This discussion paper has been produced by the Springvale Monash Legal Service Inc and printed with financial assistance from the Danks Trust. This discussion paper has been prepared to encourage discussion of, and research into, the Criminal Justice Diversion Program and related concepts within the framework of therapeutic jurisprudence. We hope to promote the many benefits of this program to the legal fraternity and wider community.

Title: Criminal Justice Diversion Program - Discussion Paper
Author: Springvale Monash Legal Service Inc.
Artwork: Chris Maplestone

© Springvale Monash Legal Service Inc. 2006

This material is copyright. It may be reproduced for legitimate educational or review purposes; copying for other purposes must be authorised by express permission of Springvale Monash Legal Service Inc.

Prepared by:
Juliet Sironi
David Brett
Angela Liaskos
Adam Zammit
Samala Nancarrow
Kristin Shergold
Nicole Wilson

Coordinated by:
Dave Taylor
Nadege Todorov
Adel Mohamed
Priscilla Chan
Anna Vuong

A Community Development Group Project of Springvale Monash Legal Service Inc.

For more information contact:
Dave Taylor
Community Development Worker
Springvale Monash Legal Service Inc.
5 Osborne Avenue
Springvale VIC 3171
p 03 9562 3144
e dave.taylor@law.monash.edu.au
w www.smls.com.au

SURVEY RESPONSES

Diversion Coordinators
Diversion Coordinator 1 – September 2005
Diversion Coordinator 2 – September 2005
Diversion Coordinator 3 – September 2005
Diversion Coordinator 4 – received 29 September 2005

Police Officers
Police Officer 1 – September 2005
Police Officer 2 – September 2005
Police Officer 3 – September 2005
Police Officer 4 – received 8 September 2005
Police Officer 5 – received 8 September 2005
Police Station Responses – received 28 September 2005

Lawyers
Lawyer 1 – October 2005
Lawyer 2 – October 2005
Lawyer 3 – October 2005
Lawyer 4 – September 2005
Lawyer 5 – September 2005
Lawyer 6 – received 3 October 2005
Lawyer 7 – received 8 September 2005
Lawyer 8 – received 3 October 2005
Lawyer 9 – received 14 November 2005
Law Institute of Victoria – received 25 October 2005

Magistrates
Magistrate 1 – received 9 March 2006
Magistrate 2 – received 1 February 2006
Magistrate 3 – received January 2006
Magistrate 4 – received January 2006

BIBLIOGRAPHY
Each month about 500 people enter into the Criminal Justice Diversion Program. Over the past year, nearly 6000 offenders have participated in this program, or nearly 9% of all offenders who were sentenced in the Magistrates' Court. This new option has become a major feature of Victoria's dispositional landscape and for that reason, it is important that it be examined and critically evaluated.

This report, undertaken by penultimate and final year law students in the Faculty of Law at Monash University who are enrolled in the Faculty's clinical, or Professional subject at the Springvale Monash Legal Service, is an excellent example of how law students can engage with their community and make a contribution to the development of the law and legal practice. As well as providing students with research and writing skills, it also develops the important personal skills of project management, teamwork and the ability to interview and engage with a wide range of participants in the criminal justice system outside the context of a court.

The report paints the program in a generally positive light, but indicates more research needs to be undertaken about the operation of the program and its outcomes. It also reveals some potential legal problems for participants. This is not surprising for a relatively new program and if the report results in its enhancement, in assisting offenders and reducing crime in Victoria, then it will have been a very successful enterprise indeed.

I commend the Springvale Monash Legal Service and the students for conceiving and executing this important project.

Arie Freiberg
Dean, Faculty of Law
Chair, Sentencing Advisory Council, Victoria
TABLE OF CONTENTS

EXECUTIVE SUMMARY
AND SUMMARY OF FINDINGS  ......................  4

1. INTRODUCTION ...............................  5-8
   Duplication with police cautioning
   Effect of enabling legislation
   – Magistrates’ Court Act
   Referrals to diversion
   Other “diversionary” programs
   “Diversion” classification difficulties
   Diversion as a sentencing substitute
   Diversion and therapeutic jurisprudence
   Further research suggestions
   Conclusion

2. METHODOLOGY ...............................  9

3. DISCUSSION .................................  10-20
   What is diversion?
   How diversion evolved:
   Purpose of diversion program
   Offences to which diversion applies
   Who makes the decision to divert offenders?
   Procedure of diversion
   Costs and benefits of diversion
   Guidelines

4. EVALUATION OF DIVERSION ...............  21-25
   Consultations
   Conclusion

5. FINDINGS AND RECOMMENDATIONS .......  26-27
   Findings

6. BIBLIOGRAPHY ...............................  28-30
   Journal articles
   Reports, government and sundry materials
   Survey responses
This paper provides an independent conceptual evaluation of the Criminal Justice Diversion Program (Diversion). Although Diversion has been evaluated in the past, the program has been notably absent in the majority of public debate and inquiry into the mechanics of the Victorian criminal justice system. With the state election pending, it is important that this valuable program is appropriately promoted to the public as an effective and intelligent response to certain types of crime.

The impetus behind the preparation of this paper has been part of the access to justice initiative of the Springvale Monash Legal Service (SMLS). Access to justice has been a cornerstone for the Community Development program at SMLS, whereby we have been seeking methods to improve access to our legal system for marginalised individuals and community groups. Ensuring access to the justice system for all members of our community is part of the vision of SMLS.

Our initial investigations stemmed from a project which works with youth of Maori and Pacific Islander background, who, from anecdotal sources, are over-represented in court statistics. These people were often reluctant to seek assistance with legal matters, precluding them in many cases from participating in Diversion. This program led us to host a community legal education forum on Diversion in mid 2004. Also, students and workers at SMLS have spent considerable time presenting information about the legal system to young people, with particular emphasis on police cautioning and Diversion.

After reviewing the limited literature available on Diversion, we initiated consultations with stakeholders involved in the program, with the exception of victims and offenders, while also conducting research into therapeutic jurisprudence, and in particular, the Drug Court of Victoria. Our aim was to gain the impressions of those involved with the program, using their comments to identify areas of Diversion which may benefit from further research or discussion.

This report will discuss the history of Diversion, the roles of the various stakeholders, literature and material available from the Magistrates’ Court including the relevant legislation. Also, the results of the survey are discussed below, and used to frame recommendations for further research.

A summary of the recommendations include:

1. Research into the benefits of Diversion being recommended without the consent of the Police Informant (Informant).
2. Research into the benefits of granting legal practitioners the power to make representations to the Magistrate in the event of refusal by the Informant to recommend Diversion.
3. Research into the benefits of preparing general and broad eligibility guidelines for Diversion to maximise parity in its application.
4. Provision of more education concerning Diversion to the police, as well as other relevant stakeholders.
5. Provision of community legal education about Diversion.
6. Research into the types of crime more likely to be suitable for Diversion.
7. Identification of the sentencing options which Diversion has replaced.
8. Ongoing consultation with Informants to determine factors which impact upon their decision to recommend Diversion.
9. Consultation with both victims of crime and Diversion participants with a view to maximising the benefits of the program.
10. Research into the potential civil pitfalls of the requirement for the defendant to admit the facts to be eligible for Diversion.
CRIMINAL JUSTICE DIVERSION PROGRAM

1. INTRODUCTION

Diversion has been subject to a major report by the Department of Justice of Victoria (DOJ) in 2004, and has been discussed in the context of therapeutic jurisprudence and court related innovations. This literature review critically assesses and highlights the important aspects of the major report and provides an overview of the current discussions surrounding Diversion.

The most comprehensive review of Diversion was carried out by Health Outcomes International Pty Ltd on behalf of the DOJ in November 2004. The terms of reference of the report included determining the “effectiveness of the Court Diversion programs”. The review covered Diversion, the subject of this report, along with the Court Referral and Evaluation for Drug Treatment (CREDIT) Program and the Drug Court.

This report followed a status report from August 1999, which considered the Diversion Pilot Program. The benefits of Diversion in the early stages were stated to be the “…opportunity to divert from the criminal justice system those for whom greater harm is caused by the appearance itself. For those who are labouring under some disability and for those whom early intervention might bring about positive lifestyle changes and thereby reduce the prospects of re-offending.” The report included summaries of interviews with administrators of the pilot program, but did not say how many people were interviewed or how the data from them was analysed. This may be due to the program being in its infancy at the time of the report.

The status report concluded that there was a need for further education and publicity of the Diversionary programs, and that Diversion should not have a rigid formal structure, thus facilitating a number of appropriate avenues for court-community communication.

DUPLICATION WITH POLICE CAUTIONING

In the 1999 status report, interviewed administrators of Diversionary programs, such as Magistrates, Registrars and the police, in principle, had no difficulties with incorporating the program into the criminal justice system, nor any difficulty with the police cautioning program operating in tandem. In 2004, a key recommendation of the final report was that further analysis and consultation should be conducted regarding the potential duplication between police cautioning and Diversion. The only evidence the report puts forward to back the recommendation is that “some stakeholders suggested police cautioning and [Diversion] are potentially duplicative in the sense that an offender could be given more than one chance for the same type of offence.” It is unclear why the views of Diversion administrators have changed since the pilot program.

EFFECT OF ENABLING LEGISLATION - MAGISTRATES’ COURT ACT

In 2002, the Magistrates’ Court Act 1989 (Vic) was amended to cater specifically for Diversion. There appeared to be an impression by stakeholders in Diversion that the lack of this legislation hindered the uptake of the program.

The DOJ final report analysed data from the Diversion database (maintained by the DOJ) between November 2000 and September 2003. The 2002 amendment was not found to have an effect on the number of entrants to the program. This report appears to be consistent with the view that Diversion operates in an “informal” manner, as recommended by a sentencing review in 2002.

BIBLIOGRAPHY

Diversion Coordinators

Diversion Coordinator 1 – September 2005
Diversion Coordinator 2 – September 2005
Diversion Coordinator 3 – September 2005
Diversion Coordinator 4 – received 29 September 2005

Police Officers

Police Officer 1 – September 2005
Police Officer 2 – September 2005
Police Officer 3 – September 2005
Police Officer 4 – received 8 September 2005
Police Officer 5 – received 8 September 2005
Police Station Responses – received 28 September 2005

Lawyers

Lawyer 1 – October 2005
Lawyer 2 – October 2005
Lawyer 3 – October 2005
Lawyer 4 – September 2005
Lawyer 5 – September 2005
Lawyer 6 – received 3 October 2005
Lawyer 7 – received 8 September 2005
Lawyer 8 – received 3 October 2005
Lawyer 9 – received 14 November 2005
Law Institute of Victoria – received 25 October 2005

Magistrates

Magistrate 1 – received 9 March 2006
Magistrate 2 – received 1 February 2006
Magistrate 3 – received January 2006
Magistrate 4 – received January 2006
INTRODUCTION

Between January and June 1999, there were 166 matters referred to Diversion through the pilot program at Broadmeadows Magistrates' Court. During this period, in the pilot program, the police referred 92% of matters and the remaining 8% were made by legal practitioners. 12 Between November 2000 and September 2003, the majority of referrals to Diversion came from the police. The police were responsible for 61.9% of referrals, 13 32.8% of referrals were from the defendant, or the defendant’s solicitor and 4.3% were from the court.

The status report data (from the 1999 report) was not referred to in the final report (the 2004 DOJ report). It may be difficult to compare the results due to the pilot program being small, at one venue only, and operating under different conditions. However, the statistics, without taking these factors into consideration, show a large attitudinal change in the referrals to Diversion by the police.

From the final report, the amount of referrals from the police appears to be an encouraging figure, considering some stakeholders, noted in section 4 of this report, are concerned about the emphasis on the involvement of the police in approving referrals to Diversion.14 The statistics do not take into account the important element of the eligibility of participants for Diversion. Further research could consider the number of eligible participants that were referred by particular stakeholders in the process (either police or recommended to police by solicitors). This would be useful in illustrating trends indicating the type of offender deemed appropriate for participation in diversion by each group of stakeholders. This would assist in determining trends in referring from each stakeholder.

A longitudinal comparison indicating which groups referred particular participants to Diversion may also be valuable. It is important to note that police are often encouraged by legal practitioners to recommend Diversion, so this type of research would need to take such factors into account.

Finally, a key recommendation of the DOJ final report is that consideration needs to be given as to whether current Diversion informational measures are sufficient. This appears to apply most significantly to defendants who lack legal representation.15

OTHER “DIVERSIONARY” PROGRAMS

Diversionary programs have been subject to analysis from the perspective of particular groups of participants, such as the homeless, individuals with substance abuse issues and/or those who suffer from mental illness.

The report by Midgley on homeless people in the court process recommends that programs such as Diversion would be useful for offenses “at the lower end of the sentencing hierarchy.” 16 It noted, “The scope of [Diversion] in Victoria is too narrow... A number of [homeless] participants had been excluded from the program because of prior offenses.” 17 This is a major topic, but unfortunately beyond the scope of this project. Further research into this area, by involved and experienced stakeholders, would be encouraged.

“DIVERSION” CLASSIFICATION DIFFICULTIES

There is an apparent inconsistency in the literature on how Diversion fits into the criminal justice system. Freiberg points out that Diversion is a “court related innovation,”18 and not a problem oriented court such as the Drug Court. However, Diversion and the Drug Court are considered “court based Diversionary programs”19 by the DOJ’s final report. The inconsistency may come down to different interpretations of the word “Diversion”. The term “Diversion... assumes that there is a proper and
prerecorded path for a dispute leading to the court from which any other process is a derogation."20 Also, many schemes such as CREDIT Bail program and the Drug Court pilot are considered Diversionary programs and thus may be referred to as ‘Diversion’. To address this possible confusion, "a deliberate change in terminology was suggested".21 It seems clear that the Criminal Justice Diversion Program is understood to be an innovative process of the court, whether or not the term "Diversion" describes it sufficiently.

