GOVERNMENT OF
WESTERN AUSTRALIA

REVIEW OF THE

CRIMINAL LAW (MENTALLY IMPAIRED ACCUSED) ACT 1996

FINAL REPORT

Department of the Attorney General

April 2016

Contents

Preface

In Australia, mental impairment is often associated with increased exposure to health risk factors (such as substance abuse and decline in health) and social risk factors (such as homelessness, poor education, unemployment, and social exclusion).[1] The combination of these factors can result in the mentally impaired person being more likely to come into contact with the criminal justice system.[2]

The *Criminal Law (Mentally Impaired Accused) Act 1996* is an Act relating to criminal proceedings involving mentally impaired people who are charged with offences. A key consideration of the legislation is the safety of the community and the protection of the rights of those people within it who are directly affected, in particular victims of alleged crime and their families, and the family members of people subject to the *Criminal Law (Mentally Impaired Accused) Act 1996* regime. Accordingly, this Report deals with the topic of the appropriate operation of Western Australian laws in response to actions and circumstances which pose difficult legal, moral, medical and social questions.

At the request of the Attorney General, the Department of the Attorney General has conducted two consultation rounds to inform this review of the *Criminal Law (Mentally Impaired Accused) Act 1996*. The outcomes from an initial consultation round with targeted stakeholders informed a public Discussion Paper (Appendix A), which was released in September 2014. The Discussion Paper posed 20 'discussion points' as a basis for public consideration of the operation of the *Criminal Law (Mentally Impaired Accused) Act 1996* during the second consultation round.

In all, the Department of the Attorney General received 52 submissions from 43 individual and agency stakeholders during the course of its consultations.

The submissions varied substantially in terms of scope. Submissions from individual members of the community tended to focus on a single issue, whereas submissions from non-Government and independent agencies generally addressed the 20 discussion points in the Discussion Paper as well as a broad range of additional matters spanning all aspects of the *Criminal Law (Mentally Impaired Accused) Act 1996* and related service provision. Submissions from Government agencies generally confined their feedback to key issues raised in the Discussion Paper as was relevant to their agency only.

[1] Australian Human Rights Commission, *Equal before the law: Towards disability justice strategies* (February 2014); Cockram J, *People with an intellectual disability in the prisons*, 12(1) Psychiatry, Psychology and Law, 163, 2005

[2] Law Reform Commission of Western Australia. *Court intervention programs: final report* Law Reform Commission of Western Australia, Perth, 2009

While this Report has sought to take into account the wide ranging concerns and interests of stakeholders, it should be noted that some significant issues raised by stakeholders went outside the scope of this review of the operation of the *Criminal Law (Mentally Impaired Accused) Act 1996*, as follows:

- the issue of which arm of Government is to be charged with making decisions regarding the management, supervision and release of persons detained under the *Criminal Law (Mentally Impaired Accused) Act 1996* (save for the issue of appeals, which is the subject of discussion and Recommendation 33 below) was not canvassed in the Discussion Paper and was not intended to be the subject of recommendations in this operational review; and

- the detail of resource allocation to meet the needs of people who find themselves in circumstances that attract the operation of the *Criminal Law (Mentally Impaired Accused) Act 1996*.

This Report on the operation of the *Criminal Law (Mentally Impaired Accused) Act 1996* has been prepared on the basis of considering the results of consultation, the Act itself, and the broader contemporary policy and legislative context in Western Australia.

Executive Summary

The *Criminal Law (Mentally Impaired Accused) Act 1996* deals with accused who have been found by a court to be mentally unfit to stand trial or have been found not guilty on account of unsoundness of mind. Accordingly, persons subject to the Act have not been – indeed, they cannot be – found criminally culpable. As such, the *Criminal Law (Mentally Impaired Accused) Act 1996* is distinct from other legislation in the area of criminal law in that it is not intended to simply proscribe and punish offending behaviour. Rather, the central purpose of the Act is to strike an appropriate balance between protecting the safety of the community, and safeguarding the rights and needs of persons with mental impairment who have been charged with offences.

The key objectives of the *Criminal Law (Mentally Impaired Accused) Act 1996* may be discerned from the Second Reading speech by the then Attorney General Peter Foss, who stated on introducing the Criminal Law (Mentally Impaired Defendants) Bill that it reflected the Government's commitment "*to the paramount goal of a safe and secure environment for all Western Australians while ensuring that all participants in the criminal justice system are treated fairly and equitably and the process itself is cost efficient and effective*."

Consistent with this commitment, the Report identifies the following two key objectives as underpinning the operation of the *Criminal Law (Mentally Impaired Accused) Act 1996* –

- the paramount safety of the community;
- the fair and equitable treatment of mentally impaired accused, consistent with the principle of least restriction.

Given their centrality to the purpose and operation of the *Criminal Law (Mentally Impaired Accused) Act 1996*, the Report has proceeded on the basis that these two key objectives form the foundation of this assessment of the operation of the Act.

<u>Statement of objects and principles</u>

A statement of objects and principles is occasionally included in statutes as a means by which to elucidate the legislative intent behind an Act. Such statements may outline the underlying purposes of the legislation and can be used by the courts to assist in resolving uncertainty in the interpretation of the legislation.

A significant number of submissions were strongly supportive of amending the *Criminal Law (Mentally Impaired Accused) Act 1996* to add a statement of objects and principles to "shape its development and guide its implementation and interpretation", noting that this appeared to be best practice in legislative drafting.

Other stakeholders, however, expressed the view that a statement of objects and principles is not necessary. These stakeholders did not consider that there was any ambiguity regarding the objects of the *Criminal Law (Mentally Impaired Accused) Act 1996*, and noted that questions arising in respect of the interpretation of the Act could be answered by reference to the Second Reading

speech and explanatory materials for the *Criminal Law (Mentally Impaired Defendants) Bill* and subsequent amending legislation.

The Report finds that while the concept of a statement of objects and principles has value, seeking to legislate the intention of the drafters through an *ex post facto* insertion of a new statement of objects and principles may not, in fact, represent the best legislative pathway through which to articulate rights and interests that are sought to be promoted under the *Criminal Law (Mentally Impaired Accused) Act 1996.* Accordingly, the Report recommends that –

- A statement of objects and principles would be appropriate in circumstances where the *Criminal Law (Mentally Impaired Accused) Act 1996* is repealed or replaced, or if a significant 'ground up' amendment of the Act occurs (Recommendation 1); and
- Should circumstances arise where the *Criminal Law (Mentally Impaired Accused) Act 1996* is repealed or replaced, or if significant 'ground up' amendment of the Act occurs, the stakeholders' views set out in the Report should inform the content of any such statement of objects and principles. (Recommendation 2)

<u>Definitions and terminology</u>

Mental illness

A number of stakeholders expressed dissatisfaction with the existence of two different definitions of the term 'mental illness' in the *Criminal Law (Mentally Impaired Accused) Act 1996*, stating that this could cause confusion for readers.

Other submissions supported the retention of two definitions of 'mental illness' in the *Criminal Law (Mentally Impaired Accused) Act 1996*, pointing out that each definition is appropriate for its purpose in the context in which it appears.

Given the role of Part 3 of the *Criminal Law (Mentally Impaired Accused) Act 1996* in providing the legislative framework in which to address persons who have been acquitted by reason of unsound mind under the *Criminal Code*, it is appropriate to retain a common definition of mental illness in both the *Criminal Code* and Part 3 of the *Criminal Law (Mentally Impaired Accused) Act 1996.*

The definition of 'mental illness' in section 5 (in Part 2) and Part 5 of the *Criminal Law (Mentally Impaired Accused) Act 1996* serves a different purpose. In those sections, the term 'mental illness' specifically relates to medical treatment for the mentally impaired accused. Accordingly, it is appropriate that the definition in this context have the same meaning as that in the *Mental Health Act 2014*.

For these reasons, the Report recommends that separate definitions for the term 'mental illness' appropriate to the context in which the term is used should be retained in the *Criminal Law (Mentally Impaired Accused) Act 1996*. (Recommendation 3)

Mental impairment

Stakeholders submitted that the terms 'brain damage' and 'senility' were outdated and pejorative, and should be deleted from the definition of mental impairment. For instance, the State Forensic Mental Health Service stated that the current definition of mental impairment "does not reflect contemporary medical classifications and uses language a century old which is highly stigmatising."

The Report recommends that the definition of mental impairment in the *Criminal Law (Mentally Impaired Accused) Act 1996* be amended to read in contemporary terms, as follows: "mental impairment means intellectual disability, mental illness, brain injury or dementia or a combination of these conditions". (Recommendation 4)

Unsoundness of mind

Some submissions which pointed out that the use of the term 'unsoundness of mind' was outdated and appeared on its face to relate to mental illness only. In practice, however, the use of the term in both the *Criminal Law (Mentally Impaired Accused) Act 1996* and the *Criminal Code* makes it clear that it should encompass both mental illness and intellectual and cognitive disability. To avoid doubt and modernise the terminology, the Report recommends that the words 'unsoundness of mind' be replaced throughout the *Criminal Law (Mentally Impaired Accused) Act* 1996, as well as in section 27 of the *Criminal Code*, by the term 'mental impairment' as defined in the *Criminal Law (Mentally Impaired Accused) Act 1996.* (Recommendation 5)

<u>Test of mental unfitness to stand trial</u>

The Report found that in general, the majority of stakeholders were comfortable with the well-established use of a '*Presser*'-style test in section 9 of the *Criminal Law (Mentally Impaired Accused) Act 1996* as the basis for the test for mental unfitness to stand trial. However, a significant number of stakeholders called for enhancements and clarifications to the current criteria of the test to better address the accused's ability to make crucial decisions in their trial.

For instance, several submissions received during consultations suggested the inclusion of a criterion which specifically addresses the ability of the accused to provide instructions to his or her legal practitioner. Whilst it was acknowledged that criterion 9(g) (pertaining to the ability of an accused to properly defend the charge) was sufficiently broad to take into account the ability of an accused to instruct counsel, stakeholders felt that there was merit in explicitly setting this out given the critical importance of legal advice and representation to individuals subject to the criminal justice system.

Stakeholders also argued that the ability of people affected by mental illness and cognitive impairment to give evidence in legal proceedings is a critical element in facilitating their effective participation in the legal process, and in ensuring that the best evidence is received by the court.

Accordingly, the Report recommends the substantial retention of section 9 of the *Criminal Law (Mentally Impaired Accused) Act 1996*, subject to an amendment to include additional criteria regarding the ability of an accused to instruct counsel, to decide whether to give evidence and to give evidence if they wish to do so. (Recommendation 6)

Determining the question of unfitness to stand trial

Guidance to the court

The majority of submissions were of the view that the current system with the Court as the forum determining the question of mental unfitness to stand trial is appropriate. However, many of these stakeholders felt that more could be done to provide guidance to the Court on how it could inform itself when deciding the question of the accused's mental unfitness to stand trial.

The Report notes that sufficient scope exists under the current provisions of the *Criminal Law (Mentally Impaired Accused) Act 1996* for the Court to inform itself in any manner with respect to the accused's mental fitness to stand trial. However, in view of the concerns raised by stakeholders, the Report recommends that the *Equality before the Law Benchbook* should be amended to provide greater guidance to the Court on how it may inform itself under section 12. (Recommendation 7)

Support for the accused

A number of submissions raised concerns about the lack of explicit provision for support to be provided to accused who are suspected of being mentally unfit to stand trial. These stakeholders suggested that this issue could be addressed by amending section 9 to explicitly provide that the court must consider if the person may be mentally fit to stand trial with appropriate support.

The Report notes that the current legislative framework already provides for modifications to be made to court processes to assist an individual to participate fully. For example, section 106R of the *Evidence Act 1906* provides that, in certain circumstances, the court may make an order that:

- the person have near to him or her a person, approved by the court, who may provide him or her with support; or
- the person have a communicator while he or she is giving evidence.

As such, rather than amend the definition in section 9, the Report recommends that section 12 of the *Criminal Law (Mentally Impaired Accused) Act 1996* be amended to explicitly allow the presiding judicial officer to make orders to enable an accused to participate in proceedings with appropriate support. This should include a non-exhaustive list of special measures which the court may consider putting in place. (Recommendation 8)

Testing the evidence

A substantial number of submissions stated that a form of special trial process should be introduced under the *Criminal Law (Mentally Impaired Accused) Act 1996* to test the evidence against an accused who has been found mentally unfit to stand trial. These submissions acknowledged that the current provisions in sections 16(6) and 19(5) of the *Criminal Law (Mentally Impaired Accused) Act 1996* already provide for consideration of the case against the accused, but felt that the level of consideration was inadequate. As such, they called for a more formal and robust trial process to test the strength of the case against the accused.

A number of submissions argued against the introduction of a special hearing on the ground that a finding by the Court that an accused is mentally unfit to stand trial should preclude the accused from

having the capacity to participate or provide instructions in any special hearing process. As such, any trial process requiring the participation of an accused who is mentally unfit to stand trial would be intrinsically flawed.

The Report notes that while there appears to be some merit in expanding on the requirement for the Court to consider the strength of the evidence against the accused, requiring an accused who has been found unfit to stand trial to undergo a trial process cannot be justified by the limited potential benefits of introducing such a system. Rather, concerns in respect of the proper consideration of the case against the accused should be addressed by requiring the Court to conduct an inquiry into whether, on the facts before it, there is a case to answer.

Accordingly, the Report recommends that sections 16(6) and 19(5) of the *Criminal Law (Mentally Impaired Accused) Act 1996* be amended to require the judicial officer to have regard to whether there is a case to answer on the balance of probabilities after inquiring into the question and informing himself or herself in anyway the judicial officer thinks fit. (Recommendation 9)

Disposition options

Expansion of options

A significant proportion of submissions noted that people with mental impairment generally have highly complex needs. As such, stakeholders were of the view that there was a strong need to ensure that key decision making bodies – the Court and the Mentally Impaired Accused Review Board – had sufficient flexibility to take into account the special needs of mentally impaired accused in crafting the most appropriate disposition to meet the needs of community safety while respecting the rights of the accused and meeting the principle of least restriction.

The Report recommends, in relation to the powers of the Court, that –

- The disposition options available to the court when addressing accused found mentally unfit to stand trial be expanded, modelled on the options available under the *Sentencing Act 1995* (Recommendation 10);
- The disposition options for juvenile mentally impaired accused found not guilty by reason of unsound mind or mentally unfit to stand trial be expanded, modelled on the disposition options under Part 7 of the *Young Offenders Act 1994* (Recommendation 11);
- Section 22(3)(b) of the *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to provide the court with the discretion to impose the full range of orders available under the *Sentencing Act 1995*, subject to any necessary amendments required to clarify that the accused has not been convicted of an offence (Recommendation 14); and
- Mandatory custody orders be removed in relation to juvenile mentally impaired accused (Recommendation 15).

Similarly, the Report makes several recommendations aimed at ensuring the Mentally Impaired Accused Review Board has sufficient powers and flexibility for the appropriate management of the mentally impaired accused.

For instance, the Report notes that under the current legislative framework, where a mentally impaired accused has breached a condition of a Leave of Absence Order or Conditional Release Order, the Mentally Impaired Accused Review Board is only empowered to cancel the order. The Report found that the availability of a greater range of responses would be useful in allowing the Board to better address the different severity and types of behaviour which may constitute the breach.

Accordingly, the Report recommends that in addition to the existing power to cancel Conditional Release Orders and Leave of Absence Orders, the Board should be provided with the power to affirm, amend or suspend the order. (Recommendation 30)

To ensure that the Board is able to respond promptly to any breaches by the accused, the Report also recommends that the *Criminal Law (Mentally Impaired Accused) Act 1996* be amended to contain an express requirement that the Board be advised in a timely manner of any breach of conditions. (Recommendation 31)

In recognition of the key 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 and the wider community, the Report also recommends that the principle of least restriction be explicitly included as a factor the Mentally Impaired Accused Review Board must have regard to before making a Leave of Absence Order. (Recommendation 24)

Further, in view of the special needs of juveniles, the Report recommends that the release considerations taken into account by the Board be reviewed in the context of juvenile mentally impaired accused, with a view to developing juvenile-specific considerations in close consultation with relevant stakeholders. (Recommendation 28)

Places of detention

A range of submissions raised the issue of prison as a place of detention under section 24(1) of the *Criminal Law (Mentally Impaired Accused) Act 1996*. The Report notes that while prison is often not an ideal place for mentally impaired accused, in practice it was sometimes the only secure option given the paramount consideration of community safety. As such, the Report recommends that absent the ready availability of sufficient secure places in either hospital or a declared place, prison should be retained as a place of custody under the *Criminal Law (Mentally Impaired Accused) Act 1996*. (Recommendation 23)

Mandatory custody orders – section 21

The Report notes that most submissions on section 21 of the *Criminal Law (Mentally Impaired Accused) Act 1996* focused on the idea of potential unfairness to the accused. However, in the absence of persuasive argument in relation to the key objective of the paramount consideration of community safety, the Report concluded that there was insufficient basis for recommending changes to the current arrangements under section 21.

Given the high level of stakeholder engagement in this issue, the Report recommends that a working group should be established, comprising the range of stakeholders, to consider further the possible amendment of section 21 and Schedule 1 of the *Criminal Law (Mentally Impaired Accused) Act 1996*. (Recommendation 13)

Restriction on availability of custody orders

Whilst the general theme of the submissions tended to advocate for the expansion of disposition options available to decision makers, a number of stakeholders also called for a restriction on the availability of custody orders where the statutory penalty for the offence alleged to have been committed by the accused does not include imprisonment.

The Report notes that the submissions did not provide sufficient persuasive policy rationale for the difference in availability of custody orders under the *Criminal Law (Mentally Impaired Accused) Act 1996* in respect of findings of mental unfitness to stand trial and acquittal on the basis of unsound mind. Given that both findings seek to balance the same interests and achieve the same policy objectives, it is appropriate that both findings should equally enliven the same disposition options. Accordingly, the Report recommends that section 22 of the *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to provide that the court may only make a custody order if the statutory penalty of the alleged offence is, or includes, imprisonment. (Recommendation 12)

<u>Enhanced procedural fairness</u>

A significant number of the submissions received during the course of the review focused on the operations of the Mentally Impaired Accused Review Board and the management of accused under its statutory authority. Most of these submissions were generally supportive of many of the current practices of the Board which enhanced procedural fairness, and expressed the view that these current practices should be explicitly prescribed so that they would continue to be applied even after the current constitution of the Board changes.

To this end, the Report includes the following recommendations –

- The right of a mentally impaired accused to appear before and make submissions to the Mentally Impaired Accused Review Board should be reflected in the *Criminal Law (Mentally Impaired Accused) Act 1996* or practice directions (Recommendation 20);
- The right of a mentally impaired accused to be represented by legal counsel or by an advocate, notified of proceedings, and to be provided with copies of relevant materials and written reasons for decisions should be reflected in the *Criminal Law (Mentally Impaired Accused) Act 1996* or practice directions. (Recommendation 21); and
- The *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to provide that the mentally impaired accused or their representative may submit a request for the Mentally Impaired Accused Review Board to review decisions made in respect of their matter. Any such request must be determined by the chairperson within a reasonable period of time. (Recommendation 33).

Custody orders

Duration

Under the *Criminal Law (Mentally Impaired Accused) Act 1996*, a mentally impaired accused subject to a custody order remains subject to the order until he or she is released by order of the Governor. This means the custody order remains in effect for an indefinite period.

A significant majority of the submissions received by the Review expressed strong views against indefinite custody orders and called for the term of the custody order to be limited by the court imposing the custody order.

The key criticism of indefinite custody orders raised in submissions was that it could potentially result in a mentally impaired accused being detained for a longer period than the length of imprisonment which would have been imposed had the accused been found guilty by the court and sentenced accordingly. A number of submissions also suggested that lawyers and accused were unduly deterred from raising mental health issues at trial for fear of receiving a custody order if they were found mentally unfit to stand trial or acquitted by reason of unsound mind. As such, submissions which called for the abolition of indefinite custody orders generally proposed that the custody order should be limited by reference to the sentence that a convicted offender would receive.

The Report considers that the introduction of a fixed term custody order (based on the sentence of an unimpaired offender who is convicted) is problematic from the perspective of community safety, in that there is a risk that a mentally impaired accused may be released prematurely in relation to their readiness to reintegrate into the community.

In this context, the indefinite custody order would appear to be preferable since it recognises that the time an individual accused requires to safely reintegrate into the community varies from person to person. This is consistent with both the community protection and therapeutic objectives of the *Criminal Law (Mentally Impaired Accused) Act 1996*.

As such, the Report makes no recommendation to change the current arrangements in respect of the indefinite nature of custody orders. However, given the high level of stakeholder engagement in this issue, it is recommended that a working group be established specifically to review the operation of indefinite custody orders under the Act. (Recommendation 16)

Constitution of the Mentally Impaired Accused Review Board

Given the central role of the Mentally Impaired Accused Review Board in the management, supervision and release framework under the *Criminal Law (Mentally Impaired Accused) Act 1996*, it is important that the Board is appropriately constituted and has access to all relevant information and expertise to carry out its functions.

Judicial chair

Under the current legislative framework, the chairperson of the Mentally Impaired Accused Review Board must be a current or retired judge of the Supreme Court or the District Court. The current chairperson of the Board is a serving judge of the District Court.

Some stakeholders were of the view that the Mentally Impaired Accused Review Board was essentially an executive body given that it provided reports and made recommendations to the Executive, which was charged with making key decisions relating to the release of mentally impaired accused. From this perspective, it might appear inappropriate for a serving member of the judiciary to chair such a body. In particular, it was suggested that *"the presence of a serving judge on an executive body will create the false impression that the Mentally Impaired Accused Review Board conforms to judicial standards of independence, transparency, and acts in accordance with the standards of procedural fairness expected of a court, when in the case of the Board, none of these things are true."*

The alternative view is that there is a practical benefit from including a serving judge and the majority of members from the Prisoners Review Board sitting on the Mentally Impaired Accused Review Board since this means "*members have knowledge of community services and funding sources and experience in assessing the degree of risk an accused presents to the personal safety of people in the community*".

On balance, having regard to the operation of the *Criminal Law (Mentally Impaired Accused) Act 1996* and to the views expressed by stakeholders, the Report considers that the practical benefits of having a serving judicial officer as chairperson of the Mentally Impaired Accused Review Board outweighs concerns about the possible appearance of inconsistency with the separation of powers. As such, the Report recommends that no amendment be made to section 42(1)(a) of the *Criminal Law (Mentally Impaired Accused) Act 1996*. (Recommendation 17)

Community members

Most of the submissions which commented on the composition of the Mentally Impaired Accused Review Board emphasised the need to ensure community members on the Board had relevant professional expertise or lived experience relevant to the subject-matter under consideration by the Board.

In light of the particular vulnerabilities of mentally impaired accused and the direct relevance of mental illness and cognitive impairment to actions taken in respect of mentally impaired accused, the Report found that it would be beneficial and appropriate to amend the *Criminal Law (Mentally Impaired Accused) Act 1996* to specifically provide that at least one community member on the Board has knowledge and understanding of mental impairment in the context of the criminal justice system.

Accordingly, the Report recommends that *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to provide that in nominating persons as community members, the Minister

must ensure that at least one community member has an understanding of forensic mental health or disability. (Recommendation 18)

Access to relevant expertise and information

To ensure that the decisions of the Mentally Impaired Accused Review Board are appropriately informed by specialist knowledge as well as the particular history and personal details of the individual accused, stakeholders submitted that it would be useful to make it explicit in the *Criminal Law (Mentally Impaired Accused) Act 1996* that the Board may appoint a person with relevant expertise to assist it.

Accordingly, the Report recommends that the *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to provide that the Mentally Impaired Accused Review Board may appoint a person with relevant expertise to assist the Board by providing a report, advice or professional services, similar to the option available to the Prisoners Review Board under section 107A of the *Sentencing Administration Act 2003*. (Recommendation 19)

During consultations carried out in the course of the review, the Mentally Impaired Accused Review Board reported that it had encountered a number of occasions where the Board was not advised of relevant information in respect of an accused (such as the accused's compliance with medication) in a timely fashion. Given the critical relevance of such information to the functions of the Board, the Report found that it would be beneficial to provide the Board with strengthened powers to obtain relevant information in respect of mentally impaired accused. To this end, the Report makes the recommendation that the *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to provide the Board with powers to compel evidence equivalent to those under section 107 of the *Sentence Administration Act 2003.* (Recommendation 22)

Victim considerations

In light of the paramount consideration of community safety, including the protection of the safety and privacy of victims of alleged offences, the Report makes the following recommendations –

- Section 33(5) of the *Criminal Law (Mentally Impaired Accused) Act 1996* should be retained in its current form, subject to any amendments in relation to juvenile mentally impaired accused arising from Recommendation 28
- The *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to provide that in providing the information as required in section 34 of the Act, the Mentally Impaired Accused Review Board may withhold some information where it is in the public interest to do so, having regard to all the circumstances. (Recommendation 29)

Service provision

Greater coordination

A significant number of submissions raised issues related to service provision for people with mental impairment in general, and to mentally impaired accused under custody orders in particular. Stakeholders who addressed this issue emphasised that the challenges and complexities involved in interacting with the criminal justice system are often greater for vulnerable individuals affected by

mental impairment, who may lack the capacity to understand legal processes or access services that may assist them. Given the nature of mental illness and cognitive impairment, these individuals may also be affected by other related issues, such as homelessness, low socio-economic status, unemployment, substance abuse and poor education, all of which further contribute to their difficulties in appropriately navigating the criminal justice system.

It should be noted that a number of submissions also raised issues related to resource allocation to fund services to mentally impaired accused. Matters related to the funding of services fall outside the scope of this review, which is focused on the operation of the *Criminal Law (Mentally Impaired Accused) Act 1996* itself. Accordingly the Report makes no recommendations in relation to resource allocation for services.

A common concern expressed by stakeholders related to the apparent lack of adequate coordination and management of services to mentally impaired accused, with a number of stakeholders noting that they were aware of cases where the release of mentally impaired accused was significantly delayed due to difficulties in coordinating a response from the various government and non-government service providers. This concern is echoed by the Mentally Impaired Accused Review Board, which noted that greater interagency collaboration is required.

The Report considers that a suitable mechanism is already available to some degree under the current section 45 of the *Criminal Law (Mentally Impaired Accused) Act 1996*, which provides for the designation of supervising officers. However, as currently drafted, the designation of supervising officers is not mandatory, and the prescribed functions of supervising officers are not sufficiently broad to meet the needs of mentally impaired accused and the Mentally Impaired Accused Review Board.

As such, the Report recommends that section 45 of the *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to provide for the mandatory appointment of supervising officers to facilitate and coordinate service delivery to mentally impaired accused. (Recommendation 34)

Further the Report recommends the amendment of the *Criminal Law (Mentally Impaired Accused) Act 1996* to explicitly provide the Board with the ability to enter into Memoranda of Understanding with other agencies carrying out functions under the Act in support of operational matters. (Recommendation 32)

Leave of absence

A number of stakeholders expressed the concern that the current 14-day limitation on Leave of Absence Orders was unduly restrictive, and was a barrier to effective service provision to mentally impaired accused. For instance, the Royal Australian and New Zealand College of Psychiatrists (Faculty of Forensic Psychiatry) noted that the requirement meant an accused would have to return to the hospital every 14 days, a practice described as “extremely difficult and disruptive” and “unnecessarily restrictive”.

The Report found that the removal of the 14-day limitation on Leave of Absence Orders would be consistent with the Board's current approach to graduated release, and would enable mentally impaired accused in custody to benefit from participate in longer training, treatment, rehabilitation and re-socialisation programs. This would also enable accused to more easily access services located in regional areas at the recommendation of the accused's treating practitioner.

Accordingly, in the interests of improving service provision to mentally impaired accused, the Report recommends that the 14-day limitation on Leave of Absence Orders be removed. (Recommendation 25)

Interstate transfers

The *Criminal Law (Mentally Impaired Accused) Act 1996* does not provide for the interstate transfer of mentally impaired accused to or from another jurisdiction. Rather, such transfers are addressed on a case-by-case basis by the Mentally Impaired Accused Review Board.

Given that decisions about interstate transfers are limited by the laws in operation in other jurisdictions, the Report recommends that consideration should be given to referring this issue to an appropriate national forum such as the Law, Crime and Community Safety Council for further consideration. (Recommendation 35)

A table setting out all the recommendations of the Report, including the key recommendations outlined in the Executive Summary, is provided below.

Table of Recommendations

Number	Recommendation
1.	A statement of objects and principles would be appropriate in circumstances where the *Criminal Law (Mentally Impaired Accused) Act 1996* is repealed or replaced, or if a significant 'ground up' amendment of the Act occurs.
2.	Consistent with Recommendation One, should circumstances arise where the *Criminal Law (Mentally Impaired Accused) Act 1996* is repealed or replaced, or if significant 'ground up' amendment of the Act occurs, the above discussion of stakeholders' views should inform the content of any such statement of objects and principles.
3.	Separate definitions for the term 'mental illness' appropriate to the context in which the term is used should be retained in the *Criminal Law (Mentally Impaired Accused) Act 1996*.
4.	The definition of mental impairment in the *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to read in contemporary terms, as follows: "mental impairment means intellectual disability, mental illness, brain injury or dementia or a combination of these conditions."
5.	References to 'unsoundness of mind' throughout the *Criminal Law (Mentally Impaired Accused) Act 1996* and in section 27 of the *Criminal Code* should be replaced by the term 'mental impairment'.
6.	Section 9 of the *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to include additional criteria regarding the ability of an accused to instruct counsel, to decide whether to give evidence, and to give evidence if they wish to do so.
7.	The *Equality Before the Law Bench Book* should be amended to provide greater guidance to the court on how it may inform itself, including through the use of reports by child and adolescent psychiatrists and psychologists.
8.	Section 12 of the *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to expressly provide that the court may order modifications to court processes to assist the accused. This should include a non-exhaustive list of special measures which the court may consider putting in place including the provision of a support person.
9.	Sections 16(6) and 19(5) of the *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to require a judicial officer to have regard to whether there is a case to answer on the balance of probabilities after inquiring into the question and informing himself or herself in any way the judicial officer thinks fit.
10.	Sections 16(5) and 19(4) of the *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to expand the disposition options available to a court when addressing an accused found mentally unfit to stand trial to include the range of orders available under the *Sentencing Act 1995*, subject to any necessary amendments required to clarify that the accused has not been convicted of an offence.

