The Way Forward

Recommendations of the Review of the Criminal Law [Mentally Impaired Defendants] Act 1996

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Transmittal

Hon Jim McGinty MLA
Attorney General and Minister for Health

Sir,

In early October 2003, a synthesis of the review of the *Criminal Law (Mentally Impaired Defendants) Act 1996* (the CLMID Act) was published, which foreshadowed a series of proposals for legislative reform for the purpose of subjecting them to public scrutiny and comment. The synthesis itself was already the product of a broad-based enterprise in community consultation lasting some 18 months. The final phase of the review has offered a further opportunity for open participation. A second round of public submissions has been received and on 31 October 2003, an open consultative forum on the synthesis of the CLMID Act was conducted at the Fremantle Arts Centre. The feedback obtained has been effective in motivating a number of important changes to what had been proposed originally.

The review is now in a position to make its final recommendations on the CLMID Act and these are contained in this report for your consideration. It should be read in conjunction with the earlier synthesis in order to obtain a full appreciation of the rationale for each recommendation. In instances where the recommendations presented here differ significantly from the proposals in the synthesis, the part of this report entitled 'notes' gives corresponding explanations for each change. 'Notes' are also recorded on recommendations that provoked debate during the final phase of the review, even if the decision was eventually to stand by the original proposal. Recommendations that have been essentially unaltered from the original proposals, and which generated no debate, do not have an accompanying explanatory note.

I would like to thank the Government for affording me the privilege of working on these important reviews and to find myself heartened by the commitment and extraordinary voluntary efforts of so many people, whose wish is to see Western Australia supported by the best possible mental health laws.

Professor C. D'Arcy J. Holman MBBS MPH(Harv.) PhD FACE FAFPHM FAIM
Reviewer of the *Mental Health Act 1996* and *Criminal Law (Mentally Impaired Defendants) Act 1996*
12 December 2003

Recommendations

A. General

New Act

A.1 The means of effecting the legislative changes recommended in this report should be through contemporaneous repeal of the CLMID Act 1996 and its replacement by new CLMID legislation. The CLMID Act should continue to stand separate from the *Mental Health Act 1996* (WA MH Act).

1. Preliminary

Interpretative Definitions

1.1 Definitions of the following terms should be added to section 3 of the CLMID Act:

- "authorized hospital is a public hospital authorized under section 21 of the WA MH Act that offers secure conditions appropriate to the purposes of this Act",
- "mental illness has the meaning given by section 8";
- "mental impairment has the meaning given by section 8";
- "mentally impaired defendant coordinator"; and
- "trial has the meaning given by section 8".

Objects and Fundamental Principles of the Act

1.2 Sets of objects and fundamental principles should be separately added as new sections in part 1 of the CLMID Act. The objects should include:

- to ensure that mentally impaired defendants (MIDs) are identified early in their contact with the justice system and that they are diverted away from corrective services;
- to ensure that MIDs receive the best possible treatment and care;
- to ensure that the community is adequately protected;
- to ensure that MIDs have access to health care and disability support services;
- to ensure that agencies responsible for servicing MIDs are well coordinated;

- to ensure that MIDs have legal representation; and
- to minimize the adverse effects of becoming a MID on the family life.

The fundamental principles should include:

- that MIDs are dealt with in court and in proceedings of the Mentally Impaired Defendants Review Board (MIDRB) in a manner that respects their rights and dignity, and that accords with principles of natural justice;
- that the rights of MIDs are to be balanced with the rights of the community to be protected;
- that acknowledgment is given that due to their mental impairment and sometimes additional and multiple disabilities and social factors, MIDs have a range of needs for health care and disability support services;
- that access of MIDs to health care and disability support services is equivalent to the access of the rest of the community;
- that to the extent that a MID does not have sufficient means to pay legal representation, it should be free of charge;
- that preference is given to options for care, treatment and rehabilitation of MIDs that cause the least restriction of their freedom that is necessary to protect the MID and the community;
- that victims have the opportunity to be acknowledged and heard;
- that when a MID is a person of Australian indigenous background or a person from another distinct cultural or linguistic group, as far as possible, the person's case is managed in a manner appropriate and consistent with the person's cultural beliefs, practices and mores, taking into account the views of the person's family and community.

Objectives of the Act

1.3 A new section should be added to the end of part 1 of the CLMID Act, after the statement of objects and fundamental principles of the Act, which requires the Minister, any judicial officer, members of the MIDRB and any other person performing any function under this Act or otherwise, in relation to the care and rehabilitation of MIDs to seek to ensure that the objects of the Act are achieved as far as it is relevant to the performance of his or her functions under this Act. This new section should be modeled on section 6 of the WA MH Act.