DIVERSION AS A SENTENCING SUBSTITUTE

The DOJ report found that 50% of the conditions of Diversion programs related to the tendering of a donation to a charitable organisation.22 Such a requirement, to successfully complete Diversion, could be considered as quasi-punitive: a sentence substitute. Further, it ranks alongside the requirement to acknowledge responsibility for the offence.23 It is argued that requirements of this nature are effectively a punishment and therefore, should only be required if there is a finding of guilt.24 The report noted that only 13% of conditions were counselling related conditions.25 This further suggests that Diversion may be used in place of a criminal sentence.

A clear interpretation of these results requires an understanding of the particular offences that were resolved with a donation, compared to counselling. Also it should be noted that one aim of Diversion is to prevent first time or low risk defendants from entering the criminal justice system.26 Therefore, the implication that Diversion is a sentencing substitute may be misconstrued.

DIVERSION AND THERAPEUTIC JURISPRUDENCE

Diversion is understood to fall under the broad ambit of the concept of therapeutic jurisprudence by "assisting an offender's rehabilitation, utilising the community's resources for appropriate counselling or treatment, and ensuring that appropriate reparation is made to the victim of the offence."27 It is suggested that applying the principles of therapeutic jurisprudence contributes to a more comprehensive resolution of the legal problem.

The use of therapeutic jurisprudence is not without criticism. The application of therapeutic remedies by the court can be seen as "fusing the court system with the welfare system, in a manner which is subtle and perhaps lacking in transparency".28 Further, Vivienne Topp, Solicitor, Mental Health Legal Centre, argues that it may not be appropriate to rely on systems of the court to address wider social problems.29 Others argue that the results speak for themselves. There have been positive outcomes in relation to evaluations of drug courts in terms of the effect of programs on recidivism, cost effectiveness and participant well-being.30

FURTHER RESEARCH SUGGESTIONS

As our research has only located one major Victorian report focusing on Diversion, there is a lack of information on certain issues which could be addressed through further research. A comparison of recidivism with non-participants of Diversion has not been undertaken. Also, an understanding of the cases that miss out on being referred to Diversion, where otherwise eligible, would be useful. This information could provide a basis for evaluating the effectiveness of Diversion and how it can be improved.

CRIMINAL JUSTICE DIVERSION PROGRAM

6. BIBLIOGRAPHY

JOURNAL ARTICLES

Arie Frieberg, Pathways to Justice Sentencing Review (2002)
As was noted in Section 2, this project was unable to consult with both Diversion participants and victims of crime. Further research with both these groups would greatly benefit the Diversion program, and also the justice system as a whole. Intelligent and sensible consultation with offenders within the justice system, as well as victims of crime, can greatly enhance the effectiveness of policy and program development.

Finally, it would be worthwhile to examine the pitfalls of admitting the facts, which can be viewed as tantamount to an admission of guilt, theoretically exposing the Diversion participant to civil action. Section 128A(4)(c)(x) of the Magistrates’ Court Act 1989 (Vic) indicates that participating in Diversion can make one vulnerable to the Confiscation Act 1997 (Vic), although the type of offence likely to be suitable for Diversion is unlikely to expose one to confiscation. This example demonstrates the importance of ensuring that the defendant is fully aware of all repercussions and consequences in consenting to Diversion. Furthermore, admitting the facts is not a finding of guilt, and as such, it is important that the current situation is maintained, so that Magistrates should not have access to information pertaining to previous Diversion orders. This information should be available only to the police.

The recommendations above highlight some areas for enhancing this already effective program. In our submission, consideration and further research of these recommendations would ensure, among other things, that the key critical participants and stakeholders involved in the program, all have thorough parallel understandings of its aims, application and desired outcomes.

**Comparison Of Recidivism Rates**

The final report indicates that recidivism amongst participants of Diversion is low, with between “0 to 7% being convicted of a subsequent offence in the 12 months following their commencement on the program”.

A comparison to recidivism of similar participants who did not undertake the program was not conducted as it “was outside the scope of [the] evaluation”. Further information on recidivism of potential Diversion participants who were dealt with through the traditional criminal justice system would lead to a clearer view on the effectiveness of the program.

**Comparison With Eligible Participants Who Do Not Participate**

There is a lack of information in the literature on the number of eligible participants of Diversion who are not referred to the program. The final report found that “6% of the incoming criminal case load is being referred to [Diversion]”. But no information was collected on the total number of criminal cases that could potentially be referred to Diversion. An understanding of the individuals who missed out on utilising Diversion could help the making of informed decisions about the development of educational aspects of the program for appropriate stakeholders. Information on eligible participants could be obtained from the “Courtlink” System or the Victoria Police records and be compared to the records of the State Diversion Coordinator. This information was available to the authors of the final report, but appeared to be outside the scope of their evaluation.

**CONCLUSION**

Diversion appears to be construed in a positive light by the DOJ’s final report, and by implication, therapeutic jurisprudence has a place in the court system. There is room for further research into the effects of Diversion on the community, the court, and the individuals who have access to the program.
CRIMINAL JUSTICE DIVERSION PROGRAM

2. METHODOLOGY

The major objective of this discussion paper is to inform the community of Diversion, and in doing so, identify and discuss any theoretical and practical issues concerning the program. This paper does not purport to be an authority on Diversion, or the theoretical framework of the various sentencing components of the justice system under the auspice of therapeutic jurisprudence. Rather, the purpose is to raise salient issues regarding Diversion, enabling stakeholders to further fine tune the program to ensure that all relevant members of the community can enjoy its full benefits.

Data for this student-driven project has been derived through informal consultations with four Magistrates, four Diversion Coordinators, nine solicitors (practicing regularly in the Magistrates’ Court) and five Victoria Police members. We also received a collective response from the Law Institute of Victoria and one regional police station. Questionnaires were prepared and consultations were conducted either via phone, mail and face to face. This variance in information gathering occurred due to difficulties in organising formal consultation times with the above groups, who indicated individual preferences for each particular style of surveying. We can claim, with some authority, that the questions were clear, as those responding are highly aware and informed of the subject matter.

It is worth noting that the samples are not representative of the respective populations; as such, this discussion paper provides only the foundation for further research.

The sample of experts was determined through systematically establishing contact with the professionals listed above from region to region and requesting them to respond. Unfortunately, a glaring gap in our research method is the total lack of diversion participant and victim consultation, although concerns from these groups were determined vicariously through comments from relevant professionals. We would applaud future research which consulted these groups.

Although there is a general paucity of literature on Diversion in Victoria, material from the Magistrates’ Court and various academic literature provided a useful theoretical and conceptual platform from which to frame our discussion.

36

CRIMINAL JUSTICE DIVERSION PROGRAM

5. FINDINGS AND RECOMMENDATIONS

FINDINGS

The different responses obtained from Diversion Coordinators, police officers, lawyers, and Magistrates indicate that Diversion may not be currently operating as effectively and efficiently as originally foreshadowed. Despite the program being highlighted by the respondents as successful, several weaknesses and inconsistencies are evident. The respondents provided possible recommendations, which they believe, would assist in improving and addressing some of these current weaknesses.

The paramount recommendation from the responses was that Diversion should be recommended without the consent of the Informant.140 One Diversion Coordinator noted that, “Magistrates should be able to compel police to give Diversion and that police are too powerful in the system”.141 If Magistrates were granted authority to recommend Diversion to appropriate offenders, this would eradicate the possibility of inconsistent recommendations made by Informants.

It was also suggested that legal practitioners should have the power to make representations to the Magistrate either in the event of refusal or in general.142 This recommendation is in adherence with the rules of natural justice, whereby the decision maker143 should grant a hearing to any person whose interests will be affected by the exercise of that decision”.144 This is consistent with S128A(6) of Magistrates’ Court Act 1989 (Vic) which states that “nothing in this section affects the requirement to observe the rules of natural justice”.

Another recommendation proposed that there should be some sort of eligibility guidelines for Magistrates as they sometimes have different ideas on who should or should not be granted Diversion.145 This would hopefully address, or, at least, minimise any inconsistencies within the court system as to eligibility for Diversion.

The responses also indicated the need for more education. In particular, the responses from the LIV outlined that there are no guiding principles or general understanding at a philosophical level of the program by Informants.146 Several lawyers also believed that there should more education concerning Diversion, particularly to police.147 In addition to police education, there appears to be little community awareness about Diversion.148

The program could benefit from further research into the types of crime more likely to be suitable for Diversion. This would assist with informing relevant stakeholders of the level of parity in the application of Diversion. It would also provide opportunity to better tailor Diversion to the criminogenic requirements related to that specific offence. This will improve the likelihood of producing better results for all parties involved. A corollary of this would be to examine the sentencing options which Diversion has replaced. There is potential, given the discretion of the Magistrates, for Diversion to be more onerous than the sentencing options which it may have replaced, which may not have been the intention of the architects of the program.

Ongoing consultation with informants to determine factors which impact upon their decision to recommend Diversion would further promote parity in its application. It would assist in raising awareness of Diversion, and improve the practice of appropriate recommendation of Diversion, within the Victoria Police.

145 Lawyer 9
146 Lawyer 2
147 Lawyer 3
148 Lawyer 1
149 Lawyer 2
150 Lawyer 1 & 2
151 Lawyer 3
152 Magistrate 3

90

92
to the benefits and current defects in Diversion. Overall, the participants perceived Diversion as a successful program. It is evident that Diversion offers fairly non-onerous penalties in comparison to penalties handed down in the mainstream criminal justice system. There were differing views amongst the participants as to which offences actually attract Diversion. One lawyer outlined that Informants believe that one cannot participate in Diversion for any traffic related matters; however the legislation only prohibits drink-driving offences. This highlights the necessity for further police education about the program. The fact that Informants possess a great deal of control as regards eligibility for Diversion drew several negative comments from some Diversion coordinators and several lawyers. The essence of their criticism was that police hold a great deal of power and discretion when recommending a defendant for Diversion and thus there is a risk that personal bias and prejudices will affect the way in which this discretion is exercised. In addition, there were some comments that Diversion was applied inconsistently and without parity both at the level of Informants and Magistrates.

**WHAT IS DIVERSION?**

**Definition:**

The Magistrates’ Court defines Diversion as a “program [which] provides mainly first time offenders with the opportunity to avoid a criminal record by undertaking conditions that will benefit the offender, victim and the community as a whole”. The program is governed by s128A of Magistrates’ Court Act 1989 (Vic) and its main purposes are to reduce re-offending, avoid first criminal convictions, assist offenders’ rehabilitation, utilise community resources for appropriate counselling or treatment and ensure that appropriate reparation is made to victims of crime.

Diversion has created an alternative sentencing option where the Court focuses on therapeutic jurisprudence and thereby tailor a legal remedy to optimise the outcome for the offender, victim and community. Through this program, societal values are reinforced positively, the respect for compliance with court orders is increased and the offender is involved in the process of sentencing. More practically, the program acts as a more cost effective alternative than formal criminal justice sentencing.

Recognition must be given to the weaknesses that are identifiable within Diversion. Arguably, the initial rollout of Diversion (and its delayed legislative foundation) has created some of the weaknesses.

Inconsistencies have been identified within Diversion due to the discretion granted to Informants and flexibility in sentencing granted to the Magistrates. The discretion of an Informant, with regard to offences which are diverted to the program, has created the opportunity for bias or discouragement of referral to the program based on an informant’s subjective assessment of an offender.

The discretion of the Magistrate has also highlighted concerns that judicial officers may not fully appreciate the difficulties in managing the rehabilitation of offenders, although they can take into consideration the circumstances of each individual case. The program has required increased need for cooperation with other community agencies and additional administration and supervision by the Court due to complexities in the program and an overlap with other sentencing and cautioning options.

**Diversion v The Traditional Criminal Courts**

The role of a traditional criminal court is to determine the guilt of an offender and impose sanctions according to the law and sentencing practice. According to the Sentencing Act 1991 (Vic) the court, when sentencing an offender, is bound to take into account five principles, being, “retribution, denunciation, incapacitation, rehabilitation and restitution”. The principle of retribution directs the court to focus on punishment being proportional to the offence. At the same time the court takes on an adversarial approach to the case and has limited power to investigate further into the facts surrounding the case.

The traditional criminal court system has previously demonstrated problems such as delays in court processing, increase in case loads, inefficiency and limited recognition of the needs of minority groups. Diversion, on the other hand, has provided an option with the ability to decrease court delays, increase case efficiency and reduce expenditure. Most importantly, it allows the court to take on a less formal approach to minor offences and focus on rehabilitation when sentencing. By combining these two features the court aims to reduce crime rates by changing both the offender’s behaviour and attitude.

36 Sentencing Act 1991 (Vic) 128A
37 Magistrates Court Act 1989 (Vic) 128A
**Diversion And Therapeutic Jurisprudence**

Therapeutic jurisprudence is a way of "looking at the law," which recognises the "role of the law as a therapeutic agent". It focuses on the law’s impact on the general wellbeing of an offender and all parties involved in the offence. It envisages that legal problems may be addressed by addressing the underlying problems of an offender.

Therapeutic jurisprudence takes into account and consequently attempts to solve problems by acknowledging that criminal conduct is influenced by other psychological, economic and social factors. Diversion demonstrates how this concept is being recognised within the Court system.

Other examples of how therapeutic jurisprudence has been implemented within the Magistrates’ Court in Victoria include:41

- Court Referral and Evaluation for Drug Intervention and Treatment (CREDIT) program: The CREDIT program is operational in the Magistrates’ Court and aims to provide early treatment for offenders with substance abuse issues and implement drug treatment as part of their sentence.
- DISABILITY CO-ORDINATOR: A position in the Magistrates’ Court which has been created to provide information and advice to the Court in order to assist it in determining the relevant disability-related issues that affect the case before it. It recognises the Court’s need to respond to the special needs and circumstances of disabled persons.
- PSYCHIATRIC SERVICES LIAISON: Services within the Magistrates’ Court, which facilitate the Diversion of mentally ill offenders into appropriate treatment. The service proves identification and assessment of mental illnesses amongst offenders and advises the Court on relevant mental health issues.
- JUVENILE JUSTICE LIAISON: Services within the Magistrates’ Court that are designed to provide services to young offenders between the ages of 17 to 21 years.

