



MENTAL HEALTH LAW CENTRE (WA) Jnc.  
ABN 40 306 626 287

## **Interaction with the Western Australian Criminal Justice System by People Affected by Mental Illness or Impairment**

### **A Policy and Law Reform Submission: *Criminal Law (Mentally Impaired Accused) Act 1996 (WA)***

“For obvious reasons, those who suffer from mental illness are more likely to intersect the legal system and the courts than other members of our community, thereby creating an enormous challenge ... for the courts and the various associated agencies of government responsible for providing services to this sector of our community.”<sup>1</sup>

“Every patient shall have the right to be treated in the least restrictive environment and with the least restrictive or intrusive treatment appropriate to the patient's health needs and the need to protect the physical safety of others.”<sup>2</sup>

“[T]here are, as it seems to me, a number of significant deficiencies in the legislation and the regime which has been created under [the Criminal Law (Mentally Impaired Accused) Act 1994 (WA)]”<sup>3</sup>

#### **Inquiries**

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<sup>1</sup> The Honourable Wayne Martin AC, Chief Justice of Western Australia, 'The WA Mental Health Court', Address to the Mental Health Law Centre (WA) Annual General Meeting 2012, 5 November 2012.

<sup>2</sup> Article 9, UN *Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care*

<sup>3</sup> *The State of Western Australia v Tax* [2010] WASC 208 para 17, at Appendix Four to this submission.

**Justice ... is a kind of compact not to harm or be harmed.**

**Epicurus, *Principal Doctrines*<sup>4</sup>**

**Justice consists of taking from no man what is his.**

**Thomas Hobbes, *Leviathan***

**Injustice anywhere is a threat to justice everywhere.**

**Martin Luther King Jr., letter from the Birmingham, Ala., jail, 1963**

" ...In 1988 the High Court decided *Chester v The Queen*<sup>[38]</sup>. In 1989 Brinsden J stated his view since *Chester* to have become that s 662(a) of the Criminal Code (WA) "should not be used if the [sentencing] judge is not clearly satisfied that the [convicted person] will remain a constant danger to the community in the future" and "cannot be used where there is only the probability of the offender re-offending as he must be seen as a constant danger to the community"<sup>[39]</sup>. That view correctly reflected *Chester*.

"The misfortune of the applicant is that *Chester* had not been decided at the time that the Court of Criminal Appeal gave its judgment in 1987. If it had been, Brinsden J could not have upheld the sentencing judge's order under s 662(a) on the basis that "[t]he applicant is a man about whom it is very difficult to have any real confidence ... that he will not re-offend, and seriously offend, when released into the community"<sup>[40]</sup>. That formulation by Brinsden J, with whom Smith J agreed, reflected their Honours' adoption of what, in the light of *Chester*, was a wrong test. The other member of the Court of Criminal Appeal was Burt CJ. He adopted the correct test. He dissented. He was right.

"The correct test, properly applied, could have led to only one conclusion. The highest the evidence before the sentencing judge went was an expression, by a clinical psychologist in training, of "fear" that the applicant "will be at risk of re-offending on his release to the community". The sentencing judge could not possibly have been satisfied that the applicant would remain a constant danger to the community...." *Yates v The Queen* [2013] HCA 8 GAGELER J para.s 42-46

**THIS SUBMISSION IS PUBLISHED AS AN INITIATIVE OF THE MENTAL HEALTH LAW CENTRE (WA) Inc. TO RAISE AWARENESS AND FURTHER DEBATE ABOUT THE UNREASONABLE IMPACTS OF THE CRIMINAL LAW (MENTALLY IMPAIRED ACCUSED) ACT 1996 (WA), TO REBUT CERTAIN ARGUMENTS IN FAVOUR OF THE ACT AND TO PROMOTE JUSTICE, FAIRNESS AND EQUITY FOR PEOPLE EXPERIENCING THE SERIOUS SIGNS AND SYMPTOMS OF A MENTAL ILLNESS AND/OR IMPAIRMENT, THAT HAS LED THEM TO BE CHARGED WITH A CRIMINAL OFFENCE.**

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<sup>4</sup> The three quotes here were cited from 'The New international Dictionary of Quotations' 1986 Rawson,H. & Miner M. Signet Book New American Library

#### **Acknowledgements**

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## PRELIMINARIES

The Mental Health Law Centre (WA) Inc. (the Centre) is a state-wide community legal centre specialising and expert in the provision of free legal advice and representation to people affected by mental illness in Western Australia. We have been providing our service for over 15 years.

We understand that the WA Attorney General's Department is preparing amendments to the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) (the MIA Act) for proposed Parliamentary consideration in 2013. We note with regret that the consultation process to date has not included the views of those directly impacted by the MIA Act or their advocates. The Centre would welcome the opportunity to comment directly on any proposed amendments through a stakeholder forum and in any consultation process. In the meantime, we make this submission in support of repeal of, or in the alternative substantial amendment to, the MIA Act.

We would be happy to comment further on any aspect of this submission, or attend any relevant consultations: please contact Sandra Boulter, Principal Solicitor, on 08 9328 8266.

## BACKGROUND

The MIA Act was introduced as part of a package of reforms<sup>5</sup> to 'modernise' and 'improve' the West Australian mental health system and implement the recommendations contained in the WA Law Reform Commission Report No 69<sup>6</sup>, "The Criminal Process and Persons Suffering from Mental Disorder, and other relevant inquiries".<sup>7</sup>

On 14 November 2001 (now over 12 years ago), the then Minister for Health appointed Professor D'Arcy Holman to undertake the prescribed statutory review of the *Mental Health Act 1996* (WA).<sup>8</sup> The MIA Act was included in the Holman review process. The final report and recommendations of the Holman review were presented to the Minister for Health on 12 December 2003. The Government responded to the review on 30 August 2004. However, the Government did not respond to any recommendations relating to the MIA Act.

On 11 September 2012 the WA Attorney-General advised Parliament that another review of the MIA Act had been completed and that, subject to Cabinet approval, amending legislation would be introduced into Parliament in 2013. Consultation to date has been restricted to government agencies and statutory bodies. We understand that there is no formal plan to undertake broader consultation on the proposed reforms.

## OVERVIEW

People affected by mental illness and/or impairment are among the most vulnerable and disadvantaged people in our community. They suffer from widespread systemic discrimination and stigma, and are consistently denied the rights and services to which they are or should be entitled.

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<sup>5</sup> Along with the *Mental Health Act 1996* and the *Mental Health (The Consequential Provisions) Act 1996*.

<sup>6</sup> <http://www.lrc.justice.wa.gov.au/2publications/reports/P69-R.pdf>

<sup>7</sup> MJ Murray QC, *The Criminal Code: A General Review* (1983)

<sup>8</sup> This review was over 10 years ago, and even since then, what is understood to be the best care and treatment of people with a mental illness and/or impairment has significantly improved and so the recommendations from the Holman Review should now be no more than background and a starting point.

In the criminal justice system, the criminalisation<sup>9</sup> of mental illness and impairment, and the absence of adequate funding for accommodation, mental health services and social welfare programs compounds and exacerbates this disadvantage. Indeed, people affected by mental illness and/or impairment are over-represented<sup>10</sup>, disempowered<sup>11</sup> and under-supported<sup>12</sup> at every stage of the criminal justice system, thereby adversely impacting their prospects for treatment<sup>13</sup> and diversion<sup>14</sup>, and leading to an increase in social costs for the community at large.

The negative consequences of such disadvantage are perhaps nowhere more evident – or more damaging – than in the MIA Act. The MIA Act creates a paternalistic and archaic regime of exclusion, punishment and discrimination with far reaching consequences for the fundamental rights and freedoms of people affected by mental illness and/or impairment in Western Australia. It has been publicly criticised by consumers, carers, consumer advocates, members of the legal profession and courts – including WA Supreme Court Chief Justice Wayne Martin.<sup>15</sup>

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<sup>9</sup> People with a mental illness and/or impairment are more likely to exhibit the kinds of behavior that will bring them into conflict with the law. Illegal acts such as disorderly conduct, criminal trespass, disturbing the peace, public intoxication and assault are often a by-product of the mental illness and/or impairment, and can indirectly discriminate against the mentally ill – in effect, criminalising mental illness/impairment: See further, *Mentally Ill Offenders and the Criminal Justice System – The Sentencing Project*, Washington Sentencing Project, January 2002, online at [www.soros.org/initiatives/justice/articles\\_publications/publications/mi\\_offenders\\_20020101/mentallyill.pdf](http://www.soros.org/initiatives/justice/articles_publications/publications/mi_offenders_20020101/mentallyill.pdf).

<sup>10</sup> Many mentally ill and/or impaired individuals are at a higher risk of being arrested and imprisoned for minor offences because of co-occurring problems such as homelessness and substance abuse. In addition community residential facilities for mentally impaired individuals are scarce and there are limited non-custodial pre-trial options available for homeless mentally impaired offenders. Research conducted in 2006 using NSW prison and community data showed that 80% of prisoners suffered from some sort of mental impairment: Butler T., Andrews G., Allnut S., Sakashita C, Smith N and Basson J., 'Mental Disorders in Australian Prisoners: A Comparison with a Community Sample', vol 40(3) *Australian and New Zealand Journal of Psychiatry*, 2006: 272-6 at 272.

<sup>11</sup> Perceptions and experience of powerlessness are strong motivations for behaviour. Studies have demonstrated correlativity between perceptions of procedural justice (ie participation, dignity and trust) during a custody proceeding and the likelihood that a mentally ill and/or impaired person will accept an adverse judicial determination (ie a custody order) and cooperate with subsequent treatment. These findings suggest that if a person affected by a mental illness and/or impairment perceives a judicial process as empowering, fair and transparent, he or she is also likely to experience enhanced feelings of self-worth and self-respect, greater trust in the legal and mental health systems and improved clinical outcomes, irrespective of the outcome of the proceeding: see further Cascardi M., Poythress N and Hall A., 'Procedural Justice in the Context of Civil Commitment: An Analogue Study', 18 *Behavioural Sciences and the Law* 2000: 731-740; Watson A. and Angell B., 'Applying Procedural Justice Theory to Law Enforcement's Response to Persons with Mental Illness' 58(6) *Psychiatric Services* 2007: 787-793.

<sup>12</sup> The use of prisons as a stop-gap measure to address the lack of appropriate open or secure housing alternatives for the mentally ill and/or impaired means the individuals affected by mental illness and/or impairment are being inappropriately subjected to the criminal justice system. Not only does this results in a lower quality of medical treatment and care – research has also shown that once in prison people affected by mental illness and/or impairment are regularly the targets of assault, exploitation, extortion and sexual abuse: Hickie I, 'Show the Mentally Ill Open Doors, Not Closed Minds', Sydney Morning Herald, February 6, 2004, <http://www.smh.com.au/articles/2004/02/05/1075853996803.html?from=storyrhs>

<sup>13</sup> Studies show that prison conditions are particularly detrimental to inmates affected by a mental illness and/or impairment: See Burdekin B., *National Inquiry into the Human Rights of People with Mental Illness*, 7 April, 2004, [http://www.hreoc.gov.au/disability\\_rights/speeches/mii93.htm](http://www.hreoc.gov.au/disability_rights/speeches/mii93.htm)

<sup>14</sup> Research clearly suggests that the best outcomes for mentally ill and/or impaired people occur as a result of early intervention and diversion away from the criminal justice system to the mental health system, where they can access treatment delivered in non-custodial environments by psychologists, psychiatrists and family doctors: Fergus Shiel, 'Call for Court for Mentally Impaired', *The Age*, 15 March, 2004, p. 7

<sup>15</sup> Banks A., *Law Help for Mentally Ill*, *The West Australian*, October 8, 2012, 3

Given the specific vulnerabilities faced by people affected by mental illness and/or impairment, often multiplied by the synergistic effects of multiple disadvantage and co-morbidity<sup>16</sup>, it is crucially important that there are procedural safeguards in place to ensure that their rights are protected at every stage of the criminal justice process.

**Research indicates that well-designed diversion, treatment and support programs do not increase risk to the community.<sup>17</sup>**

Addressing mental health and related problems that are linked to offending is more likely to reduce recidivism than criminal justice sanctions. After all, in the words of Chief Justice Martin, "...if the cause of the offending behaviour is mental illness, the most effective way of reducing the risk of further offending is by treating the mental illness."<sup>18</sup> It is unjustifiable and inhumane for Western Australia to continue to imprison people affected by mental illness and/or impairment in mainstream prisons simply to avoid expending the resources or political capital necessary to develop alternative facilities and community based programs. In this context, the Centre emphasises the seriousness of any decision to deprive a person of his or her liberty, and the importance of providing best-practice diversion options and recovery-oriented treatment programs to offenders affected by mental illness or impairment.<sup>19</sup>

The MIA Act does, but should and must not, operate in isolation. The MIA Act was enacted together with the *Mental Health Act 1996*<sup>20</sup> and the *Mental Health (The Consequential Provisions) Act 1996* to advance the shared objectives of 'improving' and 'modernising' the law relating to the treatment of people with a mental illness or impairment.<sup>21</sup> It has not done that. Any review of the MIA Act must take place in concert with the ongoing review of the *Mental Health Act 1996*, to ensure that WA implements a best practice cohesive legal regime that strikes the appropriate balance between the objectives of ensuring a safe and secure environment, protecting human rights and improving the health and well-being of all West Australians.

On this basis, and for the reasons outlined below, the Centre submits that the MIA Act is in urgent need of reform, if not repeal.

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<sup>16</sup> Low socio-economic status, unemployment, poor physical health and experiences of sexual and physical abuse are amongst risk factors for increased incidence of mental health problems and mental disorders. Equally, people with mental health problems and mental disorders may face unemployment, poor physical health and experience sexual and physical abuse.

<sup>17</sup> See National Justice Chief Executive Officers' Group, *Diversion and Support of Offenders with a Mental Illness: Guidelines for Best Practice*, [http://www.aic.gov.au/media\\_library/aic/njceo/diversion\\_support.pdf](http://www.aic.gov.au/media_library/aic/njceo/diversion_support.pdf)

<sup>18</sup> The Honourable Wayne Martin AC, Chief Justice of Western Australia, 'The WA Mental Health Court', Address to the Mental Health Law Centre (WA) Annual General Meeting 2012, 5 November 2012.

<sup>19</sup> For example, the See National Justice Chief Executive Officers' Group, *Diversion and Support of Offenders with a Mental Illness: Guidelines for Best Practice*, outlines that prisoners should receive recovery-oriented programs that focus on changing attitudes, values, feelings, goals, skills and roles: [http://www.aic.gov.au/media\\_library/aic/njceo/diversion\\_support.pdf](http://www.aic.gov.au/media_library/aic/njceo/diversion_support.pdf)

<sup>20</sup> Green Mental Health Bill 2012 was tabled in parliament December 2012, and followed the first version which was the Mental Health Bill 2011. Submissions on the Green Bill were due 26 February 2013

<sup>21</sup> Kevin Prince, Minister for Health, Second Reading Speech, 5 September 1996



## SUBMISSIONS

### 1 REPEAL CRIMINAL LAW (MENTALLY IMPAIRED ACCUSED) ACT 1996 (WA)

Maintaining the division between the MIA Act and the *Mental Health Act 1996* contributes to the criminalisation of mental illness and mental impairment, and creates gaps through which some people fall, undermining the effectiveness and coherence of the legislative regime and leading to arbitrary and unjustifiable discrimination against persons affected by mental illness and/or impairment.

Harmonised legislative policy and reform, and consolidation of the MIA Act and the *Mental Health Act 1996* would enable Western Australians to provide a best practice framework under one Minister<sup>22</sup>, which protects the dignity and human rights of people affected by mental illness and/or impairment and ensure that any differences in treatment are based on sound policy, rather than legislative inconsistency or oversight. Streamlining the implementation of such a framework would also avoid the unnecessary duplication of services and contribute to significant cost savings for Western Australia. Finally, development of a consolidated Act would ensure that sufficient community consultation and parliamentary attention is allocated to the new framework, which was regrettably not the case for the MIA Act.

While we welcome the *Mental Health Bill 2012*<sup>23</sup>, it provides only further evidence of the close relationship between the forensic and civil mental health systems, and the urgent need to consolidate Western Australia's mental health legislation into a single framework. Even if consolidation is not possible now, harmonisation of the policy and legislative regimes must remain an important objective for the development of Western Australia's mental health services, and one that must inform all ongoing reform processes.

#### RECOMMENDATION 1

That as a matter of urgency the MIA Act and the *Mental Health Act 1996* must be repealed and replaced by a consolidated single Act, under the responsibility of the Minister for Mental Health, which incorporates the recommendations contained below.

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**In the alternative, we recommend amendment to the MIA Act as follows:**

## 2 DEFINITIONS

### 2.1 DEFINITION OF MENTAL ILLNESS

The MIA Act defines a mental illness as "an underlying pathological infirmity of the mind, whether of short or long duration, and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary stimuli."<sup>24</sup> This definition is inconsistent

<sup>22</sup> The MIA Act is the responsibility of the Attorney-General and the *Mental Health Act 1996* is the responsibility of the Minister for Mental Health.

<sup>23</sup> Tabled in Parliament on 8 November 2012.

<sup>24</sup> Section 8 MIA Act

with the definition of mental illness provided in the *Mental Health Act 1996*, and creates an internal inconsistency within the MIA Act, because section 5(2) MIA Act refers to the *Mental Health Act 1996* definition, while section 8 MIA Act uses the definition above. Given that the two Acts work together to create a legislative regime in relation to people affected by mental illness, it is important that the two Acts share the same understanding of mental illness and not mix it up with mental impairment, a vastly different pathology. Furthermore, there is a vast difference between mental illness, which is susceptible to treatment and a mental impairment, which is permanent, such as an intellectual impairment. We do not consider that there is a sound policy basis for retaining this inconsistency and amalgamation of pathologies. The two states of mind must not be treated as one by legislation.

### RECOMMENDATION 2.1

**Mental Illness** in section 8 of the MIA Act must be amended as follows:

1. For the purposes of this Act a person has a mental illness if the person has a condition that:
  - a. is characterised by a disturbance of thought, mood, volition, perception, orientation or memory; and
  - b. significantly impairs (temporarily or permanently) the person's judgment or behaviour.
2. A person does not have a mental illness merely because one or more of these things apply:
  - a. the person holds, or refuses or fails to hold, a particular religious, cultural, political or philosophical belief or opinion;
  - b. the person engages in, or refuses or fails to engage in, a particular religious, cultural or political activity;
  - c. the person is, or is not, a member of a particular religious, cultural or racial group;
  - d. the person has, or does not have, a particular political, economic or social status;
  - e. the person has a particular sexual preference or orientation;
  - f. the person is sexually promiscuous;
  - g. the person engages in indecent, immoral or illegal conduct;
  - h. the person has an intellectual disability;
  - i. the person uses alcohol or other drugs;
  - j. the person is involved in, or has been involved in, personal or professional conflict;
  - k. the person engages in anti-social behaviour;
  - l. the person has at any time been:
    - i. provided with treatment; or
    - ii. admitted by or detained at a hospital for the purpose of providing the person with treatment.

Subsection (2)(i) does not prevent the serious or permanent physiological, biochemical or psychological effects of the use of alcohol or other drugs from being regarded as an indication that a person has a mental illness.