2. General Provisions

Scope of Assessment under Part 2

2.1 The title and provisions in part 2 of the CLMID Act should be modified as follows, to broaden the scope of this part to include assessment of all MIDs:

- amend the title of part 2 to "*Part 2 – General Provisions about Assessment*";
- amend the title of section 5 to "5. *Defendant refused bail may be subject to assessment order*";
- amend subsection 5(2) to state that if a judicial officer suspects on reasonable grounds that the defendant "is mentally impaired" (cf "has a mental illness"), "requiring treatment or care" (not just treatment), the officer may make an "assessment order" (cf "hospital order"); and repealing the additional conditions given in subsection 5(2)(b) and (c) (ie, in order to protect health or safety or to prevent damage to property; and refusal or inability to consent to treatment);
- amend subsection 5(3) to state that an assessment order is an order that the defendant is to be taken to and detained in "an authorized hospital or a declared place" (not just an authorized hospital) and examined by "a psychiatrist or psychologist" (not just a psychiatrist), if appropriate by audiovisual means, until a date set by the judicial officer;
- further amend subsection 5(3) such that the judicial officer may set a date for the return of the defendant that is not more than 7 days with an extension of up to an additional 14 days made possible on application by a psychologist or psychiatrist without the defendant returning to the court;
- amend subsection 5(4) to change "hospital order" to "assessment order requiring the defendant to be taken to an authorized hospital"; and
- repeal subsection 5(5) and replace it with a new subsection that takes over the role of subsections 5(3)(a) and (b), such that a defendant who is the subject of an assessment order and taken to an authorized hospital can only be made an involuntary patient if a psychiatrist determines that the criteria for becoming an involuntary patient under the WA MH Act are satisfied; and must in any other case be kept in custody.

Criteria for Becoming an Involuntary Patient

2.2 Proposal 2.2 has been subsumed within recommendation 2.1.

Judicial Officer to be Advised

2.3 A new section should be added to part 2 of the CLMID Act, stating that before a judicial officer makes an assessment order under section 5, the judicial officer should, wherever practicable, receive advice from an authorized mental health practitioner, a medical practitioner, a psychologist or a psychiatrist.

In addition, if the defendant is a person of Aboriginal or Torres Straight Islander background, before making an assessment order under section 5, a judicial officer who is not themselves a person of Australian indigenous background, should, wherever practicable, receive advice from a suitably qualified cultural adviser. Either form of advice should be allowable by audiovisual means.

Further Considerations before Making an Assessment Order

2.4 A new section should be added to part 2 of the CLMID Act, stating that before a judicial officer makes an assessment order under section 5, the judicial officer must ask all persons present in the court, including carers and service providers, if they have any relevant information to be considered. In addition, before imposing an assessment order, a judicial officer should be required to consider the least restrictive option, including the possibility of using provisions of the *Bail Act 1982* schedule 1, part D, clause 2, subclause 3a.

Report of Assessment

2.5 Section 7 of part 2 of the CLMID Act should include:

- a power for a judicial officer making an assessment order to require a report on the defendant to be furnished as a result of the assessment;
- that the principal purpose of such a report is to assess the defendant's state of mental impairment or mental illness;
- that a report may be from a psychiatrist or psychologist; and
- that a report should be made available to the prosecuting officer, who may provide information from the report to the victim(s).

Defendants may Reappear by Videoconferencing

2.6 A new section should be added at the end of part 2 of the CLMID Act, enabling the judicial officer to give leave for a defendant to reappear before the court by audiovisual means, following the making of an assessment order, if the judicial official has received an opinion in writing from a psychiatrist, psychologist or medical practitioner that reappearance of the defendant in person would be detrimental to their health.

3. Mental Unfitness to Stand Trial

Interpretation of Mental Illness and Impairment

3.1 The interpretations of mental illness and mental impairment in section 8 of the CLMID Act should be amended to become more consistent with cognate legislation. The proposed forms of words are as follows:

- "mental illness means a pathological infirmity of the mind that is consistent with the meaning of mental illness given in the WA MH Act, but does not include a condition that results from the reaction of a healthy mind to extraordinary stimuli"; and
- "mental impairment means mental illness, intellectual disability, degenerative brain disease or acquired brain injury, or a combination of these conditions";

Definition of Mental Unfitness to Stand Trial

3.2 "Unable to instruct his or her legal representative due to mental impairment" should be added to the reasons why a defendant is not mentally fit to stand trial given in section 9 of part 3 of the CLMID Act.