**Diversion V Problem-oriented Courts**

Problem-oriented courts are another example of how therapeutic jurisprudence operates. These courts also address the underlying problems of offenders and respond to their social needs. Problem-oriented courts generally focus on broader issues of an offender including their health and well-being. Furthermore, they focus on victims and public safety.

They generally allow the court to provide ongoing judicial supervision, as well as a non-adversarial approach to any hearing. There is collaboration outside the court system with persons such as judicial officers, social service providers and community groups.42

The main underlying theme is a contemporary approach to offending behaviour by the justice system, which frames offending behaviour within the context of broad social problems rather than individual pathologies.

Some examples of problem-oriented courts that are currently operating in Victoria include:43

- DRUG COURT: This Court is responsible for sentencing and supervising the treatment of offenders with substance abuse problems who have committed an offence under the influence of drugs driving offences, as well as, street offences’. The general consensus appears to be that the majority of minor offences are eligible. There were differing views regarding the quantity of sentencing options available to the judiciary in the Victorian criminal justice system, which may impact adversely upon parity in sentencing. One Magistrate answered, “Yes. In similar cases some are offered Diversion, others are not.”44 Two magistrates believed that the types of sentencing options do not impact on the use of parity.45 The Magistrates’ provided comparable responses when asked what penalties defendants are avoiding by partaking in Diversion. They all agreed that the defendants are usually avoiding an adjourned undertaking or a fine. Other penalty avoidance included, “the ‘penalty’ of a hearing in open court, a finding of guilt and a recorded prior”.46

The Magistrates were asked as to when they would intervene and interpose a Diversion agreement between an Informant and defendant. The predominant reason for any intervention was due to the inappropriate nature and seriousness of the offence. Other reasons include: the view of victim,47 “prior criminal history...defendant’s refusal to take responsibility...[and] inadequate prosecutions case against the defendant”.48

It was indicated to us that Diversion only eases case flow management marginally or to a limited extent. One Magistrate indicated that it does take some cases out of the busy mention system.49 However, there is no credible evidence to suggest that the program does ease case flow.50

The Magistrates were asked what safeguards are currently missing from the existing program. Police education appeared to be an important issue. One Magistrate indicated that they were unaware if the police had a policy regarding diversion.51 Another Magistrate stressed the fact that the Magistrates are the gatekeepers of the process and must accord the defendant natural justice, and therefore believed that there are adequate safeguards for offenders within Diversion.52 The Magistrates agreed that the court should be able to recommend Diversion where an Informant has not done so. However, one Magistrate did highlight that the view of the victim should always be sought.53

According to the responses, community awareness about Diversion appears to be minimal. For example, “generally there is little community awareness of the Diversion Program”54 and “the general community may not appreciate the difference with a matter being dealt with in Diversion or in court”.55 Another view was that people in the legal fraternity generally know about Diversion, “solicitors are aware of it”.56

The Magistrates thought it was difficult to tell if Diversion was applied equally to all offenders. Generally, it can be deduced that Diversion is not applied with equality to all offenders. One Magistrate maintains that the program is not applied equally “because the program was not assessed prior to being rolled out statewide” and “was poorly introduced without proper legislative supports.”57 Another view was that Diversion is not applied with equality because “police and Magistrates have varied views in their attitudes”.58

**CONCLUSION**

These expert consultations have provided an informative insight, from different and important perspectives, as

---

44 Magistrates Court Act 1989 (Vic) s128A(2)(a)
47 128 Magistrates 3
48 129 Magistrates 2 & 3
49 130 Magistrates 1 & 4
50 131 Magistrates 1
51 132 Magistrates 1 & 4
52 133 Magistrates 2
53 134 Magistrates 1
54 135 Magistrates 3
55 136 Magistrates 1
56 137 Magistrates 2
57 138 Magistrates 1
58 139 Magistrates 3
59 140 Magistrates 1
60 141 Magistrates 2
61 142 Magistrates 2
62 143 Magistrates 2
63 144 Magistrates 2
The general consensus concerning education for legal practitioners was that the majority of lawyers wanted more education about the program. In addition, they thought that police and Magistrates should be better educated so there is parity. The LIV responses stated that, “the fundamental objectives should be the subject of broad education to police members. It was considered that there is no guiding principle or general understanding at a philosophical level of the program by Informants”.

The major issues with Diversion outlined by the lawyers were that police and Magistrates have differing views on who is eligible for Diversion; that Diversion is discretionary; and that Diversion requires informant approval. For instance, “the program relies too much on the idiosyncratic subjective assessment of individual informants” and “police are not operating the program as a matter of course, rather are exercising too much discretion”.

The LIV responses raise issues concerning Magistrates’ appreciation and application of the program. For example, “Some magistrates do not appear to appreciate or accept the philosophical basis of the program and apply arbitrary ‘rules’ disqualifying accused persons (and more often particular offences) from the program”. Other major shortcomings of Diversion according to the respondents include, “an inability by legal practitioners to address Magistrates as to suitability for Diversion where an unfavourable recommendation is made” and “the inability of courts or legal practitioners to initiate Diversion in the absence of ‘approval’ of informants”.

Several reforms were suggested to rectify these aforementioned shortcomings. A common proposal was to remove the current requirement for consent by the informant. For instance, one respondent suggested removing “the necessity for police and victim approval”; another respondent outlined that, “Diversion should be recommended not with the consent of the informant”. In addition, it was proposed that, “a legal practitioner should have the power to make representations to Magistrates in the event of refusal”. The LIV notes, “Generally it is considered that addressing the identified shortcomings would be reform measures that would improve the program”.

**Magistrates**

Four Magistrates were consulted. They generally felt that Diversion has been successful to a certain extent. However, one Magistrate outlined that, as there has not been a review of diversion its success has not been measured. The recidivism rate of Diversion is also difficult to assess. One Magistrate stated that they have “no idea” and another outlined that, it is hard to ascertain as diversions do not appear on the Police Law Enforcement Assistance Program (LEAP) database as prior convictions. The other respondents believed it as being quite low; possibly less than 30%.

The Magistrates’ responses indicated that the offences, which are eligible for Diversion, vary. The offences that commonly get Diversion, according to the Magistrates, include: “damage to property, minor dishonesty, some alcohol. It aims at rehabilitating the offender by treating their substance abuse issues. As a corollary of this treatment, the aim is prevent further criminal behaviour.

- **INDIGENOUS COURT:** The Court has been established to work with Aboriginal defendants who have pleaded guilty to an offence. It allows members of the Aboriginal community to contribute during the hearing and thereby allow the Magistrate to better comprehend the cultural needs of Aboriginal offenders.

- **FAMILY VIOLENCE COURT:** A pilot program currently being trialled in the regions of Ballarat and Heidelberg that provides specialist support services to family violence victims. This is carried out through the provision of specialist support services and Magistrates who have been trained in family violence matters.

- **SEXUAL OFFENCES COURT:** This Court is not currently in operation within Victoria but has been suggested by the Victorian Law Reform Commission. The concept involves initiating a specialist court that deals with sex offences, including special evidence rules and a more amenable court environment for victims.

- **OTHER PROPOSED COURTS:** Other courts that have been suggested by various experts and organisations in Victoria and which have been developed in other states, or internationally, include a Mental Health, Teen and Community Courts. Problem-oriented courts are distinct from Diversion in that Diversion diverts offenders away from the court whereas problem-oriented courts continue to operate as a court where the guilt or otherwise of an offender is decided, and convictions and acquittals are recorded.

Under Diversion the Court hearing is adjourned whilst the offender is referred to a different court or community program. The criminal charges are then discharged when all conditions of the Diversion Order are satisfied and no criminal conviction is recorded.

**HOW DIVERSION EVOLVED:**

**Pilot Program**

Diversion was piloted in the Broadmeadows Magistrates’ Court in 1997 with the support of police, magistrates, legal practitioners and community groups. It was piloted in response to similar programs in New Zealand that were aimed at diverting offenders out of the criminal justice system. At the end of the Victorian pilot period, in 1999, the Criminal Justice Enhancement Program recommended that Diversion should be rolled out statewide. It was subsequently revised and then implemented in 2000.

The benefits identified as a result of the Victorian pilot program can be summarised as follows:

(a) Diversion ‘ownership’ lies broadly with the community;
(b) it provides flexibility;
(c) it forged a link between the community and the justice system; and
(d) low recidivism rates were reported during the operation of the program.

---

50 Criminal Justice Enhancement Program, ‘Possible Programs in Magistrates’ Court Project, Status Report’ (August 1999).
The Magistrates’ Court Act 1989 (Vic) was then amended to include section 128A, which provided statutory footing for the continuation of the program.

PURPOSE OF DIVERSION PROGRAM

The aims of the Diversion Program as stated by the Victorian government are:

- To prevent re-offending;
- To assist the offender’s rehabilitation;
- To utilise community resources for appropriate counseling or treatment; and
- To ensure appropriate reparation is made to the victim.

The Magistrates’ Court, in implementing the program, aims to provide court services that address the changing needs of the community. The project was designed to provide defendants, who are eligible, an alternative to court, diverting them away from the criminal justice system. The program also aims at assisting community projects and groups with voluntary work and donations and to provide constructive way of “breaking the cycle” of re-offending.

To Provide Restoration To Victims

Restorative justice is a process where all parties with an interest in an offence come together to resolve the consequences and harm that has been caused. This is done by balancing the needs of the offender, the victim and the community. It emphasises the repair of harm that has resulted from the crime. It aims to include all stakeholders to the offence (including police, offender and victim) and allows them to participate in the justice process when determining an outcome.

Notwithstanding that, Diversion mainly applies to those criminal offences which are regarded as relatively minor. Restorative justice ideally applies best to more serious criminal offences. Diversion, in theory, applies to a wide range of offences, some of which may be serious in nature. It often touches on concepts of restorative justice by involving the victim in the interview process and the Diversion plan where they wish to be involved.

The flexibility in developing a Diversion plan means that the Diversion Coordinator and Magistrate can address someone out of a conviction who doesn’t deserve to be convicted. Other officers viewed Diversion as, “the system where the underlying issues causing one to commit offences are addressed”, which has specific benefits for the community. Another view was that “Diversion is a tool to help give people a second chance away from the court system.”

Furthermore, the officers had a broad range of views on what offences attract Diversion. One officer believed that only a first offence should attract Diversion. The general consensus among the other officers was that minor offences should attract Diversion. For example, “offences appropriate should be minor in nature”; “summary offences” and “low level injury, minor property damage [and] thefts”. They all agreed that serious offences were excluded from Diversion. Accordingly, unsuitable offences for Diversion included: “serious offences”, “indictable offences” and dishonesty offences, “which involves breach of trust and other issues.”

The officers had a difference of opinion as to whether prior convictions would result in a refusal to grant Diversion, or if it is simply a consideration. A couple of officers believed that, “people with priors are not suited to Diversion.” The other officers viewed prior convictions as a consideration and stated “prions are not always relevant.” According to one officer, eligibility should be decided on a “case-by-case basis”. There were several thoughts on who would be the ideal candidate for Diversion. Some suggestions indicated that the “candidate would be a young person”; “who is willing to admit there is an underlying problem, and is sorry for what they have done.” One officer believed that there is no ideal candidate for Diversion; rather an assessment needs to be made on a case-by-case basis bearing in mind different factors.

The main change to Diversion recommended by the officers was a general reduction in paperwork. For example, an entire brief of evidence should not be required; “only a summary of admitted offences to be completed and handed up with a covering sheet”. There was one other significant recommendation concerning prior conviction guidelines, with an officer indicating that the implementation of strict guidelines with regard to eligibility for diversion and prior convictions will be useful.

Lawyers

Nine lawyers were consulted and the Law Institute of Victoria (LIV) also interviewed some of its members, and included a synopsis of responses. The lawyers collectively believed that Diversion is an attractive option for the majority of offenders most of the time. There is, however a divide in response as to whether or not offenders would admit to the facts of an offence in order to be eligible for Diversion. The LIV responses stated that, “generally it is considered that accused persons are prepared to agree to facts alleged in order to avail themselves of the program.” Other respondents stated that persons charged have not admitted to statements of facts merely to qualify for the program.
CRIMINAL JUSTICE DIVERSION PROGRAM

4. EVALUATION OF DIVERSION

CONSULTATIONS

Consultations and discussions with relevant experts have been conducted to assist in the evaluation of Diversion. Experts consulted included: Diversion Coordinators, Police Officers, Lawyers, and Magistrates.

The purpose of the expert consultations was to consider the groups’ perceptions of Diversion, such as the program’s strengths and weaknesses, and possible areas of improvement.

Diversion Coordinators

Diversion Coordinators from a number of Victorian Magistrates’ Courts were consulted. The general consensus among the Coordinators was that Diversion has been a successful program, with a low recidivism rate. One of the Coordinators provided some statistics relating to re-offending after participating in the program. Stating that, “3.5%-7% re-offend after Diversion compared to 17% who re-offend a good behaviour bond.” Further it was also indicated that successful completion of the program is very high; “94.3% have successfully completed their conditions of Diversion – state wide.” The Coordinators agreed that defendants, participating in Diversion, were commonly avoiding penalties such as fines, good behaviour bonds, community service orders and criminal records.