11.	Sections 16(5) and 19(4) of the *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to allow for a broader range of options to be made available for juveniles found mentally unfit to stand trial, modelled on the sentencing options under Part 7 of the *Young Offenders Act 1994*.
12.	Section 22 of the *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to provide that the court may only make a custody order if the statutory penalty for the alleged offence is, or includes, imprisonment.
13.	A working group should be established, comprising the range of stakeholders, to consider further the possible amendment of section 21 and Schedule 1 of the *Criminal Law (Mentally Impaired Accused) Act 1996.*
14.	Section 22(3)(b) of the *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to provide the court with the discretion to impose the full range of orders available under the *Sentencing Act 1995*, subject to any necessary amendments required to clarify that the accused has not been convicted of an offence.
15.	Section 22 of the *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to remove mandatory custody orders where the accused is a juvenile and allow for a broader range of options to be made available for juveniles found not guilty by reason of unsound mind, modelled on the sentencing options under Part 7 of the *Young Offenders Act 1994*.
16.	A working group should be established, comprising the range of stakeholders, to review the operation of indefinite custody orders under the *Criminal Law (Mentally Impaired Accused) Act 1996*.
17.	No amendment should be made to section 42(1)(a) of the *Criminal Law (Mentally Impaired Accused) Act 1996*.
18.	The *Criminal Law (Mentally Impaired Accused) Act 1996* should to be amended to provide that in nominating persons as community members, the Minister must ensure that at least one community member has an understanding of forensic mental health or disability.
19.	The *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to provide that the Mentally Impaired Accused Review Board may appoint a person with relevant expertise to assist the Board by providing a report, advice or professional services, similar to the option available to the Prisoners Review Board under section 107A of the *Sentence Administration Act 2003*.
20.	The right of a mentally impaired accused to appear before and make submissions to the Mentally Impaired Accused Review Board should be reflected in the *Criminal Law (Mentally Impaired Accused) Act 1996* or practice directions.
21.	The right of a mentally impaired accused to be represented by legal counsel or by an advocate, notified of proceedings, and to be provided with copies of relevant materials and written reasons for decisions should be appropriately reflected in the *Criminal Law (Mentally Impaired Accused) Act 1996* or practice directions.

22.	The *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to provide the Mentally Impaired Accused Review Board with powers equivalent to those under section 107 of the *Sentence Administration Act 2003*.
23.	Absent the ready availability of sufficient secure places in either hospital or a declared place, prison should be retained as a place of custody under the *Criminal Law (Mentally Impaired Accused) Act 1996*.
24.	Section 28(3) of the *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to provide that before making a Leave of Absence Order, the Board is to have regard to the extent to which the accused's mental impairment might benefit from treatment, training or any other measure, and 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.
25.	The 14-day limitation on Leave of Absence Orders should be removed.
26.	The current system of Board-supervised leaves of absence under section 27 and 28 of the *Criminal Law (Mentally Impaired Accused) Act 1996* should be retained.
27.	Section 33(5) of the Criminal Law (Mentally Impaired Accused) Act 1996 should be retained in its current form, subject to any amendments in relation to juvenile mentally impaired accused arising from Recommendation 28 below.
28.	The application of section 33(5) of the *Criminal Law (Mentally Impaired Accused) Act 1996* should be reviewed in the context of juvenile mentally impaired accused, with a view to developing juvenile-specific considerations in close consultation with relevant stakeholders.
29.	The *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to provide that in providing the information as required by section 34 of the Act, the Mentally Impaired Accused Review Board may withhold some information where it is in the public interest to do so, having regard to all the circumstances.
30.	The *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to provide the Mentally Impaired Accused Review Board with greater flexibility in responding to a breach of conditions by the accused. Specifically, in addition to the existing power to cancel Conditional Release Orders and Leave of Absence Orders, the Board should be provided with the power to affirm, amend or suspend the order. The Board must notify the Minister of its decision to make material changes to the order within 30 days.
31.	The *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to contain an express requirement that the Mentally Impaired Accused Review Board should be advised in a timely manner of any breach of conditions by a mentally impaired accused.
32.	The *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to provide for the Board's ability to enter into Memoranda of Understanding with other agencies carrying out functions under the Act.

33.	The *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to provide that the mentally impaired accused or their representative may submit a request for the Mentally Impaired Accused Review Board to review decisions made in respect of their matter. Any such request must be considered by the chairperson within a reasonable period of time.
34.	Section 45 of the *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to provide for the mandatory appointment of supervising officers to facilitate and coordinate service delivery to mentally impaired accused.
35.	Consideration be given to the referral of the issue of interstate transfers of mentally impaired accused to an appropriate national forum such as the Law, Crime and Community Safety Council.

Acknowledgements

The Department of the Attorney General gratefully acknowledges the efforts of the many individuals and organisations who have contributed to the review of the *Criminal Law (Mentally Impaired Accused) Act 1996*. The Department of the Attorney General received written and verbal submissions from a range of interested organisations and members of the public during the course of two consultation rounds. Submission authors provided thoughtful and detailed commentary on the operation, effect and reform of the *Criminal Law (Mentally Impaired Accused) Act 1996*, and these contributions have been invaluable in the development of this report.

Table of Stakeholders

Number	Name
1	Sampson, Cheryl
2	McCarthy, Mary
3	Livingstone, Donna
4	Commissioner for Children and Young People
5	Council of Official Visitors
6	Kester, Elissa
7	Aboriginal Legal Service of Western Australia
8	Law Society of Western Australia
9	Inspector of Custodial Services
10	Robinson, Alan
11	Seward, Mike
12	Richmond Fellowship of Western Australia
13	Ethnic Disability Advocacy Centre
14	Equal Opportunity Commission of Western Australia
15	Royal Australian and New Zealand College of Psychiatrists Faculty of Forensic Psychiatry
16	Royal Australian and New Zealand College of Psychiatrists WA Branch
17	Geraldton Community Legal Centre
18	Kaur, Manjit
19	People with Disabilities WA
20	Western Australian Association for Mental Health; Consumers of Mental Health WA; Developmental Disability WA; Richmond Fellowship of WA; Debora Colvin, Head of Council of Official Visitors; Carers WA; Mental Health Carers Arafmi (WA) Inc; People with Disabilities Western Australia; Bridget Silvestri; Antonio Silvestri; Alan Robinson; Seamus Murphy; Mental Health Matters 2 and the Aboriginal Disability Justice Campaign.
21	Legal Aid Western Australia
22	Mental Health Matters 2
23	Baptist Care Inc
24	Hutchinson, Colene
25	North Metropolitan Health Service
26	Webb, Margaret
27	Consumers of Mental Health WA
28	Mental Health Commission
29	Department of Local Government and Communities
30	Department for Child Protection and Family Support
31	Western Australian Police
32	Disability Services Commission
33	Office of the Director of Public Prosecutions
34	First Peoples Disability Network Australia
35	Office of the Public Advocate
36	Supreme, District and Children's Courts of Western Australia

37	Victims of Crime Reference Group
38	Office of the Chief Psychiatrist
39	Department of Corrective Services
40	Department of Health
41	Mental Health Advisory Council
42	Mental Health Law Centre
43	Mentally Impaired Accused Review Board

Definitions

Accused means a person charged with an offence.

Custody order means an order that an accused be kept in custody in accordance with Part 5 of the *Criminal Law (Mentally Impaired Accused) Act 1996*.

Conditional Release Order means a release order made by the Governor in accordance with section 35 of the *Criminal Law (Mentally Impaired Accused) Act 1996* which specifies conditions of release.

Discussion Paper means the public discussion paper released by the Department of the Attorney General in September 2014, attached at Appendix A.

Leave of Absence Order means an order made by the Mentally Impaired Accused Review Board in accordance with section 28 of the *Criminal Law (Mentally Impaired Accused) Act 1996*. The Board may only make a Leave of Absence Order in respect of a mentally impaired accused where the Governor has authorised the Board to do so under section 27 of the *Criminal Law (Mentally Impaired Accused) Act 1996*.

Mentally impaired accused means persons who are mentally unfit to stand trial or acquitted on account of unsoundness of mind. Note that under section 23 of the *Criminal Law (Mentally Impaired Accused) Act 1996* the term mentally impaired accused is more narrowly defined to mean an accused in respect of whom a custody order has been made and who has not been discharged from the order. However, for simplicity, a broader definition of mentally impaired accused is used in this report.

Mentally Impaired Accused Review Board means the Board established under Part 6 of the *Criminal Law (Mentally Impaired Accused) Act 1996* which is responsible for supervising mentally impaired accused subject to a custody order.

PART ONE: INTRODUCTION

Introduction

1. This Report considers legal and procedural issues in the application of the *Criminal Law (Mentally Impaired Accused) Act 1996* in the Western Australian criminal justice system.

2. People affected by mental illness or cognitive impairment appear to be disproportionately represented in the criminal justice system as both offenders and victims.[3] For instance, a report based on a survey of reception prisoners in Western Australia found that 63% of the women and 40% of the men met the criteria for a current diagnosis of mood disorder, anxiety disorder, post-traumatic stress disorder and/or eating disorder. The report also noted that the prevalence of mental disorder and substance use disorders in prisoners was significantly higher among reception prisoners than in the general population.[4]

3. In this context, consideration of the engagement of people affected by mental illness or cognitive impairment with the criminal justice system is critically informed by a recognition of the strong associations between mental illness and cognitive impairment and other forms of disadvantage and social exclusion – and the compounding effect of multiple disadvantage on the ability of this group to engage with the legal system.

4. In order to address these issues, the Government has implemented a number of initiatives to improve outcomes for individuals affected by mental illness or cognitive impairment in the criminal justice system.

5. The Government has established Western Australia's first Mental Health Court Diversion Program, with $16 million in pilot funding allocated since 2012-13. The adult component of this Program, the Start Court, is headed by a dedicated Magistrate and aims to reduce re-offending, improve participants' mental health and wellbeing and, where appropriate, divert mentally ill offenders from prison and other criminal sanctions. The children's component of the Program, Links, provides additional specialist clinical mental health and psychosocial support to the Children's Court. Young offenders suspected of having a mental illness may be referred to Links for assessment, case management and referral to community services.

6. The Intellectual Disability Diversion Program aims to reduce recidivism and the rate of imprisonment and to improve the way the criminal justice system deals with those with a cognitive impairment, by providing consultancy and advice to individuals with cognitive impairments, their families and agencies and supports individuals working with them. The

[3] Australian Bureau of Statistics 2013. *In Focus: Crime and Justice Statistics*, October 2013, Cat. no 4524.0, ABS, Canberra

[4] Davison S. et al. *Mental health and substance use problems in Western Australian prisons. Report from the Health and Emotional Wellbeing Survey of Western Australian Reception Prisoners, 2013*. Western Australian Department of Health, 2015

Frequent Offenders Program provides post-release support to individuals with an intellectual disability or cognitive impairment.

7. Through the Mental Health Commission, the Government has developed a strategy which outlines major reform in mental health across Western Australia to deliver person-centred supports and services, and builds the government and non-government sector's capacity to better support people in the community. The 2015-16 State Budget has committed $837 million to mental health services.

8. The Government has allocated $22.5 million over three years to fund the Statewide Specialist Aboriginal Mental Health Service. This service is an innovative arrangement which delivers whole-of-life mental health care. In addition to specialist clinical interventions, the service involves the family and engages traditional healers identified by people with mental illness and their families through community networks where appropriate.

9. Western Australia's first Disability Justice Centre (a 'declared place' for the purposes of the *Criminal Law (Mentally Impaired Accused) Act 1996*) opened in 2015 to provide accommodation, treatment and support to mentally impaired accused with disability in a secure, residential setting.

10. This review of the *Criminal Law (Mentally Impaired Accused) Act 1996* was an election commitment within the *Liberals' Mental Health Policy* released in the lead up to the 2013 State Elections. The announced review was to involve the production of a Discussion Paper by the Department of the Attorney General for public consultation.

11. The *Criminal Law (Mentally Impaired Accused) Act 1996* provides for the legal administration, care and disposition of people with a mental impairment who have been found to be either mentally unfit to stand trial, or not guilty by reason of unsound mind. The *Criminal Law (Mentally Impaired Accused) Act 1996* also provides for the management, supervision and release of people detained under the Act, and establishes the Mentally Impaired Accused Review Board.

12. It should be noted that the *Criminal Law (Mentally Impaired Accused) Act 1996* does not address all criminal justice matters concerning all people who have mental impairment. People with mental impairment who are fit to stand trial or who have been convicted of an offence are far greater in number than mentally impaired accused who are dealt with under the *Criminal Law (Mentally Impaired Accused) Act 1996.*

13. In the five years from 1 July 2010 to 30 June 2015, 0.16% of matters finalised in the Children's Court and 0.03% of matters finalised in the adult courts (Magistrates, District and Supreme Courts) involved accused who were found either mentally unfit to stand trial or not guilty by reason of unsoundness of mind.

14. As at 10 September 2015 there were 39 mentally impaired accused under the authority of the Mentally Impaired Accused Review Board. Of these 39 accused, there were:

    - 9 accused in custody;
    - 15 accused on Conditional Release Orders; and
    - 15 accused on Leave of Absence Orders.

15. While small in number, the concerns of this group and their advocates are taken seriously by the Government.

Background

16. The *Criminal Law (Mentally Impaired Accused) Act 1996* was introduced as part of a package of reforms to modernise the West Australian mental health system and implement the recommendations contained in the report by the Law Reform Commission of Western Australia Report titled 'The Criminal Process and Persons Suffering from Mental Disorder, and other relevant inquiries'[5].

17. At the time of its introduction, the *Criminal Law (Mentally Impaired Accused) Act 1996* formed part of a tranche of legislative packages introduced in a number of Australian States and Territories for the shared purpose of better addressing the complexities of the engagement with the criminal justice system by people with mental impairment.[6]

18. The time has now come to review the operation of the *Criminal Law (Mentally Impaired Accused) Act 1996* to consider whether any changes are required to ensure that it operates in a manner consistent with its purpose and underlying principles.

19. On 25 September 2014 the Attorney General released a public Discussion Paper (Appendix A) for a 12-week consultation period. The public consultation was advertised in the West Australian newspaper and the Department of the Attorney General website. Letters inviting comment were also sent to 37 individuals and organisations.

20. The Discussion Paper contained 20 open-ended discussion points across a range of matters in relation to the *Criminal Law (Mentally Impaired Accused) Act 1996*. The public was also invited to make comments on any other aspect of the operation of the *Criminal Law (Mentally Impaired Accused) Act 1996* not specifically mentioned in the Discussion Paper.

21. The Department of the Attorney General received 52 submissions from 43 individual and group stakeholders during the initial targeted consultation round and over the public consultation period. The submissions varied substantially in terms of scope. Submissions from individual members of the community tended to focus on a single issue, whereas submissions from non-Government and independent agencies generally addressed the 20

[5] Law Reform Commission of Western Australia, *The Criminal Process and Persons Suffering from Mental Disorder, and other relevant inquiries*, Report No 69, 1991

[6] Office of the Inspector of Custodial Services, *Mentally impaired accused on 'custody orders': not guilty, but incarcerated indefinitely*, April 2014 at 2

discussion points in the Discussion Paper as well as a broad range of additional matters spanning all aspects of law reform in relation to people with mental impairment and related service provision. Submissions from Government agencies generally confined their feedback to key issues raised in the Discussion Paper which were relevant to their agency.

Overview of the *Criminal Law (Mentally Impaired Accused) Act 1996*

22. The *Criminal Law (Mentally Impaired Accused) Act 1996* sets out the law and procedure regarding:

    - the process and criteria for determining if a person is unfit to stand trial;
    - the process and criteria for the statutory defence of not guilty by reason of unsoundness of mind;
    - the consequences of findings of mental unfitness to stand trial and of not guilty because of mental impairment; and
    - the supervision and management of people found mentally unfit to stand trial or not guilty because of mental impairment.

23. The *Criminal Law (Mentally Impaired Accused) Act 1996* consists of seven parts and one schedule:

    - *Preliminary* – commencement, definitions and application to all courts exercising criminal jurisdiction;
    - *General provisions about mentally ill accused* – hospital orders and the relationship between the *Criminal Law (Mentally Impaired Accused) Act 1996* and the *Mental Health Act 2014*;
    - *Mental unfitness to stand trial* – the process and criteria for determining whether an accused is unfit to stand trial, the findings that can be made and appeals in relation to unfitness to stand trial;
    - *Accused acquitted on account of unsoundness of mind* – the process and test for determining whether an accused is not guilty of an offence because of unsoundness of mind and the findings that can be made can be made in relation to the defence;
    - *Mentally impaired accused* – the management and release of mentally impaired accused;
    - *Mentally Impaired Accused Review Board* – establishes and sets out the functions and operation of the mentally impaired accused board;
    - *Miscellaneous*; and
    - *Schedule 1* – sets out offences for which a custody order must be made.

Key objectives of the *Criminal Law (Mentally Impaired Accused) Act 1996*

24. The *Criminal Law (Mentally Impaired Accused) Act 1996* deals with accused who are mentally unfit to stand trial or who have been found not guilty on account of unsoundness of mind. Accordingly, persons subject to the Act have not been convicted of an offence. It is important, therefore, to note that the *Criminal Law (Mentally Impaired Accused) Act 1996* is not intended to establish a regime by which to provide punishment for criminal guilt. Rather,

the Act is intended to balance the paramount duty of the Government to protect community safety with the rights and needs of persons with a mental or cognitive impairment.

25. When introducing the *Criminal Law (Mentally Impaired Accused) Act 1996*, the then Attorney General and Minister for Justice, the Honourable Peter Foss MLC, stated in his Second Reading speech that the Act reflected the then-government's commitment "*to the paramount goal of a safe and secure environment for all Western Australians while ensuring that all participants in the criminal justice system are treated fairly and equitably and the process itself is cost efficient and effective*."

26. Consistent with this commitment, the Report identifies the following two key objectives as underpinning the operation of the *Criminal Law (Mentally Impaired Accused) Act 1996*:

    - the paramount safety of the community, including victims of alleged crime;
    - the fair and equitable treatment of mentally impaired accused, consistent with the principle of least restriction.

27. The paramount objective of the *Criminal Law (Mentally Impaired Accused) Act 1996* is the protection of the community.

28. The management, supervision and release framework under the *Criminal Law (Mentally Impaired Accused) Act 1996* promotes community protection in two main ways:

    - In the first instance, the public is protected through the removal of a mentally impaired accused from the community by means of imprisonment, supervision or treatment. In this context – and in line with the Government's commitment to community safety – victims of alleged crime are an important stakeholder under the *Criminal Law (Mentally Impaired Accused) Act 1996*. It is acknowledged that victims suffer harm due to crime regardless of the capacity for culpability or conviction of the accused.

    - In the longer term, the public is protected through the provision of appropriate treatment and supports that contribute to the successful rehabilitation of mentally impaired accused to the point where they can be safely reintegrated into the community. In this context, the Report has had regard to the fair and equitable treatment of mentally impaired accused, as well as the need to mitigate the risk that processes under the Act may run counter to the recovery focus of the Western Australian mental health system.[7]

[7] The purpose of a recovery oriented mental health practice is designed to ensure that actions and decisions relating to persons affected by mental impairment delivered in a way that supports their recovery. The *Mental Health Act 2014* articulates the centrality of recovery to the Western Australian mental health system in its Objects, Charter of Mental Health Care Principles and by legislating to ensure those with mental illness and their family members/carers are at the centre of decisions concerning the treatment of the mentally ill.

29. While the *Criminal Law (Mentally Impaired Accused) Act 1996* is primarily criminal justice legislation rather than health management legislation, such a consideration remains a key component of the Act. The principle of least restriction can be understood as a critical safeguard to ensure that decision makers under the *Criminal Law (Mentally Impaired Accused) Act 1996* acknowledge the seriousness of any decision to deprive a person of his or her liberty, and strike the appropriate balance between the paramount consideration of community safety and the protection of the rights and needs of persons who are mentally impaired.

30. Given their centrality to the purpose and operation of the *Criminal Law (Mentally Impaired Accused) Act 1996*, the Report has proceeded on the basis that these objectives form the foundation of this assessment of the operation of the Act.

PART TWO: LEGAL CONCEPTS AND CRITERIA

Introduction

31. The *Criminal Law (Mentally Impaired Accused) Act 1996* outlines the procedures to be followed in criminal proceedings against people with a mental impairment who are found to be of 'unsound mind' or 'mentally unfit to stand trial'.

32. People who are of 'unsound mind' may be acquitted of an offence because at the time of the alleged offence they experienced some form of mental impairment which deprived them of the capacity to control or understand the consequences of their actions.

33. People who are 'mentally unfit to stand trial' are considered, due to some form of mental impairment, to be unable to properly participate in or follow the course of the trial.

Statement of objects and principles

34. In legislation, a statement of objects and principles is a mechanism by which to elucidate the legislative intent behind an Act. These statements, which are often located at the beginning of a piece of legislation, play a similar role to a preamble, outlining the underlying purposes of the legislation and can be used to resolve uncertainty and ambiguity.

35. While statements of objects and principles do not generally of themselves create actionable rights or obligations, the inclusion of such clauses may assist the courts and others in the interpretation of legislation. Section 18 of the *Interpretation Act 1984* states that:

    In the interpretation of a provision of a written law, a construction that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object.

36. In the Discussion Paper, the Government sought views concerning the inclusion of a statement of objects and principles in the *Criminal Law (Mentally Impaired Accused) Act 1996*.

37. A majority of submissions were strongly supportive of including a statement of objects and principles in the *Criminal Law (Mentally Impaired Accused) Act 1996*. As summed up by a stakeholder, "the inclusion of a statement of objects and principles in legislation, to shape its development and guide its implementation and interpretation, is currently recognised as best practice."

38. Other stakeholders, however, expressed the view that a statement of objects and principles in the *Criminal Law (Mentally Impaired Accused) Act 1996* is not necessary. These stakeholders did not consider that there was ambiguity regarding the objects of the *Criminal Law (Mentally Impaired Accused) Act 1996*, and noted that questions arising in respect of

the interpretation of the Act could be answered by reference to the Second Reading speech and explanatory materials for the *Criminal Law (Mentally Impaired Defendants) Bill 1996* and subsequent amending legislation.

39. While statements of objects and principles may potentially make a meaningful contribution to the interpretation of the *Criminal Law (Mentally Impaired Accused) Act 1996*, it is important to note that serious consideration would need to be given prior to any *ex post facto* insertion of a statement of objects and principles.

40. Statements of objects and principles clarify the intention of the drafters. At the current time, it is not anticipated that the *Criminal Law (Mentally Impaired Accused) Act 1996* is likely to be repealed and replaced with a new Act; nor is a significant 'ground up' amendment of the Act proposed. Accordingly, seeking to legislate the intention of the drafters through a new statement of objects and principles may not, in fact, represent the best legislative pathway through which to articulate rights and interests that are sought to be promoted under the *Criminal Law (Mentally Impaired Accused) Act 1996*.

Recommendation One
A statement of objects and principles would be appropriate in circumstances where the *Criminal Law (Mentally Impaired Accused) Act 1996* is repealed or replaced, or if a significant 'ground up' amendment of the Act occurs.

41. Regarding the content of any such statement of objects and principles, most stakeholders were supportive of the objects and principles which had previously been recommended by the Holman Review.[8]

Holman Review draft set of objects and principles

- *"To ensure that mentally impaired defendants are dealt with in court and other legal proceedings in a manner that respects their rights and dignity, and that accords with the principles of natural justice;*
- *To balance the rights of mentally impaired defendants with the rights of the community to be protected;*
- *To ensure that mentally impaired defendants receive the best care, treatment and rehabilitation rather than punishment;*
- *To ensure that mentally impaired defendants have access to health care and support services equivalent to the access of the rest of the community;*
- *To ensure that mentally impaired accused have legal representation, which to the extent that he or she does not have sufficient means to pay for it should be free of charge;*
- *To give preference to options for care, treatment and rehabilitation of mentally impaired defendants that cause the least restriction of their freedom that is necessary to protect the mentally impaired defendant and the community;*

[8] The Holman Review was a formal review of the *Criminal Law (Mentally Impaired Accused) Act 1996* and the *Mental Health Act 1996* conducted by Professor C. D'Arcy Holman in 2002.

- *To minimise the adverse effects of becoming a mentally impaired defendant on the family life;*
- *To give victims the opportunity to be acknowledged and heard; and*
- *When a mentally impaired defendant is a person of Aboriginal or Torres Strait Islander background or a person from another distinct cultural or linguistic group, as far as possible, to manage the person's case in a manner appropriate and consistent with the person's cultural beliefs, practices and mores, taking into account the views of the person's family and community."*

42. In relation to the question of whether such statement of objects and principles should include any specific reference to victims, stakeholders provided mixed responses.

43. The Victims of Crime Reference Group recommended that the statement include reference to victims, noting that "it is of fundamental importance that the harm suffered by the victim is acknowledged in the legislation."

44. While several submissions reflected the view expressed by the Victims of Crime Reference Group, there was concern about how references to victims in such a statement should be expressed.

45. For instance, the Office of the Inspector of Custodial Services noted that it was "wholly inappropriate" to employ the term "victims of crime" where a person has been found mentally unfit to stand trial since nothing has been formally proved against them. It may be appropriate to refer to a "victim of crime" where the accused was found not guilty by reason of unsound mind where it was proved that they did the act, however, the Inspector pointed out it must be "borne firmly in mind that the accused person was not criminally responsible."

46. This concern was also expanded on in the submission from the Supreme, District and Children's Courts of Western Australia, which noted that if recognition of victims should go beyond stating that they have the opportunity to be acknowledged and heard, *"it is important that any decision affecting the accused also give due weight to the absence of any judicial determination that the accused committed the offence charged, or to the finding that the accused is not culpable for the offence."*

47. The Director of Public Prosecutions was of the view that the interests of the victims of alleged crime should not be reflected in the *Criminal Law (Mentally Impaired Accused) Act 1996* beyond s33(5)(f) (which allows for victim impact statements to be considered by the Mentally Impaired Accused Review Board), noting that –

    To have the interests of victims of crime reflected when determining questions about assessment and treatment of mentally impaired accused, and mental unfitness to stand trial,

could potentially mislead victims as to the relevance or importance of their views in this aspect of the criminal proceedings, which would be improper, and could result in victims being re-traumatised by the process. This would be neither wise nor kind.

48. Similarly, Mental Health Matters 2 expressed the view that while victims of alleged crime should have access to all support services (such as Victims Support Services and the Victims Notification Register), they should not have a role in informing dispositions as "these dispositions should not be founded on punishment or deterrence."

49. The Public Advocate also suggested that it was unnecessary to set out specific references to victims' rights in the objects and principles as this is already adequately recognised in the current provisions of the *Criminal Law (Mentally Impaired Accused) Act 1996* and the *Victims of Crime Act 1994.* For instance, the Mentally Impaired Accused Review Board is specifically included under the definition of 'public officers and bodies' which should have regard to and apply the guidelines set out in Schedule 1 of the *Victims of Crime Act 1994*.

50. A number of stakeholders also expressed the view that, if included, any statement of objects and principles should make specific reference to the fact that, consistent with Australia's obligations under international human rights law, decisions under the *Criminal Law (Mentally Impaired Accused) Act 1996* in respect of juveniles must take into account the best interests of the child.

51. The Office of the Commissioner for Children and Young People recommended that:

"A specific principle that should be included is that, in performing a function under the Act in relation to a child, a person or body must have regard to what is in the best interests of the child as a primary consideration. This recognises the special vulnerability of mentally impaired children and the responsibility of the justice system to consider their interests and needs."

52. Similarly, the Department for Child Protection and Family Support recommended a guiding principle to recognise the special needs of children who may come under the *Criminal Law (Mentally Impaired Accused) Act 1996*.

53. Other objects and principles suggested in submissions included:

- The principle that the imposition of a custody order should only be used as a last resort
- The principle 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 lifestyle choices
- Specific recognition that in cases of unfitness to be tried, there has been no judicial determination that the accused committed the offence and in cases of acquittal due to unsound mind, the accused has been found not criminally responsible for the offence

- The principle that unreasonable delay is to be avoided and particular consideration is to be given to prioritising matters involving mental unfitness to stand trial and the defence of mental impairment where:
    - the accused is a minor or was a minor at the time of the alleged offence;
    - unreasonable delay would be inconsistent with the accused's rights; or
    - it is necessary to support therapeutic outcomes for the accused, victims and family members.

54. In addition to the objects and principles outlined above, it is clear that protection of the community - the paramount purpose of the *Criminal Law (Mentally Impaired Accused) Act 1996* - should be recognised as such in the statement of objects and principles. Given that community safety is the primary reason and justification for the continued supervision and support of certain accused who cannot be convicted due to their mental impairment, it is critical that this principle is contained in any express statement of the objects and purposes of the *Criminal Law (Mentally Impaired Accused) Act 1996.*

55. An express provision that community safety is the paramount consideration in the statement of objects and principles may be helpful to the courts and the Mentally Impaired Accused Review Board in weighing up the many competing 'welfare' and 'risk' considerations under the *Criminal Law (Mentally Impaired Accused) Act 1996*.

56. Furthermore, setting out community safety as the paramount consideration would make it clear that, unlike the position in certain civil statutes such as the *Mental Health Act 1996* for instance, the relevant considerations where a person has been charged with criminal offences should be primarily focused on the protection of the community and not solely on the individual needs of the accused.

Recommendation Two
Consistent with Recommendation One, should circumstances arise where the *Criminal Law (Mentally Impaired Accused) Act 1996* is repealed or replaced, or if significant 'ground up' amendment of the Act occurs, the above discussion of stakeholders' views should inform the content of any such statement of objects and principles.

Definition of Mental Illness

57. The *Criminal Law (Mentally Impaired Accused) Act 1996* contains two different definitions for the term 'mental illness'. The definition of the term varies depending on the Part of the Act it appears in.

58. In Part 3, 'mental illness' is defined as –

"an underlying pathological infirmity of the mind, whether of short or long term duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary stimuli."

59. This definition is consistent with the definition of 'mental illness' used in section 27 of the *Criminal Code* in relation to the defence of insanity. 'Mental illness' in this context refers to the assessment of legal capacity and is narrowly defined.

60. Where the term 'mental illness' appears in other sections of the *Criminal Law (Mentally Impaired Accused) Act 1996*, such as in section 5 (in Part 2) and Part 5, it is expressed to have the same meaning as that in the *Mental Health Act 2014*.[9]

61. Section 6 of the *Mental Health Act 2014* provides:

(1) 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.*

(3) 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.

(4) A decision 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.

[9] Section 3 of the *Criminal Law (Mentally Impaired Accused) Act 1996*

62. In the Discussion Paper, the Government sought views on whether the definition of 'mental illness' should be amended.

63. A significant number of stakeholders expressed dissatisfaction with the existence of two different definitions of the same term in the Act, stating that this could cause confusion for readers. In particular, submissions from peak organisations in the community mental health and disability services sectors argued that the definition in the *Mental Health Act 1996* should be the only definition used throughout the *Criminal Law (Mentally Impaired Accused) Act 1996* regardless of the context in which the term appears and the purpose of its usage.

