



**WESTERN AUSTRALIA**

**MENTALLY IMPAIRED DEFENDANTS REVIEW  
BOARD**

**ANNUAL REPORT**

**for the year ended 30 June 2004**

***Criminal Law (Mentally Impaired Defendants) Act  
1996***

# **CRIMINAL LAW (MENTALLY IMPAIRED DEFENDANTS) ACT 1996**

**TO:           The Attorney General**  
**FROM:       The Mentally Impaired Defendants Review Board**

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## ***REPORT PURSUANT TO SECTION 48***

*“Before 1 October in each year, the Board is to give a written report to the Minister on -*  
*(a) the performance of the Board’s functions during the previous financial year;*  
*(b) statistics and matters relating to mentally impaired defendants; and*  
*(c) the operation of this Act so far as it relates to mentally impaired defendants.”*

This report covers the period 1 July 2003 to 30 June 2004.

## ***MENTALLY IMPAIRED DEFENDANTS REVIEW BOARD MEMBERSHIP***

The following persons constituted the Mentally Impaired Defendants Review Board as at 30 June 2004:-

Chairman:	H A Wallwork QC
Members:	Ms C Chamarette – Community member Ms S McDonald – Psychologist member Dr N Morgan – Community member Dr A Pulella – Psychiatrist member Dr M Winch – Community member
Deputy Members:	Dr P Burvill - Deputy to Dr Pulella Mr P McEvoy - Deputy to Ms McDonald Rev D Robinson - Deputy to Ms Chamarette Mr C Somerville – Deputy to Dr Winch Mrs J Thompson - Deputy to Dr Morgan
Legal Research Officer:	Ms I Morgan
Acting Secretary:	Ms B Boyle
Co-ordinator:	Ms A Smylie

During part of the year, the Honourable T A Walsh QC and His Honour G T Sadleir performed duties as Chairman of the Parole Board. Mr Wallwork was appointed as Chairman of the Board on 1 April 2004.

## ***PREAMBLE***

### **1. STATISTICAL OVERVIEW**

The statistics set out in this report provide one measure of the increasing workload of the Board over the last 12 months. The Board met on 29 occasions (33 the previous year) and made 176 decisions in respect of 33 mentally impaired defendants (118 decisions in the previous year in respect of 29 mentally impaired defendants).

The Governor approved 9 Orders for Leave of Absence (3 in the previous year) and the Board amended 17 Orders for Leave of Absence (5 in the previous year).

It is of concern that the number of Aboriginal mentally impaired defendants has increased significantly over the last 12 months (increase from 6 to 10 males from the previous year).

The statistics in themselves do not reveal the increasing complexity of the cases, many of which involve people with multiple disabilities and a complex balancing of the rights of mentally impaired defendants and those of the community.

### **2. UPDATE ON REVIEW OF *CRIMINAL LAW (MENTALLY IMPAIRED DEFENDANTS) ACT 1996* AND THE *MENTAL HEALTH ACT 1996***

In December 2003, a Report on the Review of the *Criminal Law (Mentally Impaired Defendants) Act 1996* and the *Mental Health Act 1996* was presented to the Minister for Health. The Board considers that the following issues should be addressed as a matter of priority:-

#### **(a) *Shortage of beds at the Frankland Centre***

The Frankland Centre is a high-security facility which has 30 beds for mental health patients and mentally impaired defendants who have a treatable mental illness. There is an urgent need to increase the number of beds to meet demands. It is inappropriate to incarcerate a mentally impaired defendant in a prison when he or she requires treatment at the Frankland Centre.

#### **(b) *Need for a “declared place” with appropriate levels of security and supervision***

Once a Custody Order has been made by the court, section 24 of the *Criminal law (Mentally Impaired Defendants) Act 1996* requires the Board to issue a Place of Custody Order for a mentally impaired defendant to be detained in an authorised hospital, a declared place, a detention centre or a prison, until released by an order of the Governor.

The cases which pose problems for the Board include those mentally impaired defendants who:-

- ♦ Have been alleged to have committed serious offences (violent and/or sexual).
- ♦ Have some form of mental disorder, intellectual disability and/or brain damage.
- ♦ Have been in an authorised hospital or prison for a lengthy period of time. As the Custody Orders imposed by the courts are of indefinite duration, some mentally impaired defendants are in danger of being institutionalised if there is no progress towards release.
- ♦ Have very limited or no family or community support if released.
- ♦ Have an IQ level which falls outside the criteria to qualify for Disability Services Commission's involvement.
- ♦ Are not welcomed back to their own Aboriginal Community.

