5. Synthesis of Matters Pertaining to Part 5 - Mentally Impaired Defendants

5.1 This chapter concerns matters considered by the review, pertaining to sections 23-40 of the CLMID Act, known as *Part 5 – Mentally Impaired Defendants*. It is concerned with the management of defendants in respect of whom a custody order has been made under the CLMID Act; the place of custody; granting of leave of absence; reports about MIDs; and releasing MIDs.

DECLARED PLACE

5.2 Although section 24(1) of part 5 of the CLMID Act provides for a MID who is subject to a custody order to be detained in a declared place, and section 23 defines a declared place as "a place declared to be a place for the detention of MIDs by the Governor by an order published in the *Gazette*", no such place has ever been gazetted. This fact was the object of universal condemnation by the Stakeholder Committee, CLMIDWP and many individual respondents and participants to the review. The result is that in making an order to detain a MID, a judicial officer has only two choices: an authorized hospital or a prison/detention centre. The abhorrent result is that a large number of MIDs are sent to prison, where due to their vulnerable mental state or intellectual disability, they are at much increased risk of being physically, sexually or mentally abused. The review regards this situation as deplorable and considers that it is an abuse of fundamental human rights to commit a person with mental impairment to a custodial environment where their safety is severely compromised and prospects for rehabilitation are slim.

5.3 According to a paper presented to the review by Dr Neil Morgan and Ms Irene Morgan, debate about the lack of any 'declared place' has persisted for several years with no productive result. A plan to declare parts of Riverbank Prison as a declared place in 1999-2000 fell by the wayside. The Disability Service Commission is unable or unwilling to provide secure facilities for taking MIDs with intellectual disability into involuntary detention. The history is one of chronic ineffectual response by successive governments and the Stakeholder Committee feared that unless there was a very strong undertaking by the Government to implement declared places, meaningful reform of the administration of the CLMID Act would be thwarted. Accordingly, among the most significant proposals in this synthesis is the following proposal to remove the distinct option of any non-specific prison or detention centre being used for the deposition of MIDs.

Proposal 5.1

The Way Forward: Declared Place

The review is likely to recommend the deletion of references to a prison or a detention center from subsection 24(1), such that any general prison or general detention centre is not a legal place of detention of a MID subject to a custody order.

This proposal is not intended to ban all prisons and all detention centers from use as a place of custody for MIDs. Some may become declared places, where appropriate facilities exist, for example in a special unit or wing identified for the purpose, where MIDs are kept separate from mainstream prisoners. Also, the definition of a "declared place" should refer to "assessment" as well as "detention".

5.4 The review was made aware by submissions that it is particularly important that culturally appropriate declared places are created to cater for the needs of MIDs with an indigenous background, to cater for young MIDs and in rural and remote areas generally to ensure reasonable proximity to the MID's family and community. Removal of an Aboriginal person from their traditional setting is likely to increase distress and to slow progress towards rehabilitation or at least stabilization of the MID's situation.

ORDERS OF THE GOVERNOR

5.5 The review was convinced by arguments that the role of the Governor, in some instances on the recommendation of the Minister, in determining the course of management of individual MIDs is outdated and that a more appropriate basis for the decision-making should involve the MIDRB and the courts. Thus the review accepts that it is inappropriate for the case management of MIDs to be a political process and, accordingly, puts forward the following proposal, which endeavours also to harmonize the timing of reviews with that applicable for involuntary patients under the WA MH Act.

Proposal 5.2

The Way Forward: Orders of the Governor

The review may recommend the following changes to part 5 of the CLMID Act, which reduce the role of the Governor in decisions concerning the case management of MIDs, and instead place the responsibility in the hands of the courts and the MIDRB:

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

An alternative option would be for the MIDRB to be empowered to transmute a custody order to a conditional (but not unconditional) release order without reference to the court of original jurisdiction.

TIME LIMIT FOR PLACE OF CUSTODY TO BE DETERMINED

5.6 The following recommendation of the CLMIDWP was supported by the Stakeholder Committee and the review.

Proposal 5.3

The Way Forward: Time Limit for Place of Custody to be Determined

The review is likely to recommend amendment of subsection 25(1) of part 5 of the CLMID Act, such that the place of custody must be determined within 10 days rather than five days.

RE-OFFENCES

5.7 The Stakeholder Committee advised that if a MID re-offends during the currency of an order, then the matter relating to the original order should be re-considered by the court of original jurisdiction and the full range of options should once again be available to the court. In addition, the review considers that the nature of the re-offence should be taken into account and the statutory limits on the duration of custody orders be adjusted accordingly.

Proposal 5.4

The Way Forward: Re-offences

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

APPEALS

5.8 The transfer of decision-making authority with regard to MIDs subject to custody orders from the Governor to the courts raises an increased potential for appeals to higher courts than the court of original jurisdiction. The review considers that it would be useful to clarify this and also to clarify the pathway for appeals against decisions of the MIDRB, for example in connection with leave of absence.

Proposal 5.5

The Way Forward: Appeals

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

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