64. Other submissions supported the retention of two definitions of 'mental illness' in the *Criminal Law (Mentally Impaired Accused) Act 1996*, pointing out that each definition is appropriate for its purpose in the context in which it appears.

65. On balance, it is considered appropriate to retain the current arrangement of using definitions of 'mental illness' in the *Criminal Law (Mentally Impaired Accused) Act 1996* which are appropriate to the context in which the term appears.

66. It is a well-established legal principle that whether a particular mental condition may amount to a mental illness to which the insanity defence applies is not a medical question but a question of law for the Court.

67. This definition of 'mental illness' was examined in some detail by the Law Reform Commission of Western Australia during the course of its review of the law of homicide. In that context, the Law Reform Commission concluded that the current definition of mental illness as used in the Criminal Code (which is reflected in the *Criminal Law (Mentally Impaired Accused) Act 1996*) was adequate for purposes of applying the legal test under section 27 of the *Criminal Code* and does not require amendment.

68. Given the role of Part 3 in providing the legislative framework in which to address persons who have been found not guilty by reason of unsound mind under the *Criminal Code*, it is appropriate to retain a common definition of mental illness in both the *Criminal Code* and Part 3 of the *Criminal Law (Mentally Impaired Accused) Act 1996*.

69. The definition of 'mental illness' in section 5 (in Part 2) and Part 5 of the *Criminal Law (Mentally Impaired Accused) Act 1996* serves a different purpose. In those sections, the term 'mental illness' specifically relates to medical treatment for the mentally impaired accused. Accordingly, it is appropriate that the definition in this context have the same meaning as that in the relevant mental health legislation, the *Mental Health Act 2014*, and as amended from time to time.

70. Furthermore, the Report notes that when enacting the *Criminal Law (Mentally Impaired Defendants) Bill 1996*, it was the express intention of Parliament that the term 'mental illness' have a different meaning in criminal and civil proceedings.

71. For these reasons, it is recommended that separate definitions for the term 'mental illness' appropriate to the context in which the term is used be retained in the *Criminal Law (Mentally Impaired Accused) Act 1996*.

Recommendation Three
Separate definitions for the term 'mental illness' appropriate to the context in which the term is used should be retained in the *Criminal Law (Mentally Impaired Accused) Act 1996*.

Definition of Mental Impairment

72. Section 8 of the *Criminal Law (Mentally Impaired Accused) Act 1996* provides that:

    mental impairment means intellectual disability, mental illness, brain damage or senility

73. In the Discussion Paper, the Government sought views on whether any definitions in the *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended.

74. Three submissions were received suggesting that the terms 'brain damage' and 'senility' were outdated and pejorative, and should be deleted from the definition of mental impairment. For instance, the State Forensic Mental Health Service stated that the current definition of mental impairment "does not reflect contemporary medical classifications and uses language a century old which is highly stigmatising."

75. Moreover, as noted by the Disability Services Commission in its submission, the current definition of mental impairment does not recognise that in regard to any mental fitness assessment, the combination of a person's conditions may render the person unfit to stand trial. For instance, a person may have co-occurring conditions such as acquired brain injury, intellectual disability and chronic mental disorder which, *taken together*, result in the person being mentally unfit to stand trial.

76. Having regard to the operation of the *Criminal Law (Mentally Impaired Accused) Act 1996* and to the views expressed by stakeholders, it is recommended that the definition of mental impairment be amended to read as follows: "mental impairment means intellectual disability, mental illness, brain injury or dementia or a combination of these conditions."

Recommendation Four
The definition of mental impairment in the *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to read in contemporary terms, as follows: "mental impairment means intellectual disability, mental illness, brain injury or dementia or a combination of these conditions."

Definition of Unsoundness of Mind

77. Part 5 of the *Criminal Law (Mentally Impaired Accused) Act 1996* provides a legal framework for the treatment of persons who have successfully raised an insanity defence under section 27 of the *Criminal Code*.

78. In respect of such persons, it is open to the court to reach a finding of 'not guilty by reason of unsound mind'.

79. Section 27 of the *Criminal Code* provides that:

> *(1) A person is not criminally responsible for an act or omission on account of unsoundness of 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.*
>
> *(2) A person whose mind, at the time of his doing or omitting to do an act, is affected by delusions on some specific matter or matters, but who is not otherwise entitled to the benefit of the foregoing provisions of this section, is criminally responsible for the act or omission to the same extent as if the real state of things had been such as he was induced by the delusions to believe to exist.*

80. In the Discussion Paper, the Government sought views on whether any terms or definitions in the Act should be amended.

81. One stakeholder submitted that the term 'unsoundness of mind' appeared to relate to mental illness only. For the avoidance of doubt, the stakeholder stated it would be useful to replace the term with 'mental impairment' to make it clear that it could also apply in cases where the accused suffers from a cognitive impairment for instance.

82. The Director of Public Prosecutions supported the proposal to remove the references to 'unsound mind' in the *Criminal Law (Mentally Impaired Accused) Act 1996* such that the Act is amended to refer only to 'mental impairment'. The Director of Public Prosecutions further supported a corresponding amendment to section 27 of the *Criminal Code* to similarly remove and replace the reference to unsound mind.

83. The term 'mental impairment', which encompasses both mental illness and intellectual and cognitive disability, appears to be a more accurate and acceptable description of the relevant finding.

84. Having regard to the operation of the *Criminal Law (Mentally Impaired Accused) Act 1996* and to the views expressed by stakeholders, it is recommended that the words 'unsoundness of mind' be replaced throughout the *Criminal Law (Mentally Impaired*

Accused) Act 1996, as well as in section 27 of the *Criminal Code*, by the term 'mental impairment'.

Recommendation Five

References to 'unsoundness of mind' throughout the *Criminal Law (Mentally Impaired Accused) Act 1996* and in section 27 of the *Criminal Code* should be replaced by the term 'mental impairment'.

PART THREE: PROCESSES AND FINDINGS IN WESTERN AUSTRALIAN COURTS

A. UNFIT TO STAND TRIAL

Introduction

85. The question of 'mental unfitness to stand trial' does not go to criminal responsibility at the time an alleged offence was committed. Rather, it relates to the accused's mental condition at the time they are involved in court proceedings and generally involves determining whether the accused has sufficient mental capacity to understand the court proceedings brought against them.

86. In circumstances where an accused is so affected by mental impairment that they are unable to understand or participate in their trial, the requirement for a fair trial would generally necessitate the adjournment of the trial until such a time as the mental fitness of the accused is able to be re-established. In some circumstances, a finding of mental unfitness to stand trial will result in the dismissal of the charges against the accused.[10] Accordingly, the notion of mental unfitness to stand trial is ultimately a legal concept fundamental to criminal proceedings which has significant legal implications, not least the shielding of the accused from ordinary criminal justice processes and responsibilities.

87. The concept of mental unfitness to stand trial is underpinned by the fundamental right of an accused to have a fair hearing and seeks to avoid the injustice inherent in a trial proceeding in circumstances where an accused is unable to meaningfully understand or participate. It seeks to avoid inaccurate verdicts, maintain the dignity of the trial process and avoid unfairness to an accused.

88. The issues relevant to identifying fitness were identified in *R v Pritchard*:

> *"There are three points to be inquired into: First, whether the prisoner was mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper defence – to know that he might challenge any of you to whom he may object – and to comprehend the details of the evidence."* [11]

Current application in Western Australian courts

89. The current criteria for mental unfitness to stand trial in the *Criminal Law (Mentally Impaired Accused) Act 1996* is based on the common law 'Presser Criteria'[12], which provide that in order to be fit to stand trial, an accused needs to –

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[10] Sections 16(4) and 19(3) *Criminal Law (Mentally Impaired Accused) Act 1996* provide that proceedings may be adjourned for up to six months, following which the court is required to make an order dismissing the charge (or, in superior courts, quashing the indictment) against the accused without deciding the guilt or otherwise of the accused.

[11] [1836] 7 Car & P 303; 173 ER 135

[12] The 'Presser Criteria' refer to the criteria identified by Justice Smith in the case of *R v Presser* [1958] VR 45 at 48 to determine a person's fitness to stand trial.

"…be able to understand what it is that he is charged with. He needs to be able to plead to the charge and to exercise his right of challenge. He needs to understand generally the nature of the proceedings, namely, that it is an inquiry as to whether he did what he is charged with. He needs to be able to follow the course of the proceedings so as to understand what is going on in Court in a general sense, though he need not, of course, understand all the formalities. He needs to be able to understand the substantial effect of any evidence that may be given against him; and he needs to be able to make his defence or answer to the charge. Where he has counsel he needs to be able to do this by letting his counsel know what his version of the fact is and, if necessary, telling the Court what it is. He need not have the mental capacity to make an able defence: but he must … have sufficient capacity to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel, if any."

90. Drawing on these criteria, the *Criminal Law (Mentally Impaired Accused) Act 1996* creates a rebuttable presumption that an accused is mentally fit to stand trial, and provides that an accused is not mentally fit to stand trial for an offence if the accused, because of mental impairment, is unable to:

    (a) understand the nature of the charge;
    (b) understand the requirement to plead to the charge or the effect of a plea;
    (c) understand the purpose of a trial;
    (d) understand or exercise the right to challenge jurors;
    (e) follow the course of the trial;
    (f) understand the substantial effect of evidence presented by the prosecution in the trial; or
    (g) properly defend the charge.[13]

91. Each of these criteria stands alone. An accused need only satisfy one of the above criteria to be found unfit to stand trial.

92. Under the *Criminal Law (Mentally Impaired Accused) Act 1996* an accused is presumed to be mentally fit to stand trial until the contrary is found.[14] The question of whether an accused is mentally unfit to stand trial may be raised by the prosecution, defence or the presiding judicial officer on his or her own initiative and can be raised more than once in a trial. In a court of summary jurisdiction, the question may be raised at any time before or during the trial of the accused. In the Supreme Court or the District Court, the question may be raised at any time before an indictment is presented to the court, after an indictment is presented to the court and before a jury is sworn, or at any time after a jury is sworn during the trial of the accused. The question of whether an accused is not mentally fit to stand trial is to be decided by the presiding judicial officer on the balance of probabilities after inquiring into the question and informing himself or herself in any way the judicial officer thinks fit.[15]

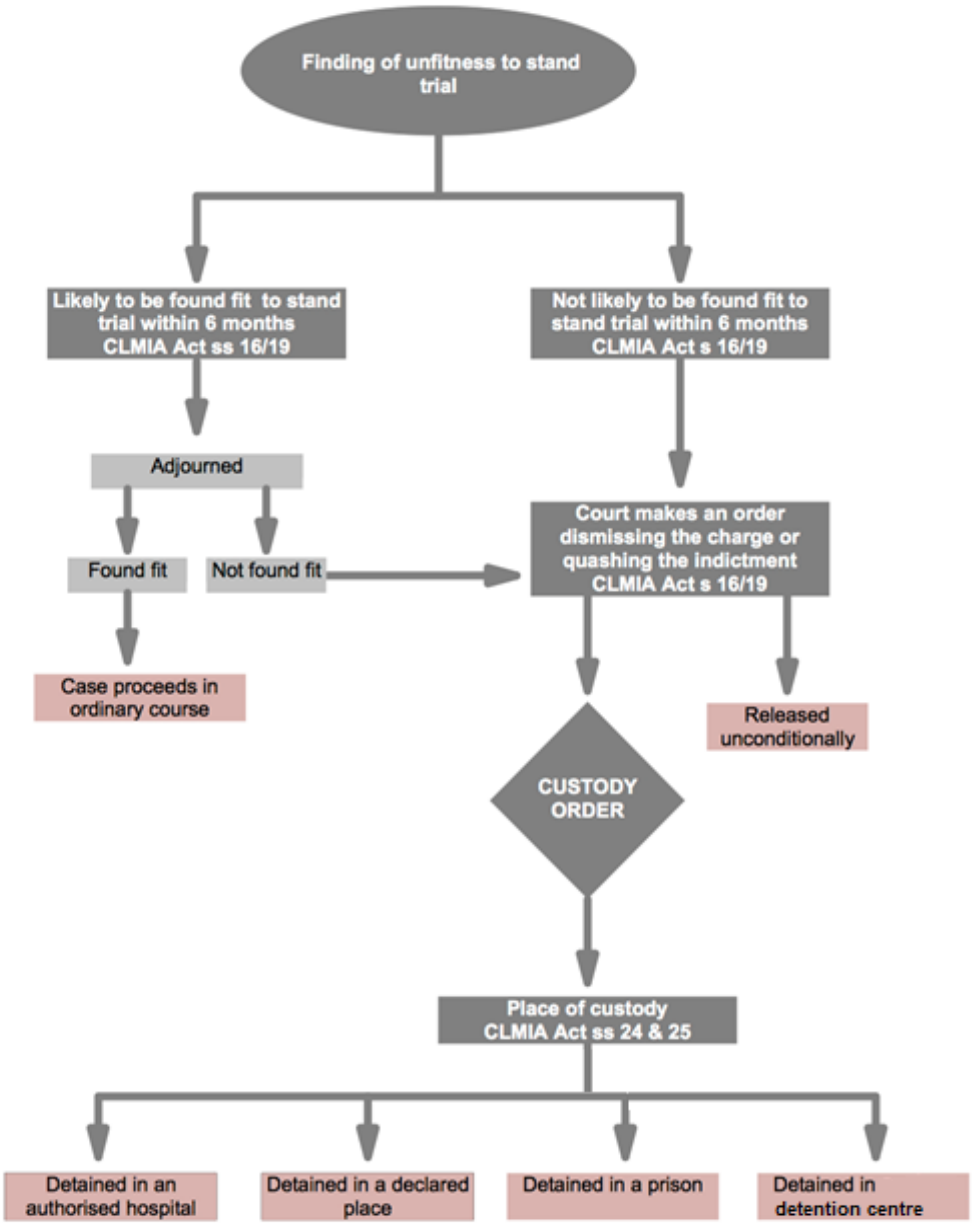
93. The procedure following a decision by the presiding judicial officer that an accused is mentally unfit to stand trial varies depending on whether the court is satisfied that the accused will not become mentally fit to stand trial within six months of the finding of mental unfitness. If the court is not satisfied, the proceedings are adjourned for no more than six months in order to see whether the accused will become fit. If the court is satisfied that the accused will not become fit to stand trial within six months, or if in fact the accused does not

[13] Section 9 *Criminal Law (Mentally Impaired Accused) Act 1996*
[14] Section 10 *Criminal Law (Mentally Impaired Accused) Act 1996*
[15] Section 12 *Criminal Law (Mentally Impaired Accused) Act 1996*

become mentally fit to stand trial within six months of the original finding, the court must make an order dismissing the charge (or quashing the indictment where appropriate) without deciding the guilt or otherwise of the accused, and either releasing or making a custody order in respect of the accused.[16]

[16] Section 16 *Criminal Law (Mentally Impaired Accused) Act 1996*

Disposition Options: Unfit to stand trial



Options

94. In the Discussion Paper, the Government sought views on Part 3 of the *Criminal Law (Mentally Impaired Accused) Act 1996* and on issues concerning mental unfitness to stand trial.

95. These included whether:

- the criteria for determining if a person is mentally unfit to stand trial should be amended;
- the procedure for determining if a person is mentally unfit to stand trial should be modified;
- a special hearing to determine the criminal responsibility of an accused who has been found mentally unfit to stand trial should be introduced; and
- the range of options available to a court when addressing an accused who has been found mentally unfit to stand trial should be expanded.

Fitness criteria

96. As noted above, the legal test of whether an accused is mentally unfit to stand trial is based on the test which was established in *Presser*. In recent years, a number of Australian jurisdictions have been considering whether the *Presser* criteria continue to provide a 'suitable modern basis' for determining the issue of unfitness to stand trial. Specifically, the *Presser* criteria have been criticised for failing to provide an adequate legal test for unfitness to plead, and for setting too high a threshold for a finding of mental unfitness.[17]

97. In the Discussion Paper, the Government sought views on whether the criteria for determining if a person is mentally unfit to stand trial should be amended. In particular, the Government sought views on whether the criteria contained in section 9 of the *Criminal Law (Mentally Impaired Accused) Act 1996* should be expanded to include an additional criterion addressing the ability of an accused to instruct his or her lawyer.

98. In its submission, the Supreme, District and Children's Courts sought amendment of the criteria for determining if an accused is mentally unfit so that there is greater emphasis on the accused's decision making ability, rather than their ability to understand specific aspects of the proceedings. In contrast, the Director of Public Prosecutions expressed the view that "it is difficult to envisage how the criteria for unfitness could be consistently assessed if the criteria were amended to assess decision making capacity in general, rather than the ability to understand specific aspects of the proceedings" and noted that "[a]pplying a generalised definition of 'decision making capacity' is a far more subjective exercise."

[17] See Victorian Law Reform Commission Review of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* Report, June 2014 at 3.19-3.22

99. Reframing the test for fitness to stand trial to focus on the decision-making capacity of the accused has been recommended by the Law Commission of England and Wales[18] and the New South Wales Law Reform Commission.[19] These recommendations reflect the view that the accused cannot participate meaningfully in their trial unless they have the capacity to make decisions in relation to it.

100. Decision-making capacity and its relevance to determining fitness to stand trial was considered by the Victorian Law Reform Commission in its *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*. The Victorian Law Reform Commission rejected the suggestion that the test for fitness to stand trial should be reformulated in this manner, noting that "in practical terms, having a test based on 'decision-making capacity' or 'effective participation' could introduce too much subjectivity. Subjectivity in the test, particularly in terms of which decisions the accused needs to be able to make and what sort of participation is required before it is 'effective', would also be problematic for expert assessments."[20]

101. It is agreed, for the purposes of this Report, that decision making ability would be a difficult test to implement in practice. Rather, it is considered that the best way to ensure that the test takes into account the accused's ability to make the crucial decisions in their trial is to enhance and clarify the operation of the *Presser* test. This approach was supported by the majority of stakeholders who supported the retention of a '*Presser*'-style test as the basis for the test for mental unfitness to stand trial in Western Australia. Rather than calling for the adoption of an altogether new test, respondents focused on enhancements and clarifications to improve the operation of the existing test for mental unfitness.

102. Several submissions suggested the inclusion of a criterion which specifically addresses the ability of the accused to provide instructions to his or her legal practitioner. Anecdotal evidence points to a range of barriers that preclude effective communication between legal practitioners and people affected by mental illness and cognitive impairment, including challenges in "telling their stories to lawyers and in understanding the advice lawyers gave them."[21]

103. It is arguable that criterion 9(g), pertaining to the ability of an accused to properly defend the charge, is sufficiently broad to take into account the ability of an accused to instruct counsel. However, given the critical importance of legal advice and representation to individuals subject to the criminal justice system, there is merit in the proposal to amend the criteria for fitness to specifically make reference to the capacity of a person to provide instructions to his or her legal counsel.

104. The Aboriginal Legal Service of Western Australia suggested the inclusion of separate criteria to consider whether the accused has the capacity to decide whether to give evidence and the ability to give evidence if they wish to do so. People affected by mental illness or

[18] Law Commission (England and Wales), *Unfitness to Plead,* Issues Paper (2014) 11–12.

[19] New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report No 138 (2013) 31–2.

[20] See Victorian Law Reform Commission Review of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* Report, June 2014 at 3.30.

[21] Gray A. Forell S and Clarke S., 'Cognitive Impairment, Legal Need and Access to Justice', Justice Issues, March 2009: p 6

cognitive impairment face a range of barriers that may limit their ability to give evidence in legal proceedings. In particular, the Judicial Commission of NSW has observed that such people –

"… are vulnerable to prejudicial assessments of their competence, reliability and credibility because judicial officers and juries may have preconceived views regarding a person with an intellectual disability. For example, they may fail to attach adequate weight to the evidence provided because they doubt that the person with intellectual disability fully understands their obligation to tell the truth. In addition, people with an intellectual disability are vulnerable to having their evidence discredited in court because of behavioural and communication issues associated with their disability."[22]

105. Furthermore, research suggests that people affected by mental illness or cognitive impairment may find it challenging to give evidence, "particularly when faced with tactics used to undermine their evidence"[23], including cross-examination. As Goodfellow and Camilleri report, in many cases persons "with cognitive impairments experience difficulties understanding the law and legal processes including the language used, following events, recalling and describing [events] – particularly under pressure and when being cross-examined."[24]

106. The ability of people affected by mental illness and cognitive impairment to give evidence in legal proceedings is a critical element in facilitating their effective participation in the legal process, and in ensuring that the best evidence is received by the court. While protection is available in Western Australia as part of the general discretion of the court to 'forbid' personal cross-examination for any witness in a criminal proceeding,[25] it may be argued that the *Evidence Act 1906* does not draw sufficient linkage between the ability of an accused to give evidence and his or her fitness to stand trial. Accordingly, there appears to be merit in the proposal to amend the criteria for mental unfitness to specifically make reference to the capacity of a person to decide whether to give evidence and the ability to give evidence if they wish to do so.

107. A number of stakeholders also supported the removal of criterion (d) regarding an accused's ability to understand or exercise the right to challenge jurors, noting that juror selection was "not an integral issue fundamental to trials in Western Australia" and had a "marginal impact" on the question of whether the accused would have a fair trial. However, in this regard, the Director of Public Prosecutions expressed the view that criterion (d) should be retained on the basis that it is fundamental to the proper empanelment of a jury that an accused receives and understands notification of the right to challenge jurors under section 103 of the *Criminal Procedure Act 2004*.

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[22] 'Equality before the Law Bench Book' (Judicial Commission of New South Wales, 2006) 5301.

[23] Gray A. Forell S and Clarke S., 'Cognitive Impairment, Legal Need and Access to Justice', Justice Issues, March 2009: p 8

[24] Goodfellow J and Camilleri M., *Beyond Belief, Beyond Justice: the Difficulties for Victim/Survivors with Disabilities when Reporting Sexual Assault and Seeking Justice*, 2003 http://wwda.org.au/wp-content/uploads/2013/12/beyondbelief1.pdf

[25] s25A *Evidence Act 1906*

108. Having regard to the operation of the *Criminal Law (Mentally Impaired Accused) Act 1996* and taking into account the views of stakeholders, it is recommended that it is unnecessary to change the basis of the test for unfitness to stand trial in Western Australia. Rather, the *Presser* test should be modernised through the inclusion of supplemental criteria in order to ensure that it appropriately assesses the ability of an accused to effectively participate in and make meaningful decisions in respect of their trial to a standard required by the interests of justice. Specifically, section 9 of the *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to include additional criteria regarding the ability of an accused to instruct counsel, to decide whether to give evidence and to give evidence if they wish to do so.

Recommendation Six
Section 9 of the *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to include additional criteria regarding the ability of accused to instruct counsel, to decide whether to give evidence, and to give evidence if they wish to do so.

Procedure

109. As outlined above, section 12 of the *Criminal Law (Mentally Impaired Accused) Act 1996* provides that the question of whether an accused is mentally unfit to stand trial is to be decided by the presiding judicial officer on the balance of probabilities after inquiring into the question and informing himself or herself in any way the judicial officer thinks fit.

110. Section 12 goes on to provide some guidance on how the Court may conduct its inquiry into the accused's mental fitness by providing that the judicial officer may:

(a) order the accused to be examined by a psychiatrist or other appropriate expert;
(b) order a report by a psychiatrist or other appropriate expert about the accused to be submitted to the court;
(c) adjourn the proceedings and, if there is a jury, discharge it;
(d) make any other order the judicial officer thinks fit.

111. Section 12(4) also provides that the prosecution and the accused may appeal against any decision that the accused is not mentally fit to stand trial.

112. In the Discussion Paper, the Government sought views on whether the procedure for determining if a person is mentally unfit to stand trial should be modified.

113. The majority of submissions that addressed this issue expressed the view that the current system with the Court determining the question of mental unfitness to stand trial is appropriate.

114. A number of stakeholders suggested that section 12(2) be expanded to provide further guidance to the Court on how it may inform itself about the accused's mental fitness to stand trial. For instance, the Disability Services Commission suggested that section 12(2) be amended to include express an reference to a psychologist (as an appropriate expert in relation to accused with disability in particular). It was also suggested by the Department for Child Protection and Family Support that section 12(2) should include recognition that children should be assessed by specialist practitioners with particular knowledge about the development of juveniles, such as forensic child and adolescent psychiatrists and psychologists.

115. On balance, it is recommended that sufficient scope exists under the current provisions of the *Criminal Law (Mentally Impaired Accused) Act 1996* for the Court to inform itself in any manner of its choosing in respect of the accused's mental fitness to stand trial. However, the *Equality before the Law Benchbook* should be amended to provide greater guidance to the Court on how it may inform itself under section 12.

Recommendation Seven
The *Equality Before the Law Bench Book* should be amended to provide greater guidance to the Court on how it may inform itself, including through the use of reports by child and adolescent psychiatrists and psychologists.

116. As outlined above, the procedure following a decision by the presiding judicial officer that an accused is mentally unfit to stand trial varies depending on whether the court is satisfied that the accused will not become mentally fit to stand trial within six months of the finding of unfitness.

117. A number of submissions from community sector health service providers and peak bodies raised concerns about the lack of explicit provision for support to be provided to accused who are suspected of being mentally unfit to stand trial. Submissions suggested that the definition in section 9 should be amended to explicitly provide that the court must consider if the person may be mentally fit to stand trial with appropriate support.

118. The concept of 'fitness with support' refers to modifications to court processes that are made in order to assist an individual to participate in court processes. For example, in respect of special witnesses, section 106R of the *Evidence Act 1906* provides that, in certain circumstances, the court may make an order that:

- the person have near to him or her a person, approved by the court, who may provide him or her with support; or
- the person have a communicator while he or she is giving evidence.

119. Rather than amend the definition in section 9, it is recommended that section 12 of the *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to allow the presiding judicial officer to make orders to enable an accused to participate 'with support' where appropriate. This approach has the support of the Disability Services Commission and the Department of Corrective Services.

Recommendation Eight
Section 12 of the *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to expressly provide that the court may order modifications to court processes to assist the accused. This should include a non-exhaustive list of special measures which the court may consider putting in place including the provision of a support person.

Special hearing

120. Following a finding that an accused is not mentally fit to stand trial, the court must make an order dismissing the charge (or, in superior courts, quashing the indictment) without deciding the guilt or otherwise of the accused and either releasing or making a custody order in respect of the accused.[26] In determining the appropriate disposition to impose, the *Criminal Law (Mentally Impaired Accused) Act 1996* requires the Court to consider:

(a) the strength of the evidence against the accused;
(b) the nature of the alleged offence and the alleged circumstances of its commission;
(c) the accused's character, antecedents, age, health and mental condition; and
(d) the public interest.[27]

121. Accordingly, given a finding of unfitness, the evidence against an accused is not formally tested in court, but is taken into account by the court in determining the appropriate disposition to impose.

122. This aspect of the procedure under the *Criminal Law (Mentally Impaired Accused) Act 1996* differs from a number of other jurisdictions in Australia. For instance, relevant legislation in the Australian Capital Territory[28], New South Wales[29], Northern Territory[30] and Victoria[31] provide that following a finding that the accused is mentally unfit to stand trial, a special hearing process should be conducted in order to test the case against the accused. In South Australia, the *Criminal Law Consolidation Act 1935* (SA) provides that if the Court orders an investigation into an accused's mental fitness to stand trial, the question of the accused's

[26] Section 16 *Criminal Law (Mentally Impaired Accused) Act 1996*
[27] Sections 16 (in courts of summary jurisdiction) and 19 (Supreme and District Courts) *Criminal Law (Mentally Impaired Accused) Act 1996*
[28] Section 316 *Crimes Act 1990* (ACT)
[29] Section 19(2) *Mental Health (Forensic Provisions) Act 1990* (NSW)
[30] Section 43V *Criminal Code Act* (NT)
[31] Section 15 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic)

mental fitness to stand trial may, at the discretion of the trial judge, be separately tried either before or after a trial of the objective elements of the alleged offence.

123. In the Discussion Paper, the Government sought views on whether a special hearing to determine the criminal responsibility of an accused who has been found to be mentally unfit to stand trial should be introduced.

124. A substantial number of submissions were received which addressed the issue of whether a form of special trial process should be introduced under the *Criminal Law (Mentally Impaired Accused) Act 1996* to test the evidence against an accused who has been found mentally unfit to stand trial. For example, the Mental Health Commission noted as a key concern the absence of a process for determining whether a mentally impaired accused did in fact commit the objective elements of the offence with which they are charged.

125. Whilst acknowledging that the current provisions in sections 16(6) and 19(5) of the *Criminal Law (Mentally Impaired Accused) Act 1996* already provide for consideration of the case against the accused, those submissions that supported the introduction of a special hearing process generally expressed the view that the level of consideration was inadequate, calling for a more formal and robust trial process to test the strength of the case against the accused. These submissions emphasised the need for a special trial to provide a mechanism which gives authority to order detention where a finding has been made that the accused did commit the unlawful act.

126. For instance, Legal Aid Western Australia noted in its submission that a key rationale for a special trial would be *"to ensure that the prosecution case is properly tested by the defence so that an assessment may be made of the reliability of witnesses, and issues such as mistaken identification can be addressed. In this way, prosecution cases which do not establish guilt beyond reasonable doubt of the physical elements of the offence will result in a finding of not guilty."*

127. While recognising that there would be deficiencies in the verdict flowing from the unfit accused's inability to instruct counsel or give evidence at a special trial, proponents of a special hearing process suggested that such deficiencies would be sufficiently addressed by the recognition in a special verdict that it is a qualified finding of guilt based on limited evidence.[32]

128. Deficiencies in the verdict of a special trial were a key consideration in those submissions that opposed the introduction of a special hearing process, with a number of stakeholders expressing strong concerns about subjecting an accused who has been found unfit to stand trial to a process aimed at approximating a trial.

[32] *Subramaniam v The Queen* [2004] HCA 51

129. For instance, submissions from WA Police and the Office of the Director of Public Prosecutions pointed out that a finding by the Court that an accused is unfit to stand trial should preclude the accused from having the capacity to participate or provide instructions in any special hearing process. Any trial process requiring the participation of an accused who is unfit to stand trial would be intrinsically flawed.

130. A joint submission from the Supreme Court, District Court and Children's Court of Western Australia also noted that *"a determination with respect to the criminal responsibility of the person charged carries the risk that the orders made by the court will be seen as a form of punishment for the guilt of the accused, deflecting the focus away from the assessment of risk, which ought to be the focus of any proceedings under the Act, at least in circumstances where the responsibility of the accused has not been established according to a process which is procedurally fair."*

131. These submissions also stated that the practical benefit of conducting a special trial process was questionable. The submissions acknowledged that in other jurisdictions, special hearings are considered an important mechanism whereby an unfit accused is given an opportunity for acquittal and unconditional release, a fundamental requirement of the criminal justice system.[33] However, the current provisions of the *Criminal Law (Mentally Impaired Accused) Act 1996* already provide the Court with the power to unconditionally discharge the accused where appropriate.