As at 30 June 2004, there were 9 mentally impaired defendants in prison, found not guilty by reason of unsoundness of mind, or unfit to stand trial due to brain damage and/or intellectual

disability. The lack of a “*declared place*” leaves no alternative but to incarcerate unconvicted people with disabilities in prison. It is inappropriate to detain those who have brain damage, an intellectual disability or dementia in a prison. Such placements can also place defendants in a vulnerable environment. Moreover, such mental conditions are very often irreversible and unlikely to improve in the foreseeable future. There is an urgent need for a declared place which is secure (for example, a facility with a perimeter fence and locked gates) and which is supervised.

**(c) *Need for medium-security placement at Graylands Hospital***

The lack of a medium-security placement at Graylands Hospital means that mentally impaired defendants with a mental illness are being detained at the Frankland Centre (a maximum secure unit) for an extended period of time before they are deemed suitable for transfer to Plaistowe Ward (open ward), for eventual release into the community.

The availability of a medium-security placement at Graylands Hospital would assist the effective and gradual transition of mentally impaired defendants from the Frankland Centre through to the community, as well as contributing to the safety of the community. It would also alleviate, to a certain degree, the problem of shortage of beds at the Frankland Centre.

This issue has been raised in the past. The Board received a positive response from the then Minister for Health in February 2003, who indicated that the issue had been raised with the Department of Justice and the Department of Health with a proposal to make a submission to the Treasury for funding.

**(d) *Inter-agency Collaboration***

Greater inter-agency collaboration between government agencies such as the Disability Services Commission, Public Advocate, Department of Health and the Department of Justice is required in order to formulate a suitable and viable release plan for mentally impaired defendants in various parts of the State, including the North. This is particularly pertinent to mentally impaired defendants from the various Aboriginal Communities.

It is of particular concern that 9 mentally impaired defendants who are currently in prison or in a detention centre or at the Frankland Centre are Aboriginals, many from remote and regional parts of the State. Of more concern is the fact that they are often young men who are between 14 and 30 years of age, and who have a history of substance abuse and chronic mental condition. This has the following ramifications:-

- ♦ They are displaced from their respective Communities.
- ♦ It is difficult for the individual to maintain regular personal contact and support from family and Community members.
- ♦ It has proved difficult to develop appropriate release plans. This problem is further exacerbated when Aboriginal Community members are unwilling to accommodate the mentally impaired defendant for fear of risk of harm to themselves.

It is often inappropriate to place mentally impaired defendants in unsupported accommodation when they are released into the community. These cases also invariably generate problems as the relevant agencies seem to find it difficult to resolve issues of responsibility and funding.

The Board is of the view that any comprehensive and structured release plan for these individuals requires inter-agency collaboration with the Disability Services Commission and the Department of Justice in order to address the specific needs of the individual, and to protect the interests of the individual, the victims and the wider community.

**(e) *Appointment of Supervising Officers***

Section 45 of the *Criminal Law (Mentally Impaired Defendants) Act 1996* states that the Board may designate a person to be a supervising officer. Since the Board's inception in 1997, no supervising officers have been appointed as the Board has not been provided with the mechanism or funding to do so.

The lack of a supervising officer creates difficulties in ensuring that the release or leave conditions for mentally impaired defendants are supervised, and that the safety of the public and victims is protected. The consequence of putting members of the public at risk of harm cannot be underestimated.

Mentally impaired defendants who are released from Graylands Hospital do not have supervising officers whilst in the community. They are followed-up in the community by the Community Forensic Mental Health Service regarding mental health issues. Where the case involves victim issues, it is inappropriate to require the treating psychiatrist to ensure that the mentally impaired defendant complies with the condition that he or she has no direct or indirect contact with the victims and/or adheres to any Mediation Agreement. In such cases, there is no supervising officer to monitor these protective conditions.

The appointment of supervising officers, with respect, requires urgent consideration and funding.