Duration of Custody if Mentally Unfit to Stand Trial

3.3 Except as provided in recommendation 5.3A, a limitation should be placed on the maximum duration of a custody order or series of custody orders made in respect of a MID who is unfit to stand trial, such that the MID may not be detained involuntarily, by virtue of the custody order(s) alone, for a period longer than the maximum term of imprisonment provided by the statutory penalty for the alleged offence. This will require the following changes:

- add a new subsection to section 16 stating that the custody order shall be for a term set by the magistrate and shall not be for a term longer than the maximum term of imprisonment provided by the statutory penalty for the alleged offence; and
- add a new subsection to section 19 stating that the custody order shall be for a term set by the judge and shall not be for a term longer than the maximum term of imprisonment provided by the statutory penalty for the alleged offence.

Judicial Officers to Receive Statements

3.4 Sections 16 and 19 of part 3 of the CLMID Act should be amended to require that prior to making any form of custody order or order for structured supervision or support, the presiding judicial officer must hear a statement of the alleged offence from the prosecution and determine whether or not the facts are disputed.

In addition, sections 16 and 19 of part 3 of the CLMID Act should be amended so that the judicial officer, although the MID is not an offender, has access to a victim impact statement in accordance with division 4 of the *Sentencing Act 1995*. The same should apply to section 22 of part 4 of the Act.

Judicial Officers to have Increased Options

3.5 Sections 16 and 19 of part 3 of the CLMID Act should be further amended to provide for the following increased options for judicial officers dealing with a defendant who is unfit to stand trial:

- an interim custody order that is of a set duration, also limited as per proposal 3.3, with a requirement that the defendant is returned to the court for further proceedings at the end of the set duration, or earlier if requested by the MIDRB or an application to reappear before the court is made by the MID or their representative; or
- an order for structured supervision or support in the community on terms that are substantially consistent with either a community release order, community based order or intensive supervision order (CRO, CBO or ISO) made under the *Sentencing Act 1995*.

It is intended that a MID returned to the court under the first option above, or earlier if requested by the MIDRB or upon application, may at that time be made subject to a further custody order, an order consistent with a CRO, CBO or ISO or be released unconditionally, and that the judicial officer must take account of any recommendations made at that time by the MIDRB.

A section should also be added towards the end of part 3 of the CLMID Act, requiring that a judicial officer who makes a custody order under this part of the Act, in setting the duration of the order within the limitation of the maximum statutory penalty that would otherwise apply, should give principal regard to the need of the MID for treatment or care as set out in the report of the examining psychiatrist or psychologist, and the need to protect the community.

A section should also be added towards the end of part 3 of the CLMID Act, requiring that a judicial officer, in making a custody order or an order for structured supervision or support under this part of the Act must inform himself or herself beforehand of the available placement options; and with respect to a MID of indigenous background, must take into account indigenous culture and, having received advice from an indigenous person with relevant knowledge of indigenous culture, may include conditions in any order that pertain to indigenous practices.

It should also be clear that if a MID should re-offend during the currency of an order, the full range of options should continue to be available to the judicial officer.

Report from Mental Health Practitioner

3.6 An amendment should be made to subsection 12(2)(a) in part 3 of the CLMID Act to read, “order the defendant to be assessed (cf examined) by a psychiatrist or psychologist; and a matching amendment to subsection 12(2)(b). The same should apply to subsections 40(1)(a) and (b) in part 5 of the Act.

4. Defendants Acquitted on Account of Unsoundness of Mind (and Schedule 1)

Schedule 1 Offences

4.1 Schedule 1 and section 21(a) of the CLMID Act should remain; however, there should be a review of schedule 1 with the aim to reduce the overall number of offences listed, while also considering any offences that should be added to the schedule. All crimes of homicide should continue to be listed in schedule 1.

Orders that may be made by Courts

4.2 Section 22 of part 4 of the CLMID Act should be changed to increase the range of options for defendants acquitted on account of unsoundness of mind, while also applying the principle of no custody for offences for which the statutory penalty does not include imprisonment. These changes should mirror those made under recommendation 3.5 with respect to a MID found unfit to stand trial. The options should thus be as follows:

- an interim custody order that is of a set duration and not for a term longer than the maximum term of imprisonment provided by the statutory penalty for the offence, with a requirement that the defendant is returned to the court for further proceedings at the end of the set duration, or earlier if requested by the MIDRB or an application to reappear before the court is made by the MID or their representative; or
- an order for structured supervision or support in the community on terms that are substantially consistent with either a CRO, CBO or ISO made under the *Sentencing Act 1995*.