132. The Victims of Crime Reference Group also expressed reservations about introducing a special trial process on the ground that "the potential for re-traumatisation of victims of crime through a special hearing is considerable".

133. On balance, while there appears to be some merit in expanding on the requirement for the Court to consider the strength of the evidence against the accused, requiring an accused who has been found unfit to stand trial to undergo a trial process cannot be justified by the limited potential benefits of introducing such a system.

134. Rather, concerns in respect of the proper consideration of the case against the accused should be addressed by requiring the Court to conduct an inquiry into whether, on the facts before it, there is a case to answer.

135. In circumstances where the facts of the case are not in dispute or it is clear from the depositions that there is a case to answer, "a public reading of the deposition and an airing of the mitigating factors" in open court (which was a key recommendation of the Holman Report[34]) may be sufficient to discharge the burden of inquiry. Where there is dispute over key elements of the offence or the court considers it appropriate in the public interest, "a

[33] New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*, Report No 138 (2014)

[34] Holman CDJ. *The Way Forward. Recommendations of the Review of the Criminal Law (Mentally Impaired Defendants) Act* 1996. Perth: Government of Western Australia, 2003

more inquisitorial approach involving relevant experts, guardians and family members" may be more appropriate.

136. Consistent with the pre-trial capacity of a court under section 98(2) of the *Criminal Procedure Act 2004* to determine as a matter of law that the accused has no case to answer on a charge, this approach would provide an important safeguard to ensure that the prosecution case is properly tested while mitigating the risks involved in reaching a verdict in respect of an unfit defendant.

137. It is noted that an ongoing assessment of whether there is a case to answer in a given proceeding is carried out by the Director of Public Prosecutions in accordance with the *Statement of Prosecution Policy and Guidelines* (2005), and that there is an opportunity for this assessment to be tested by the court at the committal stage of a proceeding as well as under section 98(2) of the *Criminal Procedure Act 2004*. However, given the special vulnerability of persons subject to the *Criminal Law (Mentally Impaired Accused) Act 1996*, the severe impact of orders under sections 16(6) and 19(5) of the Act, and the possibility of the issue of unfitness arising throughout the trial process, the interests of justice require that the court be subject to a statutory obligation to give consideration to the question of whether there is a case to answer prior to making an order under sections 16(6) or 19(5) of the *Criminal Law (Mentally Impaired Accused) Act 1996*.

138. The Director of Public Prosecutions has advised that the conduct of a separate 'case to answer' hearing would have financial implications for the Office of the Director of Public Prosecutions, as a prosecutor would be required to prepare the case to the same extent as if it was proceeding to trial. Accordingly, it is not recommended that a separate hearing be held to determine whether there is a case to answer. Rather, it is proposed that the issue of whether there is a case to answer could be considered as part of the ordinary trial process at the conclusion of the evidence (or at the point at which the trial was adjourned due to unfitness). In this regard, it is noted that it is always open to the defence to raise the question of whether there is a case to answer. By forming part of the ordinary trial process, consideration of this issue by the court is unlikely to significantly increase the burden on the Office of the Director of Public Prosecutions. Accordingly, amendment of the *Criminal Law (Mentally Impaired Accused) Act 1996* merely makes consideration of this question mandatory in respect of the small number of highly vulnerable defendants who fall under the Act.

139. Given the special vulnerability of persons subject to the *Criminal Law (Mentally Impaired Accused) Act 1996*, and the small number of cases under the Act, it is recommended that sections 16(6) and 19(5) of the *Criminal Law (Mentally Impaired Accused) Act 1996* be amended to require the judicial officer to have regard to whether there is a case to answer on the balance of probabilities after inquiring into the question and informing himself or herself in any way the judicial officer thinks fit. This is consistent with the existing requirement that the court have regard to the strength of the evidence against the accused.

Recommendation Nine
Sections 16(6) and 19(5) of the *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to require a judicial officer to have regard to whether there is a case to answer on the balance of probabilities after inquiring into the question and informing himself or herself in any way the judicial officer thinks fit.

Disposition options

140. As outlined above, where an accused has been found mentally unfit to stand trial and the court believes that the accused is unlikely to become mentally fit to stand trial within six months, the *Criminal Law (Mentally Impaired Accused) Act 1996* provides that the court must make an order dismissing the charge[35] (or, if applicable, quashing the committal or indictment[36]) without deciding the guilt or otherwise of the accused, and either releasing the accused unconditionally or making a custody order in respect of the accused.

141. This provision reflects the legal approach at the time the *Criminal Law (Mentally Impaired Accused) Act 1996* was drafted. As the Inspector of Custodial Services noted in his report –

> *In the mid-1990's, the people responsible for developing the Act took the view that it would be wrong in principle to allow the courts to impose an order that required community supervision on a person found unfit to stand trial. They argued that this would be akin to imposing a sentence on a person who had not even been placed on trial. Such legal subtleties on lost on 'consumers' who find they cannot be released under supervision but can be indefinitely incarcerated.*[37]

142. In determining the appropriate disposition to impose, the *Criminal Law (Mentally Impaired Accused) Act 1996* requires the court to consider:

> (a) the strength of the evidence against the accused;
> (b) the nature of the alleged offence and the alleged circumstances of its commission;
> (c) the accused's character, antecedents, age, health and mental condition; and
> (d) the public interest.[38]

143. The *Criminal Law (Mentally Impaired Accused) Act 1996* further provides that a custody order must not be made unless the statutory penalty for the alleged offence is or includes imprisonment.[39]

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[35] Section 16(5) *Criminal Law (Mentally Impaired Accused) Act 1996*
[36] Section 19(4) *Criminal Law (Mentally Impaired Accused) Act 1996*
[37] Office of the Inspector of Custodial Services, Mentally impaired accused on 'custody orders': not guilty, but incarcerated indefinitely, April 2014 at 8
[38] Sections 16 (in courts of summary jurisdiction) and 19 (Supreme and District Courts) *Criminal Law (Mentally Impaired Accused) Act (1996)*
[39] Section 16(6); 19(5) *Criminal Law (Mentally Impaired Accused) Act 1996*

144. It is apparent then that the range of disposition options available to the court following a finding of mental unfitness are more limited than those available following an acquittal on account of unsoundness of mind. Further, in circumstances where an accused has been charged with an offence which does not attract a custodial penalty, the court has only the single option of unconditional release of the mentally unfit accused.

145. In the Discussion Paper, the Government sought views on whether the range of options available to a court when addressing an accused who has been found mentally unfit to stand trial should be expanded.

146. Submissions which considered this issue were unanimous in calling for the range of available disposition options to be expanded to include a suite of intermediate options to provide for supervision in the community.

147. It was noted in submissions that people who are found mentally unfit to stand trial often have highly complex needs. As such, it is important that the court has sufficient flexibility to take into account the special needs of mentally impaired accused to craft the most appropriate disposition to meet the needs of public protection while respecting the rights of accused. In this context, having the choice of only two disposition options was considered an unnecessary and counter-productive fetter on the discretion of the court. It was also noted that this change would be critical in order to meet the principle of least restriction.

148. There is no persuasive policy basis upon which to maintain different disposition options following a finding of unfitness to those that are available following acquittal by reason of unsound mind. Given that both findings seek to balance the same interests and achieve the same policy objective, it is appropriate that the court should have available to it the full range of disposition options.

149. Accordingly, having regard to the operation of the *Criminal Law (Mentally Impaired Accused) Act 1996* and the views expressed by stakeholders, it is recommended that the disposition options available to the court when addressing an accused found mentally unfit to stand trial be expanded to include 'intermediate' sentencing options, including –

- A community based order;
- An intensive supervision order;
- A custody order; and
- An order releasing the accused unconditionally.

Recommendation Ten
Sections 16(5) and 19(4) of the *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to expand the disposition options available to a court when addressing an accused found mentally unfit to stand trial to include the range of orders available under the *Sentencing Act 1995*, subject to any necessary amendments required to clarify that the accused has not been convicted of an offence.

Application to Juveniles

150. Currently, the *Criminal Law (Mentally Impaired Accused) Act 1996* applies to juveniles in the same way as it applies to adults. In the context of Part 3, this means that the same limited disposition options are available irrespective of whether the accused is a juvenile or an adult.

151. In the Discussion Paper, the Government sought views on whether the *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to provide more flexibility for the courts to take into account the special needs and circumstances of children.

152. Stakeholders who commented on this issue in the context of Part 3 were unanimous that flexibility in disposition options was particularly critical in respect of juvenile offenders.

153. These stakeholders noted that special considerations apply in relation to questions of mental unfitness in the context of children and young people. For instance, the submission of the Western Australian Association for Mental Health (et al) provided that –

"[a]s children and young people are continuing to develop, it is imperative that their fitness to stand trial be re-assessed so that their impairment may be reviewed as they pass through developmental milestones. For example, a man [referred to in the media] as 'Jason' was found unfit to stand trial at 14 years of age following a significant traumatic event. In the eleven years since, there has been no requirement within the Act that his fitness is reviewed to reflect his ongoing development, or that support be provided to enable him to become fit to stand trial."

154. In this context, the Commissioner for Children and Young People supported amending the *Criminal Law (Mentally Impaired Accused) Act 1996* to provide a court with an expanded range of options and recommended, in particular, that in relation to children and young people the courts should be given the power to impose any of the disposition options available under the *Young Offenders Act 1994.*

155. The Director of Public Prosecutions similarly expressed the view that custody orders under the *Criminal Law (Mentally Impaired Accused) Act 1996* should not apply in relation to juveniles in the absence of substantive evidence against the accused, or where the offender is unlikely to have been convicted of the offence.

156. The General Principles of Juvenile Justice provided in section 7 of the *Young Offenders Act 1994* (excerpted below) are noted. In this context, and noting both the need for legislative coherence and the special circumstances of juvenile mentally impaired accused, it is concluded that flexibility of dispositions is critical in the context of juvenile offenders.

Young Offenders Act 1994

Section 7 General principles of juvenile justice

The general principles that are to be observed in performing functions under this Act are that —

(a) there should be special provision to ensure the fair treatment of young persons who have, or are alleged to have, committed offences; and

(b) a young person who commits an offence is to be dealt with, either formally or informally, in a way that encourages the young person to accept responsibility for his or her conduct; and

(c) a young person who commits an offence is not to be treated more severely because of the offence than the person would have been treated if an adult; and

(d) the community must be protected from illegal behaviour; and

(e) victims of offences committed by young persons should be given the opportunity to participate in the process of dealing with the offenders to the extent that the law provides for them to do so; and

(f) responsible adults should be encouraged to fulfil their responsibility for the care and supervision of young persons, and supported in their efforts to do so; and

(g) consideration should be given, when dealing with a young person for an offence, to the possibility of taking measures other than judicial proceedings for the offence if the circumstances of the case and the background of the alleged offender make it appropriate to dispose of the matter in that way and it would not jeopardise the protection of the community to do so; and

(h) detaining a young person in custody for an offence, whether before or after the person is found to have committed the offence, should only be used as a last resort and, if required, is only to be for as short a time as is necessary; and

(i) detention of a young person in custody, if required, is to be in a facility that is suitable for a young person and at which the young person is not exposed to contact with any adult detained in the facility, although a young person who has reached the age of 16 years may be held in a prison for adults but is not to share living quarters with an adult prisoner; and

(j) punishment of a young person for an offence should be designed so as to give the offender an opportunity to develop a sense of social responsibility and otherwise to develop in beneficial and socially acceptable ways; and

(k) a young person who is dealt with for an offence should be dealt with in a time frame that is appropriate to the young person's sense of time; and

(l) in dealing with a young person for an offence, the age, maturity, and cultural background of the offender are to be considered; and

(m) a young person who commits an offence is to be dealt with in a way that —

(i) strengthens the family and family group of the young person; and

(ii) fosters the ability of families and family groups to develop their own means of dealing with offending by their young persons; and

(iii) recognises the right of the young person to belong to a family.

157. Accordingly, and having regard to the operation of the *Criminal Law (Mentally Impaired Accused) Act 1996,* the *Young Offenders Act 1994* and to the views expressed by stakeholders, it is recommended that Part 3 of the *Criminal Law (Mentally Impaired Accused) Act 1996* be amended to allow for a broader range of options to be made available for juveniles found mentally unfit to stand trial, modelled on the sentencing options under Part 7 of the *Young Offenders Act 1994.*

Recommendation Eleven

Sections 16(5) and 19(4) of the *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to allow for a broader range of options to be made available for juveniles found mentally unfit to stand trial, modelled on the sentencing options under Part 7 of the *Young Offenders Act 1994.*

158. Scenario One below provides a simplified example to illustrate what an amended system would look like should the recommendations in this Part be implemented.

SCENARIO ONE: UNFITNESS TO STAND TRIAL

Dave has an intellectual disability and limited communication skills. During an altercation with his mother, Dave became violent and damaged property belonging to his mother's boyfriend. Dave is subsequently charged and appears in the Magistrates Court. Due to his cognitive impairment, Dave is unable to understand the charges against him. During proceedings in the Magistrates Court, his lawyer raises the issue of his mental unfitness to stand trial.

Current system	Proposed system
The Magistrate orders that Dave be examined by a psychologist.	The Magistrate orders that Dave be examined by a psychologist.
The Court is provided with an expert report that concludes that Dave is mentally unfit to stand trial.	The Court is provided with an expert report that concludes that Dave is mentally unfit to stand trial. In particular, the report notes that Dave's cognitive impairment particularly affects his ability to communicate while under stress, which could limit his ability to decide whether to give evidence and to give evidence in his own defence.
Having regard to the information contained in the expert report, the Magistrate determines that Dave is mentally unfit to stand trial and will not become mentally fit to stand trial within six months.	Having regard to the information contained in the expert report, the Magistrate appoints a support person to assist Dave in court. This greatly enhances Dave's ability to follow the trial, but is not in this case sufficient to render him fit to stand trial. The Magistrate determines that Dave is mentally unfit to stand trial and will not become mentally fit to stand trial within six months.
Having regard to the statutory factors in section 16(6) of the Act, the Magistrate determines that it would be inappropriate to release Dave unconditionally.	Given the dispute over the facts material to the prosecution's case, the Magistrate calls additional witnesses to satisfy herself that there is a case to answer on the balance of probabilities.
The Magistrate has no option but to dismiss the charge against Dave and impose a custody order.	The Magistrate is no longer limited to the orders provided in section 16(5) of the Act and is also able to consider whether to make a community based order or an intensive supervision order in respect of Dave. Forming the view that Dave has appropriate supports in place and is able to be properly managed in his local community, she dismisses the charge against Dave and places him on a community based order subject to requirements for regular treatment and drug testing.

B. ACQUITTAL ON ACCOUNT OF UNSOUNDNESS OF MIND

Introduction

159. Unlike mental unfitness to stand trial discussed in Part A above, acquittal on account of unsoundness of mind pertains to the legal culpability of an offender and is concerned with the mental state of the accused at the time the alleged offence was committed.

160. The modern concept of acquittal on account of unsoundness of mind can be traced back to the Justinian codification of Roman criminal laws in the 6th century.[40] Over time, the Justinian Code evolved into the modern English insanity defence, which imported into Australia via the common law. The basis of the insanity defence was laid down in M'Naghten's Case in 1843.[41] The M'Naghten rules provide the common law basis for a defence of insanity as follows:

[T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.[42]

161. In Western Australia, the insanity defence is codified in section 27 of the *Criminal Code*, which provides that –

A person is not criminally responsible for an act or omission on account of unsoundness of 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.[43]

162. The availability of acquittal on account of unsoundness of mind is based upon "the moral assumption that it is wrong to punish those who, by reason of mental incapacity, are not capable of free and rational action".[44] Specifically, a court may find that a defendant is not criminally responsible for their actions because, at the time of the alleged offence, they suffered from a mental impairment which deprived them of the capacity to:

- Understand what they were doing;
- Understand the implications of their actions; or
- Control their actions.

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[40] Bronnit S & McSherry B, *Principles of Criminal Law* (Sydney: Law Book Company, 2001) 209.
[41] M'Naghten's Case [1843] 10 Cl & Fin 200.
[42] M'Naghten's Case [1843] 10 Cl & Fin 200 at 202.
[43] Section 27 *Criminal Code*
[44] Fairall PA & Johnston PW, 'Antisocial Personality Disorder and the Insanity Defence' (1987) 11 *Criminal Law Journal* 78, 79.

163. The *Criminal Law (Mentally Impaired Accused) Act 1996* is concerned not with the insanity defence itself, nor its operation and procedural requirements. Rather, the *Criminal Law (Mentally Impaired Accused) Act 1996* addresses the disposition options available to the court in respect of an accused who has been acquitted on account of unsoundness of mind.[45]

Current application in Western Australian Courts

164. A finding pursuant to section 27 of the *Criminal Code* that the accused is not guilty on account of unsoundness of mind activates the provisions of Part Four of the *Criminal Law (Mentally Impaired Accused) Act 1996*.

165. As the diagram below shows, the disposition options available to the court in respect of an accused acquitted on account of unsoundness of mind currently depend on whether the proceedings take place in a superior court or a court of summary jurisdiction.

166. Where a court of summary jurisdiction finds an accused not guilty of an offence on account of unsoundness of mind, the court may:
- Release the accused unconditionally;
- Make a conditional release order[46], a community based order or an intensive supervision order; or
- Make a custody order.

167. Where a superior court acquits an accused on account of unsound mind, the options available to the court vary depending on whether the offence charged is one listed in Schedule 1 of the *Criminal Law (Mentally Impaired Accused) Act 1996*.

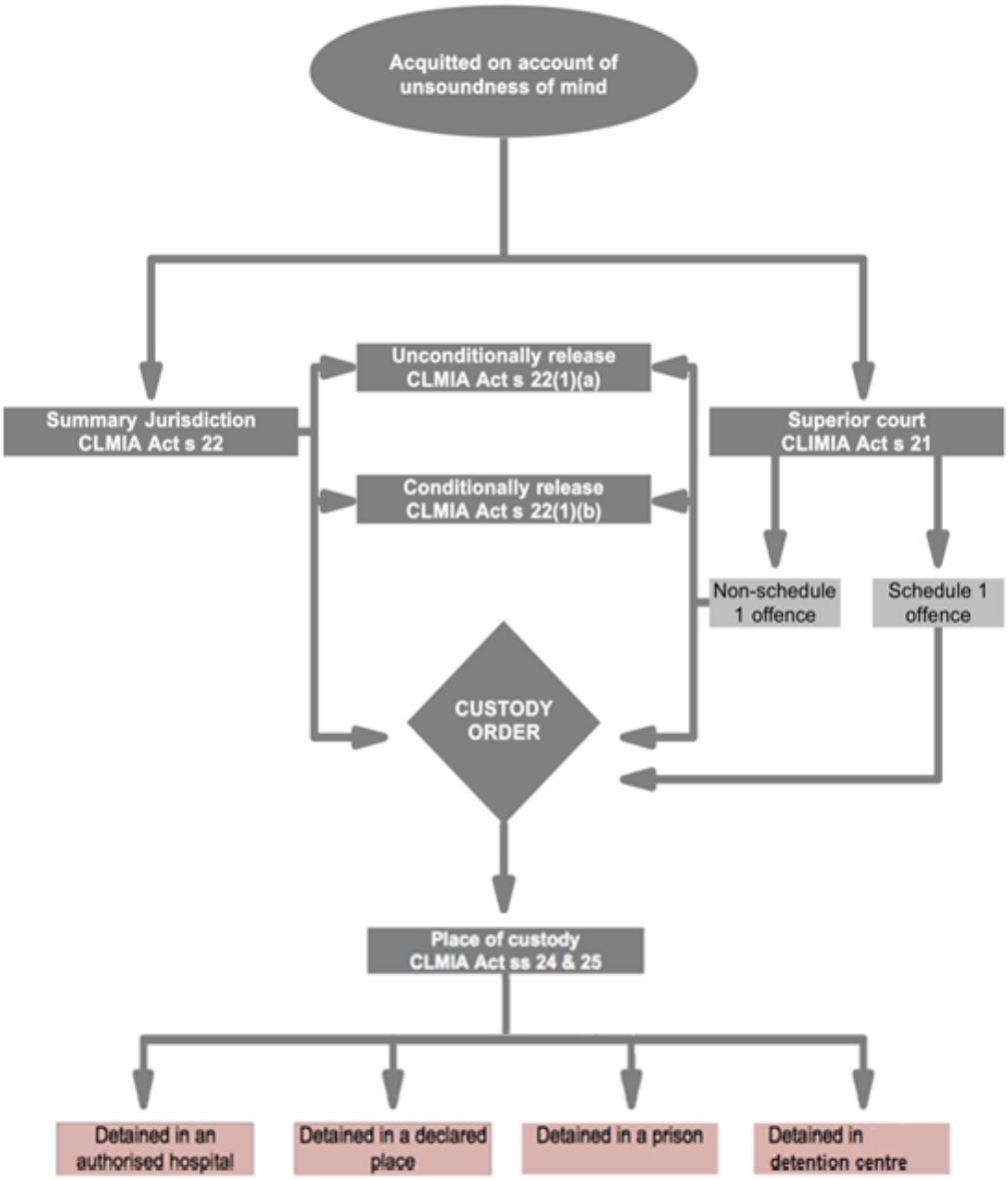
168. The offences listed in Schedule 1 include some of the most serious violent and sexual offences, such as murder, manslaughter, sexual penetration without consent and sexual coercion. Schedule 1 also includes property offences such as criminal damage. Section 21 provides that where the offence charged is a Schedule 1 offence, the superior court must impose a custody order.

169. In respect of all other offences, the superior court has the same options available to it as a court of summary jurisdiction.

[45] This distinction is critical in setting the scope of this Report. A detailed consideration of the insanity defence, its operation and procedural requirements is beyond the scope of this report. It is noted that a number of submissions addressed issues pertaining to the insanity defence, its operation and procedural requirements. It would not be appropriate to seek to address these issues in the context of an examination of the *Criminal Law (Mentally Impaired Accused) Act 1996*. Note, however, that the WA Law Reform Commission undertook a detailed analysis of the insanity defence in the homicide context in *Project 97 - A review of the law of homicide*

[46] In this context, a conditional release order refers to a non-custodial order made according to Part 7 of the *Sentencing Act 1995*. If the person commits an offence while such an order is in force, the person may be sentenced for the offence to which the order relates.

Disposition Options: Acquittal on account of unsoundness of mind



Options

Availability of custody orders

170. Under the current provisions of the *Criminal Law (Mentally Impaired Accused) Act 1996*, the court's power to impose a custody order in relation to a mentally impaired accused depends, in part, on whether the accused was found unfit to stand trial or not guilty by reason of unsound mind.

171. In relation to an accused found mentally unfit to stand trial, the court may only make a custody order if the statutory penalty for the alleged offence is or includes imprisonment.[47] No such limitation on the availability of custody orders applies in relation to an accused found not guilty by reason of unsound mind under section 22 of the *Criminal Law (Mentally Impaired Accused) Act 1996*. Accordingly, following a finding that a mentally impaired accused is not guilty by reason of unsound mind, it will be available to the court to make a custody order irrespective of whether the court would have been able to impose a custodial sentence if the accused had been convicted of the offence charged.

172. In the Discussion Paper, the Government sought views on whether the court should always have the option of imposing a custody order.

173. The majority of stakeholder submissions that considered this question expressed the view that custody orders should not be available in circumstances where the statutory penalty for the offence alleged to have been committed by the accused does not include imprisonment.

174. In support of this contention, the submission of the Supreme Court, District Court and Children's Court of Western Australia noted that the power to impose a custody order upon a mentally impaired accused exists only because that person is subject to criminal charges, emphasising that criminal courts have no free floating power to detain people regarded as dangerous. Similarly, the State Forensic Mental Health Service expressed the view that custody orders should only be available for indictable offences, noting that "[i]f people charged with lesser offences require in-patient hospital treatment, this can be achieved using the *Mental Health Act 1996*."

175. In this context, stakeholders expressed the view that any custody order imposed on a mentally impaired accused must be limited by reference to the potential sentence which is likely to have been imposed had they been convicted of the offence charged, and should therefore only be available in circumstances where a court would have been able to impose a custodial sentence if the accused had been convicted of the offence charged.

[47] Sections 16(6) and 19(5) *Criminal Law (Mentally Impaired Accused) Act 1996*.

176. There does not appear to be any persuasive policy rationale for the difference in availability of custody orders under the Act in respect of findings of unfitness and acquittal on the basis of unsound mind. Given that both findings seek to balance the same interests and achieve the same policy objective, it is appropriate that both findings should equally enliven the same disposition options. It is recommended then that section 22 of the *Criminal Law (Mentally Impaired Accused) Act 1996* be amended to provide that the court may only make a custody order if the statutory penalty for the alleged offence is, or includes, imprisonment.

Recommendation Twelve
Section 22 of the *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to provide that the court may only make a custody order if the statutory penalty for the alleged offence is, or includes, imprisonment.

Mandatory custody orders

177. As outlined above, section 21 of the *Criminal Law (Mentally Impaired Accused) Act 1996* provides that where a mentally impaired accused acquitted on account of unsound mind has been charged with an offence listed in Schedule 1 of the Act, the court must impose a custody order.

178. The offences listed in Schedule 1 include some of the most serious violent and sexual offences, such as murder, manslaughter, sexual penetration without consent and sexual coercion. Schedule 1 also includes relatively less serious offences such as assault occasioning bodily harm, indecent assault, stealing a motor vehicle in circumstances of aggravation, and criminal damage.

179. In the Discussion Paper, the Government sought views on Part 4 of the *Criminal Law (Mentally Impaired Accused) Act 1996* and issues concerning accused acquitted on account of unsoundness of mind, including whether:

- The court should always have the option of imposing a custody order;
- Section 21 and Schedule 1 of the *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended or abolished;
- Any of the current offences in Schedule 1 should be removed or new offences added to Schedule 1

180. The significant majority of submissions that addressed this issue called for the abolition of the mandatory imposition of custody orders under section 21. Specifically, stakeholders argued that mandatory custody orders impose unacceptable restrictions on judicial discretion and independence, are inconsistent with rule of law principles, and undermine confidence in the justice system.

181. For instance, the submission of the Supreme Court, District Court and Children's Court of Western Australia stated that *"the statutory requirement that certain charges against a person who has been acquitted by reason of unsoundness of mind, regardless of any other*

considerations, result in a mandatory custodial order is problematic. Like any mandatory sentencing it risks injustice because it does not allow for a court to properly consider the circumstances of the mentally impaired accused".

182. In this context, the Mental Health Commission went further, expressing the view that Schedule 1 of the *Criminal Law (Mentally Impaired Accused) Act 1996* "discriminates against mentally impaired accused by creating a de facto mandatory sentencing regime."

183. Accordingly, in order to mitigate the risk of injustice, stakeholders argued that the court should be allowed to take into account all the relevant circumstances of the matter and have broad discretion as to the appropriate disposition of a case even if it involves the allegation of serious offences such as murder and attempted murder. As noted by the Inspector of Custodial Services –

A mother who attempts to kill her infant child due to post-natal depression and then attempts to kill herself, may be well again by the time the matter is resolved. Nothing is served by way of justice, community protection or her treatment needs by a mandatory custody order. In fact she would be likely to be adversely affected and it would be an unintelligent use of scarce resources, as she would unnecessarily take up a hospital bed or would be placed in a counter-therapeutic and overcrowded prison.

184. While, as noted above, the majority of submissions that addressed this issue expressed the view that mandatory custody sentences for Schedule 1 offences should be abolished, stakeholders also expressed the view that – should mandatory custody sentences be retained – Schedule 1 should be reviewed with a view to reducing the number of included offences. In particular, most stakeholders expressed the view that Schedule 1 should be limited to the most serious crimes involving personal violence.

185. In its *Review of the Law of Homicide*, the Law Reform Commission of Western Australia recommended the abolition of mandatory custody orders, expressing the view that "*a trial or appeal court should be given discretion to impose a range of dispositions following a finding of not guilty by reason of mental impairment for any offence."*[48] Rather, the Law Reform Commission was of the view that the imposition of a custody order for a Schedule 1 offence should be presumed but not compulsory. This recommendation reflected the Commission's earlier view that –

"[t]he mandatory imposition of detention, whether in a hospital or in a prison, is unjustified because it is based on an assumption that a person who succeeds with a defence of insanity is dangerous and in need of restraint at the time of the trial, a prediction that is apparently based on the commission of the alleged offence. However, the person's mental condition may have improved between the time of the alleged offence and the time of the trial or the conduct may have arisen from a periodic disturbance such as epilepsy which can be treated with medication while the person leads a normal life in the community."[49]

[48] Law Reform Commission of Western Australia, *Review of the Law of Homicide: Final Report*, Report No. 97 (2007)

[49] Law Reform Commission of Western Australia, *The Criminal Process and Persons Suffering from a Mental Disorder*, Final Report, Project No. 69 (1991) [2.40].

186. The operation of section 21 and Schedule 1 of the *Criminal Law (Mentally Impaired Accused) Act 1996* appear to have the policy intention of ensuring that mentally impaired accused acquitted of very serious offences on account of unsound mind do not simply 'walk free' without any supervision. Section 21 and Schedule 1 are also tied to the broader question of which arm of Government is to be charged with making decisions regarding the release of persons detained under the *Criminal Law (Mentally Impaired Accused) Act 1996*. As will be discussed later in this Report (under the heading 'Executive decision making'), the basis for the legislature reposing such decisions in the Executive is the ability of that office to consider broader public interest considerations such as the gravity of the charge, the accountability of that office to the community, and the preservation of confidence in the administration of justice. The stakeholder comments on section 21 and Schedule 1 of the *Criminal Law (Mentally Impaired Accused) Act 1996* focused on the idea of unfairness to the accused. The policy considerations for the enactment in the first place of these key provisions were not as well explored, and did not make recommendations for the removal of these provisions which were consistent with the broader policy rationale of the legislation.

187. In the absence of a clear basis for changing the underlying policy rationale behind the provisions as they were enacted, a recommendation to amend current arrangements under section 21 and Schedule 1 of the *Criminal Law (Mentally Impaired Accused) Act 1996* has not been made at this time. However, given the high level of stakeholder engagement in this issue, it is recommended that a working group be established to consider further the possible amendment of section 21 and Schedule 1 of the *Criminal Law (Mentally Impaired Accused) Act 1996*.

