

Conclusion 25: Fines are clearly regarded as an effective sentencing option as they are used in over 80% of cases. Whilst there may be some process issues in the issuing of a fine (see below) and in their enforcement and effectiveness, the fine option could possibly be improved by expanding flexibility in application.

○ **Capacity to pay**

Under s. 53 of the *Sentencing Act 1995* (WA), the court is obligated to take into account the capacity of the offender to pay the fine and the extent to which payment of the fine might burden the offender. According to the Chief Justice Hon Wayne Martin, “the courts do not have the resources to make detailed determination as to an offender’s ability to pay”. Former Chief Judge Hon Antoinette Kennedy agreed, adding:

Often we must rely on what we are told by the offender or the offender’s counsel. Pre-Sentence Reports often contain information about the offender’s financial situation, but while CCOs can find some objective information such as the total fines that an offender owes, in general the CCO does not have the time or skills to investigate an offender’s financial position.

Some stakeholders suggested that fines officers (including CCOs) or the court should be authorised to instruct offenders to consult financially skilled officers so that reliable pre-sentence financial reports can be provided to the court, as is done in Northern Territory courts via the Fines Recovery Unit.¹¹

Conclusion 26: In response to stakeholder feedback, it is suggested that consideration could be given to having available to the court, persons able to assess a person’s financial standing and advise the court accordingly. Furthermore, consideration could also be immediately given, upon imposition of a fine, to options such as ‘time to pay’, thus making the process more effective, accessible and simpler

¹¹ http://www.nt.gov.au/justice/courtsupp/fines_recovery_unit/index.shtml

to adhere to. These are administrative/process issues and do not require legislative change.

- ***Mandatory minimum fines***

Stakeholders were equally concerned about mandatory fines which are generally imposed via the *Road Traffic Act 1994* (WA). The President of the Children’s Court, Hon Dennis Reynolds stated “high mandatory minimum fines cause unacceptable consequences for many people particularly, Aboriginal people”. ALSWA also criticized the mandatory minimum fine option stating:

...these penalties often impose large fines beyond the offender’s capacity to pay. These fine amounts add to the spiral of driving offences (such as driving under fines suspension) and inevitably result in high imprisonment rates for fine default and/or driving offences...[particularly for] Aboriginal people.

Conclusion 27: Whilst not within the remit of this review, it is noted that many key stakeholders, particularly relevant judicial officers, were concerned about the prevalence and quantum of mandatory minimum fines under the provisions of the *Road Traffic Act 1974*.

- ***MDL suspension***

Nearly all of those stakeholders who believed the fines enforcement system in WA is not operating effectively, were critical of drivers licence suspensions as a tool for primary enforcement. This is achieved through the operation of the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) and the Fines Enforcement Registry. Whilst this is outside the scope of this review, it is worthwhile noting that the Government is considering a number of enhancements to the fines enforcement process.

b) Partially suspended fines

Stakeholders were asked if WA Courts should consider introducing partially suspended fine options. In response to this, a number of stakeholders argued that a

partially suspended fines option is not practical, citing the existing capacity to do so under Conditional Release Orders (CRO) in s. 51 (1) (c).

However, there was support by both the Law Society of Western Australia and Legal Aid WA who suggested partially suspended fines could provide a sound sentence alternative for impecunious and Indigenous offenders. In addition, the DPP suggested it may be worthwhile to conduct further research into partially suspended fines, in order to complement existing laws that provide for payment of restitution to victims (s. 56) and reparation orders (Part 16 of the Act).

Conclusion 28: As stakeholders indicated, in some cases the partially suspended fine option could provide a viable sentencing alternative, particularly for impecunious or Indigenous offenders. This report suggests use of partially suspended fines could be considered but only after consideration of the practical implications.

c) Unit fines and other fine options

The discussion paper described the 'time fines' scheme, trialled in New Zealand in 1994 and discontinued in 1995. The scheme was designed to substitute the value (i.e. cost) of spending time in prison, with a fine.¹² Similarly, in the United Kingdom a 'unit fine' system is used whereby the 'unit' is one week (rather than a day) and fines are calculated by reference to the seriousness of the offence and the offender's ability to pay.¹³

It was suggested to stakeholders that a similar 'day' or 'unit' fines system in Western Australia would need to be in the context of the current fines system, including enforcement and the alternative sentencing options currently available to the

¹² The amount of the fine was calculated by multiplying the number of weeks the court deemed an offender could be denied a portion of their income (having regard to the seriousness of the offence) by the amount the offender could afford to pay.

¹³ Courts must firstly determine the number of units to be imposed according to the seriousness of the offence, and then decide the financial amount to be accorded to each fine unit, based on the offender's disposable income. The two figures are multiplied to give the amount of the fine.

courts. However, stakeholders were unanimous in their opposition, suggesting the current system functions adequately and appropriately. Reasons to avoid such a system are extensive, but are best captured by the 1996 NSW Law Reform Commission investigation and subsequent decision not to introduce a 'day fine' system. They ultimately concluded that:

The day fine places too great a restriction on the discretion of the sentencing court to impose the sentence which is most appropriate given all the circumstances of an individual case. It may also prove too complex and consequently unworkable in practice, as the experience of other jurisdictions suggests. Moreover, it may be too time-consuming for courts to make an accurate assessment of the offender's financial means.¹⁴

The DPP suggested the introduction of an automatic 'garnishee order' for fine defaulters which would enable the fine to be deducted from wages or via Centrelink. A garnishee system exists in Queensland and New South Wales jurisdictions with mixed success rates and can be a complex and resource intensive process.

Conclusion 29: As indicated in the discussion above, fines are an attractive sentencing option in the Magistrates Courts accounting for over 80% of all sentencing outcomes. Overall, stakeholders rejected proposals for changes to the fines structure (day fines, unit fines, etc) but were unanimous in wanting to see more flexibility in the imposition of fines. As a result there is merit in a number of possible changes, such as:

1. Introduce a suspended fine option equivalent to a CRO with bond forfeiture;
2. Introduce a process where fines can, as soon as they are imposed, be referred to FER so that time-to-pay arrangements can be entered into promptly;
3. Introduce a stand-alone work order as a direct alternative to a fine where hours of work can be equated to a specific fine amount (see also Conclusion 30 below);
4. Investigate the practical implications of introducing a partially suspended fine.