3. A decision about whether or not a person has a mental illness must be made in accordance with internationally accepted standards prescribed by the regulations for this subsection.

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## 2.2 DEFINITION OF MENTAL IMPAIRMENT

The MIA Act defines mental impairment as “intellectual disability, mental illness, brain damage or senility.”<sup>25</sup> This definition treats mental illness as a type of mental impairment while then treating the two concepts differently at various points in the legislation.<sup>26</sup> This introduces uncertainty and ambiguity into the legislation and an unacceptable and unwarranted coalescing of the pathologies.

**Given the different circumstances and needs of persons affected by mental illness and persons affected by mental impairment (particularly with respect to the duration and susceptibility to treatment of the illness or condition), the MIA Act must include separate and distinct definitions for mental illness and mental impairment, and distinguish its responses accordingly.**

### RECOMMENDATION 2.2

The definition of mental impairment in section 8 of the MIA Act must be amended as follows:

**mental impairment** means a cognitive impairment, intellectual disability or personality disorder, however and whenever caused, whether congenital or acquired, but does not include deliberate intoxication.

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## 3 STATEMENT OF OBJECTS, PURPOSES AND RIGHTS

### 3.1 OBJECTS OF THE ACT

Best practice contemporary legislation must be based on clear principles, which shape its development and guide its implementation and interpretation. Unlike the *Mental Health Act 1996*<sup>27</sup>, the MIA Act does not include a statement of objects. This is a significant and costly oversight. A statement of objects would usefully articulate the substantive objectives of the MIA Act and ensure that any lack of certainty in the legislation is able to be resolved with predictability and certainty.

**MIA Act objects would provide clarity about the context and purpose of the MIA Act, which would then act as a guide to interpreting the MIA Act, should any ambiguity or lack of clarity be exposed.**

In particular, a statement of objects would help to ensure that mentally impaired accused persons, carers, advocates, service providers and the community can understand their rights and responsibilities, and thus promote confidence in their future protective powers and in exercising them. We note the recommendation of the Holman report<sup>28</sup>, which stated that the absence of express legislative guidance about provisions ensuring compliance with human rights principles

<sup>25</sup> Section 8 MIA Act

<sup>26</sup> See, for example, section 5(2) MIA Act.

<sup>27</sup> Section 5 *Mental Health Act 1996* (WA)

<sup>28</sup> Holman CDJ *The Way Forward: Recommendations of the Review of the Criminal Law (Mentally Impaired Defendants) Act 1996*, Government of Western Australia, 2003

leaves consumers and carers unacceptably dependent on a favourable legislative interpretation based on statutory interpretation principles – hardly open or transparent.

### RECOMMENDATION 3.1

The MIA Act must be amended to include a statement of objects to guide its implementation and interpretation by boards, courts and service providers; and to help ensure that consumers, carers, advocates, service providers and the community can understand their rights and responsibilities. This new section must include the following principles:

#### Objects of Act

1. To ensure that persons affected by mental illness and/or impairment are identified early in their contact with the criminal justice system and that they are diverted away from corrective services;
2. To ensure that persons affected by mental illness and/or impairment receive the best possible treatment, care and rehabilitation, not punishment;
3. To ensure that persons affected by mental illness and/or impairment are given the opportunity to be heard in relation to decisions affecting them, and that all allegations made in relation to a person are properly tested;
4. To ensure that persons affected by mental illness and/or impairment have access to free legal representation, to the extent that he or she does not have sufficient means to pay for it;
5. To ensure that all children affected by mental illness and/or impairment have legal representation;
6. To ensure that persons affected by mental illness and/or impairment have access to health care and support services at least equivalent to the rest of the community;
7. To ensure that persons affected by mental illness and/or impairment receive the best care and treatment with the least restriction of their freedom and the least interference with their rights and dignity;
8. To ensure the proper protection of persons affected by mental illness and/or impairment;
9. To ensure the proper protection of the public from a well-founded risk of harm;
10. To ensure that all persons and authorities performing functions under the Act are sensitive and responsive to diverse individual circumstances including but not limited to those relating to gender, age, culture, spiritual beliefs, family and life style choices, and whether or not the person affected by mental illness and/or impairment is a person of Aboriginal or Torres Strait Islander background;
11. To ensure that all decisions regarding persons affected by mental illness and/or impairment are taken in accordance with the principle of least restriction; and
12. To ensure that all decisions about persons affected by mental illness and/or impairment who are subject to this Act are taken in accordance with Australia's international human rights obligations.

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### 3.2 REASONS FOR PERFORMING FUNCTIONS BOUND BY OBJECTS

#### RECOMMENDATION 3.2

The MIA Act must be amended to ensure that a person performing functions under the Act does so in a manner, which supports the implementation of the objects of the MIA Act.

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### 3.3 PROTECTION OF RIGHTS

Despite implementing a regime that authorises and enables a serious and indefinite deprivation of liberty, the MIA Act fails to provide adequate safeguards to protect the rights of West Australians affected by mental illness and/or impairment who are charged with an offence, which triggers the operation of the MIA Act at any stage.<sup>29</sup>

**Given the extreme vulnerability of a person, charged with an offence, who is significantly affected by mental illness and/or impairment, it is critical that the MIA Act is amended to ensure the protection of that person's rights at every stage of the criminal justice process, and to ensure that mentally impaired accused persons have access to the same rights provided to involuntary patients under the *Mental Health Act 1996 (WA)*, including access to the Council of Official Visitors, review by the Mental Health Review Board and right to legal representation.**

#### RECOMMENDATION 3.3

The MIA Act must be amended to include a statement of rights in order to highlight the importance of protecting and to protect the rights of people affected by mental illness and/or impairment throughout their involvement with the criminal justice system. This new section must include the following principles:

##### Protection of rights

1. Persons affected by mental illness and/or impairment have the right to be dealt with in court and in proceedings of the MIARB in a manner that respects their rights and dignity;
2. Persons affected by mental illness and/or impairment have the right to be dealt with in court and in proceedings of the MIARB in a manner that accords with principles of natural justice, including fairness, transparency and timeliness in decision-making, and the right to appeal;
3. Persons affected by mental illness and/or impairment have the right to be provided with medical and/or psychiatric treatment and/or care in an appropriate environment;
4. Decisions relating to persons affected by mental illness and/or impairment must provide for proper and timely access to health care and disability support services;
5. Decisions relating to persons affected by mental illness and/or impairment must be sensitive and responsive to diverse individual circumstances including those relating to gender, age,

<sup>29</sup> This may be contrasted with the *Mental Health Act 1996*, which introduced a number of provisions aimed at ensuring the protection of patients' rights.

physical health, culture, spiritual beliefs, family and life style choices;

6. Decisions relating to persons affected by mental illness and/or impairment, including options for care, treatment and rehabilitation, must be taken in accordance with the principle of least restriction;
7. The wishes of persons affected by mental illness and/or impairment and/or their nominated person must be taken into account in any determination regarding the place of detention under a Custody Order; and
8. Persons affected by mental illness and/or impairment have the right to timely legal advice and representation, which to the extent that he or she does not have sufficient means to pay, must be free of charge.

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## 4 THE MENTALLY IMPAIRED ACCUSED REVIEW BOARD

### 4.1 ABOLISH MENTALLY IMPAIRED ACCUSED REVIEW BOARD

Unlike in NSW, Qld and the ACT, where a single Administrative Review Board is responsible for decisions relating to both civil and forensic mental health patients<sup>30</sup>, the MIA Act established the Mentally Impaired Accused Review Board (the MIARB) as the body responsible for making decisions about mentally impaired accused persons under the MIA Act.<sup>31</sup> Maintaining separate Review Boards in civil and forensic contexts means that Western Australia systemically discriminates between persons affected by mental illness and/or impairment on the basis of their entry into the mental health system and results in an unnecessary (and costly) duplication of services.

Persons subject to Custody Orders under the MIA Act have not been convicted of an offence and should only be detained under the MIA Act for the protection of public safety, and only on the basis of clinical and risk management principles. The Mental Health Review Board, which includes members of the legal and psychiatric professions, and representatives of the general public<sup>32</sup>, has the necessary expertise to make decisions about mentally impaired accused persons.

**In the alternative, the interests of justice and compliance with Australia's international legal obligations<sup>33</sup> - demand that the MIARB incorporate rigorous procedural safeguards to ensure that the rights and interests of people affected by mental illness and/or impairment are protected at all stages of their involvement with the MIA Act administrative jurisdiction.<sup>34</sup>**

Furthermore, the release of a MIA Person on a Conditional Release Order by the MIARB means that the MIA Person is supervised by Corrective Services, and not the Mental Health or Disability Services.

<sup>30</sup> NSW: Mental Health Review Tribunal; Qld: Mental Health Review Tribunal; ACT: Australian Capital Territory Civil and Administrative Tribunal

<sup>31</sup> S 41 MIA Act

<sup>32</sup> S126 *Mental Health Act 1996* provides that the membership of the MHRB is to include at least one psychiatrist, at least one legal practitioner and at least one person who is neither medical practitioner nor legal practitioner

<sup>33</sup> See Principle 18 of the *UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care* and Article 14 of the ICCPR.

<sup>34</sup>

This is poorly founded supervision without adequate training or qualifications to supervise and manage MIA persons.

#### RECOMMENDATION 4.1

The MIARB must be abolished and its duties transferred to the Mental Health Review Board.

The MIA Act must be amended such that references to the Mentally Impaired Accused Review Board (the MIARB) are repealed and replaced with references to the Mental Health Review Board, and s. 126 of the *Mental Health Act 1996* (Members of Board) must be amended to include a psychologist so as to enable the Mental Health Review Board to assess accused persons affected by mental or cognitive impairment, and potential risk.

Supervision of a MIA person on Conditional Release Order should not be by Corrective Services but should be by Mental Health and/or Disability Services staff.

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#### 4.2 PROCEDURAL FAIRNESS: RIGHT TO BE HEARD

The principles of natural justice are underpinned by the fundamental premise that the provision of a hearing enhances the quality of decision making by improving the quality of the information available to the decision maker.<sup>35</sup> Similarly, article 18(5) of the UN *Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care* provides that a mentally ill or impaired person, and his or her personal representative and counsel shall be entitled to attend, participate and be heard personally in any hearing.

However, the MIA Act does not provide a right for a mentally impaired accused person to appear before - or be heard by - the MIARB. This leads to circumstances in which a mentally impaired accused person is unable to be heard in hearings. A MIARB review can result in the continued indefinite deprivation of his or her liberty. For example, we have clients who have requested to appear at least by video link to the MIARB but even this has been denied, and as their lawyer we are generally denied an appearance and often denied access to all relevant documents, which are in front of the MIARB.

#### RECOMMENDATION 4.2

The MIA Act must be amended to provide the right to be heard (by the person the subject of the Custody Order and their legal representative) in all MIARB matters concerning a mentally impaired accused person, and particularly in advance of any review, amendment, suspension or termination of the conditions of a Custody Order or Conditional Release Order.

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<sup>35</sup> *Seiffert v The Prisoners Review Board* [2011] WASCA 148 at 136; *R v Parole Board, ex parte Smith* [2005] UKHL 1; *Goldberg v Kelly* 397 US 254.

### 4.3 RIGHT TO LEGAL COUNSEL

Mentally impaired accused persons under the MIA Act face the possibility of an indefinite deprivation of their liberty. It is a fundamental principle of procedural fairness that all persons subject to the provisions of the MIA Act have the right to and be offered free legal advice and representation at all stages of their involvement with the criminal justice system. Similarly, article 18(1) of the UN *Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care* provides that a mentally ill or impaired person shall be entitled to choose and appoint a counsel to represent them, including representation in any complaint procedure or appeal.

Timely and accessible free legal representation is of crucial importance not only for the individual accused persons concerned, but will provide an additional level of oversight, which can reduce the risk of accused persons falling through the cracks in the forensic mental health system.

Currently, solicitors of the Centre face significant difficulties in meeting the demand for legal representation and, even when we have the resources to act, we have difficulty securing the right to appear for our clients before the MIARB or obtaining access to all relevant documents that are to be put before the MIARB. Despite the serious deprivations of liberty that can arise in matters under the MIA Act, the resource constraints faced by the Centre and the general unavailability of legal aid for Magistrate's Court matters, the likelihood of mentally impaired persons appearing without the benefit of legal representation, other than a duty lawyer and only when they are well enough to seek out the duty lawyer, is high. It is hoped that this situation will be somewhat remedied at least in the Perth Magistrates' Court by the introduction of a pilot Perth Magistrates' Court Mental Health Court, commencing 18 March 2013.<sup>36</sup>

**The MIA Act must be amended to require free legal advice and representation for all mentally impaired accused persons who might be or are subject to the MIA Act.**

While it is beyond the scope of the MIA Act, legal representation and advice should be available to all accused persons in all courts who face the possibility of a custodial sentence.

#### RECOMMENDATION 4.3

The MIA Act must be amended to require that free legal advice and representation must be available – and offered – to all mentally impaired accused persons in advance of any review, amendment, suspension or termination of the conditions of a Custody Order or Conditional Release Order.<sup>37</sup> Where the MIA Person is unable, because of incapacity, to obtain and instruct a lawyer, one should be appointed on their behalf.

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<sup>36</sup> To be known as the START Court

<sup>37</sup> Further, while it is beyond the scope of the MIA Act, the interests of justice and procedural fairness demand that in the absence of prior legal advice to the patient, the police should be prohibited from interviewing a mentally impaired accused; an involuntary patient; a voluntary patient in the mental health unit or hospital; or a patient the subject of any medications that might affect their capacity.



#### 4.4 APPOINT GUARDIAN

With respect to the enforcement of the right of MIA persons to legal representation, s.98 of the *Guardianship and Administration Act 1990* (WA) must be amended to require the Office of the Public Advocate (OPA) to ensure that all persons at risk of a Custody Order being made or who have been made subject to a Custody Order have the opportunity to access free legal advice and representation in advance of any making of a Custody Order, and review or amendment of their Custody Order or Conditional Release Order, or as necessary appoint a lawyer on their behalf. Furthermore, when a MIA person refuses legal representation, the OPA should be placed in a position to ensure that there is a friend of the court in attendance to protect the MIA person's rights. Furthermore, the MIA Act should prohibit the making of a Custody Order in any matter where the person is not legally represented, while Custody Orders remain indefinite.

##### RECOMMENDATION 4.4

Section 98 of the *Guardianship and Administration Act 1990* (WA) must be amended to require the Public Advocate to obtain legal help for a mentally impaired accused person, as needed.

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#### 4.5 APPOINT NOMINATED PERSON

##### RECOMMENDATION 4.5

The MIA Act must be amended to enable a mentally impaired accused person to appoint a Nominated Person (such as a carer or legal representative) who must be notified in a timely way of any changes or proposed changes in his or her MIA Act detention and treatment, including any upcoming reviews of his or her detention status.

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#### 4.6 PROCEDURAL FAIRNESS: ALLEGATIONS

Procedural fairness must include the opportunity to respond to any allegations made about the mentally impaired accused person, the absence of which can lead to decisions being made without a basis in evidence of the requisite probative force.<sup>38</sup> In circumstances where an individual is unable to appear before the MIARB, they must be entitled to have a Nominated Person (such as a guardian, carer, or legal representative) appear in person on their behalf.

##### RECOMMENDATION 4.6

Section 37 of the MIA Act must be amended to ensure that in making a decision following a purported breach of release conditions, the MIARB provides a high standard of procedural fairness including *inter alia*, recognition of the right of a mentally impaired accused person to be heard, to respond to allegations, to be represented by legal counsel, to obtain reasons for decision, and the right to test any evidence tendered to the MIARB on which it proposes to rely.

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<sup>38</sup> *Kostas v HIA Insurance* [2010] HCA 32; *Rodriguez v Telstra* [2002] FCA 30.

## 4.7 PROCEDURAL FAIRNESS: LEAVE

### RECOMMENDATION 4.7

Section 28 and s. 29 of the MIA Act must be amended to ensure that in making a decision whether or not to cancel a leave of absence the MIARB provide a high standard of procedural fairness including, *inter alia*, recognition of the right of a mentally impaired accused person to be heard, to respond to allegations, to be represented by legal counsel, to obtain reasons for decision.

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## 4.8 PROTECTION FOR LEGAL REPRESENTATIVES

We note that there are specific challenges, which face lawyers who represent mentally ill or impaired accused persons, especially including in matters under the MIA Act. This includes issues of professional ethical responsibility that arise in acting for a client who is not mentally fit to provide instructions. The *Legal Profession Act 2008 (WA)* and the *Legal Profession Conduct Rules 2010 (WA)* do not provide specific guidance to or protection of legal practitioners when appearing for clients with a mental illness and/or impairment. Rather, the Rules contain a number of potentially conflicting obligations, including an overriding duty to the Court<sup>39</sup>, a duty not to deceive or knowingly or recklessly mislead the Court<sup>40</sup>, and a duty to promote and protect fearlessly and by all proper and lawful means the client's best interests.<sup>41</sup> This uncertainty can discourage lawyers from acting in circumstances where a client's ability to give instructions is compromised<sup>42</sup>, which in turn makes it more difficult for mentally ill or impaired accused persons to secure expert legal representation.

The MIA Act requires amendment to ensure that Western Australian lawyers who represent mentally impaired accused persons are protected, and thereby bring Western Australia into line with best practice in other Australian jurisdictions.<sup>43</sup>

Furthermore, the issue of an appropriate role for the guardian of a mentally impaired accused person subject to or possibly will become subject to the MIA Act jurisdiction must be reviewed as a matter of urgency.

### RECOMMENDATION 4.8

The MIA Act must be amended to ensure that if a mentally impaired accused person is unable to instruct competently his or her legal representative on any question relating to a matter under the MIA Act, the legal representative can exercise his or her independent discretion in order to act in what he or she genuinely believes to be the person's best interests, until a guardian is appointed.

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<sup>39</sup> S.25 WA Barristers' Rules

<sup>40</sup> S.26 WA Barristers' Rules

<sup>41</sup> S. 37 WA Barristers' Rules

<sup>42</sup> Indeed, when the Centre consulted a member of the independent bar about acting for a particular MIA person who was facing a Custody Order, and about which there many ethical issues, we were advised not to act for the client – which in effect meant that it was the SC's opinion that the person could not be legally represented.

<sup>43</sup> See s. 4320 *Mental Health and Related Services Act 1998* (NT) and s. 38 *Criminal Justice (Mental Impairment Act) 1999* (Tas).

## 4.9 PROCEDURAL FAIRNESS: CUSTODY REVIEW

### RECOMMENDATION 4.9

Section 33 of the MIA Act must be amended to ensure that in undertaking review of the detention of mentally impaired accused persons, the MIARB provides a high standard of procedural fairness including, *inter alia*, increasing the frequency of reviews, and recognising the right of a mentally impaired accused person to request review, appear, access relevant documents in a timely way, be represented by legal counsel, and obtain reasons for decision.