Recommendation Thirteen
A working group should be established, comprising the range of stakeholders, to consider further the possible amendment of section 21 and Schedule 1 of the *Criminal Law (Mentally Impaired Accused) Act 1996.*

Consequences of cancellation of an order

188. Following the imposition of an order under section 22 in respect of an accused who has been found not guilty by reason of unsound mind, section 22(3) of the *Criminal Law (Mentally Impaired Accused) Act 1996* provides as follows:

> (3) If a court makes a CRO, CBO or ISO in respect of an accused —
>
> (a) Part 7, 9 or 10 of the Sentencing Act 1995, as the case requires, applies in respect of the order; and
>
> (b) Part 18 of the Sentencing Act 1995 applies in respect of the order, but for the purposes of —

(i) sections 127(2)(b) of that Act;
(ii) section 130(1)(a)(iii) and (b) of that Act; and
(iii) section 133(1)(a)(iii) and (b) of that Act,

if the court cancels the CRO, CBO or ISO the court must make a custody order in respect of the accused.

189. While this issue was not specifically raised in the Discussion Paper, a number of stakeholders expressed concern that the operation of this section limited the flexibility of the courts in addressing an accused who has been found not guilty by reason of unsound mind and resulted in what was in effect a mandatory custody order following a failure to comply with the terms of a conditional release order[50], community based order or intensive supervision order imposed by the court. For instance, the Richmond Fellowship of Western Australia expressed its concern that *"an accused found [not] guilty by reason of unsound mind who is conditionally released and breaches a condition is compulsorily put on a custody order, effectively an indefinite jail sentence."*

190. Given that it remains open to a court in these circumstances to confirm or amend an order under section 22(3)(b) of the *Criminal Law (Mentally Impaired Accused) Act 1996*, it is not the case that section 22(3)(b) requires the imposition of a mandatory custody order whenever the accused commits an offence or fails to comply with the terms of a conditional release order[51], community based order or intensive supervision order. Nevertheless, as currently drafted the provision does require a court to impose a custody order in circumstances where additional options might be available under the *Sentencing Act 1995*.

191. It is recommended that section 22(3)(b) of the *Criminal Law (Mentally Impaired Accused) Act 1996* be amended to provide the court with the discretion to impose the full range of non-custodial orders available under the *Sentencing Act 1995* following cancellation of a conditional release order[52] or community order, subject to any necessary amendments required to clarify that the accused has not been convicted of an offence. In particular, this amendment should ensure that it is open to a court to impose a new non-custodial community order that may be of a different type than the original order. This would support a consistent approach to this issue in the legislation in circumstances that would suggest that this is the policy intention of the legislation as enacted.

[50] In this particular context, a conditional release order refers to a non-custodial order made according to Part 7 of the *Sentencing Act 1995*.
[51] *Ibid.*
[52] *Ibid.*

Recommendation Fourteen
Section 22(3)(b) of the *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to provide the court with the discretion to impose the full range of orders available under the *Sentencing Act 1995*, subject to any necessary amendments required to clarify that the accused has not been convicted of an offence.

Application to Juveniles

192. At present, the *Criminal Law (Mentally Impaired Accused) Act 1996* applies to juveniles in the same way as it applies to adults. In the context of Part 4, this means that where a juvenile mentally impaired accused acquitted on account of unsound mind has been charged with an offence listed in Schedule 1 of the Act, the court must impose a custody order.

193. In the Discussion Paper, the Government sought views on whether the *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to provide more flexibility for the courts and the Mentally Impaired Accused Review Board to take into account the special needs and circumstances of children.

194. As discussed previously, section 22(2) of the *Criminal Law (Mentally Impaired Accused) Act 1996* enables the court to make a conditional release order[53], a community based order or an intensive supervision order in relation to a mentally impaired accused found not guilty by reason of unsound mind. However, the court may only make such orders if they would have been available under the *Sentencing Act 1995* had the accused been convicted of the offence.

195. Under Part 7 of the *Young Offenders Act 1994*, the *Sentencing Act 1995* does not apply in relation to a person under the age of 17. As such, a court cannot make a conditional release order[54] or any community order in relation to a mentally impaired accused under the age of 17. In such circumstances, the court must either release the juvenile unconditionally or make a custody order in relation to the accused.

196. Those stakeholders who considered this issue were critical of this lack of disposition options in relation to juveniles, and specifically, the use of custody orders in the context of juvenile mentally impaired accused. For instance, the Council for Official Visitors expressed the view that custody orders must only ever be a last resort for children, noting that "[a] child will very quickly become institutionalised and the effect of detention is likely to be more disabling than on an adult."

[53] In this particular context, a conditional release order refers to a non-custodial order made according to Part 7 of the *Sentencing Act 1995*.
[54] *Ibid*

197. Similarly, the Commissioner for Children and Young People suggested that the *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to provide that a child or young person cannot be subject to an indefinite custody order, on the basis that such an order "is not an appropriate way to deal with a vulnerable child or young person." In particular, the Commissioner for Children and Young People recommended that section 22 of the *Criminal Law (Mentally Impaired Accused) Act 1996* be amended to ensure that the mandatory requirement to impose a custody order in relation to a Schedule 1 offence does not apply to juvenile accused.

198. Similarly, the submission of the Western Australian Association for Mental Health (et al) recommended amendment of the *Criminal Law (Mentally Impaired Accused) Act 1996* to provide for a presumption against custody orders in respect of juvenile mentally impaired accused, noting that "[w]here a court considers a custody order necessary we recommend a requirement for written reasons as to why one has been made…"

199. The Director of Public Prosecutions expressed the view that a custody order under the *Criminal Law (Mentally Impaired Accused) Act 1996* should not apply in relation to juveniles in the absence of substantive evidence against the accused, or where the offender is unlikely to have been convicted of the offence.

200. The special vulnerability of mentally impaired children is recognised. Given the particular vulnerability of juvenile mentally impaired accused, it is recommended that any mandatory requirement to impose a custody order on juvenile mentally impaired accused be removed to provide consistency with the policy intention of the *Young Offenders Act 1994.*

Recommendation Fifteen
Section 22 of the *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to remove mandatory custody orders where the accused is a juvenile and allow for a broader range of options to be made available for juveniles found not guilty by reason of unsound mind, modelled on the sentencing options under Part 7 of the *Young Offenders Act 1994.*

SCENARIO TWO: ACQUITTAL ON ACCOUNT OF UNSOUNDNESS OF MIND

Grace is a young adult with a history of psychiatric illness and drug abuse, primarily with amphetamines. The delusions she suffered included persecutory beliefs that her brother was injecting her with drugs and had conspired with the local photography store clerk to install cameras in her home and film her in her sleep. Whilst in the grip of an acute psychotic episode, she goes to the photography store and threatens to hit the store clerk if he does not hand over a number of packages of undeveloped film. Grace is charged with robbery under section 392 of the *Criminal Code*. At trial, her lawyer successfully raises a defence under section 27 of the *Criminal Code*, which triggers the provisions of Part 4 of the *Criminal Law (Mentally Impaired Accused) Act 1996*.

Current system	Proposed system
Given that Grace is charged with a Schedule 1 offence, the Judge has no option but to make a custody order in respect of her.	The Judge is no longer limited to the orders in section 21 of the Act and is able to consider whether to release Grace or to make a community order in respect of her.
Following a significant period in custody, the Governor makes an order releasing Grace subject to certain conditions. The conditional release order requires her to remain free of illicit substances, report for weekly psychiatric treatment and remain compliant with her medication.	The Judge makes an order releasing Grace subject to certain conditions. The order requires her to remain free of illicit substances, report for weekly psychiatric treatment and remain compliant with her medication.
After six months on the order, Grace becomes non-compliant with her medication. The Mentally Impaired Accused Review Board cancels her Conditional Release Order.	After six months on the order, Grace becomes non-compliant with her medication. The Judge cancels her community order. Given the Judge is not required to make a custody order in respect of Grace, the Judge is able to consider the full range of orders available under the *Sentencing Act 1995*.
Grace is returned to indefinite custody pursuant to the custody order.	The Judge makes an intensive supervision order in respect of Grace. Unlike a custody order, treatment in the community is a significantly more cost-effective mechanism which allows Grace to benefit from family and community supports. This allows Grace to access programs which are psychologically and developmentally appropriate, and support her reintegration into the community. This is consistent with the paramount objective of community safety.

PART FOUR: CUSTODY ORDERS

Introduction

201. People subject to a custody order under the *Criminal Law (Mentally Impaired Accused) Act 1996* may be held indefinitely until they can be reintegrated into the community without posing an unacceptable risk.

202. Unlike a criminal sentence, custody orders in respect of mentally impaired accused are not intended to be retributive or punitive in nature.[55] Rather, custody orders under the *Criminal Law (Mentally Impaired Accused) Act 1996* reflect the policies underlying the insanity defence and must balance the supervision, care and rehabilitation needs of the individual with the safety and protection needs of the wider community.

203. Within this framework, reintegration is usually a graduated process that can take a number of years during which an individual may be provided with increasing amounts of freedom from their place of custody until they are unconditionally released.

Custody orders under the *Criminal Law (Mentally Impaired Accused) Act 1996*

204. As discussed above, the *Criminal Law (Mentally Impaired Accused) Act 1996* provides that when a person becomes subject to a finding that they are mentally unfit to stand trial or acquitted by reason of unsoundness of mind, the court may decide (or be required[56]) to make a custody order in respect of the person.[57]

205. Under section 24 of the *Criminal Law (Mentally Impaired Accused) Act 1996*, the mentally impaired accused is to be detained until released by an order of the Governor. This means that a mentally impaired accused is detained for an indefinite period of time rather than a fixed term.

Options for reform

206. In the Discussion Paper, the Government sought views on the availability and operation of custody orders under the *Criminal Law (Mentally Impaired Accused) Act 1996*.

207. These included:
    - Whether the duration of a custody order should be prescribed or limited in any way by the court; and

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[55] The purposes of sentencing under Australian law are set out in *Veen v The Queen (No 2)* (1988) 164 CLR 465 where Mason CJ, Brennan, Dawson and Toohey JJ said at 476: "The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what an appropriate sentence is in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions."

[56] In circumstances where the person is acquitted by reason of unsoundness of mind in respect of a Schedule 1 offence, the court must make a custody order.

[57] In circumstances where the person is found mentally unfit to stand trial, the court may not make a custody order unless the statutory penalty for the alleged offence is or includes imprisonment.

- What legislative arrangements should be made to manage the risk posed by mentally impaired accused who are assessed as being a danger to themselves or others if they are unconditionally released.

Duration of custody order

208. As outlined above, a mentally impaired accused subject to a custody order remains subject to the order until he or she is released by order of the Governor. This means the custody order remains in effect for an indefinite period.

209. While the availability of indefinite disposition orders can be seen as providing greater flexibility, such disposition orders are also criticised on the basis that they may be used to indefinitely detain a person who does not represent a danger to the public.

210. Laws that restrict the liberty of individuals for the purpose of community protection based on the possibility of future offending are sometimes regarded as a violation of the principle of 'proportionality'; that is, the concept that a penalty imposed must be commensurate with the seriousness of the offence.[58] Indeed, as it pertains to the *Criminal Law (Mentally Impaired Accused) Act 1996*, this criticism is compounded by the fact that the accused (whether unfit to stand trial or not guilty by reason of mental impairment) has not been found guilty of an offence.

211. However, in the context of mentally impaired accused, there appears to be an inherent conflict between the concept of proportionality and community protection. Tension exists between reducing the severity of the disposition on the basis that the mentally impaired accused is less culpable, and increasing the severity on the basis that the accused may pose a continuing threat to society. The dilemma between balancing the competing considerations of community protection and proportionality was explicitly addressed by the High Court in *Veen v The Queen (No 2)*:

    "Mental disorder, as exemplified by Veen's case, is a particularly paradoxical factor in sentencing because it is relevant, retrospectively, to the offender's level of culpability for the offence presently charged (suggesting, on desert grounds, a reduction in penalty), yet also bears, prospectively, upon his or her likely future conduct (suggesting, on social defence grounds, an increase in penalty)."[59]

212. In the Discussion Paper, the Government sought views on whether the duration of a custody order should be prescribed or limited in any way by the court.

213. A significant majority of the submissions which addressed this issue expressed strong views against indefinite custody orders and called for the term of the custody order to be limited by the court by reference to the period of detention a person would have received on conviction.

[58] Section 6(1) *Sentencing Act 1995* (WA)
[59] [1988] HCA 14; (1988) 164 CLR 465

214. The key criticism of indefinite custody orders raised in submissions was that it could potentially result in a mentally impaired accused being detained for a longer period than the length of imprisonment which would have been imposed had the accused been found guilty by the court and sentenced accordingly. A number of submissions pointed to the highly publicised matters involving Mr Marlon Noble and Ms Rosie Ann Fulton as examples of situations where mentally impaired accused appeared to "slip through the cracks and… [became] warehoused indefinitely in the prison system without recourse to the courts".

215. A number of submissions also suggested that lawyers and accused were unduly deterred from raising mental health issues at trial for fear of receiving a custody order if they were found mentally unfit to stand trial or acquitted by reason of unsound mind. For instance, a joint submission by the Western Australian Association for Mental Health on behalf of a number of organisations and individuals stated that community health sector agencies were aware of "individuals who were advised by their lawyer to plead guilty, despite a Section 27 defence being available, or the likelihood they would be found unfit to stand trial."

216. This view was supported by the First People's Disability Network, which argued that *"[t]he inability of the justice system to adequately process cases of people with mental impairment efficiently and fairly has created a perverse incentive. If a person with mental impairment pleads guilty to charges, regardless of culpability, they are given a definitive legal outcome. However, should they submit they are unfit to plea, they face an uncertain outcome, and risk being detained under the Act for a period of time which could be substantially longer than if found guilty."*

217. Accordingly, the prospect of indefinite detention was seen to create an "incentive… for innocent people to plead (or be advised to plead) guilty, in order to avoid the consequences of unfitness". As a result, people who may in fact be mentally unfit to stand trial may "find themselves subject to and convicted by a judicial process made unfair by their inability to participate meaningfully".

218. A number of submissions raised concerns regarding the consistency of indefinite detention with Australia's international human rights obligations. For instance, the Aboriginal Legal Service of Western Australia expressed the view that the following human rights obligations were potentially engaged by the indefinite custody regime established under the *Criminal Law (Mentally Impaired Accused) Act 1996*:

- Article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR), which prohibits arbitrary detention;
- Article 7 of the ICCPR, which provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment;
- Article 10(1) of the ICCPR, which provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person;
- Article 2(a) of the ICCPR, which provides that accused persons shall be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons; and
- Article 15 of the United Nations *Convention on the Rights of Persons with Disabilities*, which provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

219. Similarly, the Western Australian Association for Mental Health (et al) expressed the view that the United Nations *Convention on the Rights of Persons with Disabilities* "is of particular note, and its protections must feature strongly in the principles for a new *Criminal Law (Mentally Impaired Accused) Act.*"

220. Other submissions offered cautious support for indefinite custody orders as a necessary mechanism for the rehabilitation of mentally impaired persons – and for their eventual reintegration into society. As noted by the Royal Australian and New Zealand College of Psychiatrists Western Australian Branch and Faculty of Forensic Psychiatry, "both the risk to others and the nature of mental disorders fluctuate over time, and thus the time taken for someone to be fit for release from a custody order will vary." Accordingly, rather than specifying a fixed or 'nominal' term, release of a mentally impaired accused should "be determined by regular review and risk assessments."

221. In general, submissions which called for the abolition of indefinite custody orders proposed that the custody order should be limited by reference to the sentence that a convicted offender would receive. Under this approach, a custody order would be limited to the term of imprisonment that would have been available had the accused been found guilty of the offence charged. For instance, the submission from the Supreme, District and Children's Courts of Western Australia stated –

It is untenable that mentally impaired individuals who have not been convicted may be subject to worse outcomes than apply to those who are not considered mentally impaired and who have been tried and found guilty. The potential custodial term which is likely to have been imposed had the mentally impaired accused been convicted of the charge should properly provide the maximum limit to this extraordinary jurisdiction. Specifically any custody order that may be imposed on a mentally impaired accused should be limited by reference to the period of imprisonment likely to have been imposed had the accused been convicted of the offence charged. Similar limitations should apply to any non-custodial supervision order.

222. The Inspector of Custodial Services expressed reservations on the issue of a nominal term, noting that "sentencing involves an assessment of culpability not just of the harm caused. This cannot occur if the person is not placed on trial or is not culpable because of mental impairment." In this sense, any limiting time period set by the court based on a sentence a convicted offender might receive "would be artificial".

223. Other submissions noted that the introduction of a fixed term custody order would be problematic from the perspective of community safety. Specifically, these submissions noted the potential risk that a mentally impaired accused may be released prematurely in relation to their readiness to reintegrate into the community. This risk was considered particularly acute in respect of certain mentally impaired accused, such as accused with mental illness which cannot be treated or cognitive impairment only, who may not be able to be transferred into a civil regime under mental health legislation as an 'involuntary patient'.

224. Such a risk management perspective is broadly supported by the findings of the New South Wales Law Reform Commission, which considered a similar situation in detail in its 2013 report *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal responsibility and consequences* ('NSWLRC Report'). The NSWLRC Report

recognised that instituting a scheme to manage forensic patients who presented a risk of harm at the end of their limiting term was "an exceptional step", acknowledging that "the entitlement of a person to be released… at the expiry of their limiting term should not be abrogated unless for good reason."

225. However, the Commission found through its extensive consultations that the potential risk was very real and not just theoretical, and that there was a small yet significant cohort of forensic patients who presented a serious risk to the community at the end of their limiting term and could not be managed in any way other than by continuation as forensic patients under supervision. As such, despite "very strong concerns" about the preventative detention of people who were not convicted, the Commission favoured the development of a scheme which entrusted to the Supreme Court the decision to extend the person's status as forensic patients under supervision subject to careful safeguards.

226. In this context, the Victims of Crime Reference Group expressed the view that *"it is legitimate that the victim and community should expect that a person who has been acquitted on account of unsound mind, or who is unfit to stand trial, would be in custody for management and treatment, given that the court retains its overall discretion to release the accused person unconditionally following a finding of mental unfitness to stand trial."*

227. On balance, having regard to the operation of the *Criminal Law (Mentally Impaired Accused) Act 1996* and the views expressed by stakeholders, it is recommended that indefinite custody orders should continue to be available under the *Criminal Law (Mentally Impaired Accused) Act 1996*. The purpose of a sentence of imprisonment following conviction for a criminal office differs from that of civil detention pursuant to a custody order. In the former case, detention is partly for the purposes of punishment and deterrence. In the latter case, detention is for the treatment, care or rehabilitation of the individual and the protection of the community. From this perspective, the length of time a person who does not have a mental impairment may have served if convicted is not material to the question.

228. In this context, the continued availability of indefinite custody orders recognises that the time an individual accused requires to safely reintegrate to the community varies from person to person and is consistent with both the community protection and therapeutic objectives of the *Criminal Law (Mentally Impaired Accused) Act 1996*. An arbitrary measure – such as a fixed term – does not appear to have relevance to the underlying purpose of the making of the order. In the absence of a mechanism to limit the duration of the order in a way which is consistent with the purpose of making the order, it is recommended that current arrangements in respect of indefinite custody orders under the *Criminal Law (Mentally Impaired Accused) Act 1996* be retained. However, given the high level of stakeholder engagement in this issue, it is recommended that a working group be established specifically to review the operation of indefinite custody orders under the Act.

Recommendation Sixteen

A working group should be established, comprising the range of stakeholders, to review the operation of indefinite custody orders under the *Criminal Law (Mentally Impaired Accused) Act 1996*.

PART FIVE: MANAGEMENT, SUPERVISION AND RELEASE

Introduction

229. The Mentally Impaired Accused Review Board is the statutory body responsible for mentally impaired accused who are subject to a custody order, and plays a central role in the management, supervision and release framework under the *Criminal Law (Mentally Impaired Accused) Act 1996.*

230. As at 10 September 2015, there were 39 mentally impaired accused under the authority of the Mentally Impaired Accused Review Board. Of these 39 accused, there were:

- 9 accused in custody;
- 15 accused on Conditional Release Orders; and
- 15 accused on a Leave of Absence Orders.

The current management, supervision and release framework under the *Criminal Law (Mentally Impaired Accused) Act 1996*

231. The *Criminal Law (Mentally Impaired Accused) Act 1996* sets out the law and processes for determining the conditions under which a person found unfit to stand trial or not guilty because of mental impairment should be detained, supervised and provided with treatment and support.

232. As outlined above, when a person becomes subject to a finding under the *Criminal Law (Mentally Impaired Accused) Act 1996* that they are mentally unfit to stand trial or acquitted by reason of unsoundness of mind, the court may decide[60] to make a custody order in respect of the person.[61]

233. The *Criminal Law (Mentally Impaired Accused) Act 1996* provides a process and criteria for leaves of absence, release and discharge of custody orders. It also provides for determination of the place where a mentally impaired accused is to be detained, and creates a reporting mechanism to ensure that mentally impaired accused have regular reviews and are not 'lost' in the system.

234. If a custody order is made in respect of a person, the *Criminal Law (Mentally Impaired Accused) Act 1996* provides that they are to be detained in an authorised hospital, a declared place, a detention centre or a prison.[62] Depending on the nature of the mental impairment, some accused may not require or be capable of being treated and cannot be detained in an authorised hospital. For instance, an adult mentally impaired accused who suffers solely from a severe cognitive impairment may not be suitable for placement in an

[60] In circumstances where the person is acquitted by reason of unsoundness of mind in respect of a Schedule 1 offence, the court must make a custody order.
[61] In circumstances where the person is found mentally unfit to stand trial, the court may not make a custody order unless the statutory penalty for the alleged offence is or includes imprisonment.
[62] Section 24 of the *Criminal Law (Mentally Impaired Accused) Act 1996*

authorised hospital. For such accused, the only placement options are prison or a declared place.

235. The recent proclamation of the *Declared Places (Mentally Impaired Accused) Act 2015* paved the way for the first declared place, known as the Disability Justice Centre, in Western Australia. The *Declared Places (Mentally Impaired Accused) Act 2015* falls within the ministerial portfolio of the Minister for Disability Services, and is beyond the scope of the current review.

236. In addition to the courts, the key decision makers under the *Criminal Law (Mentally Impaired Accused) Act 1996* framework are the relevant Minister (the Attorney General), the Governor and the Mentally Impaired Accused Review Board.

237. The Mentally Impaired Accused Review Board is the statutory body responsible for mentally impaired accused who are subject to custody orders, and plays a central role in the management, supervision and release framework under the *Criminal Law (Mentally Impaired Accused) Act 1996*.

238. Following the making of a custody order in respect of a mentally impaired accused, the Registrar of the court is to immediately notify the Mentally Impaired Accused Review Board,[63] which is required to review the case within five working days and determine the place where the accused is to be detained.[64]

239. During the period the custody order is in effect, the Mentally Impaired Accused Review Board provides the Attorney General with statutory reports on the mentally impaired accused:

- Within eight weeks after the custody order was made in respect of the accused;
- Whenever it gets a written request to do so from the Minister;
- Whenever it thinks there are special circumstances which justify doing so; and
- In any event at least once in every year.

240. Each statutory report prepared by the Mentally Impaired Accused Review Board is generally at least fifteen pages in length and contains information gathered from a variety of sources and service providers. Statutory reports include a critical analysis of information pertaining to an accused's criminal and medical history, substance abuse issues, treatment needs, criminogenic factors, social background, protective factors and victim issues.

241. Initially, the Mentally Impaired Accused Review Board will often recommend to the Attorney General that the Governor be advised to allow the Board to grant leaves of absence to an accused pursuant to section 27(1) of the *Criminal Law (Mentally Impaired Accused) Act 1996*. Following the granting of such authority by the Governor, the Board may make Leave of Absence Orders which allow the accused access to the community for very short periods over an extended length of time. During such periods, the accused will be subject to conditions which are determined by the Mentally Impaired Accused Review Board pursuant to section 28(2)(b) of the Act.

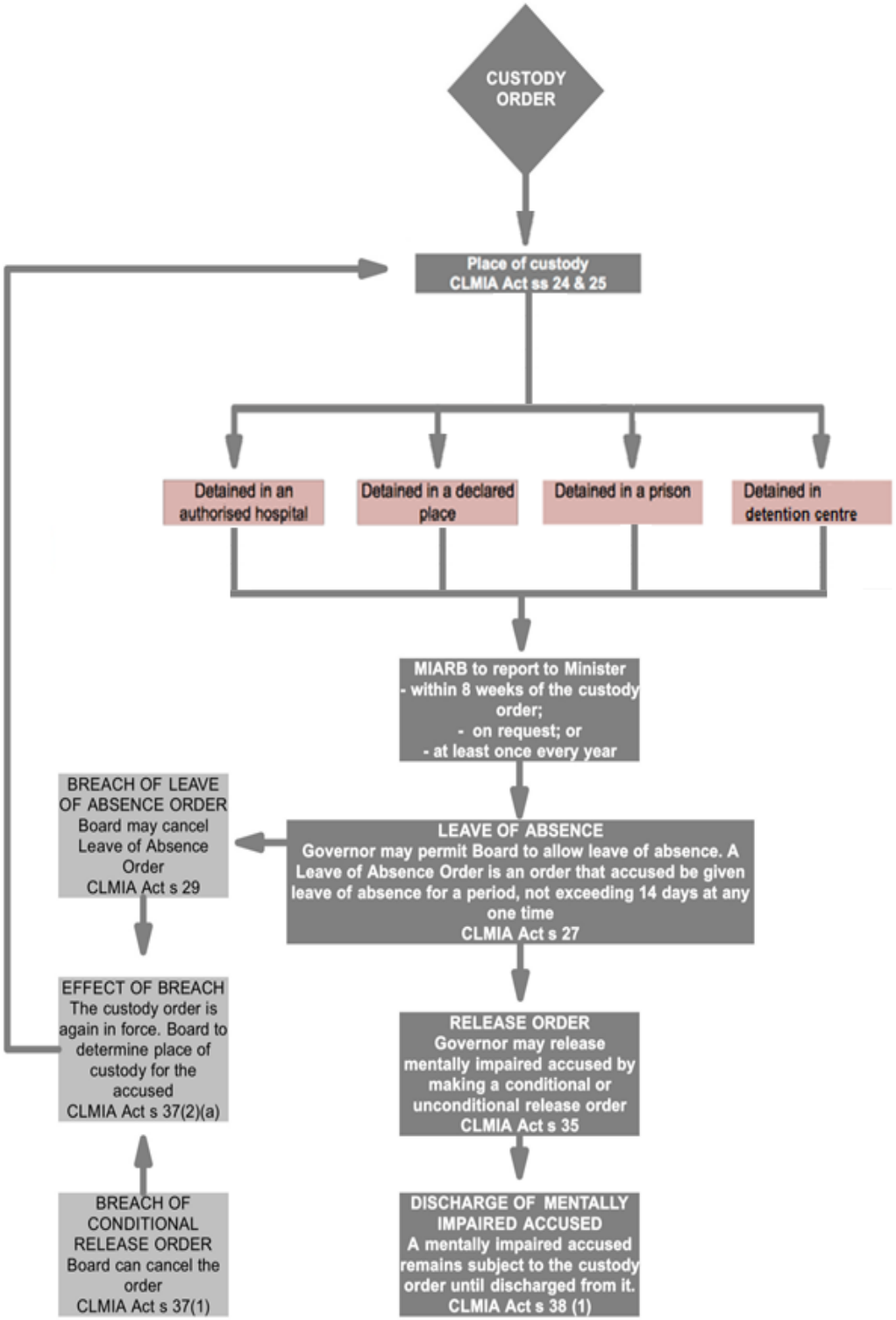
[63] Section 3 of the *Criminal Law (Mentally Impaired Accused) Act 1996*
[64] Section 25(1) of the *Criminal Law (Mentally Impaired Accused) Act 1996*

242. Following what is often a substantial period of successful community access, the Mentally Impaired Accused Review Board may allow the accused into the community for lengthier periods of time, such as overnight stays. This measured approach towards release ensures that the accused maintains a validated level of stability and compliance in the community, whilst also aiming to ensure the personal safety of individuals in the community.

243. When the Mentally Impaired Accused Review Board is convinced, taking into account the factors outlined in section 33(5) of the *Criminal Law (Mentally Impaired Accused) Act 1996,* that an accused is ready to be discharged from his or her custody order and may live in the community (with or without conditions) without posing an unacceptable risk, it will recommend as such in its statutory report to the Attorney General under section 33 of the *Criminal Law (Mentally Impaired Accused) Act 1996*.

244. Under section 35 of the *Criminal Law (Mentally Impaired Accused) Act 1996*, the Governor may at any time order that a mentally impaired accused be released by making a release order. Such release can be unconditional or on conditions determined by the Governor. Under section 38 of the *Criminal Law (Mentally Impaired Accused) Act 1996,* an accused is discharged from his or her custody order when released (if released unconditionally) or when all conditions associated with his or her release order cease to apply.

Management, Supervision and Release Framework



Options

245. In the Discussion Paper, the Government sought views on the operation of Part 5 of the *Criminal Law (Mentally Impaired Accused) Act 1996* and issues concerning the management, supervision and release system.

246. These included:
    - Whether the membership of the Mentally Impaired Accused Review Board is an appropriate mix;
    - What factors the Mentally Impaired Accused Review Board should consider in determining whether to make a leave of absence order;
    - Whether there should be a formal entitlement to appear before the Mentally Impaired Accused Review Board;
    - Whether the current criteria set out in section 33(5) of the *Criminal Law (Mentally Impaired Accused) Act 1996* are appropriate to determining if the mentally impaired accused should be released; and
    - Whether there should be a specific process for appealing against decisions of the Mentally Impaired Accused Review Board.

Executive decision making

247. In the West Australian forensic mental health system, the decision to release an individual forensic mental health patient is formulated in several stages – medical examinations and social inquiries, review by the Mentally Impaired Accused Review Board, recommendation by the Attorney General and finally the decision of the Governor. Accordingly, formal responsibility for the release of mentally impaired accused lies with the Governor.

248. The basis for the legislature reposing the release decision in the Executive is the ability of that office to consider broader public interest considerations such as the gravity of the charges, the accountability of that office to the community, and therefore the preservation of confidence in the administration of justice.

249. While beyond the scope of the present review, it is worth noting that a large number of the submissions received called for the amendment of the *Criminal Law (Mentally Impaired Accused) Act 1996* to remove the decision-making role of the executive government with regard to the care, treatment, detention and release of mentally impaired accused.