¹⁴ NSW Law Reform Commission, 1996, *Sentencing*, NSWLRC 79, 1996) at para. 3.14

Part 9 - Community Based Order (CBO)

The Community Based Order (CBO) provides offenders with an opportunity to take part in educational, vocational or personal development programs and may involve a community service requirement. CBOs were introduced as a sentencing option to replace the Probation and Community Service Orders (s. 9 and s. 20B of the *Offenders Community Corrections Act 1963*). It has been argued that Probation was conceptualised in terms of rehabilitation whereas CBOs are primarily concerned with the management and monitoring of offenders (Morgan 1996). They are used frequently (second behind fines) and represent an important mid-range penalty in the sentencing hierarchy. The term of a CBO, which is set by the court, must be at least six months and not more than 24 months.

The Issues and Questions Paper sought feedback around the following areas relating to CBOs:

- (a) Effectiveness of CBOs;
- (b) Use as a fine alternative for impecunious offenders;
- (c) Effective use of resources to support CBOs;
- (d) Spent convictions and CBOs;
- (e) Compliance incentives.

a) Effectiveness of Community Based Orders (CBO)

Although many stakeholders felt its credibility has suffered in recent times, there was unanimous support for the retention of the CBOs. Almost all those who supported retention of CBOs cited lack of resources for supervision and program input as the reasons for any perceived decline in its credibility. The ALSWA suggested, “[i]t is the manner in which community justice services administers this option that could be improved”.

Conclusion 30: Increased administrative support, particularly in regional and remote areas, by way of appropriately funded supervision, treatment programs and associated resources would undoubtedly improve the overall effectiveness of CBOs. Beyond that, there is strong support for their retention in the sentencing hierarchy contained in the *Sentencing Act 1995* (WA).

b) CBOs as a fine alternative for impecunious offenders

In considering the widespread view amongst stakeholders that CBOs should not be imposed in lieu of a fine, it is important to remember that CBOs have a supervision requirement that is not a requirement of fines. Most holding this view suggested that such a proposal would be inconsistent with the sentencing hierarchy as described in s. 39 of the *Sentencing Act 1995* (WA), with one stakeholder articulating that:

Such an approach subverts the hierarchy of sentences and exposes impecunious offenders to a harsher form of punishment simply for being poor.¹⁵

Magistrate Bayly suggested that “[c]onsideration should be given to having a sentencing option which allows community work to be ordered as an alternative to a fine and not be attached to a Community Based Order”. This idea was supported by the DPP, who stated:

...it may be preferable to make Community Service Work a sentencing option in its own right. Doing so may raise the profile of Community Service Work as a sentencing option and, consequently, reduce imprisonment rates due to the failure to pay fines.

However according to others, rather than introducing new sentencing options, existing options, such as the CBO, could simply be modified. They suggested this could be achieved, for example, by increasing the flexibility in setting conditions on CBOs, particularly those of a ‘therapeutic’ nature that target underlying issues in offending.

¹⁵ Aboriginal Legal Service WA.

Finally, several stakeholders argued that Work and Development Order (WDO) (s. 57A) provides an adequate alternative to fines for impecunious offenders, with some suggesting improvements could be made to simplify the cumbersome WDO process.

Conclusion 31: A number of stakeholders believed that a more flexible approach to CBOs, such as those outlined in Conclusion 28 (i.e. partially suspended fines and a stand alone work order), would present a viable fine alternative for impecunious offenders.

c) Effective use of resources to support CBOs

Although many stakeholders refrained from commenting on how resources could be used more effectively, the main concerns point to inadequate resourcing to begin with. His Honour Judge Denis Reynolds highlighted one of the drawbacks of limited resources in suggesting that:

...while the DCS provides Pre-sentence Reports identifying issues for offenders, it is generally failing to deliver programs and services to deal with those issues.

Others proposed that the availability of more funds could be used to emphasise community involvement in identifying, coordinating and (where appropriate) supervising community service projects. The DPP advocated a community based strategy such as restorative justice forums to gain support and input from potential providers. He stated:

There may be value in developing and piloting a system which allows communities to put forward proposals for projects and for programmes, based on the perception of need in the community. Consideration should also be given to looking at ways of reducing the extent of ongoing external monitoring of community services projects in remote communities. For example, it may also be possible for communities to estimate the number of community services hours required to complete a project, and the community to be held to account for the use of those hours on their completion.

Judge Reynolds added his support by suggesting “the future should include more outsourcing to innovative service providers including Aboriginal people and Aboriginal organisations for Aboriginal offenders.”

Finally, on the topic of *types* of community work imposed, ALSWA suggested that more emphasis should be placed on developing specific work skill sets “as opposed to menial tasks which are of little long term value to the offender”. Arguably, this approach could be strengthened by incorporating DPP suggestions to seek greater community involvement by strategically developing community based projects that are supervised and monitored by the community.

Conclusion 32: The current levels and types of resourcing available to effectively carry out CBOs, particularly in regional and remote areas, is undeniably of concern to many stakeholders.

To address the problem of limited resources, there is considerable merit in investigating opportunities to engage community based organisations, such as Aboriginal corporations. In response to stakeholder comments regarding the *nature* of work under a CBO, there may be merit in considering, alternative solutions to marry CBO requirements with skill deficits pertinent to particular individuals. For example, for lower level offenders, it may worthwhile exploring contracted arrangements with locally based organisations to identify and address specific skill shortages. This method could also make greater use of ‘the community’ as a resource by ensuring their involvement in the supervision and monitoring of the order.

It is believed that measures such as these could lead to greater use of CBOs as an effective non-custodial sentencing option, particularly in regional and remote areas. The above can be delivered without legislative amendment.

d) Spent convictions and CBOs

With regard to spent convictions, there is widespread support amongst stakeholders to retain the provisions in ss. 45 and 39 which allows the court to issue a spent conviction order for any penalty up to, and including, Community Based Orders. As Judge Reynolds, among others, pointed out, spent conviction orders can be imposed irrespective of the offence being trivial. ALSWA also supported the court's discretion in this manner and suggested,

It is important that the Court maintain the ability to relieve an offender of the effects of a conviction. This allows the Court to, in appropriate circumstances, acknowledge that an offence may be an aberration and unlikely to occur again. Further, spent convictions are rehabilitative in nature.