It is intended that a MID returned to the court under the first option above, or earlier if requested by the MIDRB or upon application, may at that time be made subject to a further custody order, an order consistent with a CRO, CBO or ISO or be released unconditionally, and that the judicial officer must take account of any recommendations made at that time by the MIDRB.

A section should also be added towards the end of part 4 of the CLMID Act, requiring that a judicial officer who makes a custody order under this part of the Act, in setting the duration of the order within the limitation of the maximum statutory penalty that would otherwise apply, should give principal regard to the need of the MID for treatment or care as set out in the report of

the examining psychiatrist or psychologist, and the need to protect the community.

A section should also be added towards the end of part 4 of the CLMID Act, requiring that a judicial officer, in making a custody order or an order for structured supervision or support under this part of the Act must inform himself or herself beforehand of the available placement options; and with respect to a MID of indigenous background, must take into account indigenous culture and, having received advice from an indigenous person with relevant knowledge of indigenous culture, may include conditions in any order that pertain to indigenous practices.

It should also be clear that if a MID should re-offend during the currency of an order, the full range of options should continue to be available to the judicial officer.

5. Mentally Impaired Defendants

Declared Place

5.1 The references to a prison or a detention centre should be deleted from subsection 24(1) of the CLMID Act, such that any general prison or general detention centre is not a legal place of detention of a MID subject to a custody order.

In addition, the definition of a "declared place" in section 23 should read, "a place declared by the Governor by an order published in the Gazette to be a place where appropriate facilities exist for the assessment, detention, care and protection of MIDs".

Orders of the Governor

5.2 Part 5 of the CLMID Act should be changed to remove the role of the Governor in decisions concerning the case management of MIDs, and instead place the responsibility in the hands of the courts and the MIDRB:

- amend subsection 24(1) such that "until released by order of the Governor" is replaced by "until the expiration of the custody order or until an earlier release order is made by the original or higher court";
- amend section 27 such that it is the MIDRB, rather than the Governor on the recommendation of the Minister, that grants leave of absence to a MID;
- amend section 33 so as to replace the system of reports to the Minister (on which basis the Minister may make a recommendation to the Governor on whether or not to release a MID) with a new system where the status of the MID is reviewed by the MIDRB within eight weeks (or other time limit so as to be consistent with the initial review of involuntary status under the WA MH Act) after a custody order is made, at least once in each six-month period thereafter (or other time limit so as to be consistent with subsequent reviews of involuntary status under the WA MH Act); and that the MIDRB at its discretion may recommend that a release order is made by the court;
- add a new section after section 33, giving the right for a MID to apply for a review by the MIDRB at times other than specified in section 33; and
- amend section 35 such that it is the court of original jurisdiction, on the recommendation of the MIDRB, that is empowered to make an unconditional or conditional release order for a MID that brings forward the date of release from what was otherwise specified as the end of the term of the custody order.

Time Limit for Place of Custody to be Determined

5.3 Subsection 25(1) of part 5 of the CLMID Act should be amended, such that the place of custody must be determined within 10 days rather than five days.

Judicial Review and Extension of a Custody Order

5.3A Part 5 of the CLMID Act should be enhanced to ensure that before a MID is released unconditionally upon the expiration of a custody order which has been limited by sentencing analogy (ie limited to the maximum prison sentence for the alleged offence), the MID should be returned to the court which, taking into account the recommendations of the MIDRB, may either (i) confirm the unconditional release of the MID; (ii) discharge the MID from the custody order, but require that they be re-examined by a psychiatrist to determine if they should become an involuntary patient under the WA MH Act; or (iii) make a further custody order if the court considers that an extension of custody is necessary to protect the public.

Re-offences

5.4 A new section should be placed in part 5 of the CLMID entitled *Re-offences*, in which it should state that if a MID who is subject to a structured community order or custody order re-offends, the MID should be returned to the court of original jurisdiction or higher court and have the matter relating to the original order re-considered along with the new charge, to inform the judicial officer's view about the need for public protection; with statutory limits on the duration of orders set in accordance with the maximum sentence provided in law for the more serious of the original and new alleged offences. This should include the offence of a MID absent without leave created in subsection 31(2) of the CLMID Act.