One of the Coordinators outlined that, while the Informant recommends the program, the Magistrate will always have the final say regarding suitability for participation, and if suitable, outline the conditions and punishment. Two of the Coordinators stated that Magistrates would only intervene in an agreement between an Informant and defendant when the offence is too serious, or the defendant has prior convictions. Generally the Coordinators believed that Diversion facilitates case flow management to a certain extent. One Coordinator indicated that diversion eases case flow as there is an extra person taking the plea for the defendant and presenting to the Magistrate. However, another Coordinator believed Diversion did not ease case flow management because there are not a huge number of cases that get Diversion and therefore have no great effect on the mention list.

The Coordinators had very few suggestions as to what additional safeguards should be added to the program. One Coordinator indicated that Magistrates should be able to compel police to give Diversion, police are too powerful in the system. They feel that Magistrates should have the authority to recommend Diversion to appropriate offenders. The Coordinators outlined that, in practice, Magistrates often do suggest Diversion where they feel it is appropriate. Although some Magistrates will do this, the legislation does however state that the prosecution must recommend the program.

The program can always be improved. Coordinators commonly educate the police and community legal services. However, it is arguable as to the extent of police awareness of the program.

Police Officers

Five police officers were consulted and comments were sought from members at one Victorian police station. The police officers’ perceptions of the program were fairly unified. They thought that, “the Diversion Program works well” and that “the program is fair and worthwhile.” The spectrum of responses relating to the opinions on the purpose of Diversion were however quite broad. A number of officers felt that the purpose of Diversion was, “avoiding a jail term” and “getting any harm that has been caused to a victim. For example, the plan may require the offender to compensate the victim for property damage or make an apology.

To Rehabilitate Offenders Within The Community

As noted above, the Magistrate has a great deal of flexibility in developing a Diversion plan. The Diversion Co-ordinator is required to provide insight into the needs of the offender and victim through the interview system.

In this way, solutions to the offence are more easily tailored to the needs of the offender in order to address their individual problems and needs. For example, the Diversion plan may require the offender to undergo treatment or counselling for any underlying social or psychological problems.

OFFENCES TO WHICH DIVERSION APPLIES

Prescribed Through Legislation

Section 128A of the Magistrates’ Court Act 1989 (Vic) states that Diversion will apply to offences which:

(a) Are summary offences or are indictable offences triable summarily; and

(b) Are not offences with a minimum or fixed sentence of penalty, including cancellation or suspension of driver’s licence or permit but not including demerit point penalties; and

(c) Are not offences under s49(1) of the Road Safety Act 1986 (Vic).

Eligibility Criteria

Section 128A(2) of the Magistrates’ Court Act 1989 (Vic) states that an offender will be eligible to apply for Diversion if:

(a) The offence is a summary offence or an indictable offence triable summarily;

(b) They admit the facts of the offence;

(c) There is enough evidence to gain a conviction;

(d) They consent to Diversion;

(e) The prosecution consents to Diversion; and

(f) Diversion is found by the Court to be appropriate in all the circumstances.

Police Protocol

Based on the wording of the legislation, a variety of offences are in theory eligible to be heard in the program. However, in practice, there appear to be further criteria that effect whether or not an offence is heard in the Diversion program.

These further ‘criteria’ are due to the power of the Informants, Diversion Coordinators and Magistrates to exercise discretion in preventing inclusion into the program. The views of these stakeholders are discussed later in this paper. In this respect, refer to consultations and findings below.

57 See below at sections 4 and 5.
WHO MAKES THE DECISION TO DIVERT OFFENDERS?

The following individuals will be involved in deciding whether an offender should be diverted into the program.

Police informant - recommendation of Diversion Section 128A(2)(c)\(^\text{58}\) states that the prosecution must agree to Diversion in order for an offender to participate. This makes the consent of the Police Informant essential to an offender’s inclusion in the program. The Informant may also recommend or refer an offender to be included in the program. Prior to the Diversion hearing, the police officer will prepare a Diversion Notice, which indicates the consent of the prosecution, and a Diversion Brief, which includes a summary of the relevant offence and any prior convictions. These documents are then filed with the Court. In some cases, it is necessary for the Police Informant to communicate with the Diversion Co-ordinator during the interview. Their comments will be considered when drafting a Diversion plan. The matter will be recorded by the police but will not be included in the offender’s criminal history. There is no set structure determining whether a Police Informant will recommend an offender for Diversion. This issue will be discussed later on in this discussion paper. Factors which might influence particular Informants may include prior convictions and the attitude of an offender. Refer to discussion of consultations and recommendations below.

Police Informant v Police Sergeant

The Police Informant may recommend Diversion but will need authorisation of the Police Sergeant. The Police Sergeant can exercise their discretion and disagree with the recommendation from the Informant. Essentially, consent from the Police Sergeant is necessary for an offender to be granted Diversion.

Diversion Co-ordinators

The Diversion Coordinator’s role is to interview the offender and establish the issues in the case that make an offender suitable or unsuitable for Diversion. These issues are discussed with the Magistrate and may be discussed with the Police Informant. The Diversion Coordinator then formulates suggestions for the Diversion plan. Following this, they submit their suggestions to the Magistrate who uses this advice in finalising a decision.

Magistrate

The Magistrate has the ultimate power to disallow Diversion. Section 128A(2)\(^\text{59}\) states that the Court must find Diversion appropriate in all the relevant circumstances to allow the offender to participate. The Magistrate will conduct a Diversion hearing and assess whether an offender is suitable for this program. The offender will be permitted to participate in Diversion if appropriate within context of the particular circumstances.\(^\text{60}\) In assessing suitability, the Magistrate will consider a number of aspects relating to the offence, in particular those relating to both the offender and the victim. A Diversion plan is formulated for the offender with advice from the Diversion Coordinator. The Diversion plan allows the Magistrate flexibility and discretion in deciding a penalty for the offender. Penalties may include treatment or counselling, tendering an apology to the victim, payment of compensation to the victim or a donation to charity or community organisation. Once a plan is formulated, the Magistrate adjourns the charges and the offender is directed to undertake the stipulations outlined in the Diversion plan. If all the conditions of the plan are met, the Magistrate will discharge the defendant without any finding of guilt.\(^\text{61}\)

to assist police when involved with the program. The Acting Assistant Commissioner of General Policing issued interim instructions for police members when the pilot program began, and according to our research, these have not been updated or amended by an appropriate Chief Commissioner’s Instruction, nor do they adequately provide Informants with a thorough indication of when the program is or is not suitable. There are a couple of paragraphs on criteria for Diversion, but they merely restate the legislation and provide little, if any, guidance for Police Informants as to what surrounding circumstances should be considered when deciding whether to recommend a defendant for Diversion.

It is important that all police members are fully aware of the program’s constraints and its benefits in order to ensure the program works effectively and meets its aims. At this stage it is unclear when, and in what circumstances, Diversion will be considered by the Informant.

It may also be considered inappropriate that police members have such high amounts of discretion in deciding whether to recommend an offender for Diversion. The Acting Commissioner’s guidelines states that “the program is to be considered where members believe the offender and/or victim will benefit from involvement with the plans and strategies of the program.”\(^\text{62}\)

The lack of clear police guidelines and varying levels of education of the program amongst the police, allows the Informant to consider personal unchallenged views and potential biases as well as external factors when making the decision to divert the offender. Given that the program cannot commence without the consent of the prosecution, this discretion can create a huge barrier for the program.

It is understandable that one of the roles of the police in the program is to ensure the efficient use of court resources and thereby it could be argued that by allowing the police to have such discretion in presenting offenders for Diversion is merely facilitating one of the aims of the program. However, it is not the role of the police to “judge” the offender. The role of the Diversion Coordinator and the Magistrates should be to ensure that the program is accessed by those offenders who would benefit the most from the program. Court resources are not used efficiently if suitable candidates for the program are otherwise sent through the standard case processes of the criminal justice system.

If the criteria set out in s.128A (2)(a)(b)(c) of the Magistrates’ Court Act 1989 (Vic) is applicable to the offence, the police should be under a duty to recommend the offender for the program, whereby the Diversion Coordinator and the Magistrate are able to look at all the surrounding circumstances and all the evidence and make a fully informed decision.

It may be worthwhile to amend the current approach to Diversion or to issue further guidelines. Given the amount of discretion police members currently hold with regard to diversion, careful amendments could provide clarification so as to assist them in making the decision to divert an offender, or otherwise.
• The cost to the offender. Sometimes the cost of Diversion may be higher than what would be given out in court, in that the conditions are more onerous than other criminal justice system sentences.

• Forced admission. Section 128A(2)(a) states that the defendant must acknowledge responsibility for the offence. “Diversion can be seen as an easy way out for individuals unfamiliar with the legal terrain within this state...[and as a result] Diversion could detract from social justice as admission of facts might be viewed as an easier option than legal conflict for some.”

• Whilst the defendant’s acknowledgement of the facts is inadmissible as evidence in a proceeding for that offence and does not constitute a plea, the affect on a co-accused has not been fully established. This could lead to further disparity between offenders where the co-accused is unable to participate in Diversion or is dealt with by different Magistrates or Courts.

• It is resource intensive. This means that there are many not so obvious or hidden costs, on both the Court’s time and financial resources. There is an increased need for the Court to cooperate with other agencies, thus, in some cases, merely replacing the time saved by the criminal justice system with that involved in the administration and supervision of the Diversion plans.

• In many cases, there are only limited community services available to assist a Diversion participant. The architects of this program may not have considered the impact this increased caseload may have on heavily burdened non government and government service providers.

• Inconsistency between offences granted Diversion and disparity in application. “Magistrates are not directed by law to use Diversion; it is up to their discretion. Therefore some Courts will use Diversion more liberally than others, which means that canny lawyers will be able to determine which Magistrates are pro Diversion and which are otherwise. This means that legal representation can have a direct and glaring inequitable affect on the outcome of the proceedings with regard to access to Diversion.”

• If it receives little attention in the media (considering the recent spate of articles on suspended sentences) and is rarely discussed in academic papers or texts. Thus, it stands to reason that many members of the community do not know about Diversion, and therefore, if the police officer does not recommend Diversion, offenders will remain unaware that they may have fit the criteria and been suitable applicants. [Also], this apparent lack of academic interest in Diversion is reason for concern as there is a sense of implied satisfaction with the program which is not necessarily supported by independent and available empirical research.

GUIDELINES

Diversion is provided for under s.128A of the Magistrates’ Court Act 1989 (Vic). There are no regulations to support the legislation. However a synopsis of the program exists on the Magistrates’ Court website which would assist offenders and defence lawyers.

Given the amount of involvement in the program by the police, it is disappointing to note the lack of guidelines if the court finds that the offender is not appropriate for Diversion, they have the discretion to prevent an offender from participating in the program. The case will then be heard before the Magistrate as a regular criminal hearing.

Offender - Must Admit Facts

An offender may apply (either themselves or through a legal practitioner) to the Police Informant to be included in the program. Alternatively, if recommended by the Police Sergeant, the offender must consent to participating in the program.

If the Informant consents, they will then undertake to draft and file a Diversion Notice and Brief. A legal practitioner may attend the Diversion hearing and interview with their client on the day of Court. Legal practitioners often play a vital role in making offenders aware of the program and explaining its nature and procedure to them.

The offender is required to admit the facts of the offence in order to be eligible. The admission of facts does not amount to a guilty plea but must be conceded so the offender may be diverted into the program. An admission of facts, although not enough for a criminal guilty plea, may have consequences within the civil jurisdiction, particularly where the Confiscation Act 1997 (Vic) may apply. Section 128A(4)(c)(i) states that the admission of facts will be enough for a finding of guilt for the purposes of certain sections of the Confiscation Act 1997 (Vic).

Diversion is mainly applicable for minor offences and therefore this issue may be of little importance given that the Confiscation Act 1997 (Vic) is mainly applicable to more serious legal offences. It is worth noting, however, that an offender may be coerced into admitting facts, thereby exposing them to civil liability.

Victims - Persuasive

Where an offence has involved a victim, the Court will seek the comments of the victim in respect of the matter. These can be made by letter or by an appearance at the hearing. Such comments may include material relating to the value of any property damage or whether an apology would be valued.

A protest by the victim against Diversion will not prevent Diversion from occurring but will be taken into account by the Informant and or the Magistrate when considering an application for Diversion.

PROCEDURE OF DIVERSION

Upon an offender being charged and either summoned to appear at a later date or being released on bail, it is possible for certain offenders to be considered for participation in Diversion. A range of people are able to make a request for Diversion. However “a Diversion will not commence without the agreement of the informant or sub-officer authorising the brief, the defendant or their legal adviser, and the court. Where a person other than the Informant requests the Diversion, the Diversion Coordinator will contact the Informant, or a member at the Informant’s station responsible for authorising briefs, to seek consent.”

Section 128A(2)(c) indicates that the defendant must also consent to Diversion. This is because one of the criteria to be met is that the defendant must admit the facts and helps demonstrate the defendant’s remorse for their behaviour. “It is important to note that Diversion is separate in process from mainstream court procedure.
When the defendant admits to the facts of the crime, they are not entering a plea and this admission is inadmissible as evidence in a criminal proceeding.64 To indicate consent from the prosecution, a Diversion Notice is filed with the Court. Once this notice, and any other relevant documentation is filed with the Court, it is then necessary for the Court to determine if the defendant is suitable for Diversion, given all the circumstances. This is primarily undertaken by the Diversion Coordinator during an interview stage, prior to the court hearing.

The Diversion Coordinator plays a major part in the administration of the program. They have many responsibilities throughout the entire process including: liaising with Informants, defendants and other stakeholders involved such as victims; identifying appropriate community projects and programs to be used in developing Diversion plans; and arranging Diversion hearings and preparing Diversion plans for consideration by the Court.65 Prior to the Diversion hearing with the Magistrate, the Diversion Coordinator must interview the defendant to “identify the major issues in the case and to formulate a suggested outcome. This is done to assist the presiding Magistrate and to lessen the required amount of Court time.”66 The Diversion Coordinator then meets with the Magistrate to further discuss the matter as the final decision of suitability rests with the Magistrate. At all times the Informant, Diversion Coordinator and Magistrate must consider all relevant eligibility criteria, and most importantly the over-riding consideration that it is appropriate in the circumstances.