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## 4.10 REVIEW OF DETENTION

Unlike the *Mental Health Act 1996 (WA)*<sup>44</sup>, detention under the MIA Act is subject only to a required review once a year<sup>45</sup>, including within 8 weeks of a court making a Custody Order<sup>46</sup>, and on request from the Minister<sup>47</sup> or whenever the MIARB thinks there are special circumstances, which justify doing so.<sup>48</sup> Treating people affected by mental illness and/or impairment differently depending on the way in which they entered the mental health system, in circumstances where they have not been convicted of an offence, amounts to an arbitrary and unjustifiable discrimination.<sup>49</sup> We also have serious concerns that the MIARB is not meeting all its review obligations under the MIA Act and there should regular audits of its operations.<sup>50</sup>

### RECOMMENDATION 4.10

The MIA Act must be amended to ensure that detention under the MIA Act is subject to review at least once every six months and more often on request by the mentally impaired accused person who can demonstrate changed circumstances, with an automatic no costs recourse to the Supreme Court if the mentally impaired accused person affected by the MIARB's failure to have a hearing according to law within a prescribed period, and/or an appeal right against a MIARB decision.

MIARB should be audited on a regular basis by the Inspector of Custodial Services and the Council of Official Visitors.

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<sup>44</sup> Section 139 of the *Mental Health Act 1996*, an involuntary patient is entitled to have his or her detention reviewed by the Mental Health Review Board every 6 months (or upon request: s 142).

<sup>45</sup> S 33(2)(d) MIA Act

<sup>46</sup> S 33(2)(a) MIA Act

<sup>47</sup> S 33(2)(b) MIA Act

<sup>48</sup> S 33(2)(c) MIA Act

<sup>49</sup> In accordance with the purposes and principles of the Charter of the United Nations and International Human Rights Conventions, not only are persons suffering from any form of disability entitled to exercise all the civil, political, economic, social and cultural rights embodied in these and other instruments, but they are recognised as being entitled to exercise them on an equal basis with other persons.

<sup>50</sup> For example, does the MIARB satisfy itself according to law as to the real risk the MIA Person poses to the community: see the recent High Court decision in *Yates* *ibid*

## 4.11 CRITERIA FOR REVIEW

Under the *Mental Health Act 1996*, a decision by the Mental Health Review Board to terminate an order for involuntary status is made primarily with reference to the mental state and behaviour of the person concerned, and then their medical and psychiatric history and social circumstances<sup>51</sup>. Under the MIA Act, a decision by the MIARB to recommend<sup>52</sup> the termination of a Custody Order is required to be made primarily having regard to a broader range of factors in s.33(5) MIA Act<sup>53</sup>, which create an unreasonably broad discretion. This in turn increases the likelihood that a Custody Order will be maintained unreasonably.

Given that a person subject to a MIA Act Custody Order has not been found guilty of a crime, decisions regarding their ongoing detention (or release) must be made primarily with reference to demonstrable risk posed to the community. If the health and wellbeing of the accused is an issue, this should not be a criterion that leads to detention in a prison, but that leads to treatment and care in a secure hospital setting under the *Mental Health Act 1996*. Accordingly, it is misplaced for the Board to be entitled to take into account any statement received by the victim of the alleged offence. Further, it is wrong for the MIARB to take into account criteria that would not in other circumstances ground a sufficient reason for deprivation of a person's liberty.

### RECOMMENDATION 4.11

Section 33(5) of the MIA Act must be amended to limit the factors that the MIARB can/must take into account in deciding whether or not to recommend the release of a mentally impaired accused person to those criteria solely and specifically related to the safety of the community.

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## 4.12 REMOVING OFFENSIVE CRITERIA

### RECOMMENDATION 4.12

References in s 33(5) of the MIA Act to the ability of the accused to take care of his or her day to day needs, obtain any appropriate treatment and resist serious exploitation as relevant criteria must be deleted. It is offensive that not meeting such criteria can require someone to be detained indefinitely in a prison, without recourse to the Courts.

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<sup>51</sup> S 137 *Mental Health Act 1996* (WA)

<sup>52</sup>We discuss below the requirement that the MIARB recommend termination rather than make a decision to terminate further at 10.6.

<sup>53</sup>(a) the degree of risk that the release of the accused appears to present to the personal safety of people in the community or of any individual in the community; (b) the likelihood that, if released on conditions, the accused would comply with the conditions; (c) the extent to which the accused's mental impairment, if any, might benefit from treatment, training or any other measure; (d) the likelihood that, if released, the accused would be able to take care of his or her day to day needs, obtain any appropriate treatment and resist serious exploitation; (e) the objective of imposing the least restriction of the freedom of choice and movement of the accused that is consistent with the need to protect the health or safety of the accused or any other person; (f) any statement received from a victim of the alleged offence in respect of which the accused is in custody.

#### 4.13 MENTALLY IMPAIRED ACCUSED REVIEW BOARD MEMBERS OVERSIGHT

Whenever a statutory power to remove or prejudice a person's rights or interests is exercised, the principles of statutory construction import an implied obligation to comply with the common law principles of natural justice and procedural fairness.<sup>54</sup>

Given that people subject to the jurisdiction of the MIARB face the possibility of a serious and indefinite deprivation of liberty, the decisions of the WA Court of Appeal in *Kirby v the Prisoners Review Board*<sup>55</sup> and *Seiffert v the Prisoners Review Board*<sup>56</sup> provide recent WA judicial insight into the elements that should comprise procedural fairness under the MIA Act, including notice that the MIARB intends to make a decision, notice of the matters that the MIARB intends to take into account in reaching its decision, an opportunity for the person concerned to be heard and then to respond to any assertions made about them, the availability of review and the provision of reasons for decisions.<sup>57</sup>

**It is crucial that the MIARB provide the highest standards of procedural fairness in all decisions relating to a mentally impaired accused person given they are or can be at any time detained in prisons without trial, and in particular the assessment of risk to the community having regard to the recent High Court decision in *Yates*<sup>58</sup>.**

Oversight of the MIARB's activities must be provided through ensuring the availability of:

- legal representation;
- guardians, and
- nominated persons,

to act in the best interests of a mentally impaired accused person; and

- appropriate expert evidence;
- a complaint process about individual MIARB members and staff, such as to the Ombudsman.

#### RECOMMENDATION 4.13

MIARB members must be subject to certain standards of conduct and there must be a remedy when a MIARB member falls short of those standards: for example as provided for in the *State Administrative Act 2004* (WA), and its Regulations and Rules.

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<sup>54</sup>*Seiffert v The Prisoners Review Board* [2011] WASCA 148 at 69; *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23

<sup>55</sup> [2011] WASCA 149

<sup>56</sup> [2011] WASCA 148

<sup>57</sup> See also *Public Service Board v Osmond* (1986) 159 CLR 656.

<sup>58</sup> *Yates* *ibid*

#### 4.14 APPEAL FROM DECISIONS OF THE MENTALLY IMPAIRED ACCUSED REVIEW BOARD

Under the *Mental Health Act 1996* (WA) a person with sufficient interest in a decision or order made by Mental Health Review Board is entitled to apply to the State Administrative Tribunal<sup>59</sup> or to the Supreme Court<sup>60</sup> for a review of the decision or order. Similarly, decisions of MIARB equivalent bodies in all other Australian states<sup>61</sup> and territories<sup>62</sup> can to be judicially reviewed. However, the MIA Act does not authorise administrative review of or appeal against its decisions.

The absence of a right of administrative review, by the SAT or Courts of decisions relating to serious aspects of the welfare and liberty of mentally impaired accused persons, creates an arbitrary and unjustifiable discrimination between involuntary patients under the *Mental Health Act 1996* and mentally impaired accused persons held under the MIA Act, and between mentally impaired accused West Australians and such people in other jurisdictions. This is especially important in circumstances, whereas in Western Australia, a police officer is called to assist the transfer of an unwell person to a psychiatric hospital for assessment, is assaulted during the course of that transfer, is authorised to charge the person with assault, and can choose to charge the person with a charge that attracts a mandatory term of imprisonment. Thus, it is the assaulted police officer who elects to put the person into the forensic system, rather than leaving the person in the civil system for treatment and care.

Furthermore, given the possible and indeed likely absence of capacity of MIA persons, then persons with sufficient interest must be entitled to bring proceedings on behalf of a MIA Person on Custody Order.

#### RECOMMENDATION 4.14

The MIA Act must be amended to allow any person, with a sufficient interest in a matter, to appeal a decision of the MIARB to the court of original jurisdiction or - when operational - the Mental Health Court, and then to the Supreme Court and Court of Appeal.

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#### 4.15 MENTALLY IMPAIRED ACCUSED REVIEW BOARD AND THE PRISONERS REVIEW BOARD INTERACTION

Section 42 MIA Act provides that the members of the MIARB are the Chairperson of the Prisoners Review Board, the Community Members of the Prisoners Review Board, a psychiatrist and a psychologist appointed by the Governor. This overlap between the MIARB and the Prisoners Review Board undermines the independence and effectiveness of the MIARB. The likelihood of confusion about the different jurisdictions, especially by administrative staff, and the culture of the one

<sup>59</sup> S148A *Mental Health Act 1996*

<sup>60</sup> S149 *Mental Health Act 1996*

<sup>61</sup> *Criminal Justice (Mental Impairment Act) 1999* (Tas) S.36; *Criminal Law Consolidation Act 1935* (SA) S.269Y; *Mental Health Act 2007* (NSW) S.44; *Crime (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) Ss 26(5), 34; Chapter 8 *Mental Health Act 2000* (Qld) Ch 8.

<sup>62</sup> *Mental Health (Treatment and Care) Act 1994* (ACT) s 141; *Mental Health and Related Services Act 1998* (NT) s 75(9), 43ZB.

pervading the other is not remote.<sup>63</sup> Furthermore, for mentally impaired persons the proper and humane response must be simply to ensure the community is safe in the face of clearly established ongoing risk<sup>64</sup>. Nonetheless, the response must be treatment and care, not punishment and retribution. We re-iterate that persons subject to Custody Orders pursuant to the MIA Act have not been convicted of any crime. They have not had a trial. They are unlikely to have been culpable for the crime they are said to have committed. Maintaining the overlap between the MIARB and the Prisoners Review Board risks the MIARB and its administration taking into account – or have the appearance of taking into account – considerations of a punitive nature and victim impact rather than issues of public safety, and best practice clinical and risk management principles.<sup>65</sup>

#### RECOMMENDATION 4.15

Section 42 of the MIA Act should be amended to ensure that membership of the MIARB does not include any members of the Prisoners Review Board. Furthermore, supervision of mentally impaired accused persons should not be the corrective services, but should be the forensic mental health service along with members of the Disability Service as needed.

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### 4.16 RELATIONSHIP BETWEEN MIARB DECISIONS AND PRISONERS REVIEW BOARD

#### Case Study

**Simon has been in custody since 1989 after trial found him guilty of Wilful Murder and not guilty (insanity) of another Murder at the same time. This of itself was a bizarre outcome. Simon was purportedly overseen by both Prisoners Review Board and the Mentally Impaired Accused Board.**

**Notwithstanding transitional provisions for MIARB, Simon had no MIARB review until 2010. There was interdepartmental disagreement between MIARB and Department of Justice about the Intensive Violent Offender Training Program. Simon was deemed unsuitable by DOJ due to sensitive nature of offending and fact that the VOTP is done in a group setting. Eventually after our submissions, MIARB accepted this and withdrew request for CL to undertake the program.**

**Conflict between MIARB and PRB was about who made a decision for release first. MIARB would not make decision before PRB and vice versa. At the most recent hearing, the Centre submitted that MIARB was required to make the decision for release before the PRB because:**

- a) Parole assessment plan indicates CL is required to be recommended for release by MIARB before PRB can consider parole;**
- b) DOJ guidelines on parole indicate you must be a minimum security risk if you are on strict life**

<sup>63</sup> The Centre was refused MIARB documents and advised in writing that the MIARB was not subject to the Freedom of Information Act 1992 (WA), when in fact it is the Prisoners Review Board that is not subject to the FOI jurisdiction and the MIARB is subject to the FOI legislation.

<sup>64</sup> " ... Burt CJ was plainly correct to conclude that the evidence did not support the making of the order. The evidence was not capable of demonstrating that the applicant was so likely to commit further crimes of violence, including sexual offences, that he constituted a constant danger to the community<sup>[31]</sup>. Yates v The Queen [2013] HCA 8 FRENCH CJ, HAYNE, CRENNAN AND BELL JJ. para 36

<sup>65</sup> We also note the importance of clarifying the relationship between the MIARB and the Prisoners Review Board. In some cases, mentally impaired accused persons will remain subject to the jurisdiction of both the MIARB and the Prisoners Review Board. In those circumstances, we consider there needs to be a clear policy directive about which Board takes the lead on decision making and, when appropriate, allowing the two Boards to sit jointly on a matter.



security and CL will not be minimum risk until MH is stable and MIARB recommend release; and

- c) Section 35(5) of the CL(MIA)Act, which indicates that 'an accused is to be released in accordance with a release order unless at the release date he or she is by law required to be kept in custody in respect of another matter' and section 10 Sentence Administration Act states accused not to be released if they are held in custody in respect of another matter.

At the MIARB hearing Simon was not permitted to attend by video-link. The Centre had not been provided full disclosure of documents that the MIARB relied on and prison behaviour was brought up against Simon but he could not respond because he was not there, and had not provided his instructions to his lawyer because the lawyer was unaware of these documents and that their content would be raised. This is procedurally unfair.

#### RECOMMENDATION 4.16

The relationship between the MIA Act and the Prisoners Review Board must be clearly established in both Acts, so that Simon (see above), and others like him cannot fall between the cracks of both jurisdictions and end up with no review of an indefinite detention, by either Board.

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### 4.17 APPEAL RIGHTS

If Simon (above) had been at the MIAB hearing he could have responded to the allegations of prison misbehaviour.

#### RECOMMENDATION 4.17

There must be an avenue of appeal (to a court) regarding decisions of Mentally Impaired Accused Review Board and/or Prisoners Review Board in respect of MIA persons on Custody Orders.

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### 4.18 FREEDOM OF INFORMATION AND THE PRISONERS REVIEW BOARD

#### RECOMMENDATION 4.18

PRB documents are not subject to FOI but MIARB documents are. Both acts must provide that when a mentally impaired accused person is subject to both Acts and the MIARB relies on PRB records, those records must be disclosed to the prisoner for the purpose for the MIARB review. Furthermore, there must be a specific right to all documents under the MIA Act, as there is under the *Mental Health Act 1996* s160, s161 for involuntary records, rather than relying on the narrower FOI Act, including for a suitably qualified person (including the person's lawyer) to review the unedited record.

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#### 4.19 PRIVACY AND CONFIDENTIALITY

The MIA Act does not include penalties for breaches of confidentiality in relation to personal information obtained in furthering the MIA Act provisions.<sup>66</sup>

##### RECOMMENDATION 4.19

The MIA Act must be amended to ensure the protection of a person's private and confidential information at all stages of his or her involvement with the criminal justice system and the MIA Act, and provide criminal sanctions for breaches.

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#### 4.20 RECORD OF DECISION

##### RECOMMENDATION 4.20

The *Criminal Law (Mentally Impaired Accused) Regulations 1997* (the Regulations) must be amended to include a prescribed form for the record of decisions made under s. 33 of the MIA Act. The Regulations must also prescribe the minimum requirements for psychiatric and psychological reports to the MIARB.

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#### 4.21 OPA AND RECORD OF MIARB DECISION

##### RECOMMENDATION 4.21

Section 34 of the MIA Act must be amended to require the MIARB to provide a copy of the record of any decision made under section 33 to the Office of the Public Advocate.

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### 5 FITNESS TO STAND TRIAL

The requirement that a person must be fit to stand trial crystallises broad considerations such as “trial fairness, humanity and the need for the public appreciation and respect for the dignity of the criminal process.”<sup>67</sup> A person is considered to be fit to stand trial if he or she is sufficiently able to comprehend the nature of the trial so as to make a proper defence to the charge.<sup>68</sup> An accused person is presumed to be mentally fit to stand trial<sup>69</sup> unless the presiding judicial officer determines

<sup>66</sup> Compare with section 206 of the *Mental Health Act 1996* (WA), which provides for a penalty in circumstances where a person divulges information obtained through the administration of the Act.

<sup>67</sup> *R v Cummings* [2006] 2 NZLR 597, [37]

<sup>68</sup> *R v Pritchard* (1836) 7 C&P 303; *Ngatayi v The Queen* (1980) 147 CLR 1; *Kesavarajah v The Queen* (1994) 181 CLR 230.

<sup>69</sup> Section 10(1) MIA Act

on the balance of probabilities<sup>70</sup> that, because of his or her mental impairment, the accused person is not mentally fit to stand trial for an offence.<sup>71</sup>

## 5.1 MEANING OF FITNESS TO BE TRIED

In making a determination of fitness in Western Australia, the presiding judicial officer will look to the section 9 MIA Act criteria.. These criteria largely codify the common law “minimum standards” contained in the over 50 year old 1958 decision *R v Presser*.<sup>72</sup> However, other jurisdictions reflect a more modern approach, where other considerations are taken into account in determining an accused person’s fitness for trial. For example, the South Australian definition of unfitness explicitly incorporates references to an accused person’s ability to make rational decisions<sup>73</sup>, while in both the Australian Capital Territory<sup>74</sup> and the Northern Territory<sup>75</sup> a person is deemed to be unfit if he or she cannot instruct his or her legal representative.

In Western Australia, an accused person who cannot make rational decisions in relation to participation in the proceedings could nevertheless satisfy the minimum standards required by the MIA Act and unjustly be found fit to stand trial.

### RECOMMENDATION 5.1

The public interest in the democratic principles embodied in trial fairness demands that MIA Act s. 9 is amended to ensure that a mentally impaired accused person cannot be found to be fit for trial unless he or she is meaningfully – and rationally – able to participate in proceedings, which must include whether or not he or she is able to instruct his or her legal representative.

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## 5.2 FITNESS AND INSTRUCTIONS

### RECOMMENDATION 5.2

Section 9 of the MIA Act must be amended to require the presiding judicial officer to consider whether or not the accused person can adequately instruct his or her legal representative as one of the factors contributing to a determination of unfitness.

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<sup>70</sup> S 12(1) MIA Act

<sup>71</sup> S 9 MIA Act

<sup>72</sup> *R v Presser* [1958] VR 45, 48

<sup>73</sup> See *Criminal Law Consolidation Act 1935* (SA) s269H

<sup>74</sup> S 311 *Crimes Act 1900* (ACT)

<sup>75</sup> S 43JF *Criminal Code Act 1983* (NT)

### 5.3 FITNESS: RATIONAL DECISIONS

#### RECOMMENDATION 5.3

Section 9 of the MIA Act must be amended to require the presiding magistrate or judge to consider whether or not the accused person is able to make rational decisions as one of the factors contributing to a determination of unfitness.

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### 5.4 DID THE MENTALLY IMPAIRED ACCUSED PERSON CARRY OUT THE OBJECTIVE ELEMENTS OF THE OFFENCE?

Western Australia is alone among Australian jurisdictions in not providing a ‘special hearing’<sup>76</sup> or related<sup>77</sup> procedure for a determination of whether or not, on the evidence available, an unfit accused person committed the objective elements of the offence alleged. This procedure requires the prosecution to provide sufficient evidence in support of the offence alleged, and ensures that the court<sup>78</sup> gives due consideration to the likelihood or otherwise that the unfit accused person in fact committed the objective elements of the offence charged. It can also provide an opportunity for an unfit accused person to put forward a defence or explanation in relation to the alleged offence.