Appeals

5.5 A new section should be placed in part 5 of the CLMID entitled *Appeals*, in which it should state that, where sufficient grounds exist, an appeal against a decision of the MIDRB lies to the court of original jurisdiction and an appeal against a decision of the court of original jurisdiction lies to the Supreme Court. The section should also clarify that appeals may be made by any person judged by the courts to have a sufficient interest in the matter.

6. Mentally Impaired Defendants Review Board

Members and Secretary of the MIDRB

6.1 Sections 42 and 43 of part 6 of the CLMID Act should be repealed and replaced by new sections that define the composition of the MIDRB along the following lines:

- a chairperson and deputy chairperson, who are appropriately experienced and qualified judicial officers, appointed by the Attorney General;
- a community member and deputy appointed by the Attorney General;
- a psychiatrist and one or more deputies appointed by the Attorney General;
- a psychologist and one or more deputies appointed by the Attorney General;
- the Chief Executive of the Disability Services Commission, or their nominee;
- a person of indigenous Australian background with knowledge of indigenous culture and a deputy appointed by the Attorney General; and
- at least one member of the MIDRB (of the above) must have knowledge of issues affecting culturally and linguistically diverse people other than people of indigenous background.

In addition, a person should be appointed by the Director General of the Department of Justice to be the secretary to the MIDRB, who is not a voting member of the MIDRB, and who is not involved in the administration of the Parole Board.

MID Coordinator

6.2 A new section should be placed before section 45 in part 6 of the CLMID Act, to be entitled *Mentally impaired defendant coordinator* and making the following provisions:

- that the Director General of the Department of Justice shall designate a person as a MID coordinator, of which there may be one or several;
- that the functions of a MID coordinator are to coordinate the activities of the Department of Justice, Department of Health, Disability Services Commission, Department for Community Development (in the case of juvenile MIDs) and other organizations involved in the case management of MIDs; to nominate a lead agency from among those involved in the case, which shall be ultimately responsible for case management; to ensure that

regional service providers such as rural mental health services are notified when a MID will be in the area on leave of absence; and to ensure that a release plan is formulated for each MID prior to the end of the term of any order under which they are serving; and

- that an additional function of a MID coordinator is to advocate on behalf of MIDs so as to raise awareness and increase responsiveness to their rights and service needs.

In addition, the following changes in support of the role of MID coordinator are envisaged elsewhere in the CLMID Act:

- add a new section to part 3 to require that when a MID is found unfit to stand trial, the court must direct the Department of Justice to nominate a MID coordinator;
- add a new section to part 4 to require that when a MID is found not guilty by reason of unsoundness of mind, the court must direct the Department of Justice to nominate a MID coordinator.

Processes of the MIDRB

6.3 Section 44 of part 6 of the CLMID Act should be changed to improve the processes of the MIDRB. These are as follows:

- change the title of section 44 to *Functions and procedures* and add a new subsection, stating that the MID has a right to appear, to be represented, to hear evidence and to view reports before the MIDRB;
- add a new subsection, stating that a victim has a right to make a statement in writing to the MIDRB;
- add a new subsection, requiring that in reaching a decision the MIDRB must ensure that it has available or has received appropriate cultural and expert clinical advice concerning the case;
- add a new subsection, clarifying that the MIDRB may request advice and reports from experts or others as it deems appropriate to assist in its deliberations;
- add a new subsection, requiring that a party to MIDRB proceedings shall be entitled to written reasons for decisions, unless the chairperson rules that the publication of reasons may pose a threat to the interests of the MID or another party; and
- add a new subsection, requiring that victims shall be notified, via the victim notification register, of a pending discharge of a MID, but not before the MIDRB makes a recommendation; victims should also be notified of any escape from custody.

7. Miscellaneous

Review of the Act

7.1 A new section should be placed in part 7 of the CLMID Act to provide for a review of the operation and effectiveness of the CLMID Act as soon as practicable after the expiration of five years from the time when amendments to the Act or a new Act comes into force.

Z. Mental Health Court

Mental Health Court

7.2 A high-level task force should be established to develop within a timeframe of 12 months, a budgeted plan for the establishment of a mental health court (or similarly entitled court) in WA. The task force should report to the Attorney General, who should consult with the Minister for Health on the composition and findings of the task force. Its members should include persons with judicial, legislative, forensic, psychiatric, psychological, social work, disability, indigenous and consumer knowledge and expertise. The task force should have a full-time executive officer with professional knowledge of the area of MIDs.