“A Diversion hearing is conducted before a Magistrate and the victim is invited to participate. At the Diversion hearing the Magistrate will assess the suitability of the offender for Diversion and, if suitable, a Diversion plan will be developed which may require the offender to undertake a range of different sentencing options, including apologising to or compensating the victim, writing a letter of gratitude to the informant, attend a defensive driving course, attend counselling or treatment programs or perform community work.”67

While the Diversion plan is undertaken, the charges are adjourned for not more than 12 months. “If the conditions are successfully met, the charges are discharged on the return date and the outcome is recorded in a similar manner to a caution. It does not form part of the person’s formal criminal record and is not available to employers and others.”68 A copy of the Diversion plan is provided to the Informant.

Should the Magistrate determine that the defendant or the matter is not suitable for Diversion, then the matter is sent back into the criminal justice system. Either way, both the victim and the Informant are advised of the outcome.

The level of impact Diversion has made on other sentencing options available to Magistrates is unclear as it is not strictly a sentencing order. According to the Sentencing Advisory Council, who include Diversion in their analysis on different sentencing orders and trends, “The introduction of new sentencing options (such as the criminal justice Diversion plan) has had an impact on sentencing trends in the Magistrates’ Court.”69 The most notable impact as a result of the introduction of Diversion appears to be a decrease in adjourned undertakings, bonds and fines, as well as a decrease in discharges, dismissals and licence cancellations and disqualifications. The decrease of these sentencing options is worrying given that they are considered less intrusive and onerous on the defendant. It would seem that there is room for consideration as to whether participation in Diversion would always be in the best interests of the defendant as the program stands today.

Costs and Benefits of Diversion

“Diversion programs provide courts with a number of options in dealing with less serious offences and drug-dependent offenders. Diversion is aimed at breaking the cycle of crime by addressing the issues (for example drug addiction, homelessness, unemployment) that lead offenders to engage in criminal activity. Options cover a range of conditions to which offenders must agree in order to demonstrate their rehabilitation or remorse.”70

On the face of it, many community members, and indeed some police members, consider Diversion as an “easy way out” for offenders. On the contrary, there are many cost/benefit factors that need to be considered by all concerned parties, including the victim, before participating in the program.

Some Of The Strengths Of Diversion Include:

- Focusing on therapeutic justice rather than punitive justice - by looking at some of the underlying reasons for the offending behaviour, working out a plan that addresses these issues and assists with the offender’s rehabilitation.
- “By utilizing community resources for appropriate counselling or treatment and assisting local community projects with voluntary work and donations”71 the benefits extend past the offender onto the victim and community as a whole and as a result societal values are reinforced.
- Increases the Magistrates’ capacity to tailor the legal remedy to optimise the outcome for the offender, the victim and the wider community enabling all involved to have a greater understanding of, and confidence in, the criminal justice system.

* Increased level of respect for, and compliance with, an order of the Court and prevents re-offending. Given the program is generally aimed at first time young offenders, the program is able to break the cycle of disregard for the law and re-offending that sometimes comes with being involved in the criminal justice system.
- Avooids a criminal conviction which thereby enables, and encourages, Diversion participants not to re-offend by not inhibiting their employment prospects.
- “By ensuring that appropriate reparation is made to the victim of the offence and where appropriate to tender an apology to the victim.”72 This assists the victim with closure and a sense of seeing justice done and, as was mentioned above, it enables the victim to be involved in all steps of the process, which increases confidence in the law.

However, There Are Also Some Costs/Weaknesses Associated With Diversion, Such As:

- The discretion of the Police Informant, including inconsistency between offences granted Diversion. “Some police officers may be less inclined to recommend Diversion than others. This may be for a variety of reasons…..Some officers may disagree with the ideology of Diversion, and subsequently deliberately choose not to recommend it for offenders. This means that subjective opinion of individual police officers not qualified to have this sort of impact on the justice system can adversely affect objective results.”73 (discussed in more detail below)

66 Above n 1, pg. 3
68 Above n 1, pg. 3
72 Above n 6
73 Rose
74 Above n 1, pg. 1.
75 Springvale Monash Legal Service reference paper on CDP (2005)
When the defendant admits to the facts of the crime, they are not entering a plea and this admission is inadmissible as evidence in a criminal proceeding. To indicate consent from the prosecution, a Diversion Notice is filed with the Court. Once this notice, and any other relevant documentation is filed with the Court, it is then necessary for the Court to determine if the defendant is suitable for Diversion, given all the circumstances. This is primarily undertaken by the Diversion Coordinator during an interview stage, prior to the court hearing.

The Diversion Coordinator plays a major part in the administration of the program. They have many responsibilities throughout the entire process including, "liaising with Informants, defendants and other stakeholders involved such as victims; identifying appropriate community projects and programs to be used in developing Diversion plans; and arranging Diversion hearings and preparing Diversion plans for consideration by the Court." Prior to the Diversion hearing with the Magistrate, the Diversion Coordinator must interview the defendant to “identify the major issues in the case and to formulate a suggested outcome. This is done to assist the presiding Magistrate and to lessen the required amount of Court time.” The Diversion Coordinator then meets with the Magistrate to further discuss the matter as the final decision of suitability rests with the Magistrate. At all times the Informant, Diversion Coordinator and Magistrate must consider all relevant eligibility criteria, and most importantly the over-riding consideration that it is appropriate in the circumstances.

“A Diversion hearing is conducted before a Magistrate and the victim is invited to participate. At the Diversion hearing the Magistrate will assess the suitability of the offender for Diversion and, if suitable, a Diversion plan will be developed which may require the offender to undertake a range of different sentencing options, including apologising to or compensating the victim, writing a letter of gratitude to the informant, attend a defensive driving course, attend counselling or treatment programs or perform community work.”

While the Diversion plan is undertaken, the charges are adjourned for not more than 12 months. “If the conditions are successfully met, the charges are discharged on the return date and the outcome is recorded in a similar manner to a caution. It does not form part of the person’s formal criminal record and is not available to employers and others.” A copy of the Diversion plan is provided to the Informant.

Should the Magistrate determine that the defendant or the matter is not suitable for Diversion, then the matter is sent back into the criminal justice system. Either way, both the victim and the Informant are advised of the outcome.

The level of impact Diversion has made on other sentencing options available to Magistrates is unclear as it is not strictly a sentencing order. According to the Sentencing Advisory Council, who include Diversion in their analysis on different sentencing orders and trends, “the introduction of new sentencing options (such as the criminal justice Diversion plan) has had an impact on sentencing trends in the Magistrates Court.” The most notable impact as a result of the introduction of Diversion appears to be a decrease in adjourned undertakings, bonds and fines, as well as a decrease in discharges, dismissals and licence cancellations and disqualifications. The decrease of these sentencing options is worrying given that they are considered less intrusive and onerous on the defendant. It would seem that there is room for consideration as to whether participation in Diversion would always be in the best interests of the defendant as the program stands today.

**COSTS AND BENEFITS OF DIVERSION**

“Diversion programs provide courts with a number of options in dealing with less serious offences and drug-dependent offenders. Diversion is aimed at breaking the cycle of crime by addressing the issues (for example drug addiction, homelessness, unemployment) that lead offenders to engage in criminal activity. Options cover a range of conditions to which offenders must agree in order to demonstrate their rehabilitation or remorse.”

On the face of it, many community members, and indeed some police members, consider Diversion as an “easy way out” for offenders. On the contrary, there are many cost/benefit factors that need to be considered by all concerned parties, including the victim, before participating in the program.

**Some Of The Strengths Of Diversion Include:**

- Focusing on therapeutic justice rather than punitive justice - by looking at some of the underlying reasons for the offending behaviour, working out a plan that addresses these issues and assists with the offender’s rehabilitation.
- “By utilizing community resources for appropriate counselling or treatment and assisting local community projects with voluntary work and donations” the benefits extend past the offender onto the victim and community as a whole and as a result societal values are reinforced.
- Increases the Magistrates’ capacity to tailor the legal remedy to optimise the outcome for the offender, the victim and the wider community enabling all involved to have a greater understanding of, and confidence in, the criminal justice system.

- Increased level of respect for, and compliance with, an order of the Court and prevents re-offending. Given the program is generally aimed at first-time young offenders, the program is able to break the cycle of disregard for the law and re-offending that sometimes comes with being involved in the criminal justice system.
- Avoids a criminal conviction which thereby enables, and encourages, Diversion participants not to re-offend by not inhibiting their employment prospects.
- “By ensuring that appropriate reparation is made to the victim of the offence and where appropriate to tender an apology to the victim.” This assists the victim with closure and a sense of seeing justice done and, as was mentioned above, it enables the victim to be involved in all steps of the process, which increases confidence in the law.

**However, There Are Also Some Costs/Weaknesses Associated With Diversion, Such As:**

- The discretion of the Police Informant, including inconsistency between offences granted Diversion. “Some police officers may be less inclined to recommend Diversion than others. This may be for a variety of reasons....Some officers may disagree with the ideology of Diversion, and subsequently deliberately choose not to recommend it for offenders. This means that subjective opinion of individual police officers not qualified to have this sort of impact on the justice system can adversely affect objective results.”

---

65 Springvale Monash Legal Service reference paper on CDFP (2005)
66 Above n 1, pg 3
68 Above n 1, pg 2
72 Above n 6
73 Rob Hulls, 1 May 2003
74 Above n 1, pg 1
75 Springvale Monash Legal Service reference paper on CDFP (2005)
• The cost to the offender. Sometimes the cost of Diversion may be higher than what would be given out in court, in that the conditions are more onerous than other criminal justice system sentences.

• Forced admission. Section 128A(2)(x) states that the defendant must acknowledge responsibility for the offence. “Diversion can be seen as an easy way out for individuals unfamiliar with the legal terrain within this state...and as a result” Diversion could detract from social justice as admission of facts might be viewed as an easier option than legal conflict for some.75, 76

• Whilst the defendant’s acknowledgement of the facts is inadmissible as evidence in a proceeding for that offence and does not constitute a plea, the affect on a co-accused has not been fully established. This could lead to further disparity between offenders where the co-accused is unable to participate in Diversion or is dealt with by different Magistrates or Courts.

• It is resource intensive. This means that there are many not so obvious or hidden costs, on both the Court’s time and financial resources. There is an increased need for the Court to cooperate with other agencies, thus, in some cases, merely replacing the time saved by the criminal justice system with that involved in the administration and supervision of the Diversion plans.

• In many cases, there are only limited community services available to assist a Diversion participant. The architects of this program may not have considered the impact this increased caseload may have on heavily burdened non-government and government service providers.

• Inconsistency between offences granted Diversion and disparity in application. “Magistrates are not directed by law to use Diversion; it is up to their discretion. Therefore some Courts will use Diversion more liberally than others, which means that canny lawyers will be able to determine which Magistrates are pro Diversion and which are otherwise. This means that legal representation can have a direct and glaring inequitable affect on the outcome of the proceedings with regard to access to Diversion.”77

• It receives little attention in the media (considering the recent spate of articles on suspended sentences) and is rarely discussed in academic papers or texts. Thus, it stands to reason that many members of the community do not know about Diversion, and therefore, if the police officer does not recommend Diversion, offenders will remain unaware that they may have fit the criteria and been suitable applicants. [Also], this apparent lack of academic interest in Diversion is reason for concern as there is a sense of implied satisfaction with the program which is not necessarily supported by independent and available empirical research.78

GUIDELINES

Diversion is provided for under s.128A of the Magistrates’ Court Act 1985 (Vic). There are no regulations to support the legislation. However a synopsis of the program exists on the Magistrates’ Court website which would assist offenders and defence lawyers.

Given the amount of involvement in the program by the police, it is disappointing to note the lack of guidelines if the court finds that the offender is not appropriate for Diversion, they have the discretion to prevent an offender from participating in the program. The case will then be heard before the Magistrate as a regular criminal hearing.

Offender - Must Admit Facts

An offender may apply (either themselves or through a legal practitioner) to the Police Informant to be included in the program. Alternatively, if recommended by the Police Sergeant, the offender must consent to participating in the program.79

If the Informant consents, they will then undertake to draft and file a Diversion Notice and Brief. A legal practitioner may attend the Diversion hearing and interview with their client on the day of Court. Legal practitioners often play a vital role in making offenders aware of the program and explaining its nature and procedure to them.

The offender is required to admit the facts of the offence in order to be eligible. The admission of facts does not amount to a guilty plea but must be conceded so the offender may be diverted into the program. An admission of facts, although not enough for a criminal guilty plea, may have consequences within the civil jurisdiction, particularly where the Confiscation Act 1997 (Vic) may apply. Section 128A(4)(x)(i) states that the admission of facts will be enough for a finding of guilt for the purposes of certain sections of the Confiscation Act 1997 (Vic).80

Diversion is mainly applicable for minor offences and therefore this issue may be of little importance given that the Confiscation Act 1997 (Vic) is mainly applicable to more serious legal offences. It is worth noting, however, that an offender may be coerced into admitting facts, thereby exposing them to civil liability.

Victims - Persuasive

Where an offence has involved a victim, the Court will seek the comments of the victim in respect of the matter. These can be made by letter or by an appearance at the hearing. Such comments may include material relating to the value of any property damage or whether an apology would be valued.

A protest by the victim against Diversion will not prevent Diversion from occurring but will be taken into account by the Informant and or the Magistrate when considering an application for Diversion.