Some stakeholders proposed that spent conviction orders should be available for all sentencing levels other than immediate imprisonment, adding, "the further up the sentencing hierarchy an offender is, the less likely a spent conviction order is to be made."¹⁶

Conclusion 33: It is suggested that whilst the issuing of immediate spent convictions at the CBO level of the hierarchy should remain, they should be used sparingly and at the discretion of the judicial officer.

e) Compliance with CBO conditions

Whilst one stakeholder suggested expanding the range of compliance incentives to include non-enforceable action, the majority of stakeholders opposed it. The DPP, for example suggested, "it [is not] necessary to use formalised compliance incentives in sentencing, beyond the sentencing options already available and the current parole regulations". Others argued that "it is difficult to regard non-enforcement of a community based order as an 'incentive'".¹⁷

¹⁶ Law Society of WA.

¹⁷ Chief Justice of WA, Hon Wayne Martin

However, Legal Aid WA was in support of the notion of formalised compliance incentives, stating that “currently the only incentive is negative i.e. enforcement action, press charges etc.” Likewise, the former Chief Judge Hon Antoinette Kennedy, proposed the introduction of a points based scheme, similar to demerit points for non-compliance, where,

(a)n offender could incur “one or more breach points depending on the nature on non-compliance up to a maximum of, say, 12, when formal breach action is initiated”. She adds that such a scheme could be implemented without legislation.

Conclusion 34: Although the Issues Paper raised issues in relation to formalised compliance incentives, this is essentially an offender management issue. Nevertheless, stakeholders have advanced a number of innovative compliance regimes to counter the current situation where the order is either breached or not (i.e. no middle ground), and where little incentive is afforded to comply. For example, consideration could be given to a formalised graded approach to ensuring a compliance regime that produces more obvious compliance outcomes.

In addition to a graded compliance system, some stakeholders believed there are other adequate compliance incentives already in existence, the most obvious being the spent conviction order. However, the setting of ‘non-enforceable conditions’ was not supported. These initiatives could be implemented without legislative amendment.

Part 10 – Intensive Supervision Order (ISO)

Stakeholders were asked whether the Intensive Supervision Order (ISO) remains an appropriate, credible and effective sentencing option at the point of being one step lower on the sentencing hierarchy than imprisonment (including suspended imprisonment), and whether any improvements could be made to this type of order.

On the whole, most stakeholders agreed that the ISO option is appropriate and credible but could be improved with increased resourcing for supervision and program monitoring, particularly in remote areas.

The DPP was concerned that the current structure and management of ISOs does not present an adequate deterrent penalty at this level of the sentencing hierarchy:

An ISO is the last level of sentencing where imprisonment is not an appropriate option, and should therefore be seen to be more serious than a CBO. Currently the only difference in practice is that the court can impose a higher number of community service hours than a CBO, but that is all...consideration could be given to amending s. 72 of the Act to require an ISO to contain two or more primary requirements, and to require the offender to be of good behaviour for the term of the ISO.

Pre-sentence report and ISOs

Former Chief Judge Antoinette Kennedy argued that it is an anomaly for an ISO to require a Pre-Sentence Report when orders on either side of it (Community Based Orders and Conditional Suspended Imprisonment) do not. She went on to suggest that this requirement could be done away with as, in many cases, the court is in possession of sufficient information to make the decision to impose an ISO.

Conclusion 35: Essentially, all stakeholders desired the ISO to remain as is with one stakeholder suggesting that the requirement for a pre-sentence report (PSR) for an ISO could be removed as sentencing options on either side of an ISO in the hierarchy do not require PSRs.

Part 11 – Suspended Imprisonment Order

A court that sentences an offender to a term of imprisonment¹⁸ of 60 months or less may order that the whole of the term be suspended for a period set by the court, but not more than 24 months. In Western Australia some concern has been

¹⁸ or to an aggregate of terms of imprisonment

expressed as to whether a serious offence that warrants five years (60 months) imprisonment is deserving of suspended imprisonment.

Stakeholders were advised about the Victorian Sentencing Advisory Council's¹⁹ public consultation study which discovered that there was little support for suspended sentences, particularly for more serious offences. In May 2010 the Victorian Government announced that it intended to completely phase out suspended sentences. As yet, there is no indication from jurisdictions in other states, nor the United States of America, the United Kingdom or Canada, to follow suit.

With this in mind, the Issues Paper sought the following feedback:

- a) Should the *Sentencing Act 1995* (WA) articulate the intent or purpose of the suspended sentence?
- b) Should restrictions be placed on the seriousness of the offence for which a suspended sentence is being considered?
- c) Is there any benefit in lowering the term of imprisonment for which a suspended imprisonment order can be given from the current 60 months under s. 76(1) of the *Sentencing Act 1995* (WA)?
- d) What are your views on the use of Wholly and Partially suspended sentences?

Preliminary issue

In terms of the sentencing hierarchy, the DCS was concerned that the suspended sentence may be misplaced.

It is difficult to understand why a suspended sentence is ranked as a higher penalty than a Community Based Order (CBO) and the Intensive Supervision Order (ISO). The suspended sentence relies simply on a threat of imprisonment whereas the CBO or ISO involves both a threat of imprisonment and an imposition on the offender's free time, such as

¹⁹ Victorian Government (2008) *Suspended Sentences Final Report Part 2*, available from <http://www.sentencingcouncil.vic.gov.au/landing/publications>

reporting to a community corrections officer and attending a program. The Department would therefore strongly recommend that the current sentencing hierarchy be reviewed with further consideration to the simplification of the sentencing hierarchy and a more comprehensive inclusion of community based options available.

Conclusion 36: Whilst there is an argument here, it is the position of this report that suspended imprisonment sentences remain as they are in the hierarchy. They are, after all, an *imprisonment sentence* which is suspended. In light of this, and the issues raised in the previous discussion on CBOs, there is merit in re-examining the whole range of community orders from community release orders through to Conditional Suspended Imprisonment Orders.

a) Intent and purpose

The response was almost unanimous that there is no need to legislate in this regard. Most stakeholders, especially judicial officers, believed that reasons for imposing, and the consequence of breaching, are clearly articulated by the judicial officer at the time of sentencing, which the DPP added, is a requirement given the *Dinsdale v The Queen* (2000)²⁰ outcome in the High Court of Australia.

Conclusion 37: It is evident that sentencing judges, as a matter of course, clearly articulate the consequences of re-offending and the purpose of the suspended sentence. As such, it is not necessary to legislate the intent or purpose specifically.

b) Restricting suspended sentences for ‘serious offences’

Again, most stakeholders were of the view that legislating a restriction is unnecessary for the following reasons, amongst others; Firstly, suspended sentences are currently only imposed for ‘objectively’ serious offences (i.e. offences for which imprisonment would be imposed). Secondly, there may be exceptional circumstances in which the court decides it is appropriate to impose a suspended sentence. Magistrate Bayly cited an example:

²⁰ 2002 CLR 321; [2000] HCA 54

(D)riving under suspension would presumably not be considered a serious offence but a suspended sentence is often imposed upon repeat offenders who would otherwise be imprisoned and such a penalty makes it clear to the offender that he drives again under suspension he will be imprisoned.