250. Submissions that addressed this issue highlighted the following criticisms of the Executive decision making model:

    - *Duration of detention*: the involvement of the Executive on the release of people under custody orders resulted in indefinite detention and in periods of detention that exceeded the time required for effective treatment;
    - *Lack of transparency and procedural fairness*: the Executive decision making model lacks transparency, particularly in relation to the process behind the Executive's

decision to release a person subject to a custody order, and accountability, particularly in relation to the absence of a requirement that reasons be provided for decisions;

- *Delay*: The absence of timeframes imposed on decision making by the Executive is a cause of delay which may have anti-therapeutic implications and unnecessarily impede the individual's progress toward eligibility for unconditional discharge;
- *No testing of evidence*: people found unfit to plead are detained without a further hearing to test the evidence against them and to determine whether or not they committed the criminal offences charged; and
- *Human rights considerations*: The inability to appeal Executive decisions is a denial of natural justice and potential breach of international human rights obligations.

251. There are inherent tensions in a system which strives to ensure community protection while at the same time providing safeguards against the arbitrary detention of people who have not been found criminally responsible or not had their criminal responsibility determined through the usual criminal justice processes.

252. Executive decision making is consistent with the principle of community protection underlying the *Criminal Law (Mentally Impaired Accused) Act 1996*.

253. Maintaining the role of the Executive in the decision-making process recognises the public interest in release decisions involving accused who cannot be found to be criminally culpable due to their mental impairment. The Attorney General, as the First Law Officer and an elected representative of the people, is in the ideal position to consider the requirements of the law, the public interest and the advice of the Mentally Impaired Accused Review Board in determining whether to advise the Governor to authorise leaves of absence, and both conditional and unconditional releases. Moreover, vesting this decision making capacity in the Executive ensures that considerations of the public interest take into account the broad range of relevant matters including the likely reaction of the community to the release of the mentally impaired accused.

Membership of the Mentally Impaired Accused Review Board

254. Pursuant to section 42(1) of the *Criminal Law (Mentally Impaired Accused) Act 1996*, the Mentally Impaired Accused Review Board is established with the following members:

- The person who is the chairperson of the Prisoners Review Board appointed under section 103(1)(a) of the *Sentence Administration Act 2003*;
- A deputy chairperson, to be nominated by the Minister and appointed by the Governor;
- A person who works for the Disability Services Commission under section 9 or 10 of the *Disability Services Act 1993*;
- The persons who are community members of the Prisoners Review Board appointed under section 103(1)(c) of the *Sentence Administration Act 2003*;
- A psychiatrist appointed by the Governor;
- A psychologist appointed by the Governor.

255. In the Discussion Paper, the Government sought views on whether the membership of the Mentally Impaired Accused Review Board provided for in the *Criminal Law (Mentally Impaired Accused) Act 1996* is an appropriate mix.

256. The stakeholders that considered the membership of the Mentally Impaired Accused Review Board focused on two key issues: firstly, the appointment of the person who is the chairperson of the Prisoners Review Board; and secondly, the necessary expertise of board members.

Judicial Chair

257. Section 42 of the *Criminal Law (Mentally Impaired Accused) Act 1996* provides that the Mentally Impaired Accused Review Board is made up of the chairperson and community members of the Prisoners Review Board, as well as a psychiatrist and a psychologist appointed by the Governor.

258. Given the current link between the Mentally Impaired Accused Review Board and the Prisoners Review Board, section 103(2) of the *Sentence Administration Act 2003* applies to provide that the chairperson must be a current or retired judge of the Supreme Court or the District Court. The current chairperson of the Mentally Impaired Accused Review Board is a serving judge of the District Court.

259. The Inspector of Custodial Services pointed out in his submission that the Mentally Impaired Accused Review Board is essentially part of the Executive as it cannot make any key decisions relating to release but simply reports with recommendations to the Attorney General.

260. This issue was also raised in the submission of the Supreme Court, District Court and Children's Court of Western Australia, which noted a division of views among judicial officers on this matter. One view was that there is a real risk that *"the presence of a serving judge on an executive body will create the false impression that the Mentally Impaired Accused Review Board conforms to judicial standards of independence, transparency, and acts in accordance with the standards of procedural fairness expected of a court, when in the case of the Board, none of these things are true."*

261. The alternative view is that there is a practical benefit from including a serving judge of the District Court and the majority of members sitting on both the Mentally Impaired Accused Review Board and the Prisoners Review Board. Judicial officers holding this view noted that current arrangements meant "*members have knowledge of community services and funding sources and experience in assessing the degree of risk an accused presents to the personal safety of people in the community*".

262. On balance, having regard to the operation of the *Criminal Law (Mentally Impaired Accused) Act 1996* and to the views expressed by stakeholders, it is considered that the practical benefits of having a serving judicial officer as Chair of the Mentally Impaired Accused Review Board outweighs concerns about the possible appearance of inconsistency with the separation of powers. As such, it is recommended that no amendment be made to section 42(1)(a) of the *Criminal Law (Mentally Impaired Accused) Act 1996*.

Recommendation Seventeen
No amendment should be made to section 42(1)(a) of the *Criminal Law (Mentally Impaired Accused) Act 1996*.

Relevant expertise

263. Section 43(1)(b) provides that membership of the Mentally Impaired Accused Review Board includes the persons who are community members of the Prisoners Review Board appointed under section 103(4)(b) *Sentence Administration Act 2003.*

264. Section 103(4)(b) *Sentence Administration Act 2003* provides that a community member nominated by the relevant Minister should have one or more of the following attributes –
    (i) knowledge and understanding of the impact of offences on victims;
    (ii) knowledge and understanding of Aboriginal culture local to the State;
    (iii) knowledge and understand of a range of cultures among Australians;
    (iv) knowledge and understanding of the criminal justice system;
    (v) broad experience in a range of community issues such as issues relating to employment, substance abuse, physical or mental illness or disability, or lack of housing, education or training.

265. Section 103(5) goes on to provide that in nominating persons as community members, the Minister must ensure that at least one community member has knowledge and understanding of the impact of offences on victims, and at least one community member is an Aboriginal person who has knowledge and understanding of Aboriginal culture local to the State.

266. While there is provision for a community member with knowledge and understanding of mental illness or disability, there is no compulsory requirement for a community member with such attributes to be nominated.

267. Most of the submissions which commented on the composition of the Mentally Impaired Accused Review Board emphasised the need to ensure members had relevant professional expertise or lived experience[65] relevant to the subject-matter under consideration by the Board. For instance, the Aboriginal Legal Service of Western Australia expressed the view

[65] The term 'lived experience' is used to describe the first-hand accounts and impressions of living as a member of a minority or oppressed group.

that the Mentally Impaired Accused Review Board should be constituted with members who have expertise in forensic mental health and disability issues.

268. In light of the particular vulnerabilities of mentally impaired accused and the direct relevance of mental illness and cognitive impairment to actions taken in respect of mentally impaired accused – and noting the prevalence of mental health issues across the criminal justice system as a whole – it would be beneficial and appropriate to amend the *Criminal Law (Mentally Impaired Accused) Act 1996* to specifically provide that in nominating persons as community members, the Minister must ensure that at least one Mentally Impaired Accused Review Board community member has an understanding of forensic mental health or disability.

269. On this basis, having regard to the operation of the *Criminal Law (Mentally Impaired Accused) Act 1996* and to the views expressed by stakeholders, it is recommended that the *Criminal Law (Mentally Impaired Accused) Act 1996* be amended to provide for the appointment of at least one community member who has knowledge and understanding of mental impairment in the context of the criminal justice system.

Recommendation Eighteen
The *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to provide that in nominating persons as community members, the Minister must ensure that at least one community member has an understanding of forensic mental health or disability.

270. The Commissioner for Children and Young People also recommended that "*when considering the continued detention or release of a mentally impaired accused who is a child or young person, the Mentally Impaired Accused Review Board should be able to access the specialist knowledge of a child and adolescent psychologist or psychiatrist.*" Similarly, the Law Society of Western Australia noted that consideration should be given to additional ex officio representatives, as needed, to address specific requirements of cultural groups.

271. There is merit in making explicit in the legislation that the Mentally Impaired Accused Review Board is able to seek specialist advice and assistance in carrying out its functions.

272. For this reason, having regard to the operation of the *Criminal Law (Mentally Impaired Accused) Act 1996* and to the views expressed by stakeholders, it is recommended that the *Criminal Law (Mentally Impaired Accused) Act 1996* be amended to provide that the Mentally Impaired Accused Review Board may appoint a person with relevant expertise to assist the board by providing a report, advice or professional services, similar to the option available to the Prisoners Review Board under section 107A of the *Sentence Administration Act 2003*.

Recommendation Nineteen

The *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to provide that the Mentally Impaired Accused Review Board may appoint a person with relevant expertise to assist the Board by providing a report, advice or professional services, similar to the option available to the Prisoners Review Board under section 107A of the *Sentencing Administration Act 2003*.

Appearing before the Mentally Impaired Accused Review Board

273. As outlined above, the Mentally Impaired Accused Review Board is the statutory body responsible for mentally impaired accused subject to a custody order, and plays a central role in the management, supervision and release framework under the *Criminal Law (Mentally Impaired Accused) Act 1996*.

274. Section 40(1) of the *Criminal Law (Mentally Impaired Accused) Act 1996* provides that the Board may require a mentally impaired accused to appear for the purpose of the Board performing its functions. However, the legislation does not provide the accused with the statutory right to appear on his or her own behalf.

275. In practice, the Mentally Impaired Accused Review Board accepts written submissions from mentally impaired accused as a matter of course, and seeks to enable them to appear by videolink where appropriate.

276. In the Discussion Paper, the Government sought views on whether there should be an entitlement to appear before the Mentally Impaired Accused Review Board.

277. While generally supportive of the current practices of the Mentally Impaired Accused Review Board in allowing input from mentally impaired accused and their advocates, the majority of stakeholders who addressed this issue were of the view that there should be an explicit statutory right for mentally impaired accused to appear before the Board.

278. For instance, Legal Aid expressed the view that mentally impaired accused should have a statutory right of appearance. The submission of the Western Australian Association for Mental Health (et al) noted that the right to appear was a critical issue of procedural fairness that should apply to any court, tribunal, board or other decision maker performing a function under the *Criminal Law (Mentally Impaired Accused) Act 1996*. The Mental Health Commission also highlighted its concern regarding the absence of a statutory guarantee of procedural fairness in connection with the proceedings of the Mentally Impaired Accused Review Board.

279. The Public Advocate noted that the right to appear before the Mentally Impaired Accused Review Board accords with international best practice as reflected in the United Nations *Principles for the Protection of Persons with Mental Illness and the Improvement of Mental*

Health Care, which provides that a mentally impaired person shall be entitled to attend, participate and be heard personally in any hearing.[66]

280. The Victims of Crime Reference Group was of the view that a victim of crime (or their advocate) should have the right to appear and make submissions to the Mentally Impaired Accused Review Board.

281. Given the *Criminal Law (Mentally Impaired Accused) Act 1996* confers on the Mentally Impaired Accused Review Board a high level of discretion to make decisions in respect of mentally impaired accused, it is essential that procedural fairness be afforded – and be seen to be afforded.

282. Affording such rights is not only important from a procedural fairness standpoint, but also plays a critical role in enhancing the recovery focus of the *Criminal Law (Mentally Impaired Accused) Act 1996*. As noted above, the recovery focus of the Western Australian mental health system is designed to ensure that actions and decisions relating to persons affected by mental impairment are delivered in a way that supports their recovery.[67]

283. While the *Criminal Law (Mentally Impaired Accused) Act 1996* is primarily criminal justice legislation rather than health management legislation, such considerations remain a key component in the effectiveness of the Act. After all, the successful rehabilitation and, if appropriate, reintegration of mentally impaired accused into society represents the most effective mechanism for the long-term protection of the community.

284. Therefore, in accordance with the principle of least restriction and consistent with the paramount consideration of community safety, the recovery and rehabilitation of mentally impaired accused are – and should be – critical components of the management, supervision and release system established under the *Criminal Law (Mentally Impaired Accused) Act 1996*.

285. In this context, and informed by a therapeutic jurisprudential[68] assessment of the management, supervision and release framework, the implementation of safeguards to enable, where possible, the meaningful and effective participation by mentally impaired accused – or their representatives – in the processes that affect them would make an

[66] Article 18(5) *United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care*.

[67] National Standards for Mental Health Services 2010 https://www.health.gov.au/internet/main/publishing.nsf/content/CFA833CB8C1AA178CA257BF0001E7520/$File/servpri.pdf

[68] Therapeutic jurisprudence is "the study of the extent to which substantive rules, legal procedures, and the roles of lawyers and judges produce therapeutic or anti-therapeutic consequences for individuals involved in the legal process." Hora P, Schma W, Rosenthal J: Therapeutic jurisprudence and the drug court movement: revolutionizing the criminal justice system's response to drug abuse and crime in America. Notre Dame Law Review 74:439-555, 1999

important contribution to the objectives of the *Criminal Law (Mentally Impaired Accused) Act 1996*, as identified in paragraph 26.

286. Accordingly, having regard to the operation of the *Criminal Law (Mentally Impaired Accused) Act 1996* and to the views expressed by stakeholders, it is recommended that the current practice of the Mentally Impaired Accused Review Board in this regard be crystallised either by amendment of the *Criminal Law (Mentally Impaired Accused) Act 1996* or through the issuance of an appropriate practice note.

Recommendation Twenty
The right of a mentally impaired accused to appear before and make submissions to the Mentally Impaired Accused Review Board should be reflected in the *Criminal Law (Mentally Impaired Accused) Act 1996* or practice directions.

287. For the right to appear to be meaningful in practice, stakeholders noted that it should be accompanied by other provisions that ensure that mentally impaired accused are able to be represented by counsel, notified of proceedings, provided with copies of relevant documentation and provided with written reasons for decisions.

288. For instance, Legal Aid Western Australia noted that mentally impaired accused should be supported in having legal representation. Similarly, the Council of Official Visitors expressed the view that mentally impaired accused should have legal representation at Mentally Impaired Accused Review Board reviews.

289. The Public Advocate noted that the right to appear before the Mentally Impaired Accused Review Board accords with international best practice as reflected in the UN *Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care*, which provides that a mentally ill or impaired person shall be entitled to choose and appoint counsel to represent them, including in any hearing.[69]

290. It is the current practice of the Mentally Impaired Accused Review Board to permit submissions to be made by legal counsel or advocates for the accused either in writing or in person to the Board. However, since the right of legal counsel and advocates to attend is not explicitly provided for in the legislation, it is subject to the decision of the Board on a case-by-case basis.

291. Section 34 of the *Criminal Law (Mentally Impaired Accused) Act 1996* provides that as soon as practicable the Mentally Impaired Accused Review Board is to give a copy of any report made under section 33 to the mentally impaired accused and on request to the accused's guardian or lawyer. It is also the current practice of the Board to provide mentally impaired

[69] Article 18(1), 18(5) *United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care*.

accused and their counsel with information regarding other decisions made regarding their matter, as well as advice regarding when their matter will next come before the Board.

292. Mentally impaired accused, their guardians and legal counsel do not have a statutory right to obtain a copy of all materials that are before the Board at its reviews. Currently, copies of such material can be requested ahead of the hearings but will only be provided with the permission of the author. Some stakeholders have stated that this has resulted in difficulties in obtaining some materials in advance of a meeting of the Mentally Impaired Accused Review Board.

293. Given the significance of the decisions made by the Mentally Impaired Accused Review Board and the general principles of procedural fairness, there would be value in crystallising the current practice of the Board in this regard either through amendment of the *Criminal Law (Mentally Impaired Accused) Act 1996* or through the issuance of a practice note.

294. On a practical level, it may be necessary to qualify this right in situations of apparent high risk. For instance, where the Mentally Impaired Accused Review Board needs to act quickly to suspend a Leave of Absence Order or issue an arrest warrant as a matter of urgency to protect the safety of individuals in the community, it may not be feasible to first organise a meeting with the legal representative or advocate of the mentally impaired accused. In such circumstances, the paramount consideration of community safety may apply to qualify the proposed right of the mentally impaired accused to be represented and notified ahead of all Board proceedings.

295. On balance, having regard to the operation of the *Criminal Law (Mentally Impaired Accused) Act 1996* and to the views expressed by stakeholders, it is recommended that the right of a mentally impaired accused to be represented by legal counsel or advocates, notified of proceedings, and to be provided with copies of relevant materials and written reasons for decisions be reflected either through amendment of the *Criminal Law (Mentally Impaired Accused) Act 1996* or through the issuance of appropriate practice directions.

Recommendation Twenty One
The right of a mentally impaired accused to be represented by legal counsel or by an advocate, notified of proceedings, and to be provided with copies of relevant materials and written reasons for decisions should be appropriately reflected in the *Criminal Law (Mentally Impaired Accused) Act 1996* or practice directions.

296. In addition to the Recommendations outlined above, the Mentally Impaired Accused Review Board has itself advised of difficulties it has faced in obtaining all relevant information necessary to carry out its work. In particular, the Mentally Impaired Accused Review Board advises that there are often occasions where the Board is not advised of particular medical information in respect of an accused in a timely fashion.

297. Given the critical relevance of such information to the functions of the Mentally Impaired Accused Review Board, the Mentally Impaired Accused Review Board would benefit from strengthened powers to obtain relevant information in respect of mentally impaired accused.

298. Accordingly, having regard to the operation of the *Criminal Law (Mentally Impaired Accused) Act 1996* and to the views expressed by stakeholders, it is recommended that the *Criminal Law (Mentally Impaired Accused) Act 1996* be amended to provide the Mentally Impaired Accused Review Board with powers equivalent to those under section 107 of the *Sentence Administration Act 2003.*

Recommendation Twenty Two
The *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to provide the Mentally Impaired Accused Review Board with powers equivalent to those under section 107 of the *Sentence Administration Act 2003.*

Place of detention

299. As outlined previously, following the making of a custody order in respect of a mentally impaired accused, the Registrar of the court is to immediately notify the Mentally Impaired Accused Review Board,[70] which is then required to review the case within five working days and determine the place where the accused is to be detained.[71]

300. Currently, it is open to the Mentally Impaired Accused Review Board to determine that a mentally impaired accused is to be detained in either:

- An authorised hospital;
- A declared place;
- A detention centre; or
- A prison.

301. While the Discussion Paper did not specifically raise the issue of the place of detention, a number of stakeholders raised concerns with the current option of detaining mentally impaired accused in prison.

302. The Royal Australian and New Zealand College of Psychiatrists (WA Branch) and Faculty of Forensic Psychiatry have strongly recommended that prison be removed from section 24 as a place of custody under a custody order. Similar calls were made by the Council of Official Visitors, in three submissions from individual members of the public and by the State Forensic Mental Health Service, which stated its view that detaining people in prison who

[70] Section 3 of the *Criminal Law (Mentally Impaired Accused) Act 1996*
[71] Section 25(1) of the *Criminal Law (Mentally Impaired Accused) Act 1996*

are not guilty by reason of unsound mind is in direct contravention of Rule 82(1) of the United Nations *Standard Minimum Rules for the Treatment of Prisoners*.

303. In particular, the Royal Australian and New Zealand College of Psychiatrists (WA Branch) and Faculty of Forensic Psychiatry stated that detaining mentally impaired accused in prison was punitive and failed to recognise the vulnerabilities and treatment needs of such persons. Further, detaining mentally impaired accused in prison "may actually heighten the risk to the community in the longer term" since the person's mental disorders were likely to deteriorate in prison due to "lack of access to appropriate individualised treatment and rehabilitation plans that reduce risk" with a view to helping such persons reintegrate safely back into the community. Stakeholders also emphasised that programs or services required by mentally impaired accused are not always available in prison.

304. This view appears to be supported by the findings of the Inspector of Custodial Services, who noted in his 2014 report that over half of mentally impaired accused placed in prison were not assessed for treatment programs or were considered not suitable for programs delivered in a group setting. Not surprisingly then, the Inspector found that mentally impaired accused detained in prison were held for a significantly longer period under the *Criminal Law (Mentally Impaired Accused) Act 1996* than those placed in a hospital. This was the case even though the alleged offences of people placed in a hospital were generally more serious than that of people placed in prison.

305. While security features have been incorporated into the design of the Disability Justice Centre for accused with disability, this facility is not expected to accommodate high-risk, violent mentally impaired accused.

306. The *Western Australian Mental Health, Alcohol and Other Drug Services Plan 2015-2025: Better Choices. Better Lives* indicates that the current number of forensic beds in the State is approximately half of what they should be in order to meet demand. This Plan also notes that a new larger facility to replace the Frankland Centre is required, but is not expected to be completed in the near future.

307. In regional areas, prison may be the only secure option available to mentally impaired accused from regional and remote communities which would allow them to be closer to their family, support networks and community.

308. A constructive response to concerns raised in submissions is to continue to focus on further improving the coordination and delivery of services to mentally impaired accused who are detained in prison, such as through the prison in-reach service recently established by the Disability Services Commission, and the proposed expansion of the position of Supervising Officer (see Recommendation 34 below).

309. Accordingly, having regard to the operation of the *Criminal Law (Mentally Impaired Accused) Act 1996* and to the views expressed by stakeholders, it is recommended that prison be retained as a place of custody under the *Criminal Law (Mentally Impaired Accused) Act 1996.* However, subject to available resources, concrete steps should be taken to improve the coordination and delivery of services to mentally impaired accused who are detained in prison and ensure that custodial staff receive appropriate training in issues relating to persons affected by cognitive impairment and mental illness.

Recommendation Twenty Three
Absent the ready availability of sufficient secure places in either hospital or a declared place, prison should be retained as a place of custody under the *Criminal Law (Mentally Impaired Accused) Act 1996*.

Leave of Absence Orders

310. Section 27 of the *Criminal Law (Mentally Impaired Accused) Act 1996* provides that the Governor may make an order permitting the Mentally Impaired Accused Review Board to grant a mentally impaired accused leaves of absence from his or her place of custody. If such an order is in place, section 28 of the Act permits the Mentally Impaired Accused Review Board to make a Leave of Absence Order at any time in respect of a mentally impaired accused.

311. A Leave of Absence Order permits the individual to leave their place of custody for up to 14 days at a time. Leave of Absence Orders may be either unconditional or subject to conditions determined by the Board. The conditions that may be included in the Leave of Absence Order may require that the mentally impaired accused –

- Undergoes specified treatment or training or other measures that alleviate or prevent the deterioration of the accused's condition;
- Resides at a specific place; and/or
- Complies with the lawful directions of a supervising officer designated by the Board.

312. Section 28(3) of the *Criminal Law (Mentally Impaired Accused) Act 1996* provides that in determining whether to make a Leave of Absence Order, the Mentally Impaired Accused Review Board must have regard to:

- 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; and
- The likelihood that, if given leave of absence on conditions, the accused would comply with the conditions.

313. It is a longstanding practice of the Mentally Impaired Accused Review Board to use Leave of Absence Orders for emergency medical treatment, attendance at cultural and religious activities on compassionate grounds, and to enable participation in rehabilitation programs. The use of Leave of Absence Orders for rehabilitative purposes in particular is contemplated by section 28 of the *Criminal Law (Mentally Impaired Accused) Act 1996* which provides that the Board may include a condition in a Leave of Absence Order requiring the mentally impaired accused to undergo treatment, training or other measures which alleviate or prevent the deterioration of the accused's condition.

314. The Leave of Absence Order is the first stage in the Mentally Impaired Accused Review Board's graduated approach to release. If the accused complies fully with the conditions in the Leave of Absence Order, the Board may gradually extend the frequency and duration of

the leave from a few hours to up to 14 days. Following a substantial period of successful community access and compliance with conditions under successive leaves of absence, the Board will consider recommending release subject to conditions.

315. The Mentally Impaired Accused Review Board considers the use of Leave of Absence Orders for rehabilitative activities to be crucial to the wellbeing of mentally impaired accused and their progress towards eventual reintegration in the community. Such use of leave for rehabilitative activities is particularly crucial to mentally impaired accused detained in prison who do not have a mental illness which can be treated, as such accused may have limited other opportunities to access specialised services appropriate to their needs or demonstrate their progress in rehabilitation to the Mentally Impaired Accused Review Board.

316. In the Discussion Paper, the Government sought views on the factors that the Mentally Impaired Accused Review Board should consider in determining whether to make a Leave of Absence Order.

317. In general, the submissions that considered this issue were comfortable with the leave of absence criteria as currently provided in the section 28 of the *Criminal Law (Mentally Impaired Accused) Act 1996*.

318. However, some stakeholders suggested additional criteria for inclusion in section 28(3). For instance, the Aboriginal Legal Service of Western Australia recommended that in addition to the considerations outlined in section 28(3), the Mentally Impaired Accused Review Board should be required to consider "the extent to which the leave of absence may benefit the accused in terms of treatment, rehabilitation or general wellbeing." For Aboriginal mentally impaired accused, the Aboriginal Legal Service of Western Australia was of the view that the Mentally Impaired Accused Review Board should also be required to consider "cultural wellbeing and the importance of maintaining connection to country, culture and community."

319. Consistent with the two key objectives underpinning the operation of the *Criminal Law (Mentally Impaired Accused) Act 1996* identified in paragraph 26 above, and given the critical role played by Leave of Absence Orders in enabling a mentally impaired accused to 'work towards' their eventual release, it would appear to be appropriate for the criteria in section 28(3) to be amended to more properly reflect that decisions of the Mentally Impaired Accused Review Board should take into account not only the paramount purpose of community safety, but also the objective of imposing the least restriction of the freedom of choice and movement of the accused.

320. The Mentally Impaired Accused Review Board should – and currently does – also take into account information about the accused's performance on any current or prior Leave of Absence Order or Conditional Release Order to inform its decision making processes.

321. It should be noted that the inclusion of the proposed objective of imposing the least restriction would not modify the Mentally Impaired Accused Review Board's current decision making practices under section 28 of the *Criminal Law (Mentally Impaired Accused) Act 1996*, which are already inherently informed by the principle of least restriction.

322. Nevertheless, an explicit statement of the factors to be considered by the Mentally Impaired Accused Review Board under this provision would increase the transparency and robustness of decision making in respect of a mentally impaired accused without undermining the paramount consideration of community safety. Such an additional criterion would also underscore that while the *Criminal Law (Mentally Impaired Accused) Act 1996* is a *sui generis* Act with distinct objects and purposes, it is nevertheless able to make a critical and coherent contribution to the recovery focus of the Western Australian mental health system.

323. On this basis, having regard to the operation of the *Criminal Law (Mentally Impaired Accused) Act 1996* and the views expressed by stakeholders, it is recommended that section 28(3) of the *Criminal Law (Mentally Impaired Accused) Act 1996* be amended to provide that before making a Leave of Absence Order, the Board is also to have regard to the extent to which the accused's mental impairment might benefit from treatment, training or any other measure, and 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.

Recommendation Twenty Four
Section 28(3) of the *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to provide that before making a Leave of Absence Order, the Board is to have regard to the extent to which the accused's mental impairment might benefit from treatment, training or any other measure, and 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.

324. In addition to the factors that the Mentally Impaired Accused Review Board should consider in determining whether to make a Leave of Absence Order, a number of stakeholders that considered Leave of Absence Orders argued strongly against the current 14-day limitation on leaves of absence under the *Criminal Law (Mentally Impaired Accused) Act 1996*.

325. The Royal Australian and New Zealand College of Psychiatrists (Faculty of Forensic Psychiatry) stated –

> *Having to return to hospital every 14 days for the night is disruptive to the individual, unnecessarily restrictive, and does not improve clinical care or risk management. Much more comprehensive reviews of individuals' risk, mental state, functioning and living circumstances could be completed in the community, which would inform risk management much better. Also, it is*

extremely difficult and disruptive to go in and out of prison in this way, so people detained in prison face much greater obstacles in progressing towards release.

326. This view was echoed in submissions from a number of stakeholders including the Office of the Public Advocate and Legal Aid Western Australia, as well as individual members of the community. The State Forensic Mental Health Service, which administers the Frankland Centre and the Community Forensic Mental Health Program, also stated that not only does the 14-day limitation "lack clinical value", it is also "difficult to administer, expensive and detracts from good quality community care".

327. As the only suitable secure authorised hospital for the purposes of the *Criminal Law (Mentally Impaired Accused) Act 1996* is located in Perth, submissions also noted that the 14-day limitation severely restricts an accused's access to care and treatment in regional areas.

328. The removal of the 14-day limitation on Leave of Absence Orders would be consistent with the Board's current approach to graduated release, and would enable mentally impaired accused in custody to participate in longer training, treatment, rehabilitation and re-socialisation programs as well as access services located in regional areas at the recommendation of the accused's treating practitioner.

329. Having regard to the operation of the *Criminal Law (Mentally Impaired Accused) Act 1996* and to the views expressed by stakeholders, it is recommended that the 14-day limitation on Leave of Absence Orders be removed.

Recommendation Twenty Five
The 14-day limitation on Leave of Absence Orders should be removed.

330. A further issue raised by some stakeholders in relation to Leave of Absence Orders is the lack of adequate Executive oversight of individual leave of absence orders.

331. In accordance with section 28 of the *Criminal Law (Mentally Impaired Accused) Act 1996*, if the Governor allows the Mentally Impaired Accused Review Board to grant leaves of absence in respect of a mentally impaired accused, the Board may make a Leave of Absence Order at any time.

332. In effect, this means that once Executive approval has been given to the Mentally Impaired Accused Review Board under section 27, the Mentally Impaired Accused Review Board may grant further leaves of absence to the accused on an unspecified number of occasions and for purposes other than those originally specified in the request for approval.

333. In this context, stakeholders suggested that consideration be given to a proposal to impose an express requirement to seek Executive approval for every individual Leave of Absence

Order under section 28, or, at a minimum, to seek such approval for each Leave of Absence Order for a purpose other than for urgent medical, cultural and compassionate reasons.

334. Other stakeholders, including the Mentally Impaired Accused Review Board, noted that a requirement to seek leave for each and every Leave of Absence Order for rehabilitative purposes would potentially add to the administrative workload of the Mentally Impaired Accused Review Board. A requirement for such continual reporting might also cause delay and impede the accused's progress through the graduated release process.

335. On balance, the current system of Board supervised leaves of absence is considered an appropriate, timely and cost effective mechanism to manage leaves of absence under the *Criminal Law (Mentally Impaired Accused) Act 1996*. Leave of Absence Orders granted under section 28 are already subject to scrutiny and regular reporting to the Executive,[72] and it remains within the power of the Executive at any time to cancel an order allowing the Board to grant leaves of absence to a mentally impaired accused.

336. Accordingly, having regard to the operation of the *Criminal Law (Mentally Impaired Accused) Act 1996* and to the views expressed by stakeholders, it is recommended that the system for Leave of Absence Orders under section 27 and 28 of the *Criminal Law (Mentally Impaired Accused) Act 1996* is consistent with the Executive decision making framework which underpins the Act as a whole, and should be retained.