PROCEDURE OF DIVERSION

Upon an offender being charged and either summoned to appear at a later date or being released on bail, it is possible for certain offenders to be considered for participation in Diversion. A range of people are able to make a request for Diversion. However “a Diversion will not commence without the agreement of the informant or sub-officer authorising the brief, the defendant or their legal adviser, and the court. Where a person other than the Informant requests the Diversion, the Diversion Coordinator will contact the Informant, or a member at the Informant’s station responsible for authorising briefs, to seek consent”.81

Section 128A(2)(c) indicates that the defendant must also consent to Diversion. This is because one of the criteria to be met is that the defendant must admit the facts and helps demonstrate the defendant’s remorse for their behaviour. “It is important to note that Diversion is separate in process from mainstream court procedure. [74] 75 76 77 78 79 80 81

Magistrates’ Court Act 1985 (Vic) s128A(2)(x).
Division 1 of Part 3 and Part 10.
Victoria Police, Interim Instructions Police Standing Orders Magistrates Court Diversion Program, pg.2.
WHO MAKES THE DECISION TO DIVERT OFFENDERS?

The following individuals will be involved in deciding whether an offender should be diverted into the program.

Police informant - recommendation of Diversion Section 128A(2)(c) states that the prosecution must agree to Diversion in order for an offender to participate. This makes the consent of the Police Informant essential to an offender’s inclusion in the program. The Informant may also recommend or refer an offender to be included in the program. Prior to the Diversion hearing, the police officer will prepare a Diversion Notice, which indicates the consent of the prosecution, and a Diversion Brief, which includes a summary of the relevant offence and any prior convictions. These documents are then filed with the Court. In some cases, it is necessary for the Police Informant to communicate with the Diversion Co-ordinator during the interview. Their comments will be considered when drafting a Diversion plan. The matter will be recorded by the police but will not be included in the offender’s criminal history.

There is no set structure determining whether a Police Informant will recommend an offender for Diversion. This issue will be discussed later on in this discussion paper. Factors which might influence particular Informants may include prior convictions and the attitude of an offender. Refer to discussion of consultations and recommendations below.

Police Informant v Police Sergeant

The Police Informant may recommend Diversion but will need authorisation of the Police Sergeant. The Police Sergeant can exercise their discretion and disagree with the recommendation from the Informant. Essentially, consent from the Police Sergeant is necessary for an offender to be granted Diversion.

Diversion Co-ordinators

The Diversion Coordinator’s role is to interview the offender and establish the issues in the case that make an offender suitable or unsuitable for Diversion. These issues are discussed with the Magistrate and may be discussed with the Police Informant. The Diversion Coordinator then formulates suggestions for the Diversion plan. Following this, they submit their suggestions to the Magistrate who uses this advice in finalising a decision.

Magistrate

The Magistrate has the ultimate power to disallow Diversion. Section 128A(2)(c) states that the Court must find Diversion appropriate in all the relevant circumstances to allow the offender to participate. The Magistrate will conduct a Diversion hearing and assess whether an offender is suitable for this program. The offender will be permitted to participate in Diversion if appropriate within context of the particular circumstances. In assessing suitability, the Magistrate will consider a number of aspects relating to the offence, in particular those relating to both the offender and the victim. A Diversion plan is formulated for the offender with advice from the Diversion Coordinator. The Diversion plan allows the Magistrate flexibility and discretion in deciding a penalty for the offender. Penalties may include treatment or counselling, tendering an apology to the victim, payment of compensation to the victim or a donation to charity or community organisation. Once a plan is formulated, the Magistrate adjourns the charges and the offender is directed to undertake the stipulations outlined in the Diversion plan. If all the conditions of the plan are met, the Magistrate will discharge the defendant without any finding of guilt.

To assist police when involved with the program the Acting Assistant Commissioner of General Policing issued interim instructions for police members when the pilot program began, and according to our research, these have not been updated or amended by an appropriate Chief Commissioner’s Instruction, nor do they adequately provide Informants with a thorough indication of when the program is or is not suitable. There are a couple of paragraphs on criteria for Diversion, but they merely restate the legislation and provide little, if any, guidance for Police Informants as to what surrounding circumstances should be considered when deciding whether to recommend a defendant for Diversion.

It is important that all police members are fully aware of the program, its constraints and its benefits in order to ensure the program works effectively and meets its aims. At this stage it is unclear when, and in what circumstances, Diversion will be considered by the Informant.

It may also be considered inappropriate that police members have such high amounts of discretion in deciding whether to recommend an offender for Diversion. The Acting Commissioner’s guidelines states that “the program is to be considered where members believe the offender and/or victim will benefit from involvement with the plans and strategies of the program.”

The lack of clear police guidelines and varying levels of education of the program amongst the police, allows the Informant to consider personal unchallenged views and potential biases as well as external factors when making the decision to divert an offender. Given that the program cannot commence without the consent of the prosecution, this discretion can create a huge barrier for the program.

It is understandable that one of the roles of the police in the program is to ensure the efficient use of court resources and thereby it could be argued that by allowing the police to have such discretion in presenting offenders for Diversion is merely facilitating one of the aims of the program. However, it is not the role of the police to “judge” the offender. The role of the Diversion Coordinator and the Magistrates should be to ensure that the program is accessed by those offenders who would benefit the most from the program. Court resources are not used efficiently if suitable candidates for the program are otherwise sent through the standard case processes of the criminal justice system.

If the criteria set out in s.128A (2)(a)(b)(c) of the Magistrates’ Court Act 1989 (Vic) is applicable to the offence, the police should be under a duty to recommend the offender for the program, whereby the Diversion Coordinator and the Magistrate are able to look at all the surrounding circumstances and all the evidence and make a fully informed decision.

It may be worthwhile to amend the current approach to Diversion or to issue further guidelines. Given the amount of discretion police members currently hold with regard to diversion, careful amendments could provide clarification so as to assist them in making the decision to divert an offender, or otherwise.

References

58 Magistrates’ Court Act 1989 (Vic)
59 Magistrates’ Court Act 1989 (Vic) s.128B
60 Magistrates’ Court Act 1989 (Vic) s.128AA(1)(c)
61 Magistrates’ Court Act 1989 (Vic) s.128(4)(e)

CONSIDERATIONS
Consultations and discussions with relevant experts have been conducted to assist in the evaluation of Diversion. Experts consulted included: Diversion Coordinators, Police Officers, Lawyers, and Magistrates. The purpose of the expert consultations was to consider the groups' perceptions of Diversion, such as the program’s strengths and weaknesses, and possible areas of improvement.

4. EVALUATION OF DIVERSION

Diversion Coordinators
Diversion Coordinators from a number of Victorian Magistrates’ Courts were consulted. The general consensus among the Coordinators was that Diversion has been a very successful program, with a low recidivism rate. One of the Coordinators provided some statistics relating to re-offending after participating in the program. Stating that, “3.5%-7% re-offend after Diversion compared to 17% who re-offend a good behaviour bond”. Further it was also indicated that successful completion of the program is very high; “94.3% have successfully completed their conditions of Diversion – state wide”. The Coordinators agreed that defendants, participating in Diversion, were commonly avoiding penalties such as fines, good behaviour bonds, community base orders and criminal records.

One of the Coordinators outlined that, while the Informant recommends the program, the Magistrate will always have the final say regarding suitability for participation, and if suitable, outline the conditions and punishment. Two of the Coordinators stated that Magistrates would only intervene in an agreement between an Informant and defendant when the offence is too serious, or the defendant has prior convictions. Generally the Coordinators believed that Diversion facilitates case flow management to a certain extent. One Coordinator indicated that diversion eases case flow as there is an extra person taking the plea for the defendant and presenting to the Magistrate. However, another Coordinator believed Diversion did not ease case flow management because there are not a huge number of cases that get Diversion and therefore have no great effect on the mention list.

The Coordinators had very few suggestions as to what additional safeguards should be added to the program. One Coordinator indicated that Magistrates should be able to compel police to give Diversion, police are too powerful in the system. They feel that Magistrates should have the authority to recommend Diversion to appropriate offenders. The Coordinators outlined that, in practice, Magistrates often do suggest Diversion where they feel it is appropriate. Although some Magistrates will do this, the legislation does however state that the prosecution must recommend the program.

The program can always be improved. Coordinators commonly educate the police and community legal services. However, it is arguable as to the extent of police awareness of the program.

Police Officers
Five police officers were consulted and comments were sought from members at one Victorian police station. The police officers’ perceptions of the program were fairly unified. They thought that, “the Diversion Program works well” and that “the program is fair and worthwhile”. The spectrum of responses relating to the opinions on the purpose of Diversion were however quite broad. A number of officers felt that the purpose of Diversion was, “avoiding a jail term” and “getting any harm that has been caused to a victim. For example, the plan may require the offender to compensate the victim for property damage or make an apology.

Eligibility Criteria
Section 128A(2) of the Magistrates’ Court Act 1989 (Vic) states that an offender will be eligible to apply for Diversion if:
(a) The offence is a summary offence or an indictable offence triable summarily;
(b) They admit the facts of the offence;
(c) There is enough evidence to gain a conviction;
(d) They consent to Diversion;
(e) The prosecution consents to Diversion; and
(f) Diversion is found by the Court to be appropriate in all the circumstances.

Police Protocol
Based on the wording of the legislation, a variety of offences are in theory eligible to be heard in the program. However, in practice, there appear to be further criteria that affect whether or not an offence is heard in the Diversion program.

These further ‘criteria’ are due to the power of the Informants, Diversion Coordinators and Magistrates to exercise discretion in preventing inclusion into the program. The views of these stakeholders are discussed later in this paper. In this respect, refer to consultations and findings below.
The Magistrates’ Court Act 1989 (Vic) was then amended to include section 128A, which provided statutory footing for the continuation of the program.

PURPOSE OF DIVERSION PROGRAM

The aims of the Diversion Program as stated by the Victorian government are:31

- To prevent re-offending;
- To assist the offender’s rehabilitation;
- To utilise community resources for appropriate counseling or treatment; and
- To ensure appropriate reparation is made to the victim.

The Magistrates’ Court, in implementing the program, aims to provide court services that address the changing needs of the community.32 The project was designed to provide defendants, who are eligible, an alternative to court, diverting them away from the criminal justice system. The program also aims at assisting community projects and groups with voluntary work and donations to provide constructive way of “breaking the cycle” of re-offending.

To Divert First Time Offenders Out Of The Formal Justice System

One aim of Diversion is to break the cycle of crime by keeping offenders out of the formal court system in the first place. It does this by providing them with an opportunity to avoid their first criminal conviction. It does this by providing them with an interview process and adopt a plan such as counselling or an apology to the victim.

To Provide Restoration To Victims

Restorative justice is a process where all parties with an interest in an offence come together to resolve the consequences and harm that has been caused. This is done by balancing the needs of the offender, the victim and the community.33 It emphasises the repair of harm that has resulted from the crime.34 It aims to include all stakeholders to the offence (including police, offender and victim) and allows them to participate in the justice process when determining an outcome.

Notwithstanding that, Diversion mainly applies to those criminal offences which are regarded as relatively minor.35 Restorative justice ideally applies best to more serious criminal offences. Diversion, in theory, applies to a wide range of offences, some of which may be serious in nature. It often touches on concepts of restorative justice by involving the victim in the interview process and the Diversion plan where they wish to be involved.

The flexibility in developing a Diversion plan means that the Diversion Coordinator and Magistrate can address someone out of a conviction who doesn’t deserve to be convicted.36 Other officers viewed Diversion as, “the system where the underlying issues causing one to commit offences are addressed”, which has specific benefits for the community.37 Another view was that “Diversion is a tool to help give people a second chance away from the court system.”38

Furthermore, the officers had a broad range of views on what offences attract Diversion.39 One officer believed that only a first offence should attract Diversion. The general consensus among the other officers was that minor offences should attract Diversion. For example, “offences appropriate should be minor in nature”;36 “summary offences”36 and “low level injury offences, minor property damage [and] thefts”.36 They all agreed that serious offences were excluded from Diversion. Accordingly, unsuitable offences for Diversion included: “serious offences”,36 “indictable offences” and dishonesty offences, “which involves breach of trust and other issues”.40

The officers had a difference of opinion as to whether prior convictions would result in a refusal to grant Diversion, or if it is simply a consideration. A couple of officers believed that, “people with priors are not suited to Diversion”.40 The other officers viewed prior convictions as a consideration and stated “prions are not always relevant”.40 According to one officer, eligibility should be decided on a “case-by-case basis”.40 There were several thoughts on who would be the ideal candidate for Diversion. Some suggestions indicated that the “candidate would be a young person”,41 “who is willing to admit there is an underlying problem, and is sorry for what they have done”.41 One officer believed that there is no ideal candidate for Diversion; rather an assessment needs to be made on a case-by-case basis bearing in mind different factors.41

The main change to Diversion recommended by the officers was a general reduction in paperwork. For example, an entire brief of evidence should not be required; “only a summary of admitted offences to be completed and handed up with a covering sheet”.42 There was one other significant recommendation concerning prior conviction guidelines, with an officer indicating that the implementation of strict guidelines with regard to eligibility for diversion and prior convictions will be useful.43

Lawyers

Nine lawyers were consulted and the Law Institute of Victoria (LIV) also interviewed some of its members, and included a synopsis of responses. The lawyers collectively believed that Diversion is an attractive option for the majority of offenders42 most of the time.43 There is, however a divide in response as to whether or not offenders would admit to the facts of an offence in order to be eligible for Diversion. The LIV responses stated that, “generally it is considered that accused persons are prepared to agree to facts alleged in order to avail themselves of the program”.43 Other respondents stated that persons charged have not admitted to statements of facts merely to qualify for the program.
The general consensus concerning education for legal practitioners was that the majority of lawyers wanted more education about the program. In addition, they thought that police and Magistrates should be better educated so there is parity. The LIV responses stated that, “the fundamental objectives should be the subject of broad education to police members. It was considered that there is no guiding principle or general understanding at a philosophical level of the program by Informants”.115