Despite most stakeholders supporting the retention of suspended imprisonment as a sentencing option, Hon Cheryl Edwardes, former Chair of the Victims Reference Group, reflected the views of a number of people in saying, “(a) suspended sentence is seen by victims of an offence as an insult. It is an ineffective penalty and provides little deterrent to the offenders...it is considered an acquittal and should be used infrequently”. A possible solution to these concerns is contained in feedback received from His Honour Judge Reynolds who suggested that there is a greater need to enable conditions on the suspended imprisonment order, thus negating the need for both suspended imprisonment *and* conditional suspended imprisonment. A detailed quote is provided in the following section.

There was significant stakeholder support for the courts to maintain their current discretion as indicated by the Law Society of Western Australia who strongly “opposes any attempt to reduce the sentencing discretion available to Judges”, and ALSWA who stated, “it is fundamental to entrust sentencing judges with a range of discretion”.

Conclusion 38: The suspended sentence option is already restricted to serious offences that warrant imprisonment and changing that would certainly increase the risk of net widening. The views of stakeholders were generally that there is no need for change. See also Conclusion 39.

c) Lower term of imprisonment

The notion of reducing the maximum term of imprisonment from 60 months attracted mixed responses from stakeholders, with the majority believing there was no reason to change the current position. Chief Justice Wayne Martin, for example, stated “[t]here is no need to lower the present cap of 60 months for terms of suspended imprisonment. Although it is unusual for sentences of this length to be

suspended, there is always the occasional case where that is appropriate". On the other hand, His Honour Judge Reynolds believed the current 60 month period may be too long as "[he] cannot think of a case that would warrant a suspension of 60 months that would not be so serious as to require immediate imprisonment".

Conclusion 39: Although rare, there continues to be exceptional circumstances where an imprisonment sentence at the higher end of the maximum 60 month term may, at the court's discretion, warrant a suspended sentence. For this reason, it is suggested that the existing maximum term of 60 months remain.

d) Partially suspended imprisonment

It is understood the Northern Territory uses wholly and partially suspended sentences effectively under the provisions of their *Sentencing Act 2008* (NT). These sentences are constructed so that they cannot exceed five years in length and may be wholly or partially suspended. The court is then able to order that the offender be subject to any such conditions the court thinks fit. In Western Australia, the Attorney General has separately announced the development of legislation to support the concept of partially suspended imprisonment.

The majority of stakeholders supported the introduction of partially suspended sentences. Legal Aid WA stated, "LAWA is of the view that such a sentencing option should be introduced. These sentencing options are already available for some Commonwealth cases in WA and appear to operate effectively". Whilst Mr Quail of the Law Society of WA noted "(t)he Society has lobbied successive governments to introduce partially suspended sentences".

Former Chief Judge, Hon Antoinette Kennedy, added that:

Partially suspended sentences are worthy of serious consideration. Such sentences may be appropriate where immediate imprisonment is warranted to reflect the need for punishment and specific and general deterrence in a particular case but where rehabilitation may be achieved in the community before entrenched criminal behaviour is learned in prison.

On the other hand, the DCS said there are adequate provisions in setting parole and non-parole periods to perform a similar function to partially suspended sentences, adding,

The appropriateness of courts making decisions so far in advance of when release will occur is a significant concern in relation to sentence management.

Rather than introducing wholly or partially suspended sentences, DCS suggested a mandatory parole option similar to that in the United Kingdom “for sentences of between 12 months and under four years”.

Conclusion 40: There is significant disquiet about suspended sentences where there is no immediate impact on the offender. Whilst there may well be some circumstances where the judicial officer, in exercising his/her discretion, feels the appropriate response to the crime is a suspended term without conditions, this report supports the proposal by Judge Reynolds that the court have available to it, a range of conditions which can be imposed, subject of the suspension. Even more flexibility and credibility could be afforded the Suspended Imprisonment sentence if it were possible to partially suspend the sentence. This report suggests that both more flexibility of conditions and the ability to partially suspend an imprisonment sentence be introduced.

Part 12 – Conditional suspended imprisonment

Currently, the Conditional Suspended Imprisonment order (CSIO) can only be imposed by the Supreme Court, District Court, Children’s Court and Perth Drug Court. Preliminary research from the United Kingdom has found that courts are much more likely to attach two or more conditions to a suspended sentence than to a community order. There are also “growing concerns about the numbers of people on Suspended Sentence Orders who are going to prison as a result of small technical

breaches”²¹. In Western Australia there have been similar concerns regarding the inflexibility of the CSIO, specifically in relation to the ability to make amendments to, or cancel the CSIO. Stakeholders were therefore asked to comment on the effectiveness of the CSIO order, as well as its preference over traditional suspended imprisonment. Feedback was also sought regarding the authority of Magistrate Courts to impose CSIO orders.

a) Effectiveness of CSIO

Most stakeholders indicated that it is an appropriate and credible option but suggested that it may need to be made more flexible. For example, Chief Justice, Hon Wayne Martin suggested:

[T]he present provisions could be improved by allowing for more generalised and flexible conditions under s. 81, s. 83 and s. 84. Community work should also be considered as a possible condition. For offenders in remote communities, there is scope for conditions which regulate or restrain their conduct generally.

Current inflexibility of the CSIO was also raised as an issue in relation to the Drug Court. It was noted that the CSIO is not used to any great extent in the Drug Court. Instead it appears as if the Drug Court uses Pre-Sentence Orders (PSO) as some of the conditions able to be imposed as part of a PSO (bail) (e.g. curfew, residential requirements, etc.) cannot be imposed as part of a CSIO.

Conclusion 41: The *Sentencing Act 1995* (WA) should provide as much flexibility as possible in both range of conditions and flexibility of their use, so that judicial officers are able to exercise as much discretion as they can in response to individual offender situations.

b) Replacing traditional Suspended imprisonment orders with CSIO

As mentioned earlier, His Honour Judge Reynolds indicated that an option that enables court discretion to impose conditions on a suspended imprisonment order is

²¹ Solomon, E. and M. Rutherford, *Community Sentences Digest* (2007) 19

a more appropriate sentencing option than traditional suspended imprisonment. He stated:

[T]he Act should be amended to substitute [suspended imprisonment and conditional suspended imprisonment] options with the one option of suspended imprisonment with the court having the discretion to not impose or to impose conditions on the order. The court should have the discretion to impose none, one or any number of supervision conditions, an attendance condition of some sort, a curfew condition, a prohibitive behaviour condition and a community work condition.

