

THE DISABILITY SERVICES COMMISSION

Submission to the

Review of the *Mental Health Act 1996* and *Criminal Law (Mentally Impaired Defendants) Act 1996*

APRIL 2003

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Summary of Recommendations

MENTAL HEALTH ACT 1996

Recommendation 1

It is recommended that the Mental Health Act include a set of Principles.

Recommendation 2

It is recommended that the Mental Health Act includes a statement about the rights of children and young people, including mature minors.

Recommendation 3

It is recommended that in the definition of "mental illness", the idea of 'a significant extent' needs to take into account the impact upon the person's functioning as a whole.

See Part 2, s.7 (g): add "and issues of disability" after 'sensitive to cultural diversity'.

See Part 2, s.9: add a reference to responsibility to "ensure the welfare of all involuntary patients, adhering to the principles of the 'least restrictive environment' and access for people with a disability".

Recommendation 4

Division 3 - Treatment of involuntary patients in the community.

s.66 add under (b) suitable arrangements can be made for the care of the patient in the community "and where disability and cultural issues exist, consultation with community stakeholders should take place".

s.68 add under (b) (ii) such other matters relating to the treatment as it is appropriate to specify, "including arrangements made in collaboration with community organisations and agencies to address disability and cultural issues".

Recommendation 5

Extension of community treatment order

s.76 (1) The patient is to be given written notice of an extension, "or, where the patient has a disability or uses an alternative language or mode of communication, notice is to be given in an alternative accessible form".

Variation of an order

s.79 (2) A psychiatrist who transfers responsibility under subsection (1) (a) is to notify the patient in writing of the transfer as soon as is practicable, "or, where the patient has a disability or uses an alternative language or mode of communication, notice is to be given in an alternative accessible form".

Action following breach

s. 81 (1) (b): should include "give the person the subject of the order notice of the breach, and where the patient has a disability or uses an alternative language or mode of communication, notice is to be given in an alternative accessible form".

Police Assistances.

s.84 (3) (a): should include "is to be given a copy of the order made under subsection (1), or if the person has a disability, or uses an alternative language or mode of communication, notice is to be given in an alternative accessible form".

Recommendation 6

It is recommended that a definition of what constitutes treatment be included in this section.

Recommendation 7

It is recommended that included in the Act is a statement of principles that recognises:

- the value of collaboration between the patient, the treating team, family and carers and the community agencies and organisations that support the person in the community;
- issues of culture and geographic location;
- the patients right to self-determination in relation to treatment;
- the interests of patients with disabilities;
- the interests of children, young people and mature minors;
- best practice principles and practices; and
- the restriction of some treatments and interventions.

Recommendation 8

It is recommended that s.97 (4) be amended to include: "(c) where the person has a cognitive disability the information is given in a form appropriate to the person's disability".

Recommendation 9

It is recommended that at the beginning of Part 6 there is a clear statement of principles and purpose of the Mental Health Review Board.

Recommendation 10

In considering the best interests of people with disabilities it is recommended that the positive aspects of the Guardianship and Administration Board should apply to the Mental Health Review Board, including:

- ◆ the ability to work outside the rules, practices and procedures applicable to courts of record and to seek to minimise costs, although bound by the rules of natural justice and procedural fairness;
- ◆ it is flexible and inclusive, with all stakeholders, including family members and carers, invited to attend;
- ◆ it uses inquisitorial and informal procedures;
- ◆ it is not to be bound by rules of evidence, but seeks to resolve disputes through conciliation or mediation where possible;
- ◆ it travels outside of the metropolitan area and uses telephone and video-conference links where necessary.

Recommendation 11

It is recommended that the concept of an 'allied person' be introduced into the Western Australian legislation.

Recommendation 12

It is recommended that:

s.175 is amended to include: (d) a person with a cognitive disability;

s.177 (2) (b) is amended to state:

(b) are not required to have any particular qualifications; and

(c) should include some persons with an understanding of and/or experience working with people with cognitive disabilities.

s.186 (c) is replaced with the following:

(c) to ensure that affected persons are visited by an official visitor or panel under this Part as soon as is practicable after admission to an authorized hospital and provided with information in a format that they can understand.

CRIMINAL LAW (MENTALLY IMPAIRED DEFENDANTS) ACT**Recommendation 1**

It is recommended that the *Criminal Law (Mentally Impaired Defendants) Act 1996* include a set of Principles.