The major issues with Diversion outlined by the lawyers were that police and Magistrates have differing views on who is eligible for Diversion; that Diversion is discretionary; and that Diversion requires informant approval. For instance, “the program relies too much on the idiomatic subjective assessment of individual informants”116 and “police are not operating the program as a matter of course, rather are exercising too much discretion”.117 The LIV responses raise issues concerning Magistrates’ appreciation and application of the program. For example, “Some magistrates do not appear to appreciate or accept the philosophical basis of the program and apply arbitrary ‘rules’ disqualifying accused persons (and more often particular offences) from the program”.118 Other major shortcomings of Diversion according to the respondents include, “an inability by legal practitioners to address Magistrates as to suitability for Diversion where an unfavourable recommendation is made” and “the inability of courts or legal practitioners to initiate Diversion in the absence of “approval” of informants”.119

Several reforms were suggested to rectify these aforementioned shortcomings. A common proposal was to remove the current requirement for consent by the informant. For instance, one respondent suggested removing “the necessity for police and victim approval”;120 another respondent outlined that, “Diversion should be recommended not with the consent of the informant”.121 In addition, it was proposed that, “a legal practitioner should have the power to make representations to Magistrates in the event of refusal”.122 The LIV notes, “Generally it is considered that addressing the identified shortcomings would be reform measures that would improve the program”.123

Magistrates
Four Magistrates were consulted. They generally felt that Diversion has been successful to a certain extent. However, one Magistrate outlined that, as there has not been a review of diversion its success has not been measured.124 The recidivism rate of Diversion is also difficult to assess. One Magistrate stated that they have “no idea”125 and another outlined that, it is hard to ascertain as diversions do not appear on the Police Law Enforcement Assistance Program (LEAP) database as prior convictions.126 The other respondents believed it as being quite low; possibly less than 30%.127

The Magistrates’ responses indicated that the offences, which are eligible for Diversion, vary. The offences that commonly get Diversion, according to the Magistrates, include: “damage to property, minor dishonesty, some and alcohol. It aims at rehabilitating the offender by treating their substance abuse issues. As a corollary of this treatment, the aim is prevent further criminal behaviour.

- INDIGENOUS COURT: The Court has been established to work with Aboriginal defendants who have pleaded guilty to an offence. It allows members of the Aboriginal community to contribute during the hearing and thereby allow the Magistrate to better comprehend the cultural needs of Aboriginal offenders.

- FAMILY VIOLENCE COURT: A pilot program currently being trialled in the regions of Ballarat and Heidelberg that provides specialist support services to family violence victims. This is carried out through the provision of specialist support services and Magistrates who have been trained in family violence matters.

- SEXUAL OFFENCES COURT:128 This Court is not currently in operation within Victoria but has been suggested by the Victorian Law Reform Commission. The concept involves initiating a specialist court that deals with sex offences, including special evidence rules and a more amenable court environment for victims.

- OTHER PROPOSED COURTS: Other courts that have been suggested by various experts and organisations in Victoria and which have been developed in other states, or internationally, include a Mental Health, Teen and Community Courts.

Pilot Program
Diversion was piloted in the Broadmeadows Magistrates’ Court in 1997 with the support of police, magistrates, legal practitioners and community groups. It was piloted in response to similar programs in New Zealand that were aimed at diverting offenders out of the criminal justice system. At the end of the Victorian pilot period, in 1999, the Criminal Justice Enhancement Program recommended that Diversion should be rolled out statewide. It was subsequently revised and then implemented in 2000.

The benefits identified as a result of the Victorian pilot program can be summarised as follows:

(a) Diversion ‘ownership’ lies broadly with the community;

(b) it provides flexibility;

(c) it forged a link between the community and the justice system; and

(d) low recidivism rates were reported during the operation of the program.129

115 Ibid.
116 Lawyer 2
117 Lawyer 4
118 LIV Responses
119 Lawyer 2
120 Lawyer 3
121 Lawyer 5
122 Lawyer 6
123 Lawyer 13
124 Magistrate 3
125 Ibid
126 Magistrate 1
127 Magistrate 4

48 Ibid
50 Criminal Justice Enhancement Program, ‘Policy/Programs in Magistrates’ Court Project, Status Report’ (August 1999).
Diversion And Therapeutic Jurisprudence

Theorising jurisprudence is a way of looking at the law, which recognises the “role of the law as a therapeutic agent”. It focuses on the law’s impact on the general wellbeing of an offender and all parties involved in the offence. It envisages that legal problems may be addressed by addressing the underlying problems of an offender.

Therapeutic jurisprudence takes into account and consequently attempts to solve problems by acknowledging that criminal conduct is influenced by other psychological, economic and social factors. Diversion demonstrates how this concept is being recognised within the Court system.

Other examples of how therapeutic jurisprudence has been implemented within the Magistrates’ Court in Victoria include:

- Court Referral and Evaluation for Drug Intervention (CREDIT) program: The CREDIT program is operational in the Magistrates’ Court and aims to provide early treatment for offenders with substance abuse issues and implement drug treatment as part of their sentence.

- DISABILITY CO-ORDINATOR: A position in the Magistrates’ Court which has been created to provide information and advice to the Court in order to assist it in determining the relevant disability-related issues that affect the case before it. It recognises the Court’s need to respond to the special needs and circumstances of disabled persons.

- PSYCHIATRIC SERVICES LIASON: Services within the Magistrates’ Court, which facilitate the diversion of mentally ill offenders into appropriate treatment. The service provides identification and assessment of mental illnesses amongst offenders and advises the Court on relevant mental health issues.

- JUVENILE JUSTICE LIASON: Services within the Magistrates’ Court that are designed to provide services to young offenders between the ages of 17 to 21 years.

Diversion V Problem-oriented Courts

Problem-oriented courts are another example of how therapeutic jurisprudence operates. These courts also address the underlying problems of offenders and respond to their social needs. Problem-oriented courts generally focus on broader issues of an offender including their health and well-being. Furthermore, they focus on victims and public safety.

They generally allow the court to provide ongoing judicial supervision, as well as a non-adversarial approach to any hearing. There is collaboration outside the court system with persons such as judicial officers, social service providers and community groups.

The main underlying theme is a contemporary approach to offending behaviour by the justice system, which frames offending behaviour within the context of broad social problems rather than individual pathologies.

Some examples of problem-oriented courts that are currently operating in Victoria include:

- DRUG COURT: This Court is responsible for sentencing and supervising the treatment of offenders with a substance abuse problem who have committed an offence under the influence of drugs driving offences, as well as street offences. The general consensus appears to be that the majority of minor offences are eligible. There were differing views regarding the quantity of sentencing options available to the judiciary in the Victorian criminal justice system, which may impact adversely upon parity in sentencing. One Magistrate answered, “Yes. In similar cases some are offered Diversion, others are not.” Two magistrates believed that the types of sentencing options do not impact on the use of parity. The Magistrates provided comparable responses when asked what penalties defendants are avoiding by partaking in Diversion. They all agreed that the defendants are usually avoiding an adjourned undertaking or a fine. Other penalty avoidance included, “the ‘penalty’ of a hearing in open court, a finding of guilt and a recorded prior.”

The Magistrates were asked as to when they would intervene and interpose a Diversion agreement between an Informant and defendant. The predominant reason for any intervention was due to the inappropriate nature and seriousness of the offence. Other reasons include: the view of victim, “prior criminal history...defendant’s refusal to take responsibility...[and] inadequate prosecutions case against the defendant.”

It was indicated to us that Diversion only exerts case flow management marginally or to a limited extent. One Magistrate indicated that it does take some cases out of the busy mention system. However, there is no credible evidence to suggest that the program does ease case flow.

The Magistrates were asked what safeguards are currently missing from the existing program. Police education appeared to be an important issue. One Magistrate indicated that they were unaware if the police had a policy regarding diversion. Another Magistrate stressed the fact that the Magistrates are the gatekeepers of the process and must accord the defendant natural justice, and therefore believed that there are adequate safeguards for offenders within Diversion. The Magistrates agreed that the court should be able to recommend Diversion where an Informant has not done so. However, one Magistrate did highlight that the view of the victim should always be sought.

According to the responses, community awareness about Diversion appears to be minimal. For example, “generally there is little community awareness of the Diversion Program” and “the general community may not appreciate the difference with a matter being dealt with in Diversion or in court.” Another view was that people in the legal fraternity generally knew about Diversion, “solicitors are aware of it.”

The Magistrates thought it was difficult to tell if Diversion was applied equally to all offenders. Generally, it can be deduced that Diversion is not applied with equality to all offenders. One Magistrate maintains that the program is not applied equally “because the program was not assessed prior to being rolled out statewide” and “was poorly introduced without proper legislative supports.” Another view was that Diversion is not applied with equality because “police and Magistrates have varied views in their attitudes.”

Conclusion

These expert consultations have provided an informative insight, from different and important perspectives, as
to the benefits and current defects in Diversion. Overall, the participants perceived Diversion as a successful program. It is evident that Diversion offers fairly non-onerous penalties in comparison to penalties handed down in the mainstream criminal justice system. There were differing views amongst the participants as to which offences actually attract Diversion. One lawyer outlined that Informants believe that one cannot participate in Diversion for any traffic related matters; however the legislation only prohibits drink-driving offences. This highlights the necessity for further police education about the program. The fact that Informants possess a great deal of control as regards eligibility for Diversion drew several negative comments from some Diversion coordinators and several lawyers. The essence of their criticism was that police hold a great deal of power and discretion when recommending a defendant for Diversion and thus there is a risk that personal bias and prejudices will affect the way in which this discretion is exercised. In addition, there were some comments that Diversion was applied inconsistently and without parity both at the level of Informants and Magistrates.

WHAT IS DIVERSION?

Definition:

The Magistrates’ Court defines Diversion as a “program [which] provides mainly first time offenders with the opportunity to avoid a criminal record by undertaking conditions that will benefit the offender, victim and the community as a whole”.

The program is governed by s128A of Magistrates’ Court Act 1989 (Vic) and its main purposes are to reduce re-offending, avoid first criminal convictions, assist offenders’ rehabilitation, utilise community resources for appropriate counselling or treatment and ensure that appropriate reparation is made to victims of crime.

Diversion has created an alternative sentencing option where the Court focuses on therapeutic jurisprudence and thereby tailor a legal remedy to optimise the outcome for the offender, victim and community. Through this program, societal values are reinforced positively, the respect for compliance with court orders is increased and the offender is involved in the process of sentencing. More practically, the program acts as a more cost effective alternative than formal criminal justice sentencing.

Recognition must be given to the weaknesses that are identifiable within Diversion. Arguably, the initial rollout of Diversion (and its delayed legislative foundation) has created some of the weaknesses.

Inconsistencies have been identified within Diversion due to the discretion granted to Informants and flexibility in sentencing granted to the Magistrates. The discretion of an Informant, with regard to offences which are diverted to the program, has created the opportunity for bias or discouragement of referral to the program based on an informant’s subjective assessment of an offender.

The discretion of the Magistrate has also highlighted concerns that judicial officers may not fully appreciate the difficulties in managing the rehabilitation of offenders, although they can take into consideration the circumstances of each individual case. The program has required increased need for cooperation with other community agencies and additional administration and supervision by the Court due to complexities in the program and an overlap with other sentencing and cautioning options.

Diversion v The Traditional Criminal Courts

The role of a traditional criminal court is to determine the guilt of an offender and impose sanctions according to the law and sentencing practice. According to the Sentencing Act 1991 (Vic) the court, when sentencing an offender, is bound to take into account five principles, being, “retribution, denunciation, incapacitation, rehabilitation and restitution”. The principle of retribution directs the court to focus on punishment being proportional to the offence. At the same time the court takes on an adversarial approach to the case and has limited power to investigate further into the facts surrounding the case.

The traditional criminal court system has previously demonstrated problems such as delays in court processing, increase in case loads, inefficiency and limited recognition of the needs of minority groups. Diversion, on the other hand, has provided an option with the ability to decrease court delays, increase case efficiency and reduce expenditure. Most importantly, it allows the court to take on a less formal approach to minor offences and focus on rehabilitation when sentencing. By combining these two features the court aims to reduce crime rates by changing both the offender’s behaviour and attitude.
The major objective of this discussion paper is to inform the community of Diversion, and in doing so, identify and discuss any theoretical and practical issues concerning the program. This paper does not purport to be an authority on Diversion, or the theoretical framework of the various sentencing components of the justice system under the auspice of therapeutic jurisprudence. Rather, the purpose is to raise salient issues regarding Diversion, enabling stakeholders to further fine tune the program to ensure that all relevant members of the community can enjoy its full benefits.

Data for this student-driven project has been derived through informal consultations with four Magistrates, four Diversion Coordinators, nine solicitors (practicing regularly in the Magistrates’ Court) and five Victoria police members. We also received a collective response from the Law Institute of Victoria and one regional police station. Questionnaires were prepared and consultations were conducted either via phone, mail and face to face. This variance in information gathering occurred due to difficulties in organising formal consultation times with the above groups, who indicated individual preferences for each particular style of surveying. We can claim, with some authority, that the questions were clear, as those responding are highly aware and informed of the subject matter.

It is worth noting that the samples are not representative of the respective populations; as such, this discussion paper provides only the foundation for further research.

The sample of experts was determined through systematically establishing contact with the professionals listed above from region to region and requesting them to respond. Unfortunately, a glaring gap in our research method is the total lack of diversion participant and victim consultation, although concerns from these groups were determined vicariously through comments from relevant professionals. We would applaud future research which consulted these groups.

Although there is a general paucity of literature on Diversion in Victoria, material from the Magistrates’ Court and various academic literature provided a useful theoretical and conceptual platform from which to frame our discussion.