The DPP indicated support for CSIO over traditional suspended sentences, with particular reference to victims, stating “suspended imprisonment is rarely regarded as an appropriate sentence by victims”. This notion is consistent with comments by the Victim Reference Group in Part 11 (b) above. In the event of a breach, the DPP also encouraged legislative change that allows courts to “take into account the time that an offender has already spent complying with any of the conditions imposed under the CSIO in determining the term of imprisonment”.

Conclusion 42: There was significant stakeholder support for the retention of both traditional suspended imprisonment and conditional suspended imprisonment orders (CSIO), thus leaving the Courts with the flexibility to exercise their discretion to decide, on consideration of the entire circumstances of the offence/s, if and what range of conditions should be imposed. The report suggests retention of traditional suspended sentences but its use be restricted to those cases where it would be most appropriate, for example, some fraud or commercial matters.

c) Magistrate authority to impose CSI

Some stakeholders expressed concern at the existing anomaly regarding authority to impose a conditional suspended imprisonment (CSI) order. This situation was highlighted by Magistrate Bayly who cited a recent Supreme Court decision (*Rhatigan v. Forbes* (2009)²²) whereby a sentence of immediate imprisonment that was imposed by a Magistrate was subsequently overturned by the Supreme Court. Furthermore, a conditional suspended sentence (which Magistrates do not have the

²² ESDV 468 and *Duggan v. Coelho* (2009) WASC 372

power to impose) was attached, pursuant to s. 81 of the *Sentence Act 1995* (WA) and s. 6B of the *Sentencing Regulations 1996* (WA)

Most stakeholders who raised the same issue, in particular judicial officers of both the superior and magistrates courts, were in favour of removing this anomaly. Hon Wayne Martin, the Chief Justice, stated, “(t)here does not appear to be any reason, in principle or logic, which would prevent Magistrates having an option which is available to Judges in superior courts”.

Conclusion 43: It is recommended that consideration be given to amending Regulation 6B of the *Sentencing Regulations 1996* (WA) to extend the authority to impose conditional suspended imprisonment to Magistrates Courts.

Part 13 – Imprisonment

Imprisonment is the most serious consequence that the state can impose on someone who has committed an offence. Whilst the focus of this report is to review the operation and effectiveness of the *Sentencing Act 1995* (WA), and not investigate the length of imprisonment terms for offences *per se*,²³ the Issues Paper took the opportunity to gain valuable feedback from key stakeholders on the following imprisonment issues:

- a) periodic detention;
- b) terms of 6 months or less;
- c) parole;
- d) standard non-parole;
- e) other enhancements to custodial sentences.

²³ The terms to be imposed for offences are contained in other legislation (e.g. the Criminal Code)

a) Periodic detention

There are various forms of periodic detention (or intermittent custody) existing in other states and around the world. A periodic detention order is generally an imprisonment sentence that requires a person to be placed in custody for say two days a week (for example) for the duration of the sentence whilst during the rest of the week, the person is free to continue employment etc.²⁴ In 2007, the NSW Sentencing Council conducted a review of NSW's periodic detention legislation and found that electronic tagging, among other forms of intensive surveillance sanctions, has become a more popular sentencing option.²⁵

In part this has been due to the significant security issues involved in the movement of part-time prisoners into and out of institutions. It has also been attributable to concerns that prisoners find it difficult to cope with the combination of work and prison, and to the significant increases in full-time prison numbers that have led to periodic detention beds being absorbed into the mainstream corrections systems.²⁶

Stakeholders were fairly evenly divided on whether periodic detention should be considered for Western Australia. Those opposing cited problems with implementation and administration, and criticised its resource intensive nature and limited accessibility in regional and remote areas, which would notably impact Aboriginal offenders. The Chief Justice, Hon Wayne Martin was opposed to its introduction on more conceptual grounds and stated, "(a)ny sentencing option which brings offenders into regular contact with fellow offenders is likely to encourage recidivism and have a detrimental impact on the community".

Of those supporting the introduction of periodic detention, most suggested it should be used for serious and repeat traffic offenders *only*. For example, Magistrate Brian Gluestein claimed:

²⁴ See for example s. 6 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

²⁵ The report is available for download from [http://www.lawlink.nsw.gov.au/lawlink/scouncil/ll_scouncil.nsf/vwFiles/Periodic_Detention_Report.pdf/\\$file/Periodic_Detention_Report.pdf](http://www.lawlink.nsw.gov.au/lawlink/scouncil/ll_scouncil.nsf/vwFiles/Periodic_Detention_Report.pdf/$file/Periodic_Detention_Report.pdf)

²⁶ Whilst the report noted both advantages and disadvantages of periodic detention, the Sentencing Council finally opted for supporting, in principle, the replacement of periodic detention with a Community Corrections Order (CCO).

I recommend there be the ability to impose weekend or limited stay detention for such offenders as the serious repeat drink drivers and those who drive under disqualification. My suggestion for such 'lower level' offenders is to deprive them of their weekends or even, in the case of fly-in/fly-out workers, deprive them of a week at a time perhaps and over say, a 6 month period. The regime could take the form of – where deprived of weekends the person enters prison (preferably some custodial facility that might be purpose designed for this category of offender). I would imagine a sentence being framed for the recidivist *Road Traffic Act* offender such as 12 months term of imprisonment in which the first 3 months he or she spends every weekend in detention and for the remaining 9 months placed on a recognisance in a monetary amount with supervision from Community Corrections.

Former Chief Judge Hon Antoinette Kennedy advocated for the introduction of periodic detention on the grounds that “it [has] the potential advantage of reducing an offender’s potential for re-offending, as the offender remains in contact with the Community during the week”. She went on to say:

It serves the purpose of deterrence and punishment. The retention of an offender in the community allows for rehabilitative measures, the maintenance of family and employment relationships and an avoidance of the inevitable negative impact of full time imprisonment.

Electronic tagging was raised by the DPP and the DCS who suggested that new Global Positioning System (GPS) technologies could be used to provide restrictions on freedom via community detention, thus providing a preferable and more cost effective sentence. DCS added “the Minister for Corrective Services is currently considering the introduction of electronic monitoring using GPS technology for high risk offenders on supervision”.