Recommendation Twenty Six
The current system of Board-supervised leaves of absence under section 27 and 28 of the *Criminal Law (Mentally Impaired Accused) Act 1996* should be retained.

Release

337. The *Criminal Law (Mentally Impaired Accused) Act 1996* provides that the Governor may at any time order that a mentally impaired accused be released by making a release order. Such a release order may be unconditional, or on conditions determined by the Governor. The Governor may be assisted in making release decisions by reports from the Board to the Attorney General under section 33 of the *Criminal Law (Mentally Impaired Accused) Act 1996*, which must include a recommendation on whether the Governor should be advised to release the mentally impaired accused.

[72] Section 33 *Criminal Law (Mentally Impaired Accused) Act 1996* provides that the Board must give the Minister a written report about a mentally impaired accused at least once in every year. The Minister may also request written reports at any time.

338. Section 33(5) of the *Criminal Law (Mentally Impaired Accused) Act 1996* sets out the criteria to which the Board is to have regard in making a recommendation to the Attorney General for the release of a mentally impaired accused. These factors are:

- 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;
- The likelihood that, if released on conditions, the accused would comply with the conditions;
- The extent to which the accused's mental impairment, if any, might benefit from treatment, training or any other measure;
- 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;
- 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;
- Any statement received from a victim of the alleged offence in respect of which the accused is in custody.

339. In the Discussion Paper, the Government sought views on whether the current criteria set out in section 33(5) of the *Criminal Law (Mentally Impaired Accused) Act 1996* are appropriate to determining whether the mentally impaired accused should be released.

340. Some stakeholders that considered this issue expressed the view that release factors should be confined to criteria solely and specifically related to the safety of the community. These stakeholders were of the view that it was inappropriate for the Board to consider the welfare of the mentally impaired accused. For instance, the Law Society of Western Australia expressed the view that –

Mentally impaired accused should not be denied release only because they are unable to look after themselves. If this is the case the person should be able to receive health and disability supports in the community. It is not the role of the criminal law to perform such a function but rather than of mental health and other community support services.

341. In this regard, the Council of Official Visitors noted that it was "inappropriate and discriminatory" for the Board to take into account the ability of the accused to take care of his or her day-to-day needs, obtain appropriate treatment and resist serious exploitation.

342. Other stakeholders considered that, given the likely vulnerability of people with mental impairment, the Mentally Impaired Accused Review Board has an obligation to ensure the safety and welfare of the mentally impaired accused in the community. These stakeholders considered it was appropriate for the Board to consider broader criteria related to the accused's welfare and their ability to care for themselves in the community in determining the accused's readiness to reintegrate safely back into the community.

343. As noted previously, this consideration of the *Criminal Law (Mentally Impaired Accused) Act 1996* in general and the management, supervision and release framework in particular is informed by the two key principles underpinning the operation of the Act, that is –

- the safety of the community, including the rights and interests of victims of alleged crime;
- the fair and equitable treatment of mentally impaired accused, consistent with the principle of least restriction.

344. While *prima facie* these two principles may suggest that the release criteria contained in section 33(5) of the *Criminal Law (Mentally Impaired Accused) Act 1996* should be limited to those factors that are specifically related to the safety of the community, this approach may fail to take proper account of the specific vulnerabilities of a mentally impaired person.

345. Rather, any assessment of the fair and equitable treatment of mentally impaired accused under the *Criminal Law (Mentally Impaired Accused) Act 1996* must be informed in part by the recovery focus of the Western Australian mental health system. Accordingly, given the particular vulnerability of mentally impaired accused and the extraordinary nature of indefinite custody orders, it is appropriate for the Mentally Impaired Accused Review Board to continue to take into account a broad range of welfare factors in making a determination to recommend the release of a mentally impaired accused.

346. A number of stakeholders commented on the appropriateness of taking into account the views of victims of alleged offences as set out in section 33(5)(f). The Mental Health Law Centre was strongly of the view that it was 'entirely misplaced' for the Board to take into account any statement made by the victim of the alleged offence. On the other hand, the Victims of Crime Reference Group emphasised the importance of retaining victim considerations as a key consideration for the Mentally Impaired Accused Review Board.

347. The Mentally Impaired Accused Review Board has advised that any victim impact statements which may have been prepared for trial are forwarded to the Board as a matter of course. Victims of alleged offences can also convey their views by writing directly to the Board, or through the Victim-Offender Mediation Unit, which can recommend protective conditions to ensure the rights and safety of both the accused and the victims of alleged offences are protected.

348. For these reasons, having regard to the operation of the *Criminal Law (Mentally Impaired Accused) Act 1996* and to the views expressed by stakeholders, it is recommended that section 33(5) of the *Criminal Law (Mentally Impaired Accused) Act 1996* be retained in its current form.

Recommendation Twenty Seven
Section 33(5) of the *Criminal Law (Mentally Impaired Accused) Act 1996* should be retained in its current form, subject to any amendments in relation to juvenile mentally impaired accused arising from Recommendation 28 below.

349. As previously noted, the *Criminal Law (Mentally Impaired Accused) Act 1996* currently applies to juveniles in the same way it applies to adults.

350. In addition to the general views on release considerations outlined above, a number of stakeholders specifically proposed review of section 33(5) of the *Criminal Law (Mentally Impaired Accused) Act 1996* as it applies to juvenile accused.

351. Australia's obligations under the *Convention of the Rights of the Child* that the best interests of the child shall be a primary consideration in all decisions concerning children[73] and that the arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time[74] are noted, as is principle 'h' of the *Young Offenders Act 1994*, which provides that in relation to juvenile offenders custody should be used only as a last resort, and for as short a time as necessary.

352. Having regard to the operation of the *Criminal Law (Mentally Impaired Accused) Act 1996*, the *Young Offenders Act 1994* and to the views expressed by stakeholders, it is recommended that section 33(5) of the *Criminal Law (Mentally Impaired Accused) Act 1996* be reviewed in the context of juvenile mentally impaired accused, with a view to developing juvenile-specific considerations in close consultation with relevant stakeholders.

Recommendation Twenty Eight
The application of section 33(5) of the *Criminal Law (Mentally Impaired Accused) Act 1996* should be reviewed in the context of juvenile mentally impaired accused, with a view to developing juvenile-specific considerations in close consultation with relevant stakeholders.

353. Section 34 of the *Criminal Law (Mentally Impaired Accused) Act 1996* requires the Mentally Impaired Accused Review Board to give a copy of any report made under section 33 to the mentally impaired accused concerned and on request to the accused's lawyer or guardian.

354. Current section 33(5)(f) provides that in making such reports, the Board is to have regard to any statement received from a victim of the alleged offence in respect of which the accused is in custody. As such, it is likely that any such report will contain information relating to the victim of the alleged offence, such as victim impact statements.

355. The current practice of the Board is to redact the content of victim submissions and sensitive victim information from statutory reports (provided in accordance with section 34) in the interests of preserving the privacy of victims of alleged offences and protecting them from harm where appropriate.

[73] Article 3, *Convention on the Rights of the Child*
[74] Article 37, *Convention on the Rights of the Child*

356. Some stakeholders have specifically identified and applauded this practice, recommending that it be made explicitly clear in the legislation that the safety and privacy of victims must be maintained.

357. Having regard to the operation of the *Criminal Law (Mentally Impaired Accused) Act 1996* and to the views expressed by stakeholders, it is recommended that the Act is amended to provide that the Board may withhold information from a mentally impaired accused if it is in the public interest to do so having regard to all the circumstances, including the interests of the accused concerned and the interests of the victim of the alleged offence in respect of which the accused is in custody.

Recommendation Twenty Nine
The *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to provide that in providing the information as required by section 34 of the Act, the Mentally Impaired Accused Review Board may withhold some information where it is in the public interest to do so, having regard to all the circumstances.

Conditions of Release

358. The management, supervision and release framework established under the *Criminal Law (Mentally Impaired Accused) Act 1996* provides for the release[75] of a mentally impaired accused subject to specific conditions.

359. These conditions may include, inter alia, a requirement that the mentally impaired accused –

- Undergoes specified treatment or training or other measures that alleviate or prevent the deterioration of the accused's condition;
- Resides at a specified place;
- Complies with the lawful directions of a supervising officer designated under section 45.[76]

350. Currently, in circumstances where a mentally impaired accused breaches a condition of their Conditional Release Order[77] or Leave of Absence Order[78], the Mentally Impaired Accused Review Board is only empowered to cancel the order.

351. The Mentally Impaired Accused Review Board has advised that it would be beneficial to expand the options available to the Board in these circumstances. Specifically, in circumstances where an accused is demonstrating behaviour which indicates an elevated risk to himself or herself or the safety of the community but the behaviour is not severe enough for the Board to warrant cancelling a Conditional Release Order, the Board considers that authority to suspend the Conditional Release Order for a defined period of time would

[75] See Section 35(2) *Criminal Law (Mentally Impaired Accused) Act 1996* in relation to release and section 28(2) in relation to leaves of absence
[76] Sections 28(4); 35(4) *Criminal Law (Mentally Impaired Accused) Act 1996*
[77] Section 37 *Criminal Law (Mentally Impaired Accused) Act 1996*
[78] Section 29 *Criminal Law (Mentally Impaired Accused) Act 1996*

allow the accused the opportunity to address the concerning behaviour. For example, in circumstances where an accused has become non-compliant with medication, suspension of a Conditional Release Order or Leave of Absence Order would enable the accused to be returned to a hospital until such a time as they reinstate their compliance with their medication and treatment regime, and are ready to reintegrate safely in the community.

352. It is noted that the suspension of parole orders is commonly used by the Prisoners Review Board and can act as a timely and effective warning for a prisoner should they be on the cusp of having their Parole Order cancelled. Section 39 of the *Sentence Administration Act 2003* authorises the Prisoners Review Board to suspend a parole order, irrespective of whether it was made by the Board or by the Governor.

353. To allow a good balance to be maintained between ensuring adequate Executive supervision and providing the Mentally Impaired Accused Review Board with sufficient flexibility in managing the mentally impaired accused, it is suggested that this broader power is coupled with a requirement for the Board to notify the Attorney General within 30 days of a decision to make a material change to the order, such as cancelling or suspending the order. Such a requirement to notify the Minister within a defined timeframe would allow the Executive to exercise its existing powers, such as the power to cancel the authority to grant leaves of absence to a particular mentally impaired accused pursuant to section 27(2) for instance, in a timely manner. The Mentally Impaired Accused Review Board notes that such an approach may increase the administrative workload of the Board, but is nevertheless supportive of this approach.

354. Having regard to the operation of the *Criminal Law (Mentally Impaired Accused) Act 1996* and to the views expressed by stakeholders, it is recommended that the Act is amended to provide the Mentally Impaired Accused Review Board with greater flexibility in responding to a breach of the condition of a Conditional Release Order or Leave of Absence Order by mentally impaired accused. Specifically, in addition to the existing power to cancel such orders, the Board should be provided with the power to affirm, amend or suspend a Conditional Release Order or Leave of Absence Order. This proposed amendment should also include a requirement that the Board notify the Attorney General within 30 days of exercising this power.

Recommendation Thirty
The *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to provide the Mentally Impaired Accused Review Board with greater flexibility in responding to a breach of conditions by the accused. Specifically, in addition to the existing power to cancel Conditional Release Orders and Leave of Absence Orders, the Board should be provided with the power to affirm, amend or suspend the order. The Board must notify the Minister of its decision to make material changes to the order within 30 days.

355. Additionally, in circumstances where an accused breaches a condition of a Conditional Release Order or Leave of Absence Order, there is currently no legislative requirement that the supervising agency of the accused notify the Mentally Impaired Accused Review Board.

356. The absence of such a statutory requirement has resulted in delay in information being transmitted to the Mentally Impaired Accused Review Board, which can undermine the ability of the Board to act in respect of a mentally impaired accused.

357. Having regard to the operation of the *Criminal Law (Mentally Impaired Accused) Act 1996* and to the views expressed by stakeholders, it is recommended that the *Criminal Law (Mentally Impaired Accused) Act 1996* be amended to contain an express requirement that the Mentally Impaired Accused Review Board be advised in a timely manner of any breach of conditions by a mentally impaired accused.

Recommendation Thirty One
The *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to contain an express requirement that the Mentally Impaired Accused Review Board be advised in a timely manner of any breach of conditions by a mentally impaired accused.

Cooperation with other agencies

358. The interaction between the Mentally Impaired Accused Review Board and other agencies carrying out functions under the *Criminal Law (Mentally Impaired Accused) Act 1996* would also be improved by empowering the Board to enter into Memoranda of Understanding with other agencies in respect of operational matters.

359. Having regard to the operation of the *Criminal Law (Mentally Impaired Accused) Act 1996* and to the views expressed by stakeholders, it is recommended that the *Criminal Law (Mentally Impaired Accused) Act 1996* be amended to provide for the Board's ability to enter into appropriate Memoranda of Understanding with other agencies which carry out functions under the Act. Such Memoranda of Understanding must be in support of operational matters under the Act.

Recommendation Thirty Two
The *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to provide for the Board's ability to enter into Memoranda of Understanding with other agencies carrying out functions under the Act.

Review and Appeal

360. The *Criminal Law (Mentally Impaired Accused) Act 1996* does not provide a specific right of review of or appeal against decisions of the Mentally Impaired Accused Review Board, or a mechanism for a merits review of any decisions or recommendations made under the Act. Accordingly, as currently drafted, the only avenue for a mentally impaired accused to seek review of a decision by the Board is to seek leave for judicial review of the decision by the Supreme Court.

361. In the Discussion Paper, the Government sought views on whether there should be a specific process for appealing against decisions of the Mentally Impaired Accused Review Board.

362. A significant majority of stakeholders which considered this issue expressed concerns that the *Criminal Law (Mentally Impaired Accused) Act 1996* fails to provide any mechanism for appealing against key decisions in relation to the release of mentally impaired accused. These submissions strongly advocated for the role of the Executive to be removed and for decision-making powers to be transferred to the Supreme Court or the Mentally Impaired Accused Review Board.

363. In the context of proposed expanded decision-making powers, the submissions recommended that a formal mechanism for appealing the Mentally Impaired Accused Review Board's decisions to an external body such as the Supreme Court or the State Administrative Tribunal was warranted to ensure procedural fairness and transparency.

364. A number of stakeholders also expressed concerns about timeliness and suggested that the *Criminal Law (Mentally Impaired Accused) Act 1996* set out timeframes for the holding of formal hearings to allow mentally impaired accused to appeal against decisions to cancel leaves of absence.

365. Where the mentally impaired accused is a child, the Department for Child Protection and Family Support ('DCPFS') recommended that the *Criminal Law (Mentally Impaired Accused) Act 1996* provide that the child's guardian may apply to appeal against decisions. For instance, DCPFS would have standing to request a review of the Mentally Impaired Accused Review Board's decisions in relation to a child under the care of the Chief Executive Officer of DCPFS.

366. The Commissioner for Children and Young People also recommended that a person who has "a sufficient interest in the matter" should be able to appeal to the State Administrative Tribunal against a decision made by the Mentally Impaired Accused Review Board in relation to the child without the payment of any fee.

367. The issue of appeals was also considered in the Holman Review, which recommended that –

> *A new section should be placed in part 5 of [the Act] entitled Appeals, in which it should state that, where sufficient grounds exist, an appeal against a decision of [the Mentally Impaired Accused Review Board] lies to the court of original jurisdiction and an appeal against a decision of the court of original jurisdiction lies to the Supreme Court.*

368. As noted above, as a matter of administrative law, decisions and recommendations of the Mentally Impaired Accused Review Board are already amenable to judicial review.

369. There is nevertheless a persuasive argument that, in addition to current entitlements, *"mentally impaired accused should be entitled to request a review at any time if his or her circumstances have changed since the last review was undertaken and at that reviews should be held at least as frequently as are provided for under civil mental health legislation."*

370. Grounds for review should include circumstances where the Mentally Impaired Accused Review Board has failed to comply with the *Criminal Law (Mentally Impaired Accused) Act 1996* in making its decision, where the Board has made an error of law, and where the Board has made its decision based on incorrect or irrelevant information.

371. As previously noted (in relation to Recommendation 17), the chairperson of the Mentally Impaired Accused Review Board must be a current or retired judge of the Supreme Court or the District Court. As such, the chairperson has a high level of relevant legal experience and expertise, and is well placed to determine a review request in a timely manner.

372. This proposed approach is broadly consistent with the current practice of the Mentally Impaired Accused Review Board, and is a cost-effective mechanism which increases stakeholder confidence in the system. Furthermore, formalising the ability of a mentally impaired accused to request a review of their matter would provide an important safeguard against individuals becoming 'lost in the system', and would appropriately respond to the risks outlined by stakeholders.

373. Having regard to the operation of the *Criminal Law (Mentally Impaired Accused) Act 1996* and to the views expressed by stakeholders, it is recommended that the *Criminal Law (Mentally Impaired Accused) Act 1996* be amended to provide that the mentally impaired accused or their representative may submit a request for the Mentally Impaired Accused Review Board to review their matter in general as well as specifically in relation to leaves of absence (including the imposition of conditions), place of custody and other matters on which the Board has decision-making authority.

Recommendation Thirty Three
The *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to provide that the mentally impaired accused or their representative may submit a request for the Mentally Impaired Accused Review Board to review decisions made in respect of their matter. Any such request must be determined by the chairperson within a reasonable period of time.

Supervising Officers

374. The challenges and complexities involved in interacting with the criminal justice system are generally much greater for vulnerable individuals affected by mental illness or cognitive impairment, who may lack the capacity to understand legal processes and access services that may assist them. Given the nature of mental illness and cognitive impairment, these individuals may also be affected by other related issues, such as homelessness, low socio-

economic status, unemployment, substance abuse and poor education, all of which further contribute to their difficulties in appropriately navigating the criminal justice system.

375. Stakeholders recommended a range of measures to assist mentally impaired accused from their entry into the jurisdiction of the Mentally Impaired Accused Review Board and throughout their process of graduated release in order to properly protect their interests and prepare them for release into the community.

376. For instance, Legal Aid Western Australia and the Aboriginal Legal Service of Western Australia suggested the development of a new type of community program order which provided monitoring and support by appropriate mental health or disability support workers rather than community corrections officers. The Director of Public Prosecutions was also in favour of a re-socialisation strategy as an option available to a Court *"if it receives a report recommending it and the court considers that adequate protection of the community can be maintained."*

377. The Inspector of Custodial Services preferred a different approach, suggesting a case management system *"akin to the Drug Court and Mental Health Court, where the court itself would play a proactive ongoing role in overseeing the management and progress of accused people placed on a community supervision order."*

378. The need for greater coordination and management in this regard has also been highlighted by the Mentally Impaired Accused Review Board in successive annual reports since 2002. Specifically, the Board has pointed to the need for greater interagency collaboration, the formulation and supervision of release plans, and funding for the appointment of supervising and support officers and community support services.

379. The establishment and funding of dedicated positions which take responsibility for the coordination and management of mentally impaired accused under the *Criminal Law (Mentally Impaired Accused) Act 1996* was also a recommendation of the Chief Psychiatrist and the Holman Review.

380. Some stakeholders have also submitted that they are aware of cases where the release of mentally impaired accused (who had been charged with relatively minor offences) was significantly delayed because of difficulties in coordinating a response from the various agencies such as the Department of Health, Department of Corrective Services and the Disability Services Commission.

381. It would be of benefit to both individual mentally impaired accused and the management, supervision and release framework under the *Criminal Law (Mentally Impaired Accused) Act 1996* as a whole to develop a mechanism for the appropriate coordination and management of persons subject to the jurisdiction of the Mentally Impaired Accused Review Board.

382. Such a mechanism is already available to an extent under section 45 of the *Criminal Law (Mentally Impaired Accused) Act 1996*, which provides for the designation of supervising officers.

383. However, as currently drafted, the designation of supervising officers is not mandatory and the functions of supervising officers are not sufficiently broad to meet the needs of mentally impaired accused and the Mentally Impaired Accused Review Board.

384. Accordingly, there appears to be merit in amending section 45 of the *Criminal Law (Mentally Impaired Accused) Act 1996* to provide for the mandatory designation of supervising officers for each mentally impaired accused. Such designation should take place in conjunction with the determination by Mentally Impaired Accused Review Board of the place where the accused is to be detained under section 25 of the *Criminal Law (Mentally Impaired Accused) Act 1996*.

385. The functions of supervising officers under section 45 of the *Criminal Law (Mentally Impaired Accused) Act 1996* should also be amended with a view to ensuring they are sufficiently broad to meet the needs of mentally impaired accused and the Mentally Impaired Accused Review Board. For instance, consideration should be given to expanding the role of the supervising officer to include facilitating the provision of support services to the mentally impaired accused, ensuring release plans are in place, notifying regional service providers when a mentally impaired accused is to be released in the area and assisting in the management of individual accused by the Mentally Impaired Accused Review Board.

386. Given the particular vulnerabilities of persons affected by mental impairment, the appointment of a supervising officer would play a critical role in assisting mentally impaired accused in navigating the criminal justice system and appropriately accessing the services to which they may be entitled (for example, access to legal aid or disability services). However, the review understands that the power to appoint supervising officers was very rarely used in the past, and has only started being used more readily in recent times.

387. The appointment of the supervising officer would represent a positive step towards addressing a number of the key criticisms made by stakeholders in respect of the management, supervision and release framework established under the *Criminal Law (Mentally Impaired Accused) Act 1996.*

388. Having regard to the operation of the *Criminal Law (Mentally Impaired Accused) Act 1996* and to the views expressed by stakeholders, it is recommended that Section 45 of the *Criminal Law (Mentally Impaired Accused) Act 1996* be amended to provide for the mandatory appointment of supervising officers to facilitate and coordinate service delivery to mentally impaired accused and advocate for their interests throughout the duration of their period subject to the jurisdiction of the Mentally Impaired Accused Review Board.

Recommendation Thirty Four
Section 45 of the *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to provide for the mandatory appointment of supervising officers to facilitate and coordinate service delivery to mentally impaired accused.

Interstate transfer

389. The *Criminal Law (Mentally Impaired Accused) Act 1996* does not provide for the interstate transfer of mentally impaired accused to or from another jurisdiction. Rather, such transfers are addressed on a case-by-case basis by the Mentally Impaired Accused Review Board.

390. While the Discussion Paper did not specifically raise the issue of interstate transfer, a number of stakeholders expressed concern that the issue should be considered in the context of a review of the *Criminal Law (Mentally Impaired Accused) Act 1996*. For instance, the Office of the Chief Psychiatrist suggested that interstate administrative agreements be developed with other jurisdictions in relation to mentally impaired accused who wish to return to their home states and local family supports, or who may have absconded interstate.

391. The issue of the interstate transfer and supervision of mentally impaired accused was considered by the Victorian Law Reform Commission in its 2014 *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997.* The Victorian Law Reform Commission noted that interstate transfers depended on reciprocal legislation in other states, and recommended that the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) be amended to allow either the Chief Psychiatrist (in the case of persons with mental illness) or the secretary of the Department of Human Services (in the case of persons with cognitive impairment) to certify that an interstate transfer is of benefit to the person and that facilities and appropriate services are available in the destination jurisdiction.

392. Reciprocal legislation and agreements with interstate forensic disability and mental health agencies will be required to facilitate the interstate transfer of mentally impaired accused and, where possible, limit delays and lengthy administrative processes.

393. Given that decisions about interstate transfers are limited by the laws in operation in other jurisdictions, consideration should be given to referring the issue to an appropriate national forum for further consideration, such as the Law, Crime and Community Safety Council.[79]

360. There may also be scope for greater collaboration and implementation of interjurisdictional arrangements for the management and supervision of mentally impaired accused who live in

[79] The LCCSC comprises ministers with responsibilities for law and justice, police and emergency management from each Australian State and Territory (and New Zealand) and assists the Council of Australian Governments by developing a national and trans-Tasman focus on fighting crime and promoting best practice in law, criminal justice and community safety.

the cross-border region as prescribed for the purposes of the *Cross-border Justice Act 2008*. Some stakeholders have suggested that consideration be given to expanding the scope of the *Cross-border Justice Act 2008* to facilitate the implementation of orders made under the *Criminal Law (Mentally Impaired Accused) Act 1996* in the prescribed cross-border region.

394. Having regard to the operation of the *Criminal Law (Mentally Impaired Accused) Act 1996* and to the views expressed by stakeholders, it is recommended that the Government consider the referral of the issue of interstate transfers of mentally impaired accused to an appropriate national forum such as the Law, Crime and Community Safety Council for further consideration of interjurisdictional justice policy matters.

Recommendation Thirty Five
Consideration be given to the referral of the issue of interstate transfers of mentally impaired accused to an appropriate national forum such as the Law, Crime and Community Safety Council.

SCENARIO THREE: MANAGEMENT, SUPERVISION AND RELEASE

Jerome, who has brain injury and also suffers from a chronic mental disorder, is acquitted on account of unsound mind and subject to a custody order under section 21 of the *Criminal Law (Mentally Impaired Accused) Act 1996*.

Current system	Proposed system
Within five working days of the imposition of the custody order, the Mentally Impaired Accused Review Board determines that Jerome is to be housed in a prison.	Within five working days of the imposition of the custody order, the Mentally Impaired Accused Review Board determines that Jerome is to be housed in a prison.
Within eight weeks of the imposition of the custody order, Jerome's order is reviewed by the Mentally Impaired Accused Review Board.	Within eight weeks of the imposition of the custody order, Jerome's order is reviewed by the Mentally Impaired Accused Review Board. The deliberations of Mentally Impaired Accused Review Board are usefully informed by the views of a community member with particular expertise in forensic mental health issues, who is able to provide critical insight into Jerome's prognosis to the Board. Jerome, his advocate and legal counsel are notified of the proceedings in advance and provided with all relevant documentation. This allows them to prepare useful and informative submissions for the Board's consideration. Jerome is able to appear by videolink to speak directly with the Board, and his counsel makes further submissions on his behalf. This information assists the Board in its deliberations. The Board is also able to obtain Jerome's medical records and relevant information from the prison through its expanded powers to compel evidence.

The Governor makes an order under section 27(2) allowing the Board to grant leave of absence to Jerome.	The Governor makes an order under section 27(2) allowing the Board to grant leave of absence to Jerome.
Having regard to the factors in section 28(3), the Board decides not to grant Jerome a leave of absence at this time. A key factor which influenced the decision was the Board's view that he is unlikely to comply with his medical treatment, which is difficult to access in his community of origin.	Having regard to the factors in section 28(3) as amended, including the principle of least restriction, the Board nevertheless determines that it is inappropriate to grant Jerome a leave of absence at this time. A key factor which influenced the decision was the Board's view that he is unlikely to comply with his medical treatment, which is difficult to access in his community of origin.
	Jerome submits a request to the Board to review the Board's decision in relation to his leave of absence. Through his counsel and advocate, he provides further information regarding the availability of support and treatment in his community of origin, which will assist him in complying with the conditions of his release. The Chairperson considers the request and determines that the decision not to make a Leave of Absence Order should be reviewed by the Board. The additional information convinces the Board that it would be appropriate to grant Jerome a leave of absence. The Board subsequently makes a Leave of Absence Order. With some assistance from the supervising officer appointed by the Board, Jerome complies fully with all the conditions of the Leave of Absence Order.
Having regard to the factors in section 33(5) of the Act, the Mentally Impaired Accused Board submits a report to the Minister recommending that the Governor should be advised to release Jerome on the condition that he continue his treatment on a non-custodial basis and remain compliant with medication.	A service provider who has been supporting Jerome while he was on the Leave of Absence Order has built a good rapport with him, and suggests to the supervising officer that Jerome is ready to spend a greater amount of time in the community with less supervision. The supervising officer agrees with this recommendation in his report.

	Having regard to the factors in section 33(5) of the Act, the Mentally Impaired Accused Board submits a report to the Minister recommending that the Governor be advised to release Jerome on the condition, inter alia, that he continue his treatment on a non-custodial basis and remain compliant with medication.
The Governor orders Jerome's release on the condition that he continues his treatment on a non-custodial basis and remains compliant with medication.	The Governor orders Jerome's release on the condition that he continues his treatment on a non-custodial basis and remains compliant with medication.
After six months of conditional release, Jerome becomes non-compliant with his medication, which is a breach of a condition of his release. The Mentally Impaired Accused Review Board is not advised of the breach for a week, by which time Jerome's condition has deteriorated further and he has engaged in offending conduct.	After six months of conditional release, Jerome becomes non-compliant with his medication, which is a breach of a condition of his release. The Mentally Impaired Accused Review Board is immediately advised of the breach by the supervising officer and is able to quickly act to suspend his release order and issue a warrant for his arrest.
The Mentally Impaired Accused Review Board cancels his release order and issues a warrant for his arrest.	The Mentally Impaired Accused Review Board suspends his release order and issues a warrant for his arrest. The Board notifies the Attorney General of its actions promptly.
Jerome is returned to custody and will remain in custody until the Governor again orders his release.	Jerome is returned to custody and becomes again compliant with his medication and treatment. The Mentally Impaired Accused Review Board decides to reinstate his Conditional Release Order. The order is varied to include new conditions designed to support Jerome in maintaining his compliance with medication and treatment in the community. The Attorney General is kept informed of this matter by timely notifications from the Board.

Appendix A

GOVERNMENT OF
WESTERN AUSTRALIA

CRIMINAL LAW (MENTALLY IMPAIRED ACCUSED) ACT 1996

Discussion Paper

The Act

The purpose of the *Criminal Law (Mentally Impaired Accused) Act 1996* (the 'CLMIA Act') is to enable the legal administration, care and disposition of people with a mental impairment who have been found to be either mentally unfit to stand trial, or not guilty by reason of unsound mind.

Review of the Act

In the lead up to the last State election a commitment was made to conduct a review of the CLMIA Act which would involve the production of a discussion paper for full public consultation.

The State Government would like to seek your feedback and comments on the operation of the CLMIA Act. Some issues and questions are set out in this Discussion Paper to provide guidance on matters you may wish to consider. You are also welcome to make submissions on any other aspect of the operation of the CLMIA Act.

As this Discussion Paper makes a number of direct references to the CLMIA Act, it is recommended that you read it together with the Act. The CLMIA Act may be downloaded from the State Law Publisher website at www.slp.wa.gov.au.

If you wish to make a submission on the issues raised in this paper, or on any other matters relating to the operation of the CLMIA Act, please do so by **12 noon, Friday 12 December 2014**.

Your submission should be addressed to:

Review of the *Criminal Law (Mentally Impaired Accused) Act 1996*
Policy and Aboriginal Services Directorate
Department of the Attorney General
GPO Box F317
PERTH WA 6841

Or emailed to CLMIAAct.Review@justice.wa.gov.au

Key Terms

Accused means a person charged with an offence.