5. FINDINGS AND RECOMMENDATIONS

FINDINGS

The different responses obtained from Diversion Coordinators, police officers, lawyers, and Magistrates indicate that Diversion may not be currently operating as effectively and efficiently as originally foreshadowed. Despite the program being highlighted by the respondents as successful, several weaknesses and inconsistencies are evident. The respondents provided possible recommendations, which they believe, would assist in improving and addressing some of these current weaknesses.

The paramount recommendation from the responses was that Diversion should be recommended without the consent of the Informant. One Diversion Coordinator noted that, “Magistrates should be able to compel police to give Diversion and that police are too powerful in the system”. If Magistrates were granted authority to recommend Diversion to appropriate offenders, this would eradicate the possibility of inconsistent recommendations made by Informants.

It was also suggested that legal practitioners should have the power to make representations to the Magistrate either in the event of refusal or in general. This recommendation is in adherence with the rules of natural justice, whereby the decision maker should grant a hearing to any person whose interests will be affected by the exercise of that decision”. This is consistent with S128A(6) of Magistrates’ Court Act 1989 (Vic) which states that “nothing in this section affects the requirement to observe the rules of natural justice”.

Another recommendation proposed that there should be some sort of eligibility guidelines for Magistrates as they sometimes have different ideas on who should or should not be granted Diversion. This would hopefully address, or, at least, minimise any inconsistencies within the court system as to eligibility for Diversion.

The responses also indicated the need for more education. In particular, the responses from the LIV outlined that there are no guiding principles or general understanding at a philosophical level of the program by Informants. Several lawyers also believed that there should more education concerning Diversion, particularly to police. In addition to police education, there appears to be little community awareness about Diversion.

The program could benefit from further research into the types of crime more likely to be suitable for Diversion. This would assist with informing relevant stakeholders of the level of parity in the application of Diversion. It would also provide opportunity to better tailor Diversion to the criminogenic requirements related to that specific offence. This will improve the likelihood of producing better results for all parties involved. A corollary of this would be to examine the sentencing options which Diversion has replaced. There is potential, given the discretion of the Magistrates, for Diversion to be more onerous than the sentencing options which it may have replaced, which may not have been the intention of the architects of the program.

Ongoing consultation with informants to determine factors which impact upon their decision to recommend Diversion would further promote parity in its application. It would assist in raising awareness of Diversion, and improve the practice of appropriate recommendation of Diversion, within the Victoria Police.
As was noted in Section 2, this project was unable to consult with both Diversion participants and victims of crime. Further research with both these groups would greatly benefit the Diversion program, and also the justice system as a whole. Intelligent and sensible consultation with offenders within the justice system, as well as victims of crime, can greatly enhance the effectiveness of policy and program development.

Finally, it would be worthwhile to examine the pitfalls of admitting the facts, which can be viewed as tantamount to an admission of guilt, theoretically exposing the Diversion participant to civil action. Section 128A(4)(c)(x) of the Magistrates’ Court Act 1989 (Vic) indicates that participating in Diversion can make one vulnerable to the Confiscation Act 1997 (Vic), although the type of offence likely to be suitable for Diversion is unlikely to expose one to confiscation. This example demonstrates the importance of ensuring that the defendant is fully aware of all repercussions and consequences in consenting to Diversion. Furthermore, admitting the facts is not a finding of guilt, and as such, it is important that the current situation is maintained, so that Magistrates should not have access to information pertaining to previous Diversion orders. This information should be available only to the police.

The recommendations above highlight some areas for enhancing this already effective program. In our submission, consideration and further research of these recommendations would ensure, among other things, that the key critical participants and stakeholders involved in the program, all have thorough parallel understandings of its’ aims, application and desired outcomes.

Comparison Of Recidivism Rates

The final report indicates that recidivism amongst participants of Diversion is low, with between “0 to 7% being convicted of a subsequent offence in the 12 months following their commencement on the program”. A comparison to recidivism of similar participants who did not undertake the program was not conducted as it “was outside the scope of [the] evaluation”. Further information on recidivism of potential Diversion participants who were dealt with through the traditional criminal justice system would lead to a clearer view on the effectiveness of the program.

Comparison With Eligible Participants Who Do Not Participate

There is a lack of information in the literature on the number of eligible participants of Diversion who are not referred to the program. The final report found that “6% of the incoming criminal case load is being referred to [Diversion]”. But no information was collected on the total number of criminal cases that could potentially be referred to Diversion. An understanding of the individuals who missed out on utilising Diversion could help the making of informed decisions about the development of educational aspects of the program for appropriate stakeholders. Information on eligible participants could be obtained from the “Courtlink” System or the Victoria Police records and be compared to the records of the State Diversion Coordinator. This information was available to the authors of the final report, but appeared to be outside the scope of their evaluation.

Conclusion

Diversion appears to be construed in a positive light by the DOJ’s final report, and by implication, therapeutic jurisprudence has a place in the court system. There is room for further research into the effects of Diversion on the community, the court, and the individuals who have access to the program.
preordained path for a dispute leading to the court from which any other process is a derogation”. Also, many schemes such as CREDIT Bail program and the Drug Court pilot are considered Diversionary programs and thus may be referred to as “Diversion”. To address this possible confusion, “a deliberate change in terminology was suggested”. It seems clear that the Criminal Justice Diversion Program is understood to be an innovative process of the court, whether or not the term “Diversion” describes it sufficiently.

DIVERSION AS A SENTENCING SUBSTITUTE

The DOJ report found that 50% of the conditions of Diversion programs related to the tendering of a donation to a charitable organisation. Such a requirement, to successfully complete Diversion, could be considered as quasi-punitive: a sentence substitute. Further, it ranks alongside the requirement to acknowledge responsibility for the offence. It is argued that requirements of this nature are effectively a punishment and therefore, should only be required if there is a finding of guilt. The report noted that only 13% of conditions were counselling related conditions. This further suggests that Diversion may be used in place of a criminal sentence.

A clear interpretation of these results requires an understanding of the particular offences that were resolved with a donation, compared to counselling. Also it should be noted that one aim of Diversion is to prevent first time or low risk defendants from entering the criminal justice system. Therefore, the implication that Diversion is a sentencing substitute may be misconstrued.

DIVERSION AND THERAPEUTIC JURISPRUDENCE

Diversion is understood to fall under the broad ambit of the concept of therapeutic jurisprudence by “assisting an offender’s rehabilitation, utilising the community’s resources for appropriate counselling or treatment, and ensuring that appropriate reparation is made to the victim of the offence.” It is suggested that applying the principles of therapeutic jurisprudence contributes to a more comprehensive resolution of the legal problem.

The use of therapeutic jurisprudence is not without criticism. The application of therapeutic remedies by the court can be seen as “fusing the court system with the welfare system, in a manner which is subtle and perhaps lacking in transparency”. Further, Vivienne Topp, Solicitor, Mental Health Legal Centre, argues that it may not be appropriate to rely on systems of the court to address wider social problems.

Others argue that the results speak for themselves. There have been positive outcomes in relation to evaluations of drug courts in terms of the effect of programs on recidivism, cost effectiveness and participant well-being.

FURTHER RESEARCH SUGGESTIONS

As our research has only located one major Victorian report focusing on Diversion, there is a lack of information on certain issues which could be addressed through further research. A comparison of recidivism with non participants of Diversion has not been undertaken. Also, an understanding of the cases that miss out on being referred to Diversion, where otherwise eligible, would be useful. This information could provide a basis for evaluating the effectiveness of Diversion and how it can be improved.

CRIMINAL JUSTICE DIVERSION PROGRAM

6. BIBLIOGRAPHY

JOURNAL ARTICLES

Arie Freiberg, Pathways to Justice Sentencing Review (2002)

INTRODUCTION

Between January and June 1999, there were 166 matters referred to Diversion through the pilot program at Broadmeadows Magistrates’ Court. During this period, in the pilot program, the police referred 92% of matters and the remaining 8% were made by legal practitioners. 12 Between November 2000 and September 2003, the majority of referrals to Diversion came from the police. The police were responsible for 61.9% of referrals, 13 32.8% of referrals were from the defendant, or the defendant’s solicitor and 4.8% were from the court. The status report data (from the 1999 report) was not referred to in the final report (the 2004 DOJ report). It may be difficult to compare the results due to the pilot program being small, at one venue only, and operating under different conditions. However, the statistics, without taking these factors into consideration, show a large attitudinal change in the referrals to Diversion by the police.

From the final report, the amount of referrals from the police appears to be an encouraging figure, considering some stakeholders, noted in section 4 of this report, are concerned about the emphasis on the involvement of the police in approving referrals to Diversion.14 The statistics do not take into account the important element of the eligibility of participants for Diversion. Further research could consider the number of eligible participants that were referred by particular stakeholders in the process (either police or recommended to police by solicitors). This would be useful in illustrating trends indicating the type of offender deemed appropriate for participation in diversion by each group of stakeholders. This would assist in determining trends in referring from each stakeholder. A longitudinal comparison indicating which groups referred particular participants to Diversion may also be valuable. It is important to note that police are often encouraged by legal practitioners to recommend Diversion, so this type of research would need to take such factors into account.

Finally, a key recommendation of the DOJ’s final report is that consideration needs to be given as to whether current Diversion informational measures are sufficient. This appears to apply most significantly to defendants who lack legal representation.15

OTHER “DIVERSIONARY” PROGRAMS

Diversionary programs have been subject to analysis from the perspective of particular groups of participants, such as the homeless, individuals with substance abuse issues and/or those who suffer from mental illness.

The report by Midgley on homeless people in the court process recommends that programs such as Diversion would be useful for offences “at the lower end of the sentencing hierarchy.”16 It noted, “The scope of [Diversion] in Victoria is too narrow... A number of [homeless] participants had been excluded from the program because of prior offences.”16 This is a major topic, but unfortunately beyond the scope of this project. Further research into this area, by involved and experienced stakeholders, would be encouraged.

“DIVERSION” CLASSIFICATION DIFFICULTIES

There is an apparent inconsistency in the literature on how Diversion fits into the criminal justice system. Freiberg points out that Diversion is a “court related innovation”,17 and not a problem oriented court such as the Drug Court. However, Diversion and the Drug Court are considered “court based Diversionary programs”18 by the DOJ’s final report. The inconsistency may come down to different interpretations of the word “Diversion”. The term “Diversion... assumes that there is a proper and
Criminal Justice Diversion Program

1. INTRODUCTION

Diversion has been subject to a major report by the Department of Justice of Victoria (DOJ) in 2004, and has been discussed in the context of therapeutic jurisprudence and court related innovations. This literature review critically assesses and highlights the important aspects of the major report and provides an overview of the current discussions surrounding Diversion.

The most comprehensive review of Diversion was carried out by Health Outcomes International Pty Ltd on behalf of the DOJ in November 2004. The terms of reference of the report included determining the “effectiveness of the Court Diversion programs”. The review covered Diversion, the subject of this report, along with the Court Referral and Evaluation for Drug Treatment (CREDIT) Program and the Drug Court.

This report followed a status report from August 1999, which considered the Diversion Pilot Program. The benefits of Diversion in the early stages were stated to be the “...opportunity to divert from the criminal justice system those for whom greater harm is caused by the appearance itself. For those who are labouring under some disability and for those whom early intervention might bring about positive lifestyle changes and thereby reduce the prospects of re-offending”. The report included summaries of interviews with administrators of the pilot program, but did not say how many people were interviewed or how the data from them was analysed. This may be due to the program being in its infancy at the time of the report.

The status report concluded that there was a need for further education and publicity of the Diversionary programs, and that Diversion should not have a rigid formal structure, thus facilitating a number of appropriate avenues for court-community communication.

Duplication with Police Cautioning

In the 1999 status report, interviewed administrators of Diversion, such as Magistrates, Registrars and the police, in principle, had no difficulties with incorporating the program into the criminal justice system, nor any difficulty with the police cautioning program operating in tandem. In 2004, a key recommendation of the final report was that further analysis and consultation should be conducted regarding the potential duplication between police cautioning and Diversion. The only evidence the report puts forward to back the recommendation is that “some stakeholders suggested police cautioning and [Diversion] are potentially duplicative in the sense that an offender could be given more than one chance for the same type of offence”. It is unclear why the views of Diversion administrators have changed since the pilot program.

Effect of Enabling Legislation - Magistrates’ Court Act

In 2002, the Magistrates’ Court Act 1989 (Vic) was amended to cater specifically for Diversion. There appeared to be an impression by stakeholders in Diversion that the lack of this legislation hindered the uptake of the program.

The DOJ final report analysed data from the Diversion database (maintained by the DOJ) between November 2000 and September 2003. The 2002 amendment was not found to have an effect on the number of entrants to the program. This report appears to be consistent with the view that Diversion operates in an “informal” manner, as recommended by a sentencing review in 2002.

BIBLIOGRAPHY

Survey Responses

Diversion Coordinators

Diversion Coordinator 1 – September 2005
Diversion Coordinator 2 – September 2005
Diversion Coordinator 3 – September 2005
Diversion Coordinator 4 – received 29 September 2005

Police Officers

Police Officer 1 – September 2005
Police Officer 2 – September 2005
Police Officer 3 – September 2005
Police Officer 4 – received 8 September 2005
Police Officer 5 – received 8 September 2005
Police Station Responses – received 28 September 2005

Lawyers

Lawyer 1 – October 2005
Lawyer 2 – October 2005
Lawyer 3 – October 2005
Lawyer 4 – September 2005
Lawyer 5 – September 2005
Lawyer 6 – received 3 October 2005
Lawyer 7 – received 8 September 2005
Lawyer 8 – received 3 October 2005
Lawyer 9 – received 14 November 2005
Law Institute of Victoria – received 25 October 2005

Magistrates

Magistrate 1 – received 9 March 2006
Magistrate 2 – received 1 February 2006
Magistrate 3 – received January 2006
Magistrate 4 – received January 2006