Conclusion 44: There may be an argument that periodic detention provides a legitimate and rehabilitative sentencing avenue for certain offenders to be punished whilst continuing to contribute to society, retain employment and maintain family and social responsibilities. However, as indicated by some stakeholders, the practicalities and cost of operating periodic detention throughout the state, including the types of offenders to whom it would best be suited, would need to be carefully considered. Some stakeholders have also identified several other credible,

rehabilitative and cost effective alternatives. This report suggests that options of partially suspended sentences and electronic tagging could have the same impact at lower cost and should be considered in preference to any proposal for periodic detention.

b) Imprisonment terms of six months or less

Currently s. 86 of the *Sentencing Act 1995* (WA) prohibits imprisonment terms of six months or less, and in recent years this has attracted significant attention and debate. In 2004 the NSW Sentencing Council announced that the outcomes of Western Australia's abolition of short sentences, among several other conditions, would determine whether or not the NSW Attorney General would adopt a similar option in the future.²⁷ As yet, there has been no decision taken on this. In 2007, an internal report by the DCS²⁸ revealed that offences that had previously attracted sentences of less than six months were now receiving longer sentences (known as 'sentence creep'). Several magistrates also expressed the view that mandating a minimum custodial sentence at six month plus one day results in a lack of flexibility for magistrates in their sentencing deliberations.

When asked to respond on the current prohibition on sentences of six months or less, stakeholders were unanimous. Without exception, stakeholders advocated the removal of this provision with the Chief Justice, Hon Wayne Martin summing up the views of most stakeholders:

[T]he current prohibition on sentences of 6 months or less should be abolished. There can be little doubt that the prohibition has resulted in 'sentence creep', in that offences which previously attracted terms of less than 6 months imprisonment now tend to be dealt with by way of a longer term rather than a community based option.

²⁷ The report is available at http://www.lawlink.nsw.gov.au/lawlink/scouncil/ll_scouncil.nsf/pages/scouncil_publications

²⁸ Department of Corrective Services, Unpublished, *Report on the Effects of Rates of Imprisonment following Sentencing Legislation Reforms of 2003*, June 2007

The DPP, Mr Joe McGrath supported 'short, sharp, shock' sentences designed to "provide the shock required for [particularly first time and young offenders] to consider the consequences of their actions". He went on to suggest that:

A more direct way of achieving short term sentences could be made available through the use of partially suspended sentences, where a person is imprisoned for 1 month, and the sentence suspended for further 11 months. This appears to offer a more flexible approach to sentencing...and has the benefit of avoiding the uncertainty of a parole hearing.

Magistrate Gluestein added that the minimum period of imprisonment should be returned to three months, but recommended that it be considered together with proposals for partially suspended sentences.

Conclusion 45: There is considerable merit in allowing short term sentences of less than six months and it is recommended that, for practical reasons, minimum imprisonment sentences be returned to three months, consistent with the original *Sentencing Act 1995 (WA)*. In addition, there appears to be considerable interest and stakeholder support for considering partially suspended sentence options that may involve conditions such as community service or program participation.

Aboriginal affairs and short sentences

Support for short prison sentences also came from a number of Aboriginal communities who deal with a range of offences, but particularly to deter offenders bringing alcohol and other 'deleterious substances' into their communities. This issue was in fact raised by the Ngaanyatjarra Council at a meeting with the Attorney General in Warburton in mid 2009, and had been raised with his predecessor through the Ngaanyatjarra Community's 2002 'Law and Justice Submission'. The Ngaanyatjarra Community requested the reintroduction of short prison sentences as a possible penalty for breach of its community by-laws, arguing that fines were ineffective in dealing with offences such as the trafficking of alcohol and volatile substances (including petrol) for sniffing, because the potential profits from such trafficking far exceeded the impact of the fine penalties available under the either by-law regime or under the *Liquor Control Act 1988*.

Conclusion 46: Penalties for breach of by-laws in all Aboriginal communities are set by the *Aboriginal Communities Act 1979* (ACA) itself (s. 7 (2)(d)) rather than within each set of by-laws established as regulations under the ACA. The reintroduction of short prison sentences for breach of Aboriginal community by-laws would require consequential amendments to the *Aboriginal Communities Act* in line with wider changes to s. 86 of the *Sentencing Act 1995*.²⁹

Whilst a reform to enable short sentences would address the concerns raised by the Ngaanyatjarra Community, there exists the potential risk of net-widening unless the *Aboriginal Communities Act 1979* is also amended to set a maximum prison term of say four or six months. The findings and recommendations (especially Recommendation 168)³⁰ of the Royal Commission into Aboriginal Deaths in Custody (1991) remain relevant in this regard.

c) Parole

Hon Justice Narelle Johnson, as she was then, provided comment on current terminology around parole pursuant to s. 89 of the Act which empowers the court to order that the offender “be eligible for parole” by making a “parole eligibility order”. Her Honour maintained that these terms are misunderstood by prisoners who believe they should be released on parole after the minimum term rather than be eligible for consideration for release on parole.

Conclusion 47: Whilst the issue of terminology regarding ‘parole eligibility’ was not a specific question posed to all stakeholders as part this review, Hon Narelle Johnson’s comments are deserving of further consideration.

²⁹ In theory, the option also exists to amend the ACA so that particular penalties were specified within each set of by-laws, but this would be a major amendment to the ACA, and would be complex to implement.

³⁰ <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol3/166.html>

d) Standard non-parole period

Other than a proposal for significant reform of the structure of custodial sentences (to be discussed below) very little feedback was received on the current parole settings in the *Sentencing Act 1995* (WA) and the *Sentencing Administration Act 1996* (WA). However, interest has been expressed in NSW's use of standard non-parole periods fixed in statute. As a result, stakeholders were asked to comment on the NSW initiative.

Part 4, Division 1A of the *Crimes (Sentencing Procedure) Act 1999* (NSW), when applied, reduces the discretion of the courts when sentencing an offender, in that the standard non-parole period represents the non-parole period for an offence in the middle of the range of 'objective seriousness' for offences in the Table in this Division. Based on the standard non-parole period, the sentencing court is required to record its reason for increasing or reducing the sentencing beyond a statutory standard non parole period, specifically identifying each factor, as required per section 54B(3).

Part 4 Division 1A s. 54A of the *Crimes (Sentencing Procedure) Act 1999* NSW states:

What is the standard non-parole period?