Notes

A.1 Participants in the final consultative forums made a convincing argument that not only do the extent of recommended changes warrant a new CLMID Act, but also that the quality of Parliamentary debate, with prospects for further community participation, will be enhanced if the substrate for debate is a whole piece of new legislation.

1.2 The review accepted advice that it would be best to separate 'objects' from 'fundamental principles' in the CLMID Act, as has been recommended for the WA MH Act. The previous reference to 'rather than punishment' has been removed from the second dash-point of the objects, as it might serve to highlight a tension that should not exist. Despite suggestions to the contrary, it was decided not to mention custodial services in the objects. The words 'legal proceedings' have been removed from the first dash-point of the principles, as they might cause confusion, and have been replaced by 'proceedings of the MIDRB'. It is recognized, as pointed out on many occasions to the review, that to address the recommended objects and fundamental principles of the CLMID Act will require new resources. Cases in point are the additional cost of legal representation and alternatives to prison in the form of declared places. However, this must be seen in the context that the new CLMID Act is likely to be in place for some decades into the future.

A matter attracting persistent controversy has been the extent to which victims should be acknowledged and heard in proceedings involving MIDs. One side of the argument is that the involvement of victims confuses judicial issues with what is predominantly a medical and health issue. The other side of the argument is that the trauma suffered by victims is increased if they are ignored merely because the perpetrator of the offence was mentally impaired. The review is persuaded more towards the latter point of view and believes that victims' interests can be addressed without prejudice to the principle that MIDs do not deserve punishment. The same applies to recommendations 3.4 and 6.3.

Greater emphasis has been given in the fundamental principles to the needs of MIDs that may arise from what are sometimes multiple disabilities and social factors.

2.1 The review has opted for a simplified approach that relies on a unitary concept of assessment order, rather than distinguishing between an assessment order and a hospital order. Under this recommendation, what was a hospital order becomes one possible form of assessment order. The review also considers that the criteria in subsection 5(2)(b) and (c) (ie, in order to protect health or safety or to prevent damage to property; and refusal or inability to consent to treatment) are an unnecessary complication in this new format, because they do not apply to mental impairment other than mental illness. The recommended approach makes it clear that it is for a psychiatrist, not the judicial officer, to determine if a defendant sent to an authorized hospital for assessment should become an involuntary patient.

The review has accepted argument that the initial time limit for return of the defendant to court should be retained as seven days, as the availability of an extension for up to another 14 days should be sufficient to solve the problem of premature return, without encouraging inefficiencies in the system.

The review heard many arguments about which classes of psychologist should be able to asses a MID. Given that mental impairment is a much broader concept than mental illness, a restriction to clinical psychologist has not been applied.

The use of audiovisual means to perform an assessment anticipates the future availability of such facilities in declared places in rural and remote areas. The Disability Services Commission does not support the recommendation to enable assessments to occur in declared places (other than an authorized hospital), albeit that the Commission has acknowledged that the recommendation is potentially beneficial to MIDs in rural and remote areas.

2.2 The requirement for harmonization with criteria for becoming an involuntary patient under the WA MH Act is now dealt with in the last part of recommendation 2.1. While not within the terms of reference of this review, it is unsatisfactory that subclause 3a of clause 2 of part D of schedule 1 of the *Bail Act 1982* provides for a judicial officer to impose as a condition of bail that the defendant be admitted to an authorized hospital. The wording would be much better read as “received at an authorized hospital”, as only a psychiatrist should be able to admit a person as an involuntary patient.

2.3 For reasons of pragmatics, especially in rural and remote areas, “authorized medical practitioner” has been changed to “medical practitioner” and “psychologist” has been added.

2.4 Information given by service providers may also be valuable to the court and has been specifically included in the recommendation.

2.5 The review has accepted advice that it would represent too much of a loss of privacy of the MID to have the report on their state of mental impairment or mental illness read out in court. Rather, the victim(s) should be kept informed by the prosecution. The recommendation now also clarifies that the judicial officer has the power to require a report from an assessment and that a psychiatrist or psychologist may make a report.

2.6 Because some MIDs may have serious physical health problems that may be exacerbated by attendance in court, "medical practitioner" has been added to this recommendation.