### **3. VICTIM ISSUES**

In deciding whether to make a recommendation to the Governor that the mentally impaired defendant be granted leave of absence from his or her place of custody, or be released on a Conditional Release Order, the Board is required to consider a number of factors set out in the *Criminal Law (Mentally Impaired Defendants) Act 1996*. The factors which are relevant to the victims are:-

- ♦ The degree of risk that the release of the mentally impaired defendant appears to present to the personal safety of people in the community or of any individual in the community; and
- ♦ The likelihood that the mentally impaired defendant would comply with the conditions of the Order.

The Board considers victim issues in detail. It has been the Board's practice to give consideration to the likely effect of a mentally impaired defendant's release on a victim as well as any potential victims. There are several factors which influence the rate of victim participation in the release process:-

- ♦ In the Board's experience, victims of serious or violent offences may be more inclined to make submissions than victims of property offences. Other types of offences may have no specific victim (such as certain drug crimes) or have corporate victims (such as fraud). It is also possible that some victims who have made a statement to the sentencing court have no desire to make further statements.
- ♦ However, the Board has observed that written submissions from victims have increased noticeably over the past year. It appears that increased public awareness and new processes for victim participation resulting from the implementation of the Department of Justice's "*Policy for Victims of Crime*" in early 2003 have contributed to the increase. The policy ensures that victims are heard and their needs are taken into account in all their dealing with the justice system, including the Mentally Impaired Defendants Review Board. Victim involvement has also increased due to the Victim Support Services, Victim Notification Register and Victim-offender Mediation Unit performing their roles in a proactive manner.

The "*Policy for Victims of Crime*" will have an impact on the Board's processes and workload with increased victim involvement in at least three areas:-

- (a) the right to be informed of an upcoming review by the Board;
- (b) the right to make a written submission for consideration at the review; and
- (c) the right to have those submissions considered at the review.

Generally, it would be wrong to refuse the release of a mentally impaired defendant solely because of the objection of a victim. However, the Board does consider victim submissions as important to the types of conditions which would be imposed in an Order for Leave of Absence or a Conditional Release Order. For example, the Board commonly imposes restrictions to ensure that the defendant does not make direct or indirect contact with the victim.

There is a need for empirical research into victim involvement in the release process regarding:-

- (a) the impact of victim submissions on release decisions;
- (b) victim satisfaction with the process; and
- (c) the actual content of victim submission.

Given the differences that exist between the various Australian jurisdictions, research into the comparative strengths and weaknesses of each system would also be valuable.

#### **4. EARLY IDENTIFICATION OF PRISONERS WITH MENTAL ILLNESS AND DIVERSIONARY PROGRAMS FOR THOSE WITH INTELLECTUAL DISABILITY**

The Board welcomes the partnership between the Departments of Justice and Health regarding early identification and treatment of prisoners who enter the prison with a mental illness, and providing them with options for treatment and rehabilitation. This initiative is a key part of the Department of Justice's *Community Re-entry Program* which is designed to assist offenders to re-establish themselves in the community, when released. It is hoped that the initiative will extend to mentally impaired defendants who are currently in prison, and not simply to convicted offenders.

The Board also welcomes a joint effort between the Department of Justice and the Disability Services Commission in diverting people with intellectual disabilities away from the criminal justice system.

#### **5. CROSS-BORDER JUSTICE PROJECT**

The Board understands that the Department of Justice recently established a working party to improve the quality and integration of community justice service delivery between the Northern Territory, South Australia and Western Australia in four key areas:-

- (a) supervision protocols
- (b) community work protocols
- (c) program development and access
- (d) staffing

This initiative is part of the Ngaanyatjarra, Pitjantjatjara and Yankunytjatjara Lands Cross Border Project which also involves prisons, courts, police and legislative review. The first round of consultation with Aboriginal people living on the lands was carried out in April/May 2004, with more extensive consultation to be undertaken towards the end of 2004.

This is a positive initiative particularly as it is not improbable that mentally impaired defendants who come from remote Aboriginal Communities which border onto or extend into South Australia and the Northern Territory, would cross these borders.

There is no specific provision in the *Criminal Law (Mentally Impaired Defendants) Act 1996* which allows the Board to transfer the management of a mentally impaired defendant to an interstate agency, or for the apprehension and return of a mentally impaired defendant who absconds interstate.