Recommendation 2

It is recommended that consideration be given to the impact of the person's disability when assessing a person on a hospital order.

Recommendation 3

It is recommended that the term mental impairment be replaced with the definition used in *the Guardianship and Administration Act 1990 (2002 amendments)* Section 3: that is

' "Mental impairment" means intellectual disability, mental illness, brain damage or senility;' is replaced with

' "mental disability" includes an intellectual disability, a psychiatric condition, an acquired brain injury and dementia or a combination of these conditions;'

Recommendation 4

It is recommended that a service is developed to ensure that people with disabilities are given the assistance they need to understand the process of a trial.

Recommendation 5

It is recommended that **s.9** be amended to include:

"(i) unable to instruct his/her lawyer".

Recommendation 6

It is recommended that **s.10** (2) be amended to read:

A defendant found under this part to be not mentally fit to stand trial might be presumed fit in relation to another matter.

Recommendation 7

It is recommended that **s 12** (2) be amended to include "a clinical psychologist with experience of disability or other appropriate expert to ensure an assessment of the person's level and range of disability and the impact of the disability.

Recommendation 8

It is recommended that the process for appeal be included in **s 12** (4).

Recommendation 9

It is recommended that in **s 16** (5) the judicial officer is given the range of sentencing options from the *Sentencing Act 1995*.

Recommendation 10

It is recommended that a trial of facts take place before a person is given a custody order.

Recommendation 11

It is recommended that a custody order is only to be made by a Judge and that a Magistrate be limited to non-custodial dispositions. Where a Magistrate decides a custody order is appropriate he/she should remand the case to the District Court for a trial of the facts.

Recommendation 12

It is recommended that a judge in the superior court has a range of sentencing options as set out in **Recommendation 9**.

Recommendation 13

It is recommended that there is a limit placed upon a custody order to the effect that no penalty should be more severe than that which would have been imposed for the crime.

Recommendation 14

It is recommended that consideration be given to the development of a 'secure service'.

Recommendation 15

That culturally responsive plans be developed for people from Indigenous backgrounds and from remote areas.

Recommendation 16

That special facilities and services be developed to protect the rights and to meet the needs of juveniles, particularly those from remote areas.

Recommendation 17

It is recommended that additional leave conditions be applied to mentally impaired defendants on custody orders to support community access during their custody.

Recommendation 18

It is recommended that where appropriate an application on behalf of mentally impaired defendants is made to the Guardianship and Administration Board for the appointment of a guardian.

Recommendation 19

It is recommended that where it is not possible to appoint a guardian it is important that an alternative independent advocate or legal advocate is appointed.

Recommendation 20

It is recommended that **s.40**

(1) (a) is amended to replace the term 'examine' with 'assessed'; and that
(1) (b) expands the list of practitioners to include Clinical Psychologists with expertise in expert assessment of disability, Social Workers and people with knowledge and experience of the impact of cultural and linguistic identity on disability, including family and carers.

Recommendation 21

It is recommended that the Mentally Impaired Defendants Review Board membership include additional members with experience of Intellectual Disability, Acquired Brain Injury and Dementia and with knowledge of cultural and Indigenous issues.

Recommendation 22

It is recommended that a small unit is set up to case manage a planning process to arrange release plans for mentally impaired defendants on custody orders.

The Mental Health Act 1996

Introduction

People with intellectual disability and other cognitive disabilities are generally accepted to have a higher incidence of mental illness than the general population. International studies suggest a prevalence of nearly 50% in people with severe and profound disabilities and approximately 20% to 25% in those with a mild intellectual disorder (Mental Health Special Interest Research Group of the International Association for the Scientific Study of Intellectual Disabilities 2001). It is therefore important that their interests are addressed in the Mental Health Act and that their rights are protected.

The impact of a mental illness may be compounded when a person also has a disability. People with disabilities may have difficulty in verbally describing their symptoms and may require additional support in order to participate in their treatment. They may present with challenging behaviours that may mask a major psychiatric condition (Alexander & Singh 1999). If there is not an adequate response to these symptoms the person's employment and accommodation placement may be placed at risk. People with disabilities may require advocacy to deal with the mental health system and may require information to be provided in a form that they can understand.

The Disability Services Commission (the Commission) provides and funds services for people with disabilities and their families who meet the Commission's eligibility criteria. The Commission works with other government agencies to ensure that all people with disabilities have access to an appropriate range of services within the community. The Commission provides leadership to protect the rights of people with disabilities who are especially vulnerable.