- 1) For the purpose of this Division the standard non-parole period for an offence is the non-parole period set out opposite the offence in the Table to this Division.
- 2) For the purpose of sentencing an offender, the standard non-parole period represents the non-parole period for an offence in the middle of the range of objective seriousness for offences in the Table to this Division.

The NSW Act further requires the court to set out in writing their reasons for departing from the non-parole period and moreover the court is required to identify each factor it took into account in arriving at their decision to sentence above or below the standard non-parole period. The Table contained in Division 1A specifies non parole periods of 10 years for attempted murder, 7 years for wounding with intent or resisting arrest, 10 years for aggravated sexual assault and 7 years for aggravated burglary. These are just a sample of offences contained in the Table (refer Appendix C).

The Issues Paper asked stakeholders whether provisions similar to those contained in the New South Wales *Crimes (Sentencing Procedure) Act 1999* should be considered for WA. Former Chief Judge Hon Antoinette Kennedy sums up stakeholder feedback:

The present system works well and was instituted to replace the former system where judges had the discretion to set the non-parole period. Any tinkering with the present regime is likely to result in a lack of consistency in sentencing and potentially in increased appeals against sentences.

This represents the majority view of stakeholders who were opposed to implementing such a provision in Western Australia.

Conclusion 48: The NSW standard non-parole system clearly restricts the sentencing discretion of judicial officers. It is not surprising that most of the stakeholders who inputted to this review were opposed to any such move for Western Australia. However, it nevertheless is used in NSW and enjoys support from the community. Any possible introduction in Western Australia would have to be considered carefully.

e) Other enhancements to custodial sentences

Apart from suggestions around the introduction of periodic imprisonment and partially suspended sentences, stakeholders did not suggest any major reforms to the types of imprisonment sentences that can be imposed. One exception was Chief Justice Hon Wayne Martin, who quoted extensively from a paper prepared by the Hon Justice Murray in 2009.³¹ According to Justice Murray (as quoted by Chief Justice Martin), “prison management problems are improved if the prisoner can predict with certainty the day of his or her release”. Further, “the true function of parole is not to reduce the term served, but to promote rehabilitation by aiding the transition from prison back into the community and thereby to reduce recidivism”. And finally,

³¹ This report was an internal document dated 9 April 2009. It was forwarded to the office of the Hon. Attorney General under the cover of a letter of the Hon Chief Justice. The focus of the report was on reform of the law with respect to parole, rehabilitation and recidivism.

“deferral or denial of parole by the Prisoner’s Review Board is wrong in principle. It encourages ‘back-end sentencing’ and increases prison management problems”.

Hon Justice Murray proposed significant reform to the structure of a prison sentence. The Chief Justice summarised its essential features as follows:

1. The sentence of imprisonment is imposed, resulting in a fixed term which may be an aggregate of individual sentences;
2. That is the term which will then be served without remission, except to the limited extent available by making a re-entry release order or under the *Prisons Act*;
3. Parole will not be available if the term is 12 months or less;
4. For terms longer than a year, there will be a requirement for supervised release (parole) for a period equal to the length of the term, up to a maximum of 2 years;
5. The function of the Prisoners Review Board will be to set the terms and conditions of parole from no or minimal supervision to detailed program requirements;
6. Breach of parole will be an offence punishable in the Magistrates Court by imprisonment, a fine, other non-custodial options or variation of the existing parole order;
7. The present system will continue to apply to prisoners sentenced to life imprisonment or indeterminate terms and the proposed system would have only limited application to young offenders who are dealt with differently under the *Young Offenders Act 1994 (WA)*.³²

Additional stakeholder comments concerning the need for greater simplification of the sentencing structure and clarification of terminology were noted. For example, one stakeholder argued that imprisonment sentences “should be able to be simplified because they are currently a mystery known only to the Sentence Information Unit, who spend their time sending matters back to the court to change sentences to reflect what they are trying to achieve”.³³ On the issue of ambiguous sentencing terminology, the former Chair of the Victims Reference Group, Hon Cheryl Edwardes, suggested being realistic about the nomenclature used in describing imprisonment sentences:

In reality ‘life imprisonment’ does not mean an offender is sentenced to prison for the rest of their life. This creates a great deal of anger, confusion and misunderstanding amongst the community and victims feel they are

³² Ibid.

³³ Stakeholder has requested to remain anonymous.

being misled by the courts. The use of the term “life” should be removed for sentences that do not actually send the offender to jail for the remainder of their lives.

In other words, the clarification of such terminology may help to simplify some of the definitions of imprisonment sentence types.

Her Hon Justice Narelle Johnson, as she was then, provided some final comments on issues related to imprisonment. Hon Narelle Johnson noted that, following a Court of Appeal decision, the setting of minimum terms when a number of sentences are involved and where they can be served cumulatively or concurrently, has been settled. However, she noted that a cumbersome process exists where, should the Sentence Information Unit in the DCS arrive at a minimum term to be served different to that set out by the court pursuant to s. 34(2) of the Act, then the matter must be returned to court for a correction of the sentence.

Conclusion 49: The proposal of Hon Justice Murray is interesting and represents a significant shift from the current way custodial sentences are constructed. It certainly achieves the goals of simplification and clarification of imprisonment sentences. Whilst there may be merit in further considering this approach, it is interesting to note that no other key stakeholders suggested any significant changes to the current construction of imprisonment sentences.

Ancillary issues

Stakeholders were invited to present other views on the Act that had not been captured elsewhere. The main topics that attracted additional comments were:

- a) Remand
- b) Young Offenders
- c) Sentencing Advisory Council

a) Remand

Whilst remand is not specifically within the legislative ambit of the *Sentencing Act 1995* (WA), there are nevertheless some crossovers which may, according to the DPP, warrant some amendments to the Act. The DPP suggested, for example,

amending s. 87 so that time on remand can be taken into account in such situations where an offender is on bail for one offence, but in custody for another, and is subsequently found not guilty in relation to the offence he or she was in custody for. He also suggested that where orders exist in another Act which are conditional on sentencing (e.g. *Restraining Orders Act*), they should probably be incorporated into *Sentencing Act 1995 (WA)*.