It is hoped that the Cross-border Justice Project will consider these issues, and that the Board will be included in future consultation forums.

## **6. VISITORS**

The Board had 12 visitors who observed the proceedings of Board meetings over the last 12 months, and is happy for this to be continued in the foreseeable future.

## **7. NEW INITIATIVES**

The Board has taken and will be undertaking proactive initiatives including:-

- (a) Meetings with psychiatrists, registrars and treating team concerning the role and obligations of the Board under the *Criminal Law (Mentally Impaired Defendants) Act 1996* and the contents of psychiatric reports submitted to the Board.
- (b) Similar meetings with guardians, Community Corrections Officers and other relevant agencies with an understanding of the respective roles of the agencies in formulating viable release plans for mentally impaired defendants.

In November 2003, the Board's Legal Research Officer gave a presentation to the guardians and officers at the Office of the Public Advocate on the role of the Board and the role of a guardian in relation to a mentally impaired defendant. The seminar proved invaluable as it forged a better working relationship between both parties.

In May 2004, the Board held a meeting with Parole Board members, and representatives from the State Forensic Mental Health Service and the Community Forensic Mental Health Service. A discussion was held regarding the detention, management and release of mentally impaired defendants from each agency's perspective. It led to a greater understanding of the respective roles of each agency with a consensus that more funding is required as a matter of urgency, to reduce public risk.

## **8. SECRETARIAT STAFF**

The evident increase in the Board's workload and the complexity of cases over the past three years means that there must be a corresponding level of support provided by the Secretariat to the Board. In its Annual Report of 2003, the Board stressed the need to increase the staff number of the Secretariat with the appropriate funding. This matter is still under consideration by the Department of Justice, and the Board hopes that it will be resolved as a matter of priority.

## **9. CONCLUSIONS AND ACKNOWLEDGEMENT**

The Board continues to receive the co-operation of the psychiatrists and their assistants who have the responsibility of monitoring and treating the mentally impaired defendants. Once again, we place on record the Board's appreciation of their commendable efforts to assist the Board to function effectively together with the related agencies, including, the Courts, the Department of Justice, the Department of Health, the Office of the Public Advocate and the Disability Services Commission.

## ***STATISTICS***

### **A. BOARD'S WORKLOAD**

During the period 1 July 2003 to 30 June 2004, the Board met on 29 occasions (33 the previous year) and made 176 decisions (118 the previous year) in respect of 33 mentally impaired defendants (29 the previous year).

### **B. CUSTODY ORDERS BY COURTS**

#### **Part 3 of the Act: Mental Unfitness to Stand Trial:**

Section 16: Order made by Court of Summary Jurisdiction.

Section 19: Order made by Superior Court.

#### **Part 4 of the Act: Acquitted on Account of Unsoundness of Mind:**

Section 21: Order made by Superior Court.

Section 22: Order made by Court of Summary Jurisdiction.

During the period 1 July 2003 to 30 June 2004, the Courts made 6 Custody Orders.

<b>Jurisdiction</b>	<b>No. of Orders</b>	<b>S16</b>	<b>S19</b>	<b>S21</b>	<b>S22</b>	<b>Place of Custody</b>
<b>Supreme Court</b>	2			2		(1) Graylands Hospital (1) Prison
<b>District Court</b>	2			2		(1) Graylands Hospital (1) Prison
<b>Petty Sessions</b>	1				1	(1) Prison
<b>Children's Court</b>	1	1				(1) Detention Centre
<b>Total</b>	6	1	0	4	1	

### **C. PLACE OF CUSTODY ORDERS BY BOARD**

#### **Section 25:**

*“Place of Custody to be determined (by Board) within 5 days of Order (by Court)”*



## PLACES OF CUSTODY

Number considered by Board	Authorised Hospital *	Prison	Juvenile Detention Centre	Declared Place **
9	6	2	1	0

Notes:

\* Graylands Hospital is the only authorised hospital which has the facilities to cater for long term and high risk mentally impaired defendants.

\*\* No place has yet been declared for this purpose.

There were also an additional 17 occasions when the Board amended the initial Place of Custody Order.