3.1 The words "but does not include a condition that results from the reaction of a healthy mind to extraordinary stimuli" in the CLMID Act definition of mental illness are based on the judgment of the High Court in the case of The Queen vs Falconer. Mary Falconer killed her husband in 1988, and was acquitted on appeal to the High Court on the basis of non-insane automatism, which had failed as her defence in the Supreme Court and the Court of Criminal Appeal in WA. The argument revolved around whether the earlier precedent of accepting 'a blow to the head' as a legal cause of automatism could be extended to the concept of a 'psychological blow to the head'. The wording of section 8 of the CLMID Act was subsequently introduced by the Parliament to direct the courts that a 'psychological blow to the head' is not a legal defence. The review agrees with the advice received that the echo of Falconer makes no sense medically, but does not wish to remove a measure taken by the Parliament to clarify a previously controversial point of law. "Degenerative brain disease" has been added to the definition of mental impairment to remove any doubt that Alzheimer's disease and the dementia of Huntington's chorea are included.

3.4 The original proposal has been modified to curtail the extent to which the court proceedings may become a 'pseudo-trial'. Some respondents to the review have argued that the receipt of a victim impact statement is inappropriate in the circumstance where a MID is found unfit to stand trial. Clearly, there are competing principles at play, but the review considers that it should be possible for victims to be heard even though the defendant is unfit to stand trial.

3.5 The option of initially making a custody order of a set duration has been removed to prevent the risk that MIDs might then be detained without adequate consideration of the implications of treatment and possibly recovery in the case of mental illness. The recommendation requires that all initial custody orders are interim custody orders, still limited by the equivalent statutory penalty. The recommendation also provides for the MID or their representative to apply to reappear before the court for reconsideration of the custody order. The recommendation also deals with the question of guidance to judicial officers on factors to be considered in setting the duration of a custody order. The review has accepted that a person who advises on indigenous culture should himself or herself be of indigenous background.

3.6 This recommendation has not been modified, despite a view expressed that any mental health practitioner with expertise in mental impairment should be able to make the assessment. The review is concerned that this would be inconsistent with recommendation 2.1.

4.1 The review has accepted advice that the public would find it unacceptable that a custody order might not be mandatory for a MID who has committed or allegedly committed homicide. A number of the relatively less serious offences involving assault should probably be removed from the list, whereas some more offences, eg, sexual offences against children, are not presently listed in schedule 1.

4.2 This recommendation has been modified such that the range of options available to the courts becomes the same regardless of whether the MID is found unfit to stand trial or not guilty by reason of unsoundness of mind.

5.1 A point made strongly and consistently by respondents to the synthesis was that the proposals had not gone far enough in ensuring that a general prison should not be used as a place of detention of people with mental impairment. The synthesis had foreshadowed a recommendation to remove a prison from subsection 24(1) as one of the specified options for where a MID could be detained under a custody order. This still left open the possibility that a general prison could be gazetted as a declared place under section 23, and thereby the status quo might continue. The review accepts that MIDs should not be held in general prisons, but could in some instances be detained in a special unit or wing of a prison campus, identified for the purpose and where MIDs are kept separate from mainstream prisoners. The recommendation in its final form has strengthened this position by changing the definition of a

declared placed, such that appropriate facilities much exist for the assessment, detention, care and protection of MIDs. A residual concern is that MIDs may then be mixed with prisoners who warrant protective custody because they are sex offenders or paedophiles. This is not the review's intention and would clearly not meet the requirements in the definition of a declared place for appropriateness and protection. The same applies to MIDs who are juveniles: the facilities must be appropriate and protective.

The review is aware of a tension existing between service agencies as to which should be responsible for the establishment, maintenance and staffing of declared places, which are appropriate for MIDs. The Disability Services Commission has stated that in line with the *Disability Services Act 1993*, it has no mandate from provision of compulsory care or detention services for people with disabilities; the Department of Justice claims quite rightly that MIDs are not prisoners; and the Department of Health is only potentially responsible if the MID has a mental illness needing treatment, as it is not the principal provider of residential services to people with intellectual disability. It is the opinion of the review that only the Government has the authority to clarify this significant source of conflict and confusion; and that the agency or agencies identified by the Government as having the a role in providing detention services for MIDs must be adequately resourced for the task. In the case of the Disability Services Commission, enabling amendments may be necessary to the *Disability Services Act 1993*.

According to information supplied by the Department of Justice, there are currently 29 people held under the CLMID Act. Eight of these are currently in prisons, nine are in the Frankland Centre at Graylands Hospital and 12 are being supervised in the community. The Department of Justice is keen to work with the Health Department and the Disability Services Commission to examine alternative models to the use of prisons for these defendants.