Special hearing procedures go some way towards ensuring that an unfit accused person is not made subject to the criminal justice system in circumstances where, if not unfit to be tried, he or she would not have been found guilty of the offence alleged. In this regard, we recall the very real risk that an unfit accused person, see Marlon Noble<sup>79</sup> can be incarcerated for a significant period of time without adequate assessment of the evidence in support of the offence alleged and indeed when amended, years later, the evidence was found unlikely to have been enough to support a conviction. Surprisingly, the MIA Act does not contemplate later grounds for reconsideration and it must.

Despite the value of incorporating such safeguards, special hearings could be problematic. The purpose of the finding of unfitness is to ensure that people are not made subject to an unfair trial, so as to protect both individual rights and the dignity of the criminal justice system. It is contrary to basic principles of justice that a person who is unfit to be tried must be subject to a procedure that aims to imitate a trial and to achieve a result that approximates a trial decision. Indeed, empowering the court to make a determination regarding the commission of an alleged offence in circumstances of unfitness of the accused could create the erroneous perception that the accused person has been found guilty, despite the fact that there has not been a full and fair trial of the

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<sup>76</sup> *Criminal Justice (Mental Impairment Act) 1999* (Tas) S.15; *Criminal Law Consolidation Act 1935* (SA) Ss.269FB, 269GA,269MA,269NA; *Mental Health (Criminal Procedure) Act 1990* (NSW) S.19(1); *Crime (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) S.15; *Mental Health Act 2000* (Qld) Ch6p4; *Crimes Act 1900* (ACT) s 316; *Mental Health and Related Services Act 1998* (NT) S.43V.

<sup>77</sup> Under section s20B(1) of the *Crimes Act 1914* (Cth), the Court must establish that there is a prima facie case that the person committed the alleged offence. A “prima facie case” is one in which “there is evidence that would (except for the circumstances by reason of which the person is unfit to be tried) provide sufficient grounds” to put the accused on trial for the offence: *Crimes Act 1914* (Cth) s 20B(6).

<sup>78</sup> Which may be constituted by a judge or jury depending on the jurisdiction.

<sup>79</sup> In March 2003 Marlon Noble – a cognitively impaired indigenous man - was determined to be unfit to plead in relation to allegations of sexual assault. He was subsequently made subject to a custody order and was imprisoned for over ten years without ever having been found guilty of an offence.

facts. Accordingly, the introduction of a special hearing or similar procedure in Western Australia should be very carefully designed, and outcomes carefully worded so as to be very clear about what they mean.

Nonetheless, the safeguards currently available in relation to an unfit accused person in Western Australia are woefully and embarrassingly inadequate. Under the MIA Act, a magistrate or judicial officer determines whether or not an accused is fit to stand trial without reference to his or her culpability. If an unfit accused person is unlikely to become fit within six months, the court must quash the indictment or committal, and release or make a Custody Order with respect to the MIA person. The MIA Act does not provide a process for ensuring whether or not an unfit accused person is likely to have committed the objective elements of the alleged offence before making an order to release or detain the accused. Rather, the strength of the evidence against the accused is merely and bizarrely one of several factors<sup>80</sup> the court is required to have regard to in determining whether it is 'appropriate'<sup>81</sup> to make a Custody Order.

**Given the serious consequences of a Custody Order, it is crucial that the court be required to satisfy itself to a high degree of probability that the mentally impaired accused person carried out the objective elements of the alleged offence.**

The introduction of a requirement that the court establish whether or not the elements of the offence have been established beyond reasonable doubt would mirror the legislative position in South Australia<sup>82</sup> and ensure that a mentally impaired accused person cannot be subject to a Custody Order under the MIA Act in circumstances where he or she would or could not have been imprisoned in ordinary proceedings.

Given that the mentally impaired accused person has never been subject to a binding determination of guilt (or innocence) in relation to an alleged offence, it must remain open to appeal any orders made under the MIA Act for as long as the accused remains subject to those orders. This safeguard would ensure that an accused person in the position of Marlon Noble would always be in a position to adduce further evidence about whether or not he or she carried out the objective elements of the alleged offence, as well as the appropriateness of the finding of unfitness and the orders made under the MIA Act, and be empowered to request that the Custody Order be discharged. The MIA Act has no such provision but it must.

#### RECOMMENDATION 5.4

The MIA Act must be amended to provide that if an accused person is found unfit to stand trial, a court must not make a Custody Order in respect of the accused unless the court is satisfied to a high degree of probability that the accused carried out the objective elements of the alleged offence. This must be an ongoing obligation so that subsequent evidence can be introduced and the Custody Order discharged at any time when later evidence reveals that the objective elements of the offence are not demonstrated.

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<sup>80</sup> The other factors are the nature of the alleged offence and the alleged circumstances of its commission; the accused's character, antecedents, age, health and mental condition; and the public interest.

<sup>81</sup> S16(6) MIA Act

<sup>82</sup> S269B *Criminal Law Consolidation Act (SA) 1935*

## 5.5 APPEAL RIGHTS

### RECOMMENDATION 5.5

The MIA Act must be amended to ensure that any accused person in respect of whom MIA Act orders have been made following a finding of unfitness has the right to appeal to the Supreme Court the finding and associated orders throughout the period that he or she remains subject to MIA Act orders.

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## 5.6 SENTENCING OPTIONS

The MIA Act does not provide sufficient flexibility regarding orders that can be made with respect to an unfit accused person. As outlined above, where a mentally impaired accused person has been found unfit to be tried, a presiding magistrate or judge can only make orders for the release or indefinite detention of the accused person on a Custody Order, nothing more or less. Limiting the orders available curtails the ability of the court to act in the best interests of the unfit accused person – and the community. We note the decision in *WA v Tax*<sup>83</sup> in which the Chief Justice noted that due to the significant legislative deficiencies in the MIA Act the court does not have access to “*the range of remedies that the court must have to deal with complex and multifaceted situations such as this.*”<sup>84</sup>

Since the commencement of the MIA Act, the *Sentencing Act 1995 (WA)* has been amended a number of times to reflect contemporary approaches to sentencing and the disposition of criminal charges. A similar approach must be adopted in the MIA Act for the disposition of MIA Act proceedings to ensure that the presiding magistrate or judge is empowered to make orders in the best interests of the unfit accused person and the community as a whole.

**At the minimum, all the options available under the *Sentencing Act 1995 (WA)* must be available to the court in making orders disposing of a matter regarding a mentally impaired accused person who has been found unfit to stand trial.<sup>85</sup> This is one of the provisions that causes great injustice and so the MIA Act should be amended as a matter of urgency to introduce these options now, while deliberations over the wider provisions of the MIA Act continues.**

### RECOMMENDATION 5.6

Sections 16 and 19 of the MIA Act must be amended to broaden the range of ‘disposition’ options available to a presiding magistrate or judge in circumstances of unfitness to stand trial and to ensure that the court cannot make a Custody Order for an unfit accused person unless imprisonment is available for the alleged offence, the accused has been found to have carried out the original offence, and a Custody Order is necessary, on the basis of objective evidence of risk, to protect the health and safety of the community.

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<sup>83</sup> [2010] WASC 208

<sup>84</sup> [2010] WASC 208 at para 19.

<sup>85</sup> See S39 *Sentencing Act 1995*, sentencing options for a natural person.

## 6 AN UNSOUND MIND

Section 27 of the *Criminal Code Act Compilation Act 1913* provides that “a person is not criminally responsible for an Act or omission on account of an unsound mind if at the time of doing the act or making the omission he is in such a state of mental impairment as to deprive him of capacity to understand what he is doing, or of capacity to control his actions, or of capacity to know that he ought not to do the act or make the omission.”

**It is appropriate and just that such a defence is available. However, in truth, it is rarely – if ever - fairly available to MIA persons and it is only in rare circumstances we would we advise pleading the s27 defence. The MIA person faces the risk of a Custody Order, albeit a minor risk,, for the most minor of offences. The MIA person faces the risk of a mandatory Custody Order if they subsequently breach any orders of the Court made to dispose of their matter. They face longer imprisonment if they successfully plead the defence than if they had pleaded guilty. They cannot be awarded costs if they are successful so it is harder to get a lawyer. It is a Clayton’s Defence and so it is harsh and odious discrimination**

The consequences of successfully raising the defence of an unsound mind are provided in and triggers the operation of the MIA Act. Specifically, when an accused person has been found not guilty<sup>86</sup> or acquitted<sup>87</sup> on the basis of unsound mind, the Court can release the accused person,<sup>88</sup> make a conditional release order (CRO), a community based order (CBO) or an intensive supervision order (ISO) under the *Sentencing Act 1995*<sup>89</sup>; or make a Custody Order.<sup>90</sup> For offences in Schedule One of the MIA Act, if an accused is acquitted by a superior court (or on appeal) of an offence, on account of an unsound mind the court is required to make a Custody Order in respect of the accused.<sup>91</sup> This is a mandatory indefinite Custody Order without any further recourse to the courts, other than appeal against the initial order.

### 6.1 SCHEDULE ONE OFFENCES

If a mentally impaired accused person has been acquitted of one of the offences identified in Schedule One of the MIA Act on account of an unsound mind, the court must make a Custody Order in respect of the accused person.<sup>92</sup>

It is wrong –and leads to injustice - to deny the court the exercise of its discretion regarding the orders it can make with respect of a mentally impaired accused person acquitted of a MIA Act Schedule One offence. A Custody Order under the MIA Act is indefinite detention (usually in a prison) of a person who has not been convicted of an offence. In *McGarry v R*<sup>93</sup> the High Court emphasised that orders for indefinite detention<sup>94</sup> are not lightly to be made, and must only be made following consideration of a “very large” amount of evidence relevant to the question of future behaviour. Denying the court the opportunity to undertake a consideration of evidence and

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<sup>86</sup> S20 MIA Act

<sup>87</sup> S21 MIA Act

<sup>88</sup> S22(1)(a) MIA Act

<sup>89</sup> S22(1)(b) MIA Act

<sup>90</sup> S22(1)(c) MIA Act

<sup>91</sup> S21(a) MIA Act

<sup>92</sup> S 21 MIA Act

<sup>93</sup> (2001) 207 CLR 121

<sup>94</sup> Which in that case arose under s 98 of the *Sentencing Act 1995* (WA).

exercise its discretion under the MIA Act creates an arbitrary and unjustifiable discrimination between a mentally ill accused person and a culpable accused person facing ordinary proceedings under the *Sentencing Act 1995* (WA).

A Custody Order under the MIA Act is made in circumstances where an accused has not been found guilty of an offence and is not criminally responsible for their actions. The MIA Act also requires a Custody Order to be made if the MIA person receives other than a Custody Order but subsequently breaches that order. There is no democratic basis in law for, nor is there any justice in making such punitive outcomes.

**An indefinite order for the incarceration of a mentally impaired accused person must be justified by reference only to the safety of the community identified by a real and demonstrable risk posed by the MIA person.**

Accordingly, the nature or severity of the offence charged and victim impact is relevant only to the extent that it informs the judgment of the court regarding the safety of the community.

**Mandatory Custody Orders for Schedule One offences are unjust and undermine the ability of the court to act in the best interests of the mentally impaired accused person or society in general. Irrespective of the offence charged, the court must be in a position to exercise its discretion in deciding an appropriate disposition of the charges made against a MIA person.**

This discretion would help prevent the arbitrary detention of a mentally impaired accused person who has not been convicted of a crime and does not pose a threat to the health and safety of others.

In the alternative, the specific offences contained in Schedule One must be reviewed with the objective of reducing the overall number of offences listed, given the extremely serious human rights consequences of inclusion in Schedule One for a mentally impaired accused person (who has not been convicted of a crime). Schedule One offences must be limited only to the most serious offences against the person such as homicide and serious sexual offences. Narrowing the scope of Schedule One to only these most serious offences will properly broaden judicial discretion and oversight.

#### RECOMMENDATION 6.1

Schedule One and section 21(a) MIA Act must be repealed so that there are no offences for which the Court is required to make a mandatory Custody Order. In the alternative, Schedule One must be reviewed with the objective of significantly reducing the number of offences that require the imposition of a Custody Order without consideration of or reference to the circumstances of the offence.

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## 6.2 COSTS

It is a fundamental principle of criminal prosecutions in Western Australia that “a successful accused is entitled to his costs.”<sup>95</sup> However, surprisingly this entitlement does not apply to an accused person who is acquitted of a charge on account of his or her unsound mind.<sup>96</sup> An accused person acquitted because of the successful defence of an unsound mind has not been convicted of an offence and should not be refused costs in a manner different from any other accused person who is acquitted. Limiting the entitlement in this way is discriminatory, creates a disincentive for an accused to raise the defence of an unsound mind, which could then compromise the ability of the court to act in the best interests of the accused – and the community as a whole. Furthermore, the unavailability of costs can make it more difficult for an accused to obtain legal representation.

Furthermore, the prosecution might be more inclined to drop or reduce charges against a MIA person if they know that the s27 defence will be proved, there is no need for a custodial sentence and there will be costs awarded against the Crown if the s27 defence is proved. Accordingly, having costs available will tend to reduce court costs and time.

### RECOMMENDATION 6.2

Section 4(2) of the *Official Prosecutions (Accused's Costs) Act 1973* (WA) must be amended so that an accused who is acquitted of a charge on account of an unsound mind can apply for a costs order against the Crown.

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## 6.3 CRIMINAL RECORD

The Centre supports the current practice that an accused person who has been acquitted of a charge on account of an unsound mind does not have a conviction recorded on his or her criminal record.

### RECOMMENDATION 6.3

The current practice that an accused person who has been acquitted of a charge on account of an unsound mind does not have a conviction recorded on his or her criminal record should be codified in the MIA Act for reasons of predictability and certainty.

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## 7 DIMINISHED RESPONSIBILITY

In *Criminal Process and Persons Suffering from Mental Disorder*, the Law Reform Commission of Western Australia (the Commission) recommended that the concept of diminished responsibility be introduced in relation to charges of wilful murder and murder.<sup>97</sup> The Commission recommended

<sup>95</sup> S5(1) *Official Prosecutions (Accused's Costs) Act 1973*

<sup>96</sup> S4(2) *Official Prosecutions (Accused's Costs) Act 1973*

<sup>97</sup> Project No 69, *The Criminal Process and Persons Suffering from Mental Disorder*



that if a person who has been convicted of wilful murder or murder suffered from an abnormality of mind at the time of the offence, which substantially impaired his or her responsibility for the offence, he or she will be guilty of manslaughter only. In 2002, the Commission reiterated its recommendation for the introduction of a partial defence of diminished responsibility. However, in 2007 the Commission changed its position and recommended that “no partial defence to murder of diminished responsibility or substantial mental impairment be introduced in Western Australia.”<sup>98</sup>

**The Centre supports the view of the Western Australia Law Reform Commission that a partial defence of diminished responsibility must be introduced in Western Australia.**

The partial defence usefully increases the sentencing options available to a judge in circumstances where an accused person was affected by a mental illness and/or impairment at the time of the killing but cannot establish the defence of unsound mind.

Respectfully, we remain unconvinced that the partial defence must not be available unless “the circumstances giving rise to the defence always demonstrate a significant reduction in moral culpability.” This approach would mean that accused persons for whom moral culpability is significantly reduced by reason of mental illness and/or impairment would fall through the cracks. A better approach would be to allow the presiding magistrate or judge the discretion to determine the applicability of the partial defence on a case-by-case basis. In so doing, amendment of the Criminal Code to introduce the partial defence will bring Western Australia into line with England<sup>99</sup>, New South Wales<sup>100</sup>, Queensland<sup>101</sup>, the Australian Capital Territory<sup>102</sup> and the Northern Territory.<sup>103</sup>

#### RECOMMENDATION 7

The *Criminal Code Act Compilation Act 1913 (WA)* must be amended to introduce the partial defence of diminished responsibility so as to increase the sentencing options available to a judge in circumstances where an accused person was affected by a mental illness and/or impairment. The partial defence must include the following elements:

##### **Diminished Responsibility for Abnormality of Mind**

That at the time of the offence the accused person was suffering from a disturbance of thought, mood, volition, perception, orientation or memory that substantially impaired the accused in one of the following ways:

- The capacity to understand the nature of the relevant act (or omission);
- The capacity to understand that the act (or omission) was wrong; or
- The capacity to control the act (or omission).

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<sup>98</sup> Recommendation 39, Project No 97, Review of the Law of Homicide

<sup>99</sup> *Homicide Act 1957 (UK)* s 2

<sup>100</sup> *Crimes Act 1900 (NSW)* s23A

<sup>101</sup> *Criminal Code (QLD)* s304A

<sup>102</sup> *Crimes Act 1900 (ACT)* s 14

<sup>103</sup> *Criminal Code (NT)* s 37

## 8 CUSTODY ORDERS

A presiding magistrate or judge in a matter under the MIA Act can (and in some circumstances, must) make a Custody Order in circumstances where a person has been found mentally unfit to stand trial<sup>104</sup> or acquitted on the basis of an unsound mind.<sup>105</sup> A person to whom a Custody Order is in force is referred to in the MIA Act as a “mentally impaired accused”.<sup>106</sup> A mentally impaired accused person can be detained<sup>107</sup> and made subject to significant constraints on his or her liberty for an indefinite period of time<sup>108</sup> until discharged<sup>109</sup> by order of the Governor,<sup>110</sup> which can amount to significantly longer than any period of incarceration, which could and/or would have been ordered if the mentally impaired accused person had been found guilty by a court.

The operation of Custody Orders under the MIA Act is out of step with Australia's national best practice<sup>111</sup> and means that some accused persons are detained for longer, and subject to more restrictive conditions, than reasonable. A mentally impaired accused person who has been found unfit to stand trial or acquitted on the basis of unsound mind has not been convicted of the offence<sup>112</sup> and is entitled to be released unless the safety of the justifies the imposition of restrictions on the accused person's liberty. However, the current operation of the MIA Act means that people whose blameworthiness has been reduced by mental illness and/or impairment are punished more severely than offenders who have been found guilty of similar offences. Furthermore, the provisions of the MIA Act with respect to Custody Orders compromise just and appropriate management (secure where necessary) of mentally impaired accused persons according to clinical and risk management principles and they promote a punitive approach. Prolonged detention and control when not justified is an abuse of a person's civil rights; and it is excessively costly and hinders individual recovery, with adverse implications for the community as a whole.

### 8.1 DURATION OF CUSTODY ORDERS

**The common law sentencing principle of proportionality provides that the “type and extent of punishment must be commensurate to the gravity of the harm and the degree of responsibility of the offender.”<sup>113</sup>**

<sup>104</sup> If the offence charged is one for which the accused could have been sentenced to a term of imprisonment: 16(4), 19(5) MIA Act.

<sup>105</sup> S 27 *Criminal Code*; ss 20, 21 MIA Act.

<sup>106</sup> s23 MIA Act.

<sup>107</sup> In an authorised hospital, a declared place, a detention centre or a prison.

<sup>108</sup> s24(1) MIA Act.

<sup>109</sup> s38 MIA Act.

<sup>110</sup> s35 MIA Act.

<sup>111</sup> For example, under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, the Victorian legislation emphasised the seriousness of a custody order when it provided that a judge **must not** make an order remanding a defendant in custody unless there is **no practicable alternative**. [our emphasis].