Conclusion 50: In line with the suggestions of the DPP, there is merit in considering amendments to s. 87 of the *Sentencing Act 1995 (WA)* to enable remand to be considered more broadly in specific situations, such as the example outlined above.

b) Young adult offenders

There has been an acknowledgement across most jurisdictions of the need to treat young adult offenders as distinct from young/juvenile offenders as well as from older adults. In the United Kingdom, a recent study highlighted the problem with a criminal justice system that categorised anyone over eighteen as an adult, without consideration for the unique transitional status between adolescence and adulthood. The study indicated that young adolescents experience different levels, timing and stages of physical, emotional, sexual and social maturity during the transition into adulthood and, the ability to handle drink and drugs occur at different times for different people and are provoked by different triggers:

Some people mature earlier than others and nearly everyone matures at different times in different stages of their lives. Most, however, remain emotionally and socially immature, dependent on parental or state support, powerfully influenced by peers, and living experimental lives of trial and error ... The legal system, however, treats everyone 18 and over as an adult.³⁴

Whilst Western Australian law does not currently delineate 18 to 24 year old offenders from other adults, both New South Wales and Victoria have trialled a conferencing model aimed at this age group. Furthermore, a report by the Victoria

³⁴ Barrow Cadbury Trust, 2005

Sentencing Advisory Council has recommended the introduction of a new form of Community Based Order specifically for young adults.³⁵

Stakeholders were invited to comment on the possibility of broadening sentencing options for young adult offenders in the wake of Government's recent commitment to building a specific detention facility for this group of offenders. There was a mixed response, with judicial officers and the Law Society opposed to the idea on the grounds that age of the offender "will be weighed against the seriousness of the offence, the personal circumstances of the offender, the need for specific and general deterrence and prospects for rehabilitation."³⁶ Therefore "existing principles [already] take into account youth as a powerful mitigating factor and it is not necessary to set up a statutory sentencing regime for young adult offenders".³⁷

On the other hand ALSWA suggested that separate principles of sentencing modelled on those contained in Sections 7 and 46 of the *Young Offenders Act 1994* should be made.

Conclusion 51: It is the view of this report that an offender's age and maturity levels are already taken into account when judicial officers exercise their discretion in sentencing and therefore there appears to be little reason to make any amendments in this regard.

c) Sentencing Advisory Council

Sentencing Advisory Councils (SAC) are thought to provide a credible advisory and consultation function independent of law makers (i.e. the legislature) and law implementers (i.e. the judiciary). SACs that have been established in the UK, USA, New Zealand, NSW and Victoria, generally share a number of common functions, such as:

³⁵ The report is available from <http://www.sentencingcouncil.vic.gov.au/content/publications/suspended-sentences-final-report-part-2>

³⁶ Mr Richard Bayly (Magistrates: Perth Magistrate Courts)

³⁷ Law Society of WA.

- the provision of accessible sentencing data;
- the provision of accessible data on crime trends;
- gauging public opinion on sentencing matters;
- co-ordinating strategies to educate the public on crime and sentencing issues;
- conducting research on sentencing matters;
- consulting with government bodies, stakeholders and members of the public on sentencing matters; and
- advising the Attorney-General on sentencing matters.

If such a body was set up statutorily in Western Australia, this would most likely be under the auspices of the *Sentencing Act 1995* (WA). Stakeholders were divided on the issue of whether the Western Australian justice system would benefit from a Sentencing Advisory Council. The DPP was one of several in support of the notion, suggesting that the existence of such a body would provide an appropriate response “to community outrage, for example, against perceived lenient sentencing in WA”. In addition, he adds:

Having accessible data on crime trends and sentencing would be invaluable in relation to appeal matters. There is currently a lot of debate about what is the usual sentencing range in order to establish whether a particular sentence is manifestly inadequate or excessive...It would also be useful to have information about public opinion on sentencing matters to assist the DPP in working with victims. Such information has the potential to provide a better sense of the average person’s view on sentencing...

Those stakeholders opposing the establishment of such a body argued that it has the potential to erode judicial independence if this role is taken too far. The Law Society of WA supports a Sentencing Advisory model so long as its remit was for the production and analysis of statistical trends in sentencing for public consumption. The DCS questioned the benefit of such a body when the Law Reform Commission already provides such a function. However, suggested it could be considered if it were “truly independent to enable independent advice to Justice stakeholders”.

Conclusion 52: Stakeholder arguments for and against the introduction of a Sentencing Advisory Council are evenly matched. However, none presented a particularly compelling case for its introduction and therefore it is not specifically supported in this report.

6. Summary and conclusion

It must be reiterated that in the last fifteen years the *Sentencing Act 1995* (WA) has attracted little negative feedback. After analysing the views of key stakeholders, it is evident that the majority of stakeholders remain satisfied with most parts of the Act, especially those that ensure judicial officers maintain as much discretion as is needed to respond to individual offender situations. The areas of Fines, Community Based Orders and understandably, Imprisonment represent the majority of changes for Government to consider, essentially focussing on increased flexibility in the imposition of these orders and the conditions associated with them.

In pursuing continual improvement of an Act which has served the State well for over fifteen years, this report enables Government to determine whether the policy objectives of the Act remain valid and whether the terms of the legislation remain appropriate for securing those objectives.

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Appendix A: List of key stakeholders

The Department of the Attorney General acknowledges the following people for their valuable contribution to the Statutory Review of the *Sentencing Act 1995* (WA):

Hon Wayne Martin	Chief Justice of Western Australia, Supreme Court of Western Australia
Hon Antoinette Kennedy	Former Chief Judge, District Court of Western Australia
Mr Steven Heath	Chief Magistrate, Magistrates Court of Western Australia
Hon Denis Reynolds	President of the Children's Court Western Australia
Hon Narelle Johnson	Former President, Prisoner's Review Board WA
Mr Richard Bayly	Magistrate, President, Magistrates' Society of Western Australia
Mr Brian Gluestein	Magistrate
Mr Peter Collins	Aboriginal Legal Service WA
Mr Richard Utting	Former President, Criminal Lawyers Association of Western Australia
Mr Hilton Quail	Former President, Law Society of Western Australia
Mr George Turnbull	Director, Legal Aid of Western Australia
Mr Joe McGrath	Director of Public Prosecutions
Mr Ian Johnson	Former Commissioner, Department of Corrective Services
Acting Senior Sergeant	Western Australia Police
Senior Constable	Western Australia Police
Prosecutor	Western Australia Police
Hon Cheryl Edwardes	Former Chair, Victims of Crime Reference Group

Ms Kay Benham	Former Director, Court Counselling & Support Services, Department of the Attorney General
Mr Frank Morgan	Associate Professor, Crime Research Centre, University of Western Australia
Mr Guy Hall	Associate Professor, Murdoch University
Mr Thomas Crofts	Associate Professor, Murdoch University