The review accepts that for practical reasons it may be necessary for the Remand Centre to be made a declared place to cater to those instances in which the appropriate facility is a secure authorized hospital bed at the Frankland Centre, but a vacant bed is awaited.

5.2 One submission argued strongly that a custody order must be reviewable by the MIDRB initially within a period considerably shorter than eight weeks, for the reason that many MIDs will have already received successful treatment over the appreciable period leading up to the date of the hearing. The review considers that the time period should be consistent with the maximum allowable time frame for a review of involuntary status under WA MH Act and

has modified the recommendation accordingly. The same applies to subsequent reviews.

5.3A An important deficiency in the synthesized proposals was the omission of a means for the courts to extend a custody order in situations where such an extension is essential for protection of the public and where the MID may not meet the criteria for being made an involuntary patient under the WA MH Act. Accordingly a new recommendation, number 5.3A, has been added to ensure that all MIDs who would otherwise by released directly into the community have their cases reviewed and the courts have the discretion on the advice of the MIDRB to extend the custody order.

5.4 The State Forensic Mental Health Service does not support this recommendation, on the basis that it is seen to represent a form of double jeopardy. The review has made one modification in response, which is to underline that the judicial officer is only to consider the nature of the original offence in forming a view about the need for public protection.

5.5 The recommendation now includes reference to a requirement for sufficient grounds to the appeal.

6.1 On advice, an additional stipulation is that the member with knowledge of indigenous culture must themselves have an Australian indigenous background. It has also been clarified that the secretary is appointed by the Department of Justice rather than the Minister and that the secretariat must be separate from that of the Parole Board. The proposal for the President of the Mental Health Review Board or equivalent tribunal to be a member has been dropped as it might cause confusion between the two jurisdictions. In place, and in keeping with the previous arrangement to a degree, a community member has been added. The review has also accepted argument that the Attorney General rather than the Governor should have the power to make appointments, and that more than one deputy for the psychiatrist and psychologist should be possible.

6.2 The review has accepted an argument that the position of MID coordinator should be kept independent from the MIDRB, for one reason because the MID coordinator needs to be involved in the processes of the CLMID Act from the time when a MID is found unfit to stand trial or not guilt by reason of unsoundness of mind and well before a MID makes contact, if any, with the MIDRB. The recommendation differs from the original proposal in that the

Director General of the Department of Justice and not the MIDRB now appoints a MID coordinator.

As with recommendation 5.1, concerns were expressed that giving a MID coordinator a function to nominate a lead agency might place a service organization in the position where it has responsibility for a client for whom inadequate resources exist to meet their needs. The review considers that this scenario is already prevalent in many areas of provision of human services, and that inadequate resources should not be addressed by declining to accept responsibility. Other submissions spoke of the frustration that arises from lack of an agency taking the lead role in service coordination, albeit with support from other agencies. "The position (of MID coordinator) cannot be allowed to be a toothless tiger". As with recommendation 5.1, the difficulties would be reduced by the articulation of a clear Government position on which service organizations are responsible for the ongoing detention, supervision and care of MIDs, especially those who do not have a mental illness. In addition, the need sometimes to involve the Department of Community Development in juvenile cases has been acknowledged.

It was suggested to the review that the MID coordinator could be a position placed within the Office of the Public Advocate. This suggestion warrants further exploration.

7.1 The review has accepted advice that there should be a provision to ensure that the CLMID Act is reviewed at around the same time when the WA MH Act is next reviewed.

Z.1 The task force established under this recommendation may wish to consider that, while not designated a 'mental health court', diversion facilities for MIDs in various forms exist in New South Wales, Victoria and South Australia in addition to Queensland, and that active steps are being taken to address the issue in the UK as well as the USA. The review notes from correspondence that the Hon Chief Justice in Western Australia is very much in support of this recommendation, and has asked that the task force give serious consideration to such a mental health court being conducted as a division of Supreme Court, being presided over by a judge of the Supreme Court.

Abbreviations

CBO	Community based order, including youth community based order
CLMID	Criminal Law (Mentally Impaired Defendant)
CLMID Act	Criminal Law (Mentally Impaired Defendant) Act 1996 in Western Australia
CRO	Conditional release order
ISO	Intensive supervision order, including an intensive youth supervision order
MIDRB	Mentally Impaired defendants Review Board
MID	Mentally impaired defendant
WA	Western Australia
WA MH Act	Western Australian Mental Health Act 1996