<sup>112</sup> In this regard we note that Western Australia and Queensland are alone among Australian jurisdictions in failing to provide for a special hearing in circumstances where a defendant is found to be unfit to be tried. A special hearing is a process used to determine, on the evidence available, whether or not the defendant committed the offence charged. While we do not support the introduction of a special hearing that is in effect a trial procedure in Western Australia, it is important to emphasise that the current procedure under the MIA Act limits the availability of formal judicial review of the strength of the evidence against the accused and should not result in a defendant being treated as he or she would be if he or she committed the alleged offence.

<sup>113</sup> *Fox R., Victorian Criminal Procedure, 2000: 298*

The rationale for this principle is to ensure that sentences remain proportional to the seriousness of the offence even when the court takes into account the protection of society. Indefinite detention provisions create tension between proportionality and questions of risk and public protection, and do so despite the inherent problems in efforts to use custodial sentences to protect society from the risk of future harm.<sup>114</sup> This tension is heightened in the context of the MIA Act, where the accused person made subject to the detention has not been found guilty of the offence charged.

The High Court has described indefinite detention as a punishment of a "stark and extraordinary nature."<sup>115</sup> Furthermore, mandatory indefinite sentences under s21 (a) MIA Act might be unconstitutional based on the decision in *Kable v Director of Public Prosecutions (NSW)*.<sup>116</sup> Most Australian jurisdictions (not Western Australia) place some form of time limit on the period for which mentally impaired accused persons can be detained or subject to conditional release. The Commonwealth, the ACT, the NT, SA and Victoria all require the court to set a 'limiting term' or 'nominal term' for the detention and supervision of a mentally impaired accused person<sup>117</sup>, while NSW applies a limiting term to an accused person who has been found unfit to stand trial.<sup>118</sup>

**Western Australia's MIA Act Custody Order approach is archaic, out-dated and inhumane, and a poor reflection on us all.**

The possibility of indefinite detention under the MIA Act means that a mentally impaired accused person can remain subject to the criminal justice system for much longer than a culpable person who was convicted and sentenced in the ordinary way for the same conduct. This is arbitrary and unjustifiable discrimination, which can deter accused persons from relying on the purported protections in the MIA Act in respect of an unsound mind and unfitness. This leads to outcomes, in our experience, which fail to meet the interests of justice, public safety or the person's treatment needs. In particular, given that in WA a person subject to a Custody Order can be (is most likely to be) detained in a prison<sup>119</sup> it is crucial that he or she is not detained or subjected to restrictions for longer than he or she would have been if convicted of the relevant offence at an ordinary trial. This is especially important to an accused person with a mental illness, whose PBS and Medicare entitlements are removed while in prison.

**A limitation must be placed on the maximum duration of a Custody Order or a series of Custody Orders so that a mentally impaired accused person cannot be detained involuntarily for a period longer than the term of imprisonment that would have been imposed or in the alternative could have been imposed for the alleged offence. On the expiration of the Custody Order a mentally impaired accused person must be released from any obligations under the MIA Act.**

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<sup>114</sup> It is well known that there are practical problems inherent in the prediction of future violent behaviour. In its submission to the NSW Law Reform Commission Report 79 (Sentencing), the NSW Director of Public Prosecutions noted that there is "overwhelming evidence that psychiatrists are very poor predictors of whether a person will re-offend.": Cowdery N., Submission (17 June 1996) at 8

<sup>115</sup> *Chester v the Queen* (1988) 165 CLR 611 at 619

<sup>116</sup> (1996) 189 CLR 51

<sup>117</sup> *Crimes Act 1914* (Cth) s 20BC(2); *Crimes Act 1900* (ACT) s 301; *Criminal Code Act 1983* (NT) s 43ZG; *Criminal Law Consolidation Act 1935* (SA) s 2690(2); *Crimes (Mental Impairment and Unfitness to be Tried Act 1997* (Vic) s 28(1)

<sup>118</sup> MHFPA s 51, 52(2), 54 NSW

<sup>119</sup>Note the discussion of the lack of declared place below.

**"Involuntary detention of people with intellectual disability on the basis of harm to others may be viewed as discriminatory..."<sup>120</sup>**

In circumstances where the mentally impaired accused person continues to pose a risk to others or to require medical treatment or care they must be transferred into the civil mental health system or other care, support or supervision arrangements, as contemplated by sections 35 and 39 of the MIA Act.<sup>121</sup>

#### RECOMMENDATION 8.1

Section 38 of the MIA Act must be amended so that a mentally impaired accused person cannot be detained longer than he or she would have been imprisoned if found guilty of the original offence charged.

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## 8.2 SIMPLE AND SUMMARY OFFENCES

Under the MIA Act courts of summary jurisdiction are empowered to make Custody Orders for an accused person who is unfit<sup>122</sup> or an accused person who is acquitted on the basis of an unsound mind<sup>123</sup> where it is considered that he or she can be a danger to themselves or the community. A finding of unfitness or an unsound mind means that the person has not been convicted of a crime, and the disposition of offences summarily will take place in courts of summary jurisdiction (magistrates' courts).

**It must not be open to a Magistrate's Court to make a MIA Act Custody Order - in its present form.**

Rather, any risk that he or she can be a danger to themselves or the community must be addressed in the ordinary way by the mental health system, under the relevant provisions of the *Mental Health Act 1996* for MIA persons with a mental illness or Disability Services for MIA persons with a permanent impairment.

In the alternative, in circumstances where a magistrate in a summary court considers that a Custody Order is appropriate, the matter must be sent to the Supreme Court for a decision. This approach would bring WA into line with best practice in other Australian jurisdictions: for example, in Tasmania, only the Supreme Court is authorised to make orders for the restriction (custody) or supervision of mentally impaired accused persons.<sup>124</sup>

<sup>120</sup> McSherry, B., "The Involuntary Detention of People with Intellectual Disabilities" Right Now: Human Rights in Australia October 30, 2012

<sup>121</sup> S 35 of the MIA Act provides that release by the Governor can be made subject to conditions.

<sup>122</sup> S16(5)(b) MIA Act

<sup>123</sup> S22(1)(c) MIA Act

<sup>124</sup> S. 18 and 21 *Criminal Justice (Mental Impairment Act) 1999* (Tas).

### RECOMMENDATION 8.2

The MIA Act must be amended to ensure that Custody Orders are not available for summary offences. In the alternative, if a Magistrate in summary jurisdiction is of the opinion that a Custody Order should be made in respect of a mentally impaired accused person, the Magistrate must refer the matter to the Supreme Court for determination.

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### 8.3 BREACH OF AN ORDER: COURT HEARING

Pursuant to section 22(3) of the MIA Act when an accused person acquitted on the basis of an unsound mind has been placed on a CRO<sup>125</sup>, CBO<sup>126</sup> or ISO<sup>127</sup> and that order is later cancelled because of a breach, the MIA Act currently requires that accused person to be placed on a Custody Order. There is no good reason to limit judicial discretion in these circumstances, and doing so leads to injustice and provides a significant disincentive to plead a defence, which is properly available because the person might breach one of these orders because of their mental impairment.

#### Case Study

**Peter was charged with Assault (groped a woman's chest).**

- **Acquitted on basis of an unsound mind defence and received an ISO<sup>128</sup>.**

**He re-offended during the term of his ISO and it was cancelled by the court.**

**Court was then required to place Peter onto a Custody Order from which he has since been only intermittently conditionally released, with a requirement not to use drugs and alcohol.**

**Peter self-reports whenever he uses drugs or alcohol and his CROs are cancelled.**

**He has been on Custody Order for over two years**

**Peter was recommended for release by MIARB but WA A-G declined.**

**At a subsequent review the Centre submitted that MIARB must make an order for a leave of absence, which was accepted. Technical hitches in the MIA Act have stopped his release.**

### RECOMMENDATION 8.3

Breach of an Intensive Supervision Order must be subject to a court hearing with evidence from psychiatrists on risk factors, and not a mandatory Custody Order as is currently the case.

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<sup>125</sup> Conditional Release Order

<sup>126</sup> Community Based Order

<sup>127</sup> Intensive Supervision Order

<sup>128</sup> Intensive Supervision Order

## 8.4 CANCELLATION OF A COMMUNITY RELEASE ORDER: COURT HEARING

### RECOMMENDATION 8.4

Cancellation of a CRO<sup>129</sup> must be subject to an open hearing with representation so that the client can respond to the evidence alleging breach of the order.

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## 8.5 BREACH COMMUNITY BASED ORDER DECISIONS

### RECOMMENDATION 8.5

The Attorney General must not have power to decide the issue of a Community Based Order<sup>130</sup>. This must be a court decision.??

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## 8.6 BREACH SENTENCING OPTIONS

### RECOMMENDATION 8.6

Section 22 of the MIA Act must be amended to ensure that if an accused person is acquitted of an offence on account of an unsound mind, a court must not make a Custody Order in respect of the accused unless the statutory penalty for the alleged offence is or includes imprisonment and in all the circumstances the person would have been imprisoned had they been found guilty of the offence.

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## 8.7 WHERE THE STATUTORY PENALTY DOES NOT INCLUDE IMPRISONMENT

Sections 16(6) and 19(5) MIA Act provide that a Custody Order must not be made in respect of an accused unless the statutory penalty for the alleged offence is or includes imprisonment. Similarly, section 22(2) provides that a CRO, CBO or ISO must not be made in respect of an accused person unless such an order could have been made under the *Sentencing Act 1995*, if the accused had been found guilty of the offence.<sup>131</sup> However, there is no equivalent safeguard with respect to making a Custody Order under section 22(1)(c) MIA Act. This creates an arbitrary and unjustifiable discrimination between a mentally impaired accused person and a culpable accused person in ordinary proceedings under the *Sentencing Act 1995*.

A court must not be authorised to make a Custody Order in respect of a mentally impaired accused person unless the statutory penalty for the alleged offence is or includes imprisonment, and the court is convinced that the evidence would have supported a conviction. It is not

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<sup>129</sup> Conditional Release Order

<sup>130</sup> Conditional Release Order

<sup>131</sup> S22(2) MIA Act

appropriate to use the criminal justice system to impose custodial sentences on a mentally impaired accused person, which would not have been available in ordinary proceedings under the *Sentencing Act 1995* for a culpable accused person. Any risk that the mentally impaired accused person can be a danger to themselves or the community must be addressed in the ordinary way by the civil mental health system, under the relevant provisions of the *Mental Health Act 1996* or the Disability Services.

### RECOMMENDATION 8.7

Section 22 of the MIA Act must be amended to ensure that if an accused person is acquitted of an offence on account of an unsound mind, a court must not make a Custody Order in respect of the accused unless the statutory penalty for the alleged offence is or includes imprisonment and in all the circumstances the person would have been imprisoned if found guilty.

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## 8.8 CRITERIA FOR CUSTODY ORDER

**It is a fundamental principle of the Australian criminal justice system that no person shall be punished except following conviction for a criminal offence.<sup>132</sup>**

A person who is unfit to stand trial or has been acquitted on account of an unsound mind has not been convicted of a crime and there is no basis in law to impose punishment. In these circumstances, any decision to make orders other than the unconditional release of the accused person must be made only by reference to considerations of public safety, and clinical and risk management principles, as is the case under the *Mental Health Act 1996* (WA).<sup>133</sup> However, the current criteria<sup>134</sup> for imposing a Custody Order against an accused person who has been found unfit to be tried<sup>135</sup> or acquitted on the basis of an unsound mind<sup>136</sup> create a broad discretion without sufficient guidance for decision makers.

In particular, the content of the 'public interest' criterion is unclear and has been inconsistently applied.<sup>137</sup> If the rationale for this criterion is to allow the court to make a Custody Order where the court perceives the person to pose a danger to the public, this must be clarified and limited by a requirement to adduce relevant expert evidence about risk. Furthermore, the requirements to have

<sup>132</sup> *Jago v District Court of NSW* (1989) 168 CLR 23; *Dietrich v The Queen* (1992) 177 CLR 292

<sup>133</sup>Section 26(1) *Mental Health Act 1996* (WA) provides that "[a] person should be an involuntary patient only if (a) the person has a mental illness requiring treatment; and (b) the treatment can be provided through detention in an authorised hospital or through a community treatment order and is required to be so provided in order — (i) to protect the health or safety of that person or any other person; or (ii) to protect the person from self-inflicted harm of a kind described in subsection (2); or (iii) to prevent the person doing serious damage to any property; and (c) the person has refused or, due to the nature of the mental illness, is unable to consent to the treatment; and (d) the treatment cannot be adequately provided in a way that would involve less restriction of the freedom of choice and movement of the person than would result from the person being an involuntary patient."

<sup>134</sup>Specifically, the strength of the evidence against the accused; the nature of the alleged offence and the alleged circumstances of its commission; the accused's character, antecedents, age, health and mental condition; and the public interest.

<sup>135</sup>Section 16(6) and 19(5) MIA Act

<sup>136</sup>S 22 MIA Act.

<sup>137</sup> See eg *R v Gardiner* [1999] WADC 23; *R v Gardiner (No 3)* 24 SR WA 136; *GFS v The Queen* [2001] WASCA 219; *R v Garlett* (2002) 29 SR WA 1



regard to the nature and circumstances of the alleged offences and to the accused person's "character, antecedents, age, health and mental condition" are sentencing considerations. It is unacceptable law for the court to undertake a quasi-sentencing exercise in respect of a mentally impaired accused person who has not been found guilty of an offence.

**The MIA Act must be amended so that a decision to make a Custody Order can only be made when the presiding magistrate or judge is satisfied to a high degree of probability by credible and cogent evidence that a Custody Order is necessary to meet the objectives contained in section 26(1)(b)(i) and (ii) of the Mental Health Act 1996<sup>138</sup> or ???**

This amendment would place appropriate emphasis on the seriousness of orders under the MIA Act, ensure that there is sufficient guidance to the court about when to make a Custody Order and bring the standard of proof required by the MIA Act into line with *the Dangerous Sexual Offenders Act 2006* (WA).

Furthermore, it would improve the capacity of the court to achieve the objects of the MIA Act and the *Mental Health Act 1996* (WA), and remove arbitrary and unjustifiable discrimination between involuntary patients who find themselves in the civil mental health system and mentally impaired accused persons who find themselves in the forensic mental health system, through no fault of their own.

#### RECOMMENDATION 8.8

The MIA Act must be amended to ensure that if an accused person is found unfit to stand trial or acquitted of an offence on account of an unsound mind, a court must not make a Custody Order in respect of the person unless it is satisfied that a Custody Order is necessary, on the basis of objective evidence of risk, to protect the health and safety of the community.

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### 8.9 DECISION MAKING: GRANT OR REVOCATION OF LEAVE OF ABSENCE

#### RECOMMENDATION 8.9

The MIA Act must be amended to provide that a mentally impaired accused person is to be released by order of the MIARB or the original or higher court, not the Governor.

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### 8.10 EXECUTIVE DISCRETION

The MIA Act provides that termination of<sup>139</sup> or leave of absence from<sup>140</sup> a Custody Order can take place at any time by order of the Governor. The MIA Act is silent on the criteria that the Governor

<sup>138</sup>We do not consider that the objective of preventing property damage is sufficient to justify a custody order delivering a person to a prison indefinitely

<sup>139</sup> S35(1) MIA Act



must take into account in making a decision to grant a release order or leave of absence. While it can be presumed that the Governor would exercise the power to make a release order in circumstances when he or she has been recommended to do so by the WA Attorney-General following a section 33 report by the MIARB, the MIA Act does not actually require the Governor to follow this recommendation, nor does it provide a mentally impaired accused person with an avenue for appeal in circumstances where the Governor does not adopt the A-G recommendation to release or the A-G does not support a MIARB recommendation to release.

The retention of the executive discretion under the MIA Act is inconsistent with Principle 17(1) of the *UN Principles for the Protection of Persons with Mental Illness & the Improvement of Mental Health Care* and with considerations of justice. In *Chester v R*, the High Court<sup>141</sup> was critical of a section of the *Criminal Code Act Compilation Act 1913 (WA)*, which provided for indefinite preventative detention. In particular, the High Court noted with disapproval that the provision conferred a large discretionary power without specifying a precise criterion according to which the power is to be exercised<sup>142</sup> and that orders under the provision were terminable by executive government and not a judicial decision.<sup>143</sup> These criticisms apply equally to the MIA Act with respect to the role of the Governor in the termination of, and grant of leave of absence from Custody Orders.

**Decisions to terminate or grant a leave of absence from a Custody Order must be made by the MIARB<sup>144</sup>, and must be subject to appeal to the Supreme Court.<sup>145</sup>**

The MIARB, which includes members of the legal, psychiatric and psychological professions and representatives of the general public<sup>146</sup>, is the appropriate body to make an order for release – or leave of absence - of a mentally impaired accused person as it has the necessary expertise to determine whether and under what circumstances a person must remain subject to a Custody Order. Having this decision determined by the Board would also avoid politicisation of the decision.

See recommendation 8.8, 8.9, 8.10.

#### RECOMMENDATION 8.10

Section 28 of the MIA Act must be amended to provide that the MIARB is responsible for granting and revoking a leave of absence from a Custody Order.

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<sup>140</sup> S27 MIA Act

<sup>141</sup> (1988) 165 CLR 611

<sup>142</sup> *Chester v R* (1988) 165 CLR 611, 617

<sup>143</sup> *Chester v R* (1988) 165 CLR 611, 619

<sup>144</sup> Or, for the reasons outlined in section 4 above, the Mental Health Review Board.

<sup>145</sup> See section 4.14 above.

<sup>146</sup> S.42 MIA Act.

## 8.11 BREACH OF AUSTRALIA'S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

Compliance with Australia's international human rights obligations and other relevant instruments, such as the United Nations *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care*<sup>147</sup> must be regarded as the fundamental basis for government policy regarding mentally ill and impaired persons.

The availability, operation and manner of termination of Custody Orders under the MIA Act appear to breach Australia's obligations under Article 9 the *International Covenant on Civil and Political Rights* (ICCPR)<sup>148</sup>, which prohibits arbitrary<sup>149</sup> and indefinite detention<sup>150</sup>, and requires that "anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court can decide without delay on the lawfulness of his detention and order his release if the detention is not lawful".<sup>151</sup>

Furthermore, the UN *Convention on the Rights of Persons with Disabilities* provides for equal access to justice for people with disabilities<sup>152</sup> and states that "the existence of a disability shall in no case justify a deprivation of liberty."<sup>153</sup>

Finally, we note that the disproportionate effect of the MIA Act on Aboriginal and Torres Strait Islanders potentially engages and breaches the UN *Convention on the Elimination of Racial Discrimination*.<sup>154</sup>

### RECOMMENDATION 8.11

The MIA Act must respect and be consistent with Australia's Human Rights Obligations.

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## 9 CHILDREN AND YOUNG PEOPLE

Young people affected by mental illness and/or impairment are particularly vulnerable and disadvantaged in both the criminal justice and mental health systems, and face a specific set of challenges. It is crucial that the rights and interests of young people affected by mental illness and/or impairment are protected at all stages of their involvement with the criminal justice system, and that all relevant agencies incorporate a child-centred approach to the services they deliver.<sup>155</sup>

<sup>147</sup> UN Res 46/119, 17 December 1991

<sup>148</sup> Ratified by Australia 1980.

<sup>149</sup> Article 9(1): Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

<sup>150</sup> Article 9(3): Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.