Mental Health Act

The following recommendations have been developed to represent the interests of people with cognitive disabilities who come under the *Mental Health Act 1996*.

PRINCIPLES

It is suggested that the Mental Health Act include a list of principles. The Queensland *Mental Health Act 2000* provides an example of such a list. These should include:

- ◆ same human rights; and
- ◆ a reference to the needs of special groups, including people with disabilities, for example:
 - 'a commitment to provide services that are inclusive and equitable and protect the rights of people with disabilities, people from Indigenous backgrounds, people from culturally and linguistically diverse backgrounds and people from remote areas'.

Recommendation 1

It is recommended that the Mental Health Act include a set of Principles.

CHILDREN AND ADOLESCENTS

The *Mental Health Act 1996* applies to all ages but is silent on the needs and rights of children and young people and their parents and carers. Consideration should be given to the rights of children and young people to consent to treatment, including electroconvulsive therapy, and to the provision of information. The rights of this group and their parents or carers should be set out in the legislation. In the absence of a Children's Commissioner there is also a need for legal protection for vulnerable children and young people. This should include some oversight of children and young people who are given electroconvulsive therapy in the private sector.

Recommendation 2

It is recommended that the Mental Health Act includes a statement about the rights of children and young people, including mature minors.

DEFINITIONS

It is important to include under definitions some notion of the compounding effects of dual or multiple disabilities. These may affect the impact of a mental illness or personality disorder upon some special groups, including people with disabilities. An acute anxiety disorder or depression may have a greater impact upon a person with a disability living alone in the community than it would on a person living with family support. There is a need for a more holistic view of the impact of a mental illness on people with disabilities.

Recommendation 3

It is recommended that in the definition of "mental illness", the idea of 'a significant extent' needs to take into account the impact upon the person's functioning as a whole.

See Part 2, s.7 (g): add "and issues of disability" after 'sensitive to cultural diversity'.

See Part 2, s.9: add a reference to responsibility to "ensure the welfare of all involuntary patients, adhering to the principles of the 'least restrictive environment' and access for people with a disability".

TREATMENT IN THE COMMUNITY

The treatment of people with disabilities will often be possible in the community with the support of the person's family and carers and with a collaborative response from the mental health and the disability services that work with the person. Setting up supports for discharge from hospital may take time to arrange and it is important that all stakeholders are consulted early in the process of hospitalisation to ensure that the person with a disability has adequate supports at the time of discharge.

Recommendation 4**Division 3 - Treatment of involuntary patients in the community.**

s.66 add under (b) suitable arrangements can be made for the care of the patient in the community "and where disability and cultural issues exist, consultation with community stakeholders should take place".

s.68 add under (b) (ii) such other matters relating to the treatment as it is appropriate to specify, "including arrangements made in collaboration with community organisations and agencies to address disability and cultural issues".

PROVISION OF INFORMATION

When information is given to people it is important to ensure that it is given to them in a form that they can understand, particularly where a failure to comply with instructions may have negative consequences for the person. Where the person has a disability or uses English as a second language it is important that information is given in a modality that takes account of the person's ability to understand.

Recommendation 5**Extension of community treatment order**

s.76 (1) The patient is to be given written notice of an extension, "or, where the patient has a disability or uses an alternative language or mode of communication, notice is to be given in an alternative accessible form".

Variation of an order

s.79 (2) A psychiatrist who transfers responsibility under subsection (1) (a) is to notify the patient in writing of the transfer as soon as is practicable, "or, where the patient has a disability or uses an alternative language or mode of communication, notice is to be given in an alternative accessible form".

Action following breach

s.81 (1) (b): should include "give the person the subject of the order notice of the breach, and where the patient has a disability or uses an alternative language or mode of communication, notice is to be given in an alternative accessible form".

Police Assistance

s.84 (3) (a): should include "is to be given a copy of the order made under subsection (1), or if the person has a disability, or uses an alternative language or mode of communication, notice is to be given in an alternative accessible form".

TREATMENT AND CONSENT

Part 5 - Treatment of Patients

Because people with intellectual disability and psychiatric illness may present with behavioural disturbance in the first instance, it is important that behavioural management strategies and other psychological and psychosocial interventions are considered as a part of the treatment (Alexander & Singh 1999).

Recommendation 6

It is recommended that a definition of what constitutes treatment be included in this section.

It would be preferable if a statement of principles was included in the Act.