## **D. REPORTS TO MINISTER**

### **Section 33(1):**

*“At any time the Minister, in writing, may request the Board to report about a mentally impaired defendant.”*

### **Section 33(2):**

*“The Board must give the Minister a written report about a mentally impaired defendant:*

- (a) within 8 weeks after the custody order was made in respect of the defendant;*
- (b) whenever it gets a written request to do so from the Minister;*
- (c) whenever it thinks there are special circumstances which justify doing so; and*
- (d) in any event at least once in every year.”*

Total Reports	Section 33(2)(a)	Section 33(2)(b)	Section 33(2)(c)	Section 33(2)(d)
39	9	-	9	21

## **E. LEAVE OF ABSENCE**

### **Section 27(1)**

*“The Board may at any time recommend to the Minister that the Governor be advised to make an order allowing the Board to grant leave of absence to a mentally impaired defendant.”*

### **Section 27(2)**

*“The Governor may at any time –*

- (a) make an order allowing the Board to grant leave of absence to a mentally impaired defendant;*
- (b) cancel an order made under paragraph (a).”*

### **Section 28(1)**

*“If an order under section 27(2) is in effect, the Board may at any time make a leave of absence order in respect of a mentally impaired defendant.”*

**Section 28(2)**

*“A leave of absence order is an order that the defendant be given leave of absence for a period, not exceeding 14 days at any one time, determined by the Board –*

- (a) unconditionally; or*
- (b) on conditions determined by the Board.”*

**F. RELEASE OF MENTALLY IMPAIRED DEFENDANTS**

**Section 35(1)**

*“The Governor may at any time order that a mentally impaired defendant be released by making a release order.”*

**Section 35(2)**

*“A release order is an order that on a release date specified in the order the defendant is to be released –*

- (a) unconditionally; or*
- (b) on conditions determined by the Governor.”*

## YEAR TO YEAR COMPARISON

	<b>2000 / 2001</b>	<b>2001 / 2002</b>	<b>2002 / 2003</b>	<b>2003 / 2004</b>
Board Workload				
♦ Meetings	32	28	33	29
♦ Number of decisions made	107	88	118	176
Custody Orders (Courts)	(2)	(1)	(8)	(6)
♦ Section 16 (Unfit to Stand Trial – Lower Court)	0	0	1	1
♦ Section 19 (Unfit to Stand Trial – Superior Court)	1	0	3	-
♦ Section 21 (Schedule 1 - Unsoundness of Mind)	1	1	4	4
♦ Section 22 (Unsoundness of Mind)	0	0	0	1
Place of Custody Orders (Board)	(4)	(4)	(8)	(9)
♦ Authorised Hospital	3	2	4	6
♦ Prison	1	2	4	3
♦ Juvenile Detention Centre	0	0	0	2
♦ Declared Place	0	0	0	0
Reports to Minister	(33)	(22)	(30)	(39)
♦ Section 33(20(a)	5	1	8	9
♦ Section 33(2)(b)	0	0	0	-
♦ Section 33(2)(c)	11	8	12	9
♦ Section 33(2)(d)	17	13	10	21
Leave of Absence Orders approved by the Governor	9	1	3	9
Subsequent amendments to Leave of Absence Orders by the Board	5	7	5	17
Conditional Release Orders approved by the Governor	2	3	2	3
Unconditional Release Orders approved by the Governor	2	1	2	1
Cancellation of Conditional Release Orders	0	1	0	1
Completions	3	1	0	0
Conditional Release Orders (current)	9	12	10	11
Defendants in custody	(12)	(9)	(16)	(19)
♦ Prison and detention centre	3	3	7	9
♦ Frankland Centre and Plaistowe Ward	9	6	9	10
Number of defendants and gender	(21)	(21)	(29)	(33)
♦ Male	19	19	26	30
♦ Female	2	2	3	3
Aboriginality	(3)	(3)	(6)	(10)
♦ Male	3	3	6	10
♦ Female	0	0	0	0

## ***ACKNOWLEDGEMENT***

The Board wishes to acknowledge the assistance and co-operation of all those personnel associated with the Board.

As Chairman, I would like to extend my personal thanks to all Board members and deputies for their work and contribution during the year. I also wish to thank the services provided by the Department of Justice, the various agencies and voluntary organisations involved in the rehabilitation and supervision of the mentally impaired defendants in the the community.

As Chairman, I also wish to thank the Secretariat staff for their support and hard work in what can often be a challenging and complex task.