<sup>151</sup> Article 9(4) ICCPR

<sup>152</sup> Article 13 *UN Convention on the Rights of Persons with Disabilities*, ratified by Australia 2008.

<sup>153</sup> Article 14(1)(b) of the *UN Convention on the Rights of Persons with Disabilities*.

<sup>154</sup> For example, as at 11 September 2012 we understand that of the 15 mentally impaired accused individuals currently detained in prison, 10 identified as Aboriginal or Torres Strait Islander – amounting to 66% of the mentally impaired accused individuals detained in prison, whereas only 2.5% of the general population identify as Aboriginal or Torres Strait Islander. See *Hansard*, 11 September 2012.

<sup>155</sup> Trotter C., "Effective Community Based Supervision for Young Offenders" Trends and Issues in Crime and Criminal Justice No 448 December 2012

**The MIA Act applies indiscriminately to adult and juvenile accused persons alike and provides no special safeguards for children and young people. Multiple amendments are required to adequately protect the rights and interests of young people affected by mental illness and/or impairment throughout their involvement with the criminal justice system.**

## 9.1 NO CUSTODY ORDER FOR JUVENILES

**A court must not be authorised to make an indefinite Custody Order for a juvenile accused person.**

However, if this practice is to be continued, there is a critically urgent need to review the manner in which juvenile accused persons are detained. In particular, a juvenile accused person must never be subject to an order of indefinite custody. Furthermore, it is critically important that juvenile accused persons detained under the MIA Act are kept separate from adults, and that when detained under the MIA Act they are kept separate from juvenile offenders who are not affected by a mental illness and/or impairment. This means that juvenile accused persons under the MIA Act must never be detained in a detention centre or in adult facilities, such as the Frankland Centre. The need for children to be segregated from adults and accorded age appropriate treatment<sup>156</sup> directed at promoting their rehabilitation<sup>157</sup> is recognised in international law, and is crucially important in order to ensure that juvenile persons are given the best opportunity to ‘grow out’ of crime. This amendment would also bring WA into line with the best practice of other Australian jurisdictions. For example, the *Criminal Justice (Mental Impairment) Act 1999 (TAS)*<sup>158</sup> provides that a Court must not commit a juvenile accused person to a secure mental health unit unless the Chief Forensic Psychiatrist advises that it is the most appropriate place to detain the accused person, and adequate facilities exists for his or her age appropriate treatment and care.

### RECOMMENDATION 9.1

The MIA Act must be amended so that MIA Act Custody Orders are not available for juvenile accused persons.

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## 9.2 FURTHER RESOURCES FOR THE CHILDREN'S COURT

**The MIA Act must be amended to provide additional safeguards (over and above those outlined in sections 5 and 6 of this submission) to ensure the protection of the rights and interests of young people affected by mental illness and/or impairment.**

This would involve the provision of additional resources to ensure that the Children's Court can preside appropriately over MIA Act matters in a manner, which enables it to intervene early, and divert children and young people away from incarceration and into mental health care and/or

<sup>156</sup> Article 10(3); 10(2)(b) ICCPR

<sup>157</sup> Article 14(4) ICCPR

<sup>158</sup> Section 39A *Criminal Justice (Mental Impairment) Act 1999 (TAS)*.

treatment and/or secure accommodation. In particular, we support the recommendations of the Commissioner of Children and Young People to the Stokes Report<sup>159</sup>, including the establishment of a dedicated mental health unit for children and young people, and the provision of appropriate, comprehensive mental health assessment, referral and treatment services for children and young people appearing before the Children's Court of WA. It is also imperative that all mentally impaired juvenile accused persons are represented by a lawyer (as they are in family court)<sup>160</sup>.

#### RECOMMENDATION 9.2

Children's Court Magistrates must be provided with comprehensive services, including 24 hour access to psychiatrists, a specialist forensic team and other additional resources as necessary to preside over all MIA Act matters.

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## 10 HOSPITAL ORDERS AND INVOLUNTARY PATIENTS

Section 5(5) of the MIA Act prohibits a magistrate or judge from making a hospital order for an involuntary patient. While there can be policy reasons for this subsection with respect to involuntary patients who are detained in hospital, it does not properly take into account that involuntary patients include people who are not in hospital but are subject to a Community Treatment Order (CTO) under Part 3 Division 3 of the *Mental Health Act 1996*, or a person who is an involuntary patient in and out of hospital on leave. The effect of this subsection is that when bail is refused an involuntary person must be remanded to a prison.

#### RECOMMENDATION 10

Section 5(5) MIA Act must be amended so that it is open to a presiding magistrate or judge to make a Hospital Order irrespective of whether or not the person is an involuntary patient. Furthermore, a magistrate should have the option of ordering psychiatric assessments other than in a secure locked environment, to minimise the pressure on the few beds currently available.

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## 11 THE GUARDIANSHIP AND ADMINISTRATION ACT

The *Guardianship and Administration Act 1990* (WA) provides that when a person becomes a mentally impaired accused person under the MIA Act, the secretary of the MIARB shall notify the Public Advocate so that the Public Advocate can investigate whether or not the person is in need of an administrator of his estate and take such other action as he considers appropriate.<sup>161</sup> In order to ensure that no oversight occurs, we recommend that the MIA Act is amended to mirror clearly this provision and make clear that the Public Advocate is to obtain legal representation for the mentally impaired person.

<sup>159</sup> Stokes B., *Review of the Admission or Referral to and the Discharge and Transfer Practices of Public Mental Health Facilities/Services in Western Australia*, July 2012 at 115.

<sup>160</sup> Under s 164 of the *Family Law Act 1997* (WA), the court may order that a child's interests in proceedings are to be independently represented by a lawyer.

<sup>161</sup> Section 98 *Guardianship and Administration Act 1990* (WA). At 6.2 above we discuss the need for s 98 to be amended to include the need for legal representation.

### RECOMMENDATION 11

The MIA Act must be amended to require the Public Advocate to investigate whether or not a mentally impaired accused person is in need of a legal representation or an administrator of his or her estate, and to take any other appropriate action. This amendment would mirror the *Guardianship and Administration Act 1990 (WA)* and is intended to ensure that no oversight of this obligation occurs.

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## 12 PLACE OF DETENTION

People affected by mental illness and/or impairment are over-represented in the criminal justice system at all levels.<sup>162</sup> The evidence clearly demonstrates that incarceration in the prison system is likely to detrimentally impact on mental health.<sup>163</sup> Detaining mentally ill or mentally impaired individuals in a custodial setting means that their psychiatric needs are unlikely to be met.<sup>164</sup> Furthermore, they are denied access to PBS and Medicare entitlements. Indeed, studies show that mental health and well-being outcomes in the forensic mental health care system lag behind those of its civilian counterpart.<sup>165</sup>

Accordingly, it is wrong – and inconsistent with Australia's international obligations – to detain a person affected by mental illness and/or impairment in the prison system where there is a less restrictive alternative.<sup>166</sup> However, given the lack of declared places<sup>167</sup> in Western Australia and the shortage of available hospital beds, the practical effect of the MIA Act is that a significant proportion of mentally impaired accused persons are detained in prison, sometimes indefinitely<sup>168</sup> without any right to appeal or parole or the courts.

### 12.1 BUILD DECLARED PLACES

The absence of appropriate and available housing options in Western Australia is compounded by the operation of the MIA Act. Section 25 prioritises the forensic mental health system over the civilian system when it provides that all mentally impaired accused persons who are not already in an

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<sup>162</sup> For example, one study showed that 80% of NSW's prison population had at least one mental health disorder compared to 31% in the general population: Butler T., Andrews G., Allnut S., Sakashita C, Smith N and Basson J., 'Mental Disorders in Australian Prisoners: A Comparison with a Community Sample', vol 40(3) *Australian and New Zealand Journal of Psychiatry*, 2006: pp 272-6.

<sup>163</sup> Velamuri M and Stillman S *Longitudinal Evidence of the Impact of Incarceration on Labour Market Outcomes and General Well-Being*. HILDA Survey Research Conference, Melbourne Institute of Applied Economics and Social Research 2007.

<sup>164</sup> Submission No. 29 to the Inquiry into the Mental Health and Wellbeing of Children and Young People in Western Australia from Children's Court of Western Australia, p. 2.

<sup>165</sup> Butler T., Andrews G., Allnut S., Sakashita C, Smith N and Basson J., (2006) 'Mental Disorders in Australian Prisoners: A Comparison with a Community Sample', *Australian and New Zealand Journal of Psychiatry*, vol 40(3) pp 272-6

<sup>166</sup> Principle 20 of the United Nations *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care* states that defendants affected by mental illness or impairment should receive the best available mental health care and treatment to the fullest extent possible, with only such limited modifications and exceptions as are necessary in the circumstances.

<sup>167</sup> A declared place is a place declared by the Governor to be a place for the detention of mentally impaired accused.

<sup>168</sup> As at 11 September 2012, 15 of the 33 mentally impaired accused individuals under the statutory authority of the Board were currently detained in a prison.

authorised hospital have to spend at least 5 days in prison while the Board determines the appropriate place of detention.<sup>169</sup> Similarly, while section 24 provides that a mentally impaired accused person must be detained in an authorised hospital, a declared place, a detention centre or a prison, it contains conditions,<sup>170</sup> which impede the capacity of the MIARB to exercise its discretion justly in determining whether a mentally impaired accused person, especially absent legal representation must be detained in an authorised hospital. Given the vulnerability of a mentally impaired accused person, it is important that the MIARB has the flexibility to act in the accused's best interests rather than be held hostage to unclear<sup>171</sup> or unjustified<sup>172</sup> legislative prescription.

### Case study: Damien

**Damien is a young indigenous client of the Mental Health Law Centre who has been diagnosed with co-occurring mental illness, mental impairment and substance abuse. Damien was charged with aggravated burglary, and had available the defence of an unsound mind. As his charges represent his third strike, Damien faced a mandatory term of imprisonment. His diagnosis means he is likely to experience significant hardship in the prison environment. However, given the absence of an appropriate 'declared place' to detain Damien, his lawyer is unlikely to recommend he pursue the defence of an unsound mind as the successful defence would result in his indefinite rather than a defined detention in prison.**

#### RECOMMENDATION 12.1

Declared Places must be built as a matter of urgency in both the metropolitan area, and in the north and south regions and regional centres perhaps with Royalties for Regions funding.

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## 12.2 DO NOT CO-LOCATE MENTALLY IMPAIRED ACCUSED CHILDREN AND ADULTS

#### RECOMMENDATION 12.2

Children and adults must not be detained together in the same accommodation. Nor is it appropriate to keep mentally ill or impaired, children and young people with adolescents who are criminally culpable for serious offences. Western Australia requires a dedicated and adequately resourced forensic mental health unit for children and young people, and for adolescents.

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<sup>169</sup> S 25(2) MIA Act

<sup>170</sup> A mentally impaired accused person can only be detained in an authorised hospital if he or she has a mental illness that is capable of being treated; the treatment is required to protect the health and safety of the accused or another person or to prevent the accused doing serious damage to property; the accused person has refused or is unable to consent to the treatment and the treatment can only be satisfactorily provided in a hospital: s 24 MIA Act.

<sup>171</sup> For example, the MIA Act does not provide sufficient guidance regarding what constitutes a "mental illness that is capable of being treated" or what sort of treatment "can only be satisfactorily provided in a hospital".

<sup>172</sup> For example, we fail to understand the policy justification of the requirement that an accused must have refused or be unable to consent to treatment in order to be detained in an authorised hospital.

## 12.3 APPROPRIATE DESIGN OF MENTALLY IMPAIRED ACCUSED HOSPITAL ORDER, REMAND AND CUSTODY PLACE

The Centre welcomed announcements regarding the funding of declared places in the Perth metropolitan area.<sup>173</sup> We understand that the Government has committed \$17.7 million to establish two 10-bed Disability Justice Centres (MIA Act declared places) in the Perth metropolitan area as well as a prison in-reach program.

**It is crucial that the Government fast-track the establishment of declared places for the housing, treatment and care of mentally impaired accused persons under the MIA Act, and ensure that sufficient beds are available in these declared places to house mentally impaired accused persons affected by either a cognitive/intellectual disability, or a mental illness and/or impairment. One way to avoid community agitation against such proposals, would be for each local government area to be provided a facility for its own community members and request local government to find an appropriate site. This could be done rolled out as funding is available.**

We would welcome the opportunity to participate in the consultative process the Disability Services Commission is currently undertaking in this regard.

Currently, Western Australia is failing to provide an acceptable level of treatment, care and support to prisoners affected by mental illness and/or impairment. Urgent changes must be made to the delivery of treatment and care to mentally impaired accused persons currently detained in the prison system. We note that the forensic mental health system must be better integrated with the civil mental health system so that a more seamless transition occurs for prisoners affected by a mental illness and/or impairment as they move between the various systems.<sup>174</sup>

***“Difficulties with bed space and resources in the only authorised facility in Western Australia realistically able to take forensic patients (Frankland Centre/Graylands Hospital) is under great pressure. Prisoners are therefore released, prematurely, back to prison.”<sup>175</sup>***

### RECOMMENDATION 12.3

The MIA Act must be amended to ensure that mentally impaired accused persons are kept in places appropriately designed for their treatment and care, and not prisons.

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<sup>173</sup> On 24 July 2012 the Hon Helen Morton, Disabilities Services Minister, announced the development of two secure disability justice centres in the Perth metropolitan area. In mid-2011 the Disabilities Services Minister announced that a declared place for the housing of mentally impaired or unwell accused was close to completion: <http://au.news.yahoo.com/thewest/a/-/newshome/10013428/justice-closer-for-mentally-ill>

<sup>174</sup> While it is beyond the scope of this submission, the *Prisons Act 1981* should be amended to expressly require Corrective Services to deliver to all prisoners their prescribed medications in accordance with the prescribed manner of delivery, at least until the prisoner has been formally examined and assessed by the Prison psychiatrist and the Prison psychiatrist has consulted with the psychiatrist who prescribed the medications. Sudden withdrawal of a number of psychiatric medications can exacerbate the illness or cause side effects that pose a risk to health and breach the prison's duty of care to the prisoner.

<sup>175</sup> Vicker E. (Deputy State Coroner), Record of Investigation of Death Ref No 26/11 under the *Coroners Act 1996* (WA)



## 12.4 PLACE OF CARE FOR MENTALLY IMPAIRED ACCUSED PERSONS

Current policy regarding referral to Graylands Hospital, and particularly the Frankland Centre must be reviewed. While the MIA Act allows for detention of persons subject to a MIA Act Hospital Order to be detained in any authorised hospital, at present all such persons are referred to the Frankland Centre or the Plaistowe Ward at Graylands Hospital. It is a wrong and unnecessary depletion of the limited resources of the Frankland Centre to use it to triage, assess and treat non-violent offenders.

Furthermore, until appropriate 'declared places' are constructed in WA medium security housing alternatives must be available at Graylands and in regional areas. We also endorse the unanimous submissions to the Stokes Report that the current number of secure beds in the Frankland Centre is highly inadequate to meet demand.<sup>176</sup>

### RECOMMENDATION 12.4

Section 24(3)(a) MIA Act must be amended to ensure that mentally impaired persons who cannot necessarily be treated but can still benefit from care can be detained in an authorised hospital.

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## 12.5 HEARING BEFORE CHANGE OF PLACE OF CUSTODY

We also note that the health and well-being of a mentally impaired accused person is likely to be compromised by his or her arbitrary transfer within the prison system. In particular, this practice can make it difficult for people to maintain 'circles of support' - links with friends, family and community support networks - which will compound the isolation already experienced by mentally ill or impaired persons.

**Arbitrary relocation/transfer within the prison system can have particularly deleterious consequences for people from culturally and linguistically diverse backgrounds, and Aboriginal and Torres Strait Islander peoples, because it makes it difficult for people to maintain their family, friends and community support networks.**

### RECOMMENDATION 12.5

Section 26 MIA Act must be amended to provide the mentally impaired accused person with an opportunity to be heard prior to making a decision to change their place of custody.

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<sup>176</sup>Stokes B., *Review of the Admission or Referral to and the Discharge and Transfer Practices of Public Mental Health Facilities/Services in Western Australia*, July 2012 at 119.



## APPENDIX ONE: COMPARATIVE LAW

	WA <sup>177</sup>	VIC <sup>178</sup>	NSW <sup>179</sup>	SA <sup>180</sup>	QLD <sup>181</sup>	TAS <sup>182</sup>	NT <sup>183</sup>	ACT <sup>184</sup>	CTH <sup>185</sup>
<b>Legislative Coherence</b>									
Consolidated, cost-effective and mutually supportive civil and forensic mental health systems			Yes. <sup>186</sup>		Yes. <sup>187</sup>			Yes.	
<b>Procedural Fairness</b>									
Right to special hearing for unfit accused		Yes. S. 15	Yes. S.19(1)	Trial of objective elements of the offence: S.269FB, 269GA, 269MA, 269NA	Yes. Chapter 6, Part 4.	Yes. S.15.	Yes. S.43V	Yes. S.316 <sup>188</sup>	"Prima facie case": S20(3)

<sup>177</sup> *Criminal Law (Mentally Impaired Accused) Act 1996 (WA)*

<sup>178</sup> *Crime (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)*

<sup>179</sup> *Mental Health (Forensic Provisions) Act 1990 (NSW)*

<sup>180</sup> *Criminal Law Consolidation Act 1935 (SA)*

<sup>181</sup> *Criminal Code 1899 (Qld), Mental Health Act 2000 (Qld)*

<sup>182</sup> *Criminal Justice (Mental Impairment Act) 1999 (Tas)*

<sup>183</sup> *Criminal Code Act (NT)*

<sup>184</sup> *Crimes Act 1900 (ACT)*

<sup>185</sup> *Crimes Act 1914 (CTH)*

<sup>186</sup> Mental Health Review Tribunal plays significant role under forensic mental health legislation.

<sup>187</sup> Mental Health Court plays central role in both civil and forensic health systems.

<sup>188</sup> *Crimes Act 1900 (ACT)*

## APPENDIX ONE: COMPARATIVE LAW

	WA <sup>170</sup>	VIC <sup>171</sup>	NSW <sup>172</sup>	SA <sup>173</sup>	QLD <sup>174</sup>	TAS <sup>175</sup>	NT <sup>176</sup>	ACT <sup>177</sup>	CTH <sup>178</sup>
Right to be heard		Yes. S.36(1); 70	Yes. S. 34 <i>Mental Health Act 2007.</i>	Yes.	Yes. S. 403(a)	Yes. S.26.	Yes. S.432I.	Yes. S.80.	Yes. S.20BK, 20BD.
Right to legal representation		Yes. S36(3), 70	Yes. S. 15 <i>Mental Health Act 2007.</i>		Yes. S.403(b)		Yes. S.360.	Yes (children) S.81.	
Right to reasons for decision		Yes. S.66			Yes. S205.			Yes. S.138.	
Right to 6 monthly review			Yes. S. 37 <i>Mental Health Act 2007.</i>		Yes.		Yes.	Yes. S.72(2) <sup>189</sup>	Yes. S.20BD, 20BK.
Right to request review		Yes. S.31	Yes. S. 42 <i>Mental Health Act 2007.</i>	Yes. S.269P.	Yes. S.201.			Yes S.73 <sup>190</sup> , 137A.	
	WA <sup>170</sup>	VIC <sup>171</sup>	NSW <sup>172</sup>	SA <sup>173</sup>	QLD <sup>174</sup>	TAS <sup>175</sup>	NT <sup>176</sup>	ACT <sup>177</sup>	CTH <sup>178</sup>
Right to appeal		Yes. S.26(5); 34	Yes. s. 44 <i>Mental Health Act 2007.</i>	Yes. S.269Y.	Yes. Chapter 8.	Yes. S.36.	Yes. S432B.	Yes. S.141.	