Mental impairment means intellectual disability, mental illness, brain damage or senility.

Custody order means an order that an accused be kept in custody in accordance with Part 5 of the CLMIA Act. More information about custody orders is provided on page 15 of the Discussion Paper.

Mentally Impaired Accused Review Board means the board established under Part 6 of the CLMIA Act which is responsible for supervising mentally impaired accused subject to a custody order. More information about the Mentally Impaired Accused Review Board is provided on page 19 of the Discussion Paper.

A note on the usage of 'mentally impaired accused'

Section 23 of the CLMIA Act defines the term 'mentally impaired accused' as

an accused in respect of whom a custody order has been made and who has not been discharged from the order

In previous discussions related to the CLMIA Act, it was observed that stakeholders frequently used the term 'mentally impaired accused' more broadly to refer to persons who are found unfit to stand trial or acquitted on account of unsound mind, regardless of whether a relevant custody order had been made. For simplicity, the phrase 'mentally impaired accused' is used in this broader sense in this Discussion Paper.

Issues for Consideration

Definition of 'mental illness'

A different definition of the term 'mental illness' may apply in the CLMIA Act depending on the purpose and context of the term.

For the purposes of Part 3 of the CLMIA Act, 'mental illness' is defined as –
"an underlying pathological infirmity of the mind, whether of short or long term duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary stimuli"

This definition is consistent with the definition of 'mental illness' used in the *Criminal Code Act Compilation Act 1913* ('*Criminal Code*'), and reflects the codification of well-accepted common law principles related to the meaning of mental illness for the purposes of the defence under section 27 of the *Criminal Code*.

It is a well-established principle in law that whether a particular mental condition may amount to a mental illness to which the insanity defence applies is not a medical question but a question of law for the Court. This definition of 'mental illness' was examined in some detail by the Law Reform Commission of Western Australia during the course of its review of the law of homicide in 2005 - 2007. The Law Reform Commission concluded that the current definition of mental illness as used in the *Criminal Code* (which is reflected in the CLMIA Act) was adequate for the purposes of applying the legal test under section 27 of the *Criminal Code* and did not require amendment.

In Part 5 of the CLMIA Act, the term 'mental illness' is defined for the purposes of the Part (which relates to the disposition and treatment of mentally impaired accused) to have "the same definition as in the *Mental Health Act 1996*". Section 4 of the *Mental Health Act 1996* provides –

(1) For the purposes of this Act a person has a mental illness if the person suffers from a disturbance of thought, mood, volition, perception, orientation or memory that impairs judgment or behaviour to a significant extent.

(2) However a person does not have a mental illness by reason only of one or more of the following, that is, that the person —

- holds, or refuses to hold, a particular religious, philosophical, or political belief or opinion
- is sexually promiscuous, or has a particular sexual preference;
- engages in immoral or indecent conduct;
- has an intellectual disability;
- takes drugs or alcohol;
- demonstrates anti-social behaviour.

A definition consistent with that in the *Mental Health Act 1996* was considered appropriate for the purposes of addressing treatment for the mentally impaired accused in Part 5. Similarly, where the term mental illness is specifically used in the context of treatment in section 5 of the CLMIA Act, it is defined to have the same meaning as that in the *Mental Health Act 1996* (rather than that in the *Criminal Code*).

Some stakeholders have noted that having two different definitions of a term in a single Act may be confusing for readers, and suggested that the definition of 'mental illness' be reviewed with a view

to developing a single definition which may be applied throughout the CLMIA Act regardless of whether the term is used in the context of a legal test for a criminal defence or medical treatment for a person.

Discussion points:

Should the definition of 'mental illness' be amended? Are there any other terms and definitions that should be reviewed?

Statement of objects and principles

It has been suggested that it would be helpful to readers of the CLMIA Act if it contained a set of objects and fundamental principles to provide guidance on what the values and aims of the CLMIA Act are. Such a statement of the CLMIA Act's objects and principles may also assist decision-makers in interpreting the CLMIA Act and determining how best to carry out their functions and responsibilities.

Should a statement of objects and principles be included, some stakeholders have suggested that such a statement should be primarily focused on the needs of the mentally impaired accused.

Other stakeholders, however, have suggested that any statement of objects and principles should contain recognition of victims' rights and the harm suffered by victims of crime. It has been proposed that the acknowledgment of victims of crime, the harm they have suffered and the nature of the alleged offence is information relevant to case management decisions regarding the mentally impaired accused in the contemporary justice system of a civil society. This view is reflected in section 33(5)(f) of the CLMIA Act which allows for consideration to be given to victim impact statements in determining whether the mentally impaired accused should be released into the community.

Discussion points:

Should a statement of objects and principles be included in the CLMIA Act? If so, bearing in mind the purpose of the CLMIA Act, what objects and fundamental principles do you think should be included?

If the objects and principles include victims of crime, how should the interests of victims of crime be reflected?

Unfitness to stand trial

Criteria

Section 9 of the CLMIA Act provides that --

An accused is not mentally fit to stand trial if the accused, because of the mental impairment, is –
(a) unable to understand the nature of the charge;
(b) unable to understand the requirement to plead to the charge or the effect of a plea;
(c) unable to understand the purpose of a trial;
(d) unable to understand or exercise the right to challenge jurors;
(e) unable to follow the course of the trial;
(f) unable to understand the substantial effect of evidence presented by the prosecution in the trial; or
(g) unable to properly defend the charge.

The current criteria for mental unfitness to stand trial in the CLMIA Act incorporates the common law 'Presser Criteria'. The 'Presser Criteria' refer to the criteria identified by Justice Smith in the case of *R v Presser* to determine a person's fitness to stand trial. The Court noted in the case that an accused needs to –

"…be able to understand what it is that he is charged with. He needs to be able to plead to the charge and to exercise his right of challenge. He needs to understand generally the nature of the proceedings, namely, that it is an inquiry as to whether he did what he is charged with. He needs to be able to follow the course of the proceedings so as to understand what is going on in Court in a general sense, though he need not, of course, understand all the formalities. He needs to be able to understand the substantial effect of any evidence that may be given against him; and he needs to be able to make his defence or answer to the charge. Where he has counsel he needs to be able to do this by letting his counsel know what his version of the facts is and, if necessary, telling the Court what it is. He need not have the mental capacity to make an able defence: but he must… have sufficient capacity to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel, if any".

It has been suggested that an additional criterion be added in relation to the ability of a person to instruct his or her lawyer. The rationale provided for this suggestion is that it could be unjust to the accused if the trial proceeded despite the fact that he or she was unable to participate in a meaningful manner by instructing his or her lawyer.

The addition of a criterion related to a person's ability to instruct counsel would also bring the legislation in line with equivalent legislation regarding fitness to stand trial in Victoria, the Northern Territory and the Australian Capital Territory.

Discussion points:

Should the criteria for determining if a person is mentally unfit to stand trial be amended?

Forum for determining unfitness

Under the CLMIA Act, the question of fitness is determined by the presiding judicial officer in the court where the issue is raised.

Section 12 of the CLMIA Act provides that the question of whether an accused is not mentally fit to stand trial is determined on the balance of probabilities, and the judicial officer may inform himself or herself in any way the judicial officer thinks fit. To this end, the judicial officer may –

- order the accused to be examined by a psychiatrist or other appropriate expert;
- order a report by a psychiatrist or other appropriate expert about the accused to be submitted to the court;
- adjourn the proceedings and, if there is a jury, discharge it;
- make any other order the judicial officer thinks fit.

Some stakeholders from the mental health sector have noted that expert evidence may be crucial to the question of unfitness to stand trial. As such, they have suggested that relevant accused who appear to be unfit to stand trial be referred by the Court to a specialist mental health or disability tribunal instead to make the determination on the accused's unfitness to stand trial.

On the other hand, stakeholders from the legal field have argued that while expert evidence is often influential in the determination of unfitness to stand trial, the notion of unfitness to stand trial is ultimately a legal concept fundamental to criminal proceedings, which has significant legal implications, not least the shielding of the accused from the ordinary criminal justice processes and obligations. As such, the court must not lightly abdicate its responsibility on this issue to an expert medical witness and refer findings of unfitness to a mental health or disability board.

On a practical level, allowing the question of unfitness to stand trial to be determined in court may also have the advantage of avoiding a lengthy separate process in another tribunal. Having the issue dealt with in the court where it was raised would avoid the duplication of evidence and processes, thereby reducing the level of stress on the accused, victims and witnesses.

Discussion points:

Should the determination of an accused's unfitness to stand trial be modified? What alternative forums could be utilised?

Special hearing

The key focus of the Court in addressing the issue of unfitness to stand trial is the mental capacity of the person at the time of the hearing (rather than at the time of the alleged offence). If the accused is found on the balance of probabilities to be mentally unfit, the judicial officer must determine whether the accused is likely to become fit within six months. If the accused is unlikely to, or has not become fit within six months, the Court must, without deciding the guilt or otherwise of the accused, quash the indictment or committal. The Court must then decide whether to release the person unconditionally or make a custody order.

In determining the appropriate disposition to impose, the CLMIA Act requires the Court to consider the following factors:

(a) the strength of the evidence against the accused;
(b) the nature of the alleged offence and the alleged circumstances of its commission;
(c) the accused's character, antecedents, age, health and mental condition; and
(d) the public interest

The considerations set out in (a) and (b) allow for formal judicial review of the case against the accused by the Court. However, some stakeholders have suggested that this provision is inadequate, and that the CLMIA Act should be amended to introduce a more extensive consideration of the case against the accused following the finding that the accused is mentally unfit to stand trial.

In some Australian jurisdictions such as Victoria and New South Wales, a special hearing may be conducted following a finding of mental unfitness to stand trial to test the strength of the evidence and ensure the court gives due consideration to the likelihood that the accused committed the objective elements of the offence charged. Such a special hearing would provide an opportunity for the accused to put forward a defence or explanation in relation to the offence, notwithstanding the fact that the accused has been found unfit to stand trial and cannot be convicted of the offence.

The concept of the special hearing was developed in Victoria and New South Wales to address a perceived weakness in the legislative framework at the time which did not allow the mentally unfit person the opportunity for acquittal. This meant the accused was detained indefinitely at the Governor's pleasure without any consideration of whether they had actually committed the objective elements of the offence. The special hearing was seen as an opportunity for the accused to be acquitted and released unconditionally.

It has also been suggested that another important purpose of the special hearing in jurisdictions that have them is to help give a sense of closure to victims and preserve their access to victims' compensation. Conversely, requiring victims of crime to present evidence may result in unnecessary re-traumatisation.

In Western Australia, the Court already has the option to release the accused unconditionally following a finding of mental unfitness to stand trial. The *Criminal Injuries Compensation Act 2003* (WA) also specifically provides that victims may apply for compensation where the accused is found to be mentally unfit to stand trial for the alleged offence. Given arrangements already in place, it has been suggested that there is no clear need for the introduction of a special hearing for accused found unfit to stand trial. Moreover, it was noted that requiring an accused who has been found unfit to stand trial to participate in a hearing appears inconsistent.

The value of any verdict from a special hearing has also been a subject of debate, given that the evidence presented may be severely limited by the accused's lack of capacity to participate in a

meaningful manner. It was suggested that the introduction of the requirement for a special hearing might place the lawyer for the accused in the difficult and potentially untenable position of taking instructions from a client who has been shown to be unable to understand the charge or proceedings, and is unlikely to be able to provide instructions.

Discussion points:

Should a special hearing to determine the criminal responsibility of an accused who has been found mentally unfit to stand trial be introduced? If so, what verdicts should be available following a special hearing?

If special hearings are adopted, should victims of crime have a right to decline any involvement in such a hearing?

Range of Available Options

The range of options available to the court in relation to mentally impaired accused varies depending on whether the accused was found mentally unfit to stand trial or acquitted on account of unsoundness of mind.

Unfit to Stand Trial

Under section 9 of the CLMIA Act, an accused is unfit to stand trial if the accused, because of mental impairment, is unable to –

- understand the nature of the charge;
- understand the requirement to plead to the charge of the effect of a plea;
- understand the purpose of a trial;
- understand or exercise the right to challenge jurors;
- to follow the course of the trial;
- understand the substantial effect of evidence presented by the prosecution in the trial; or
- properly defend the charge.

The CLMIA Act sets out the proceedings which apply when a court finds that an accused is mentally unfit to stand trial. The CLMIA Act also sets out what orders the court can make in such a situation.

Where the accused is found unfit to stand trial and the court believes that the accused is unlikely to become fit to stand trial within six months, the court only has two options open to it. The court must either release the accused without any conditions, or make a custody order in relation to the accused.

The CLMIA Act also provides that the court cannot make a custody order unless the statutory penalty for the alleged offence is or includes imprisonment, and the court is satisfied the custody order is appropriate having regard to a range of factors.

In light of the complex needs of people with severe mental impairment, it has been suggested that a court may require greater flexibility than that offered by the two orders currently available under the CLMIA Act to take into account the special needs of mentally impaired accused found mentally unfit to stand trial.

The CLMIA Act provides a wider range of dispositions the court can make under section 22 in relation to mentally impaired accused who are acquitted by reason of unsound mind.

Under section 22 of the CLMIA Act, the court may make orders similar to a conditional release order, a community based order or an intensive supervision order under the *Sentencing Act 1995*. Such orders allow a person to be released in the community under different levels of restrictions and supervision.

Some mental health service providers have suggested that as a matter of consistency the same range of disposition options as that set out in section 22 in relation to mentally impaired accused acquitted due to unsound mind should be made available to a court addressing mentally impaired accused found unfit to stand trial.

Discussion points:
Should the range of options available to the court when addressing an accused who has been found mentally unfit to stand trial be expanded? If so, what options should be considered?

Acquittal on Account of Unsound Mind

A court may find that some people are not criminally responsible for their actions because at the time of the alleged offence, they suffered from a mental impairment which deprived them of the capacity to:

- understand what they were doing ;
- understand the implications of their actions; or
- control their actions.

The CLMIA Act sets out what orders the court can make if it finds that the person is not guilty because of his or her unsound mind at the time of the alleged offence.

Section 20 of the CLMIA Act provides that the Magistrates Court and Children's Court may make an order under section 22 in respect of an accused who is acquitted due to unsound mind for any offence.

Section 21 of the CLMIA Act provides that the District Court and Supreme Court may only make an order under section 22 if the relevant offence is not an offence listed in Schedule 1 of the CLMIA Act. Where the relevant offence is an offence listed in Schedule 1, section 21(a) states the court must make a custody order.

Schedule 1 Offences

The offences listed in Schedule 1 include some of the most serious violent and sexual offences, such as murder, manslaughter, sexual penetration without consent and sexual coercion. Schedule 1 also includes property offences such as criminal damage (section 444 of the *Criminal Code*), and other offences such as indecent assault (which attracts a maximum penalty of five years' imprisonment).

The issue of mandatory custody orders in relation to Schedule 1 offences has sparked considerable interest in the community. Given the complexities which may arise in matters involving people with severe mental impairment who are charged with offences, a number of mental health stakeholders have suggested the District and Supreme Courts would benefit from having the flexibility of a wider range of options to deal with the nuances of individual matters. Removing the requirement to impose a mandatory custody order by abolishing Schedule 1 was proposed as an option for consideration.

Another view which has also been expressed emphasises that as a matter of public safety special attention should be focused on cases where very serious offences have been alleged. Additionally, community safety needs to be paramount in the Court's consideration of these cases. From this perspective, it has also been suggested there is value in retaining a prescribed list of key serious offences in Schedule 1, provided the list was reviewed to ensure that it reflects community views on what serious offences warrant special measures.

Discussion points:

Should section 21 and Schedule 1 be amended or abolished?

Should any of the current offences in Schedule 1 be removed or new offences added to Schedule 1?

Custody Orders

Overview

The custody order is one of the dispositions a court may make in relation to a mentally impaired accused under the CLMIA Act. It is an order which requires the mentally impaired accused to be detained in an authorised hospital, a declared place, a detention centre or a prison.

If a custody order is made in relation to the mentally impaired accused, he or she remains subject to the custody order until he or she is released by an order of the Governor. The accused may be released either unconditionally or subject to conditions determined by the Governor.

Section 25 of the CLMIA Act provides that the Mentally Impaired Accused Review Board (the 'Board') must review the case of the mentally impaired accused and determine the place of custody for the accused within five days of the custody order being made.

Under the CLMIA Act, the accused may be placed in an authorised hospital, a declared place, a detention centre or a prison. Section 26 of the CLMIA Act also provides that the Board may change the place where the mentally impaired accused is to be held depending on their individual needs.

As at 30 June 2014 there were 39 mentally impaired accused under the supervision of the Board. Under the current provisions of the CLMIA Act, the Board must review the accused and submit a written report to the Attorney General within eight weeks of the imposition of the custody order and at least once every year.

The CLMIA Act also provides that a report may be made whenever the Board receives a request from the Minister to do so or on its own initiative whenever there are circumstances which justify doing so. This allows the Board flexibility in allocating its resources effectively to conduct more frequent reviews of particular cases where appropriate.

The Board applies a graduated approach to release in relation to the supervision of mentally impaired accused. Under this approach, the Board may grant successively longer periods of leaves of absence to mentally impaired accused where they have demonstrated the ability to maintain a validated level of stability and compliance in the community. While on a leave of absence the accused may be subject to conditions imposed by the Board. The behaviour of the accused during these limited periods of community access under a leave of absence order is taken into account by the Board in determining whether to recommend the release of the accused into the community under a conditional or unconditional release order.

As at 30 June 2014, there were ten accused in an authorised hospital, 18 accused in a prison, and no accused in a declared place or juvenile detention centre.

Availability of Custody Orders

Under the current provisions of the CLMIA Act, the court's power to impose a custody order in relation to a mentally impaired accused depends, in part, on whether the accused was found unfit to stand trial or not guilty by reason of unsound mind.

In relation to an accused found mentally unfit to stand trial the court may only make a custody order if the statutory penalty for the alleged offence is, or includes, imprisonment, and the court is satisfied the custody order is appropriate having regard to –

- 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.

No such limitation on the availability of custody orders applies in relation to an accused found not guilty by reason of unsound mind under section 22 of the CLMIA Act. Some stakeholders consider this difference an anomaly and have suggested that section 22 be amended to include a limitation similar to that which applies where the accused is found unfit to stand trial.

An alternative approach to addressing this perceived anomaly is to remove the limitation on the court's ability to impose a custody order in relation to an accused who is mentally unfit to stand trial.

Discussion points:

Should the court always have the option of imposing a custody order regardless of what offence the mentally impaired person was charged with? If not, what limitations should apply?

Duration of Custody Order

A matter which has consistently sparked interest and community debate is the issue of the duration of the custody order. A mentally impaired accused remains subject to the custody order until he or she is released by order of the Governor. This means the custody order remains in effect for an indefinite period.

It has been argued the indefinite duration of the custody order may be unfair to the mentally impaired accused as such persons may potentially remain in custody longer than someone who had been convicted of the offence.

On the other hand, some victim advocacy groups have expressed concerns that a mentally impaired accused on a custody order may be released back into the community after only a short period (relative to a sentence a person may have received on conviction) under supervision. These groups have argued that such an outcome may be considered disproportionate to the gravity of the offence, its impact on the community and be disrespectful to victims.

An important factor to consider in discussions on the duration of the custody order is the nature and key purposes of a civil detention order imposed under the CLMIA Act as opposed to a criminal sentence of imprisonment imposed following conviction.

Sentences of imprisonment which are imposed following a conviction are often focused primarily on punishment and deterrence. Civil detention on the other hand is aimed primarily at the supervision, care and rehabilitation of the individual and the protection of the community. Given the different focus and key purposes of the orders, the criminal sentence a person (who does not have the same impairment as the mentally impaired accused) may have received on conviction may not necessarily be a suitable guide for when a mentally impaired accused should be unconditionally released from a civil detention order.

Some stakeholders have also suggested that the offence the accused was charged with should have little or no bearing on the period of supervision the mentally impaired accused is subject to, since people who have been found unfit to stand trial have not had a full trial of the charged offence, and people who have been found not guilty by reason of unsound mind are not criminally responsible for the offence charged.

Discussion points:

Should the duration of the custody order be limited in any way by the court? If so, what factors should be taken into account in determining the appropriate duration of a custody order?

Should there be a minimum period of detention for a person who is held under the CLMIA Act?

Risk Management

An advantage of the current approach of the indefinite custody order is that it focuses attention on the needs of mentally impaired persons, allowing for the supervision of these persons until such time as they are no longer determined to be a risk to the community or to themselves. From this perspective, the introduction of a requirement to release mentally impaired accused on the expiration of a fixed term may result in some people being released prematurely in relation to their readiness to reintegrate safely into the community. This may pose a serious risk to community safety.

It has been suggested that any risk posed by releasing mentally impaired accused who are assessed as a danger to the community or a threat to themselves at the expiry of a proposed capped term can be managed under the 'involuntary patient' provisions of the *Mental Health Act 1996*.

Section 26 of the *Mental Health Act 1996* provides that a person can only be made an 'involuntary patient' if that person has a mental illness requiring treatment and is considered a danger to self, another person, or property. A person who is made an involuntary patient under the *Mental Health Act 1996* becomes the responsibility of the Chief Psychiatrist, and may be either treated in the community or detained in an authorised hospital. Some commentators have suggested the availability of 'involuntary patient' provisions are sufficient to address any fears about the potential risk to community safety which might result from the introduction of a maximum limit on custody orders.

However, a potential limitation of relying on the *Mental Health Act 1996* to manage such risk is that it fails to cater for the situation of mentally impaired accused who do not have a treatable mental illness, such as accused with a cognitive impairment or intellectual disability. Consequently, a protective order which could apply to all relevant mentally impaired accused regardless of whether they have a treatable mental illness may be required.

Discussion points:

What legislative arrangements should be made to manage the risk posed by mentally impaired accused who are assessed as being a danger to themselves or others if they are unconditionally released?

Mentally Impaired Accused Review Board

Overview

The Mentally Impaired Accused Review Board (the 'Board') plays a central role in the operation of the CLMIA Act. The functions of the Board are set out in Part 5 of the CLMIA Act. The constitution of the Board as set out in section 42 of the CLIMIA Act provides that the chairperson and community members of the Prisoners Review Board are members of the Board. Membership of the Board also includes a psychiatrist and psychologist, appointed by the Governor.

The Board is responsible for mentally impaired accused who are subject to a custody order under the CLMIA Act. A key role of the Board is to make a written report on each mentally impaired accused within eight weeks of the custody order being made, and thereafter at least once a year to the Attorney General. Each statutory report must include recommendations to the Governor as to whether the accused should be released and if so whether such release should be subject to any conditions.

Part 5 of the CLMIA Act also sets out powers the Board may exercise to facilitate the performance of its functions and responsibilities. For example, section 40 of the CLMIA Act provides that the Board may require the mentally impaired accused to be examined by a psychiatrist or other relevant expert.

The Board is also responsible for determining the place of custody for each mentally impaired accused.

Constitution of the Board – Community Members

The membership of the Board is set out in section 42 of the CLMIA Act –

(1) The members of the Board are —
(a) the person who is the chairperson of the Prisoners Review Board appointed under section 103(1)(a) of the *Sentence Administration Act 2003;*
(b) the persons who are community members of the Prisoners Review Board appointed under section 103(1)(c) of the *Sentence Administration Act 2003*;
(c) a psychiatrist appointed by the Governor; and
(d) a psychologist appointed by the Governor.

Section 42(1)(b) provides that persons who are appointed as 'community members' of the Prisoner Review Board under the *Sentence Administration Act 2003* are automatically 'community members' of the Mentally Impaired Accused Review Board. The attributes of these community members is set out in the *Sentence Administration Act 2003*, which provides that each community member must have one or more of the following attributes –

- the person has a knowledge and understanding of the impact of offences on victims;
- the person has a knowledge and understanding of Aboriginal culture local to this State;
- the person has a knowledge and understanding of a range of cultures among Australians;
- the person has a knowledge and understanding of the criminal justice system;
- the person has a broad experience in a range of community issues such as issues relating to employment, substance abuse, physical or mental illness or disability, or lack of housing, education or training.

Discussion points:

Is the membership of the Mentally Impaired Accused Review Board an appropriate mix? Should the membership include people with other qualifications?

Leaves of Absence

The CLMIA Act provides that the Governor may permit the Board to grant leaves of absence to mentally impaired accused. A leave of absence may not exceed 14 days at any one time, and may be either unconditional or subject to conditions determined by the Board. The kinds of conditions that may be included in the leave of absence order may require that the mentally impaired accused –

- undergoes specified treatment or training or other measures that alleviate or prevent the deterioration of the accused's condition;
- resides at a specific place;
- complies with the lawful directions of a supervising officer designated by the Board.

Section 28(3) of the CLMIA Act provides that in determining whether to make a leave of absence order, the Board must have regard to –

- 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; and
- the likelihood that, if given leave of absence on conditions, the accused would comply with the conditions.

Some stakeholders have noted the listed considerations for making a leave of absence order are less extensive than the prescribed considerations in relation to recommending a general release order under section 33(5) of the CLMIA Act.

Discussion points:

Are there any other factors the Board should consider in determining whether to make a leave of absence order?

Board Review Process – Right to Appear

The way the Board conducts reviews of persons under its supervision has been consistently raised as a key issue of concern in the operation of the CLMIA Act.

Section 33 of the CLMIA Act requires the Board to provide reports to the Attorney General which contain the release considerations set out in section 33(5) of the CLMIA Act.

The statutory reports must be provided:

- within eight weeks after the custody order was made in respect of the accused;
- whenever it gets a written request to do so from the Minister;
- whenever it thinks there are special circumstances which justify doing so; and
- in any event at least once in every year.

Section 40 provides that the Board may require a mentally impaired accused to appear before the Board for the purposes of performing its functions. In practice, the Board accepts written submissions from the mentally impaired accused as a matter of course, and the accused's advocate may make submissions in writing or in person to the Board.

While generally supportive of the current practice of the Board in allowing input from mentally impaired accused and their advocates, some stakeholders have pointed out that this approach is at the discretion of the Board and may be subject to change since there is no express right contained in the CLMIA Act for mentally impaired accused or their advocates to appear before the Board while their case is being considered.

Given the potentially severe consequences of the Board's decisions on the lives of the mentally impaired accused, it has been suggested that the accused (and their representative or support person where appropriate) should be provided with an explicit right to appear before the Board whenever their matter is being considered for the purposes of preparing a written report to the Minister. The view has also been put forward that allowing the mentally impaired accused the right to appear would assist in the Board's decision-making processes by increasing transparency, procedural fairness and the quality of information available to the Board.

Discussion points:

Should there be a formal process where the mentally impaired accused has a right to appear before the Board? Who should be entitled to appear to represent the accused's interests or provide information to the Board?

Release Considerations

The CLMIA Act provides that the Governor may at any time order that a mentally impaired accused be released by making a release order. Such a release order may be unconditional, or on conditions determined by the Governor. The Governor may be assisted in making release decisions by reports from the Board to the Attorney General under section 33 of the CLMIA Act, which must include a recommendation on whether the Governor should be advised to release the mentally impaired accused.

Section 33(5) of the CLMIA Act sets out the factors which the Board is to have regard to in deciding whether to recommend the release of a mentally impaired accused. These factors are –

- 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;
- The likelihood that, if released on conditions, the accused would comply with the conditions;
- The extent to which the accused's mental impairment, if any, might benefit from treatment, training or any other measure;
- 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;
- 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;
- Any statement received from a victim of the alleged offence in respect of which the accused is in custody.

It has been suggested that the factors to be considered by the Board as set out in section 33(5) in determining whether to recommend the release of the mentally impaired accused should be reviewed. In particular, it has been suggested the factors should be confined to criteria solely and specifically related to the safety of the community.

A contrary view is that given the potential vulnerability of mentally impaired persons, the Board has an obligation to ensure the safety and welfare of the mentally impaired accused in the community. From this perspective, it may be appropriate for the Board to consider criteria related to the accused's welfare and their ability to care for themselves in the community in determining the accused's readiness to reintegrate safely back in the community.

Discussion points:

Are the current criteria set out in section 33(5) of the CLMIA Act appropriate to determining whether the mentally impaired accused should be released? Is there other information the Board needs to consider?

Review of Board decisions

Section 34 of the CLMIA Act provides that as soon as practicable the Board is to give a copy of its report recommending the release or otherwise of the accused to the accused and on request to the accused's lawyer or guardian.

As no specific right of review or appeal is provided in the CLMIA Act, the only avenue for the mentally impaired accused to seek review of the Board's decision is to seek leave for judicial review of the decision by the Supreme Court.

It has been suggested that the grounds for judicial review of administrative decisions are very narrow and that seeking review by the Supreme Court may be a confusing and expensive process for the mentally impaired accused.

Discussion points:

Should there be a specific process for appealing against the Board's decisions? Which type of Board decisions should be subject to appeal?

Specific provisions for juveniles

The CLMIA Act applies to juveniles in the same way as it applies to adults. It has been suggested that it would be more appropriate to treat juveniles differently from adults since juvenile mentally impaired accused may have special needs due to their youth and immaturity. In particular, it has been suggested the CLMIA Act should be amended to provide more flexibility for the courts and the Board to take into account the special needs and circumstances of children.

Disposition Options for Juveniles

Under section 22 of the CLMIA Act, the court may make a conditional release order (CRO), a community based order (CBO) or an intensive supervision order (ISO) in relation to a mentally impaired accused found not guilty by reason of unsound mind. However, the court may only make a CRO, CBO or ISO if such orders would have been available under the *Sentencing Act 1995* had the accused been convicted of the offence.

Under Part 7 of the *Young Offenders Act 1994*, the *Sentencing Act 1995* would not apply in relation to a person under the age of 17. As such, a court cannot make a CRO, CBO or ISO in relation to a mentally impaired accused under the age of 17. In such circumstances, the court must either release the juvenile unconditionally or make a custody order in relation to the accused.

Discussion points:

Should the CLMIA Act be amended to include specific provisions for juveniles? What juvenile-specific issues should be addressed?

Making your submission

The Department of the Attorney General would appreciate your feedback and comments on the operation of the CLMIA Act. You are welcome to make submissions on the issues raised in this Discussion Paper or on any other aspect of the operation of the CLMIA Act.

We understand that in providing submissions, you may need to provide confidential information. If this is the case, please clearly identify which information is confidential and we will do our best to protect that confidentiality subject to our other legal obligations.

If you wish to make a submission on the CLMIA Act, please do so by **12 noon, Friday 12 December 2014**.

Your submission should be addressed to:

Review of the *Criminal Law (Mentally Impaired Accused) Act 1996*
Policy and Aboriginal Services Directorate
Department of the Attorney General
GPO Box F317
PERTH WA 6841

Or emailed to CLMIAAct.Review@justice.wa.gov.au