<sup>189</sup> *Mental Health (Treatment and Care) Act 1994 (ACT)*

<sup>190</sup> *Mental Health (Treatment and Care) Act 1994 (ACT)*

## APPENDIX ONE: COMPARATIVE LAW

<b>Detention Orders</b>									
Always subject to judicial discretion		Yes. S.26(2)	Yes. S.39.	Yes. S.269O(1)	Yes. S.289.	Yes. S. 18, 21.	Yes. S.432.	Yes. S.323(1), 324(1), 329, 335(2) <sup>191</sup>	
Limited duration		Nominal term S.28	Limiting term S.23	Yes. S.269O(2)				Yes. S.303 <sup>192</sup> S. 75(1) <sup>193</sup>	Yes. S. 20BC, 20BJ.
Termination by a Court <sup>194</sup>		Yes. S.35	Yes. S.39	Yes. S269P		Yes. S.27	Yes. S.43ZH	Yes. S928R	
	WA <sup>170</sup>	VIC <sup>171</sup>	NSW <sup>172</sup>	SA <sup>173</sup>	QLD <sup>174</sup>	TAS <sup>175</sup>	NT <sup>176</sup>	ACT <sup>177</sup>	CTH <sup>178</sup>
<b>Children and Young People</b>									
Special procedures?					Yes. Chapter 6 Part 2.	Yes. S 39A.	Yes. S 52A.		Depends on state or territory law: S 20C

<sup>191</sup> Crimes Act 1900 (ACT)

<sup>192</sup> Crimes Act 1900 (ACT)

<sup>193</sup> Mental Health (Treatment and Care) Act 1994 (ACT)

<sup>194</sup> For the purposes of this table, 'court' is taken to include tribunal or board.

**THE STATE OF WESTERN AUSTRALIA -V- TAX [2010] WASC 208 (10 AUGUST 2010)**

**JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA**

IN CRIMINAL

**CITATION : THE STATE OF WESTERN AUSTRALIA -v- TAX [2010] WASC 208**

**CORAM : MARTIN CJ**

**DELIVERED : 18 JUNE 2010**

**PUBLISHED : 10 AUGUST 2010**

**FILE NO/S : INS KUN 7 of 2010**

**BETWEEN : THE STATE OF WESTERN AUSTRALIA**

Prosecution

AND

HAROLD TAX

Accused

*Catchwords:*

Whether accused mentally fit to stand trial - Limitations of legislative regime

*Legislation:*

*Criminal Code (WA), s 204, s 320(4)Criminal Law (Mentally Impaired Accused) Act 1996 (WA), s 8, s 9, s 12, s 19*

*Result:*

Indictment and committal quashed

Unconditional release order made

*Category: A*

**Representation:**

*Counsel:*

Prosecution : Ms L J Keane

Accused : Ms B M Lonnie

*Solicitors:*

Prosecution : Director of Public Prosecutions (WA)

Accused : Legal Aid (WA)

**Case(s) referred to in judgment(s):**

Nil

**MARTIN CJ:** (This judgment was delivered extemporaneously on 18 June 2010 and has been edited from the transcript.)

## Introduction

1 The question before me is whether Mr Harold Tax is mentally fit to stand trial in relation to two charges that have been brought against him. The first charge is the charge of doing an indecent act with intent to insult or offend. The allegations made by the State in relation to that charge are that at about 6.40 am on the morning of 13 December 2008 the complainant, who was then aged about 41 years of age, was jogging along a street in Halls Creek when she noticed a male person in the park adjacent to the street. As she approached the corner of the street she observed that person to be jogging three metres behind her and as she turned left into another street the accused, so the State says, continued to follow her.

2 The complainant looked at the face of the person following her and made certain observations, then crossed into another street, after which the State alleges that the accused called out, 'Mrs, Mrs, you want this one,' and made reference to his genital area. He grabbed his crotch and was pushing his hips forward in a thrusting motion. He then shouted out sexual words and ran up Thomas Street following the complainant, showing, on the State's case, a degree of persistence.

3 The State accepts that there are possible issues about identification regarding this charge, and I have been told by counsel for Mr Tax that there may be alibi evidence available by way of defence. So, in relation to the criteria that I am required to consider under s 19 of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) (the Act), it seems to me that I should regard that case as a reasonable case with potential issues that would require resolution if the matter were to proceed to trial.

4 The second charge brought against Mr Tax is that of indecent dealing with a child under the age of 13 years. The complainant in that case is a three-year-old female child. It is alleged by the State that at about 4 pm on 7 April 2009 in the Mulan Aboriginal community the complainant disappeared from the community store where she was with her mother. She was later found naked inside the residence occupied by the accused some distance from the store.

5 The State's case is that the complainant was lying naked on a mattress and the accused was kneeling next to her using his hand to touch her in the genital area. It is said by the State that the complainant ran from the residence and was located by her mother who was looking for her.

6 The State accepts that the current State of the evidence in relation to that charge is such that it could only be characterised as a poor State case. There is little admissible direct and cogent evidence relating to that offence, so although the allegations made by

the State in relation to this charge are, of course, very serious, they are offset by the lack of strength in the evidence the State currently has available to it to support them.

7 When a question arises as to the mental fitness of an accused person to stand trial, s 12 of the Act provides that the judge determining that question is to determine it on the balance of probabilities after inquiring into the question and informing himself or herself in any way the judge might think fit. In this case all the evidence that has been produced to me has essentially been hearsay and has taken the form of letters and statements from others. The State has not objected to that course and with respect to the State, that it is entirely appropriate because I am satisfied that the material that has been provided is reliable and that I can act upon it.

### **Does Mr Tax suffer a mental illness or impairment?**

8 The first question to assess is whether the accused person suffers either mental illness or mental impairment. Mental illness is defined by s 8 of the Act to mean 'an underlying pathological infirmity of the mind, whether of short or of long duration and whether permanent or temporary'. Mental impairment means 'intellectual disability, mental illness, brain damage or senility'. Section 9 of the Act sets out the criteria that the court is to apply in determining the fitness of an accused person to stand trial and includes seven alternative elements, including the accused's understanding of the nature of the charge, the requirement to plead, and the purpose of the trial.

9 Dealing with the first question, being the existence of mental illness or mental impairment, I have received in evidence a report from Dr Bala who is a psychiatrist who interviewed Mr Tax with the assistance of an interpreter in the Kukatja language. Dr Bala reports that Mr Tax was born on 13 June 1990 and is therefore currently 20 years of age. At the time of his birth his mother was only 12 years old. He was born after a prolonged labour and emergency caesarean section. He was also born prematurely at about 34 to 36 weeks. He was observed to be flat at birth, which is associated with impaired neurological functioning. He had an extremely small head circumference which placed him in the bottom tenth percentile of children his age on that measure. Mr Tax has significant intellectual disability. He cannot read or write. His schooling seems to have been very limited, although his general health is good. He currently works on the Community Development Employment Program (CDEP) and is sometimes assisted in that regard by his uncle, Mr Johnny Gordon.

10 Dr Bala examined Mr Tax and considered that he had an intellectual disability. He made little spontaneous speech, even through the interpreter, in the course of interview. Mr Tax also advised Dr Bala that he regularly hears lots of voices both during the day and the night. Dr Bala concluded that it was unclear whether Mr Tax suffered from an underlying psychiatric illness, but he did conclude that he suffers a moderate degree of intellectual impairment. He considers that degree of mental impairment to amount to intellectual disability so as to fall within the definition of 'mental impairment' to which I have already referred.

11 Dr Bala is currently unable to identify the causes of that intellectual impairment and considers that Mr Tax would benefit from a thorough medical evaluation. Those causes might include autism spectrum disorder or organic disorders such as epilepsy. Nutritional deficiency, birth trauma or foetal alcohol syndrome are all possible causes although Dr Bala is unable at this time to indicate whether any of those conditions are the cause of the mental impairment which he has identified. There is clearly, in Dr Bala's view, a deficit in communication, consequent reduction in reciprocal social interaction and a capacity to develop and maintain relationships which extends well beyond cultural and language factors.

12 In relation to the specific criteria provided by s 9 of the Act, Dr Bala has provided an opinion that Mr Tax does not at all appear to know what he has been charged with; he does not understand the significance of the difference between pleading guilty and not guilty, despite repeated efforts to explain that to him; he does not seem to understand the trial process and the purpose of a trial, again despite efforts to describe that to him; and he seems to lack the capacity to challenge jurors and other witnesses in an adversarial setting.

13 Mr Bala also considers that Mr Tax may not be able to follow the course of the trial satisfactorily because of deficits that he has in maintaining attention and focus. He also considers that Mr Tax would be unable to understand the substantial effect of the evidence presented during the trial and therefore not be able to fully defend the charge, given his cognitive impairment. So, in the view of Dr Bala, all seven criteria specified by s 9 are met in this case.

14 There is no evidence to the contrary. The State accepts that I should accept the evidence of Dr Bala. I therefore find, based on that evidence, that each of the seven criteria set out in s 9 is satisfied. I conclude therefore in terms of the Act that Mr Tax suffers mental impairment that renders him mentally unfit to stand trial.

### **Will Mr Tax become mentally fit to stand trial?**

15 The next question under s 19 of the Act that I must address is whether I am satisfied that the accused will not become mentally fit to stand trial within six months after my finding of mental unfitness. In this regard the evidence of Dr Bala is clear. The cognitive impairment which Mr Tax suffers, and which gives rise to the consequences enunciated by Dr Bala, is unfortunately a permanent condition and is not going to change, in his view. I therefore find also that the accused will not become mentally fit to stand trial within six months.

### **Unconditional release or custody order - legislative deficiencies**

16 The next question which arises under s 19(4), after quashing the indictment in respect of the first charge and the committal in respect of the second count, is whether I should release the accused or make a custody order. I cannot take the latter course until, under s 19(5), I am satisfied that a custody order is appropriate having regard to the strength of the evidence against the accused, the nature of the alleged offences and the



nature of the alleged circumstances of their commission, the character, antecedents, age, health and mental condition of the accused, and the public interest.

17 I have already referred to the first two of those factors, that is, the strength of the evidence and the nature of each alleged offence, and I will refer to the character of the accused and the public interest in due course, but before doing that I should point out that there are, as it seems to me, a number of significant deficiencies in the legislation and the regime which has been created under this legislation.

18 The first significant deficiency, as it seems to me, is that under s 19(4) I have only two choices, being, an unconditional release or a custody order. There is no intermediate course available to the court such as a conditional release in terms which would enable the court to fashion conditions which would enhance the protection and the safety of the community and perhaps enhance the treatment program that a mentally unfit accused person might need in order to be properly cared for. That is, I think, the first deficiency.

19 The second deficiency is, as counsel for the State has pointed out, if I were to make a custody order there is no declared place to which Mr Tax could be taken and, because he does not suffer an illness, he could not be placed in a hospital. So, the effect of making a custody order is that Mr Tax would be imprisoned indefinitely. My only choices are between an unconditional release and indefinite imprisonment without significant prospect of treatment of the conditions which have made Mr Tax unfit to plead or which might have precipitated the offending which the State alleges. That, it seems to me, is an unsatisfactory situation and does not provide the court with the range of remedies that the court should have to deal with complex and multifaceted situations such as this. Nevertheless, I must do the best I can in those circumstances.

20 On the question of whether or not there should be an unconditional release or a custody order, I have received a volume of material which has been diligently prepared and compiled by those representing Mr Tax. I am very grateful to them for the effort that they have put into the investigation of this case and the compilation of the evidentiary materials that have been presented to the court. I will briefly run through those materials.

21 I have received a letter from Mr Kopp who is the acting chairperson of the Mulan Aboriginal community, and that is the community at which Mr Tax resides. He advises that Mr Tax is one of the workers in the CDEP program that he supervises, that he has known him a long time, that everybody in the community is keeping an eye on him and that Mr Kopp will continue to keep an eye on him and watch out for him.

22 I have also received a letter from Mr Yoomarie who is the chairman of the Mulan Aboriginal Corporation. He advises the court, I am told on behalf of the council of the community, that the community has no concerns with Mr Tax's continued presence in the community and he advises also that Mr Tax has joined the work team and will be an active participant in the CDEP program.

23 I have also received a letter from the Palyalatju Maparna Health Committee. They advise that they provide services to the communities surrounding Balgo, including

Mulan. There is a men's program coordinator who provides services in addition to a local service provided by a Mr Bede Lee. Mr Lee is Mr Tax's uncle, and Mr Lee would be available to provide counselling and support to Mr Tax in the event that a release order is made.

24 I have also received a letter from the principal of the Catholic school in Mulan who advises that after being notified of Mr Tax's charges he met with the staff of the school. He has reported to me the various protective strategies which the school has in place in order to protect the children in that school. It seems that there is a regime in place that would be of assistance in protecting the children from any risk of repetition of the sort of behaviour that is indicated by the second charge although I note again the State's concession that there is not a strong case in relation to that charge.

25 Mr Phillips, who is a mental health professional employed by the Kimberley Mental Health and Drug Service, has indicated that he would be prepared to assess Mr Tax on his next visit to Mulan and provide an assessment of whether further treatment would be of assistance to Mr Tax. Again I think that is a very positive step.

26 Ms Wendy Burns from the Department of Community Development advises me that the Department for Child Protection does take steps and will monitor the situation in Mulan and do its best to ensure that there are protective behaviours in place in that community to protect children in that community from possible predatory behaviour, including possible behaviour by Mr Tax.

27 I have also received a letter containing material provided by Mr Tax's biological mother and her two sisters, who Mr Tax also regards as his mothers. They are the people with whom Mr Tax lives and who take responsibility for supervising his behaviour. Philippa Tax is the main one looking after Mr Tax, but the family act and work together and the support of these three women for Mr Tax is evident from their attendance in court this morning.

28 Mr Tax also receives support from Johnny Gordon, Mr Tax's uncle who sometimes works with Mr Tax. He is in Derby at the moment but he may return to Mulan and he provides possible support for Mr Tax. The three mothers of Mr Tax also advise me that the community is structured in such a way and they supervise Mr Tax to ensure that he does not play with the little kids any more. The community is aware of the general nature of the charges that have been brought, so steps are also in place within the community to make sure that children do not come near Mr Tax.

29 So the situation is that there are positive signs of steps that might be taken, albeit of a limited nature, given the limited range of services available in remote communities like Mulan. There are some positive steps on the horizon and the community has itself taken steps to minimise the prospect of any significant reoffending behaviour. Of course, as I have already indicated, under the Act there is nothing I can do to impose conditions that would improve the likelihood of those positive steps continuing indefinitely. I have to take on faith the proposition that those steps will remain in place. As I have already indicated, that seems to me to be something of a deficiency in this legislation.

30 I am presented with two stark alternatives, either indefinite imprisonment on the one hand, or, on the other, the maintenance of a situation in which whatever can be done, despite the limitations imposed by the limited range of services available in Mulan, is being done to assist Mr Tax to live within the community and hopefully live a positive and constructive life.

31 It seems to me that the public interest, having regard to the other factors mentioned by s 19(5), that is, Mr Tax's character, antecedents, age and health and mental condition, all strongly favour the making of a release order and so I will make orders quashing the indictment in the case of the first count, dismissing the charge and quashing the committal in the case of the second count, and releasing Mr Tax under s 19(4).

## APPENDIX THREE: SUMMARY SUBMISSIONS

**NB: Click on title to be taken to the submission in the body of the document**

**The principal recommendation of this submission is:**

### [RECOMMENDATION 1: REPEAL CRIMINAL LAW \(MENTALLY IMPAIRED ACCUSED\) ACT 1996](#)

That as a matter of urgency the MIA Act and the *Mental Health Act 1996* must be repealed and replaced by a consolidated single Act, under the responsibility of the Minister for Mental Health, which incorporates the recommendations contained below.

**In the alternative, we recommend amendment to the MIA Act as follows:**

### [RECOMMENDATION 2: DEFINITIONS](#)

#### [RECOMMENDATION 2.1: Definition of Mental Illness](#)

**Mental Illness** in section 8 of the MIA Act must be amended as follows:

1. For the purposes of this Act a person has a mental illness if the person has a condition that:
  - a. is characterised by a disturbance of thought, mood, volition, perception, orientation or memory; and
  - b. significantly impairs (temporarily or permanently) the person's judgment or behaviour.
2. A person does not have a mental illness merely because one or more of these things apply:
  - a. the person holds, or refuses or fails to hold, a particular religious, cultural, political or philosophical belief or opinion;
  - b. the person engages in, or refuses or fails to engage in, a particular religious, cultural or political activity;
  - c. the person is, or is not, a member of a particular religious, cultural or racial group;
  - d. the person has, or does not have, a particular political, economic or social status;
  - e. the person has a particular sexual preference or orientation;
  - f. the person is sexually promiscuous;
  - g. the person engages in indecent, immoral or illegal conduct;
  - h. the person has an intellectual disability;
  - i. the person uses alcohol or other drugs;
  - j. the person is involved in, or has been involved in, personal or professional conflict;
  - k. the person engages in anti-social behaviour;
  - l. the person has at any time been:
    - i. provided with treatment; or
    - ii. admitted by or detained at a hospital for the purpose of providing the person with treatment.

## APPENDIX FOUR: SUMMARY SUBMISSIONS

Subsection (2)(i) does not prevent the serious or permanent physiological, biochemical or psychological effects of the use of alcohol or other drugs from being regarded as an indication that a person has a mental illness.

A decision about whether or not a person has a mental illness must be made in accordance with internationally accepted standards prescribed by the regulations for this subsection.

### RECOMMENDATION 2.2: Definition of Mental Impairment

The definition of mental impairment in section 8 of the MIA Act must be amended as follows:

**mental impairment** means a cognitive impairment, intellectual disability or personality disorder, however and whenever caused, whether congenital or acquired, but does not include deliberate intoxication.

### RECOMMENDATION 3: STATEMENT OF OBJECTS, PURPOSES AND RIGHTS

#### RECOMMENDATION 3.1: Objects of the Act

The MIA Act must be amended to include a statement of objects to guide its implementation and interpretation by boards, courts and service providers; and to help ensure that consumers, carers, advocates, service providers and the community can understand their rights and responsibilities. This new section must include the following principles:

Objects of Act

1. To ensure that persons affected by mental illness and/or impairment are identified early in their contact with the criminal justice system and that they are diverted away from corrective services;
2. To ensure that persons affected by mental illness and/or impairment receive the best possible treatment, care and rehabilitation, not punishment;
3. To ensure that persons affected by mental illness and/or impairment are given the opportunity to be heard in relation to decisions affecting them, and that all allegations made in relation to a person are properly tested;
4. To ensure that persons affected by mental illness and/or impairment have access to free legal representation, to the extent that he or she does not have sufficient means to pay for it;
5. To ensure that all children affected by mental illness and/or impairment have legal representation;
6. To ensure that persons affected by mental illness and/or impairment have access to health care and support services at least equivalent to the rest of the community;
7. To ensure that persons affected by mental illness and/or impairment receive the best care and treatment with the least restriction of their freedom and the least interference with their rights and dignity;
8. To ensure the proper protection of persons affected by mental illness and/or impairment;
9. To ensure the proper protection of the public from a well-founded risk of harm;
10. To ensure that all persons and authorities performing functions under the Act are sensitive and responsive to diverse individual circumstances including but not limited to those relating to gender, age, culture, spiritual beliefs, family and life style choices, and whether or not the person affected by mental illness and/or impairment is a person of Aboriginal or Torres Strait Islander background;

## APPENDIX FOUR: SUMMARY SUBMISSIONS

11. To ensure that all decisions regarding persons affected by mental illness and/or impairment are taken in accordance with the principle of least restriction; and
12. To ensure that all decisions about affected by mental illness and/or impairment who are subject to this Act are taken in accordance with Australia's international human rights obligations.

### **RECOMMENDATION 3.2: Reasons for Performing Functions Bound By Objects**

The MIA Act must be amended to ensure that a person performing functions under the Act does so in a manner, which supports the implementation of the objects of the MIA Act.

### **RECOMMENDATION 3.3: Protection of Rights**

The MIA Act must be amended to include a statement of rights in order to highlight the importance of protecting and to protect the rights of people affected by mental illness and/or impairment throughout their involvement with the criminal justice system. This new section must include the following principles:

Protection of rights

1. Persons affected by mental illness and/or impairment have the right to be dealt with in court and in proceedings of the MIARB in a manner that respects their rights and dignity;
2. Persons affected by mental illness and/or impairment have the right to be dealt with in court and in proceedings of the MIARB in a manner that accords with principles of natural justice, including fairness, transparency and timeliness in decision-making, and the right to appeal;
3. Persons affected by mental illness and/or impairment have the right to be provided with medical and/or psychiatric treatment and/or care in an appropriate environment;
4. Decisions relating to persons affected by mental illness and/or impairment must provide for proper and timely access to health care and disability support services;
5. Decisions relating to persons affected by mental illness and/or impairment must be sensitive and responsive to diverse individual circumstances including those relating to gender, age, physical health, culture, spiritual beliefs, family and life style choices;
6. Decisions relating to persons affected by mental illness and/or impairment, including options for care, treatment and rehabilitation, must be taken in accordance with the principle of least restriction;
7. The wishes of persons affected by mental illness and/or impairment and/or their nominated person must be taken into account in any determination regarding the place of detention under a Custody Order; and
8. Persons affected by mental illness and/or impairment have the right to timely legal advice and representation, which to the extent that he or she does not have sufficient means to pay, must be free of charge.

### **RECOMMENDATION 4: THE MENTALLY IMPAIRED ACCUSED REVIEW BOARD**

#### **RECOMMENDATION 4.1: Abolish Mentally Impaired Accused Review Board**

The MIARB must be abolished and its duties transferred to the Mental Health Review Board.

The MIA Act must be amended such that references to the Mentally Impaired Accused Review Board (the MIARB) are repealed and replaced with references to the Mental Health Review Board, and s. 126 of the *Mental Health Act 1996* (Members of Board) must be amended to include a psychologist so as to enable the Mental Health Review Board to assess accused persons affected by mental or cognitive impairment, and potential risk.

## APPENDIX FOUR: SUMMARY SUBMISSIONS

Supervision of a MIA person on Conditional Release Order should not be by Corrective Services but should be by Mental Health and/or Disability Services staff.

### **RECOMMENDATION 4.2: Procedural Fairness: Right to be Heard**

The MIA Act must be amended to provide the right to be heard (by the person the subject of the Custody Order and their legal representative) in all MIARB matters concerning a mentally impaired accused person, and particularly in advance of any review, amendment, suspension or termination of the conditions of a Custody Order or Conditional Release Order.

### **RECOMMENDATION 4.3: Right to Legal Counsel**

The MIA Act must be amended to require that free legal advice and representation must be available – and offered – to all mentally impaired accused persons in advance of any review, amendment, suspension or termination of the conditions of a Custody Order or Conditional Release Order. Where the MIA Person is unable, because of incapacity, to obtain and instruct a lawyer, one should be appointed on their behalf.

### **RECOMMENDATION 4.4: Appoint Guardian**

Section 98 of the *Guardianship and Administration Act 1990* (WA) must be amended to require the Public Advocate to obtain legal help for a mentally impaired accused person, as needed.

### **RECOMMENDATION 4.5: Appoint Nominated Person**

The MIA Act must be amended to enable a mentally impaired accused person to appoint a Nominated Person (such as a carer or legal representative) who must be notified in a timely way of any changes or proposed changes in his or her MIA Act detention and treatment, including any upcoming reviews of his or her detention status.

### **RECOMMENDATION 4.6: Procedural Fairness: Allegations**

Section 37 of the MIA Act must be amended to ensure that in making a decision with respect to a breach of release conditions, the MIARB provides a high standard of procedural fairness including *inter alia*, recognition of the right of a mentally impaired accused person to be heard, to respond to allegations, to be represented by legal counsel, to obtain reasons for decision, and the right to test any evidence tendered to the MIARB.

### **RECOMMENDATION 4.7: Procedural Fairness: Leave**

Section 28 and s. 29 of the MIA Act must be amended to ensure that in making a decision whether or not to cancel a leave of absence, the MIARB provides a high standard of procedural fairness including, *inter alia*, recognition of the right of a mentally impaired accused person to be heard, to respond to allegations, to be represented by legal counsel and to obtain reasons for decision.

### **RECOMMENDATION 4.8: Protect Legal Representatives**

The MIA Act must be amended to ensure that if a mentally impaired accused person is unable to instruct competently his or her legal representative on any question relating to a matter under the MIA Act, the legal representative can exercise his or her independent discretion in order to act in what he or she genuinely believes to be the person's best interests, until a guardian is appointed.

### **RECOMMENDATION 4.9: Procedural Fairness: Custody Review**

Section 33 of the MIA Act must be amended to ensure that in undertaking review of the detention of mentally impaired accused persons, the MIARB provides a high standard of procedural fairness including, *inter alia*, increasing the frequency of reviews, and recognising the right of a mentally impaired accused person to request review, appear, access relevant documents in a timely way, be represented by legal counsel, and obtain reasons for decision.

### **RECOMMENDATION 4.10: Review of Detention**



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The MIA Act must be amended to ensure that detention under the MIA Act is subject to review at least once every six months and more often on request by the mentally impaired accused person who can demonstrate changed circumstances, with an automatic no costs recourse to the Supreme Court if the mentally impaired accused person affected by the MIARB's failure to have a hearing according to law within a prescribed period, and/or an appeal right against a MIARB decision.

MIARB should be audited on a regular basis by the Inspector of Custodial Services.

### **RECOMMENDATION 4.11: Criteria for Review**

Section 33(5) of the MIA Act must be amended to limit the factors that the MIARB can/must take into account in deciding whether or not to recommend the release of a mentally impaired accused person to those criteria solely and specifically related to the safety of the community.

### **RECOMMENDATION 4.12: Removing Offensive Criteria**

References in s 33(5) of the MIA Act to the ability of the accused to take care of his or her day to day needs, obtain any appropriate treatment and resist serious exploitation as relevant criteria must be deleted. It is offensive that not meeting such criteria can require someone to be detained indefinitely in a prison, without recourse to the Courts.

### **RECOMMENDATION 4.13: Mentally Impaired Accused Review Board Members Oversight**

MIARB members must be subject to certain standards of conduct and there must be a remedy when a MIARB member falls short of those standards: for example as provided for in the *State Administrative Act 2004* (WA), and its Regulations and Rules.

### **RECOMMENDATION 4.14: Appeal from Decisions of the Mentally Impaired Accused Review Board**

The MIA Act must be amended to allow any person, with a sufficient interest in a matter, to appeal a decision of the MIARB to the court of original jurisdiction or - when operational - the Mental Health Court, and then to the Supreme Court and Court of Appeal.

### **RECOMMENDATION 4.15: Mentally Impaired Accused Review Board and the Prisoners Review Board Interaction**

Section 42 of the MIA Act should be amended to ensure that membership of the MIARB does not include any members of the Prisoners Review Board. Furthermore, supervision of mentally impaired accused persons should not be the corrective services, but should be the forensic mental health service along with members of the Disability Service as needed.

### **RECOMMENDATION 4.16: Relationship between MIARB Decisions and Prisoners Review Board**

The relationship between the MIA Act and the Prisoners Review Board must be clearly established in both Acts, so that Simon (see below), and others like him cannot fall between the cracks of both jurisdictions and end up with no review of an indefinite detention, by either Board.

### **RECOMMENDATION 4.17: Appeal Rights**

There must be an avenue of appeal (to a court) regarding decisions of Mentally Impaired Accused Review Board and/or Prisoners Review Board in respect of mentally impaired accused persons subject to the MIA Act.

### **RECOMMENDATION 4.18: Freedom of Information and the Prisoners Review Board**

PRB documents are not subject to FOI but MIARB documents are. Both acts must provide that when a mentally impaired accused person is subject to both Acts and the MIARB relies on PRB records, those records must be disclosed to the prisoner for the purpose for the MIARB review. Furthermore, there must be a specific right to all documents under the MIA Act, as there is under the *Mental Health Act 1996* for involuntary records, rather than relying on the FOI Act.



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### **RECOMMENDATION 4.19: Privacy and Confidentiality**

The MIA Act must be amended to ensure the protection of a person's private and confidential information at all stages of his or her involvement with the criminal justice system and the MIA Act, and provide criminal sanctions for breaches.

### **RECOMMENDATION 4.20: Record of Decision**

The *Criminal Law (Mentally Impaired Accused) Regulations 1997* (the Regulations) must be amended to include a prescribed form for the record of decisions made under s. 33 of the MIA Act. The Regulations must also prescribe the minimum requirements for psychiatric and psychological reports to the MIARB.

### **RECOMMENDATION 4.21: OPA and Record of MIARB decision**

Section 34 of the MIA Act must be amended to require the MIARB to provide a copy of the record of any decision made under section 33 to the Office of the Public Advocate.

## **RECOMMENDATION 5: FITNESS TO STAND TRIAL**

### **RECOMMENDATION 5.1: Meaning of Fitness to Be Tried**

The public interest in the democratic principles embodied in trial fairness demands that MIA Act s. 9 is amended to ensure that a mentally impaired accused person cannot be found to be fit for trial unless he or she is meaningfully – and rationally – able to participate in proceedings, which must include whether or not he or she is able to instruct his or her legal representative.

### **RECOMMENDATION 5.2: Fitness and Instructions**

Section 9 of the MIA Act must be amended to require the presiding judicial officer to consider whether or not the accused person can adequately instruct his or her legal representative as one of the factors contributing to a determination of unfitness.

### **RECOMMENDATION 5.3: Fitness: Rational Decisions**

Section 9 of the MIA Act must be amended to require the presiding magistrate or judge to consider whether or not the accused person is able to make rational decisions as one of the factors contributing to a determination of unfitness.

### **RECOMMENDATION 5.4: Did The Mentally Impaired Accused Person Carry Out The Objective Elements Of The Offence?**

The MIA Act must be amended to provide that if an accused person is found unfit to stand trial, a court must not make a Custody Order in respect of the accused unless the court is satisfied to a high degree of probability that the accused carried out the objective elements of the alleged offence. . This must be an ongoing obligation so that subsequent evidence can be introduced and the Custody Order discharged at any time when later evidence reveals that the objective elements of the offence are not demonstrated.

### **RECOMMENDATION 5.5: Appeal Rights**

The MIA Act must be amended to ensure that any accused person in respect of whom MIA Act orders have been made following a finding of unfitness has the right to appeal to the Supreme Court the finding and associated orders throughout the period that he or she remains subject to the orders.

### **RECOMMENDATION 5.6: Sentencing Options**

Sections 16 and 19 of the MIA Act must be amended to broaden the range of sentencing options available to a presiding magistrate or judge in circumstances of unfitness to stand trial, and to ensure that the court cannot make a Custody Order for an unfit accused person unless

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imprisonment is available for the alleged offence, the accused has been found to have carried out the original offence, and a Custody Order is necessary, on the basis of objective evidence of risk, to protect the health and safety of the community.

### **RECOMMENDATION 6: UNSOUND MIND**

#### **RECOMMENDATION 6.1: Schedule One Offences**

Schedule One and section 21(a) MIA Act must be repealed so that there are no offences for which the Court is required to make a mandatory Custody Order. In the alternative, Schedule One must be reviewed with the objective of significantly reducing the number of offences that require the imposition of a Custody Order without consideration of or reference to the circumstances of the offence.

#### **RECOMMENDATION 6.2: Costs**

Section 4(2) of the *Official Prosecutions (Accused's Costs) Act 1973* must be amended so that an accused who is acquitted of a charge on account of an unsound mind can apply for a costs order against the Crown.

#### **RECOMMENDATION 6.3: Criminal Record**

The current practice that an accused person who has been acquitted of a charge on account of an unsound mind does not have a conviction recorded on his or her criminal record should be codified in the MIA Act for reasons of predictability and certainty.

### **RECOMMENDATION 7: DIMINISHED RESPONSIBILITY**

The *Criminal Code Act Compilation Act 1913 (WA)* must be amended to introduce the partial defence of diminished responsibility so as to increase the sentencing options available to a judge in circumstances where an accused person was affected by a mental illness and/or impairment. The partial defence must include the following elements:

Diminished Responsibility for Abnormality of Mind

That at the time of the offence the accused person was suffering from a disturbance of thought, mood, volition, perception, orientation or memory that substantially impaired the accused in one of the following ways:

- The capacity to understand the nature of the relevant act (or omission);
- The capacity to understand that the act (or omission) was wrong; or
- The capacity to control the act (or omission).

### **RECOMMENDATION 8: CUSTODY ORDERS**

#### **RECOMMENDATION 8.1: Duration of Custody Orders**

Section 38 of the MIA Act must be amended so that a mentally impaired accused person cannot be detained longer than he or she would have been imprisoned if found guilty of the original offence charged.

#### **RECOMMENDATION 8.2: Simple and Summary Offences**

The MIA Act must be amended to ensure that Custody Orders are not available for summary offences. In the alternative, if a Magistrate in summary jurisdiction is of the opinion that a Custody Order should be made in respect of a mentally impaired accused person, the Magistrate must refer the matter to the Supreme Court for determination.

#### **RECOMMENDATION 8.3: Breach of an Order: Court Hearing**

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Breach of an Intensive Supervision Order must be subject to a court hearing with evidence from psychiatrists on risk factors, and not a mandatory Custody Order as is currently the case.

### **RECOMMENDATION 8.4: Cancellation of a Community Based Order: Court Hearing**

Cancellation of a Community Based Order must be subject to an open hearing with representation so that the client can respond to the evidence alleging breach of the order.

### **RECOMMENDATION 8.5: Breach Community Based Order: Decisions**

The Attorney General must not have power to decide the issue of a Community Based Order. This must be a court decision.

### **RECOMMENDATION 8.6: Sentencing Options**

Section 22 of the MIA Act must be amended to ensure that if an accused person is acquitted of an offence on account of an unsound mind, a court must not make a Custody Order in respect of the accused unless the statutory penalty for the alleged offence is or includes imprisonment and in all the circumstances the person would have been imprisoned had they been found guilty of the offence.

### **RECOMMENDATION 8.7: Where the Statutory Penalty Does Not Include Imprisonment**

Section 22 of the MIA Act must be amended to ensure that if an accused person is acquitted of an offence on account of an unsound mind, a court must not make a Custody Order in respect of the accused unless the statutory penalty for the alleged offence is or includes imprisonment and in all the circumstances the person would have been imprisoned if found guilty.

### **RECOMMENDATION 8.8: Criteria for Custody Order**

The MIA Act must be amended to ensure that if an accused person is found unfit to stand trial or acquitted of an offence on account of an unsound mind, a court must not make a Custody Order in respect of the person unless it is satisfied that a Custody Order is necessary, on the basis of objective evidence of risk, to protect the health and safety of the community.

### **RECOMMENDATION 8.9: Decision Making: Grant or Revocation Of Leave Of Absence**

The MIA Act must be amended to provide that a mentally impaired accused person is to be released by order of the MIARB or the original or higher court, not the Governor.

### **RECOMMENDATION 8.10: Executive Discretion**

Section 28 of the MIA Act must be amended to provide that the MIARB is responsible for granting and revoking a leave of absence from a Custody Order.

### **RECOMMENDATION 8.11: Breach Of Australia's International Human Rights Obligations**

The MIA Act must be consistent with Australia's Human Rights Obligations.

## **RECOMMENDATION 9: CHILDREN AND YOUNG PEOPLE**

### **RECOMMENDATION 9.1: No Custody Orders for Juveniles**

The MIA Act must be amended so that MIA Act Custody Orders are not available for juvenile accused persons.

### **RECOMMENDATION 9.2: Further Resources for Children's Court**

Children's Court Magistrates must be provided with comprehensive services, including 24 hour access to psychiatrists, a specialist forensic team and other additional resources as necessary to preside over all MIA Act matters.

## **RECOMMENDATION 10: HOSPITAL ORDERS AND INVOLUNTARY PATIENTS**

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Section 5(5) MIA Act must be amended so that it is open to a presiding magistrate or judge to make a Hospital Order irrespective of whether or not the person is an involuntary patient. Furthermore, a magistrate should have the option of ordering psychiatric assessments other than in a secure locked environment, to minimise the pressure on the few beds currently available.

### **RECOMMENDATION 11: THE GUARDIANSHIP AND ADMINISTRATION ACT**

The MIA Act must be amended to require the Public Advocate to investigate whether or not a mentally impaired accused person is in need of a legal representation or an administrator of his or her estate, and to take any other appropriate action. This amendment would mirror the *Guardianship and Administration Act 1990* (WA) and is intended to ensure that no oversight occurs.

### **RECOMMENDATION 12: PLACE OF DETENTION**

#### **RECOMMENDATION 12.1: Build Declared Places**

Declared Places must be built as a matter of urgency in both the metropolitan area, and in the north and south regions and regional centres.

#### **RECOMMENDATION 12.2: Do Not Co-Locate Mentally Impaired Accused Children and Adults**

Children and adults must not be detained together in the same accommodation. Nor is it appropriate to keep mentally ill or impaired, children and young people with adolescents who are criminally culpable for serious offences. Western Australia requires a dedicated and adequately resourced forensic mental health unit for children and young people, and for adolescents.

#### **RECOMMENDATION 12.3: Appropriate Design of Mentally Impaired Accused Hospital Order, Remand And Custody Place**

The MIA Act must be amended to ensure that mentally impaired accused persons are kept in places appropriately designed for their treatment and care, and not prisons.

#### **RECOMMENDATION 12.4: Place of Care For Mentally Impaired Accused Persons**

Section 24(3)(a) MIA Act must be amended to ensure that mentally impaired persons who cannot necessarily be treated but can still benefit from care can be detained in an authorised hospital.

#### **RECOMMENDATION 12.5: Hearing Before Change Of Place Of Custody**

Section 26 MIA Act must be amended to provide the mentally impaired accused person with an opportunity to be heard prior to making a decision to change their place of custody.