Recommendation 7

It is recommended that included in the Act is a statement of principles that recognises:

- the value of collaboration between the patient, the treating team, family and carers and the community agencies and organisations that support the person in the community;
- issues of culture and geographic location;
- the patients right to self-determination in relation to treatment;
- the interests of patients with disabilities;
- the interests of children, young people and mature minors;
- best practice principles and practices; and
- the restriction of some treatments and interventions.

Informed Consent

Where consent for treatment is sought it is important that sufficient information is given to the patient so that he/she is able to make an informed decision. If the person has a cognitive disability, sometimes he/she will understand information if it is presented in an appropriate way. If the person does not have the capacity to make an informed decision then the issue of guardianship should be considered.

Recommendation 8

It is recommended that s. 97 (4) be amended to include: " (c) where the person has a cognitive disability the information is given in a form appropriate to the person's disability.

Part 6 - Mental Health Review Board

These recommendations are made with the understanding that the Mental Health Review Board is to be co-located with the State Administrative Tribunal (SAT) but will operate in line with amendments to be made to the *Mental Health Act 1996*. It is proposed that the President of the SAT is to be a Supreme Court Judge and the two Deputy Presidents are to be District Court Judges. The President or a Deputy President of the SAT is to chair both the

Guardianship and Administration Board and the Mental Health Review Board, with members of the Boards appointed as members of the SAT in order to maintain the expertise of the Board members.

Recommendation 9

It is recommended that at the beginning of Part 6 there is a clear statement of principles and purpose of the Mental Health Review Board.

Recommendation 10

In considering the best interests of people with disabilities it is recommended that the positive aspects of the Guardianship and Administration Board should apply to the Mental Health Review Board, including:

- ◆ the ability to work outside the rules, practices and procedures applicable to courts of record and to seek to minimise costs, although bound by the rules of natural justice and procedural fairness;
- ◆ it is flexible and inclusive, with all stakeholders, including family members and carers, invited to attend;
- ◆ it uses inquisitorial and informal procedures;
- ◆ it is not to be bound by rules of evidence, but seeks to resolve disputes through conciliation or mediation where possible;
- ◆ it travels outside of the metropolitan area and uses telephone and video-conference links where necessary.

Where a person is known to have a decision-making disability at the time of attending the Mental Health Review Board hearing, it is important that the person has representation by: a family member or carer; a lawyer; an appointed Guardian or an Official Visitor. It is important that there are special provisions in the amended Mental Health Act to safeguard children and young people coming before the board. In the Queensland *Mental Health Act 2000*, an involuntary patient may choose an "allied person" to represent their views, wishes and interests.

Recommendation 11

It is recommended that the concept of an 'allied person' be introduced into the Western Australian legislation.

Part 9 – Council of Official Visitors

People with disabilities may be particularly vulnerable when they are admitted to an authorized hospital or other mental health facility for treatment. It is important that they are able to have contact with an Official Visitor whether they are voluntary or involuntary patients to ensure that they understand their rights in relation to the Mental Health Act.

The Council of Official Visitors is able to visit premises, to make inquiries and see all documentation unless an 'affected person' has declined to see the Official Visitor or has denied the official Visitor access to their records. It is important that people with cognitive disabilities are given an explanation about the role of Official Visitors in a format that suits their style of communication and comprehension.

People with cognitive disabilities may be reluctant to initiate contact. It is therefore useful for the Official Visitor to initiate the first contact and to explain their role.

It is also important that there are some Official Visitors who understand disability and who have skills to communicate with people with disabilities. Information provided needs to be in appropriate formats.

Recommendation 12

It is recommended that:

s. 175 is amended to include: (d) a person with a cognitive disability;

s. 177 (2) (b) is amended to state:

(d) are not required to have any particular qualifications; and

(e) should include some persons with an understanding of and/or experience working with people with cognitive disabilities.

s. 186 (c) is replaced with the following:

(c) to ensure that affected persons are visited by an official visitor or panel under this Part as soon as is practicable after admission to an authorized hospital and provided with information in a format that they can understand.

Criminal Law (Mentally Impaired Defendants) Act 1996

The *Criminal Law (Mentally Impaired Defendants) Act No 70 of 1996* was enacted to deal with the people who are most vulnerable within the justice system, those with mental impairment. People with an intellectual disability and other cognitive disabilities are at a disadvantage in the justice system. The differences between the people with cognitive disabilities and those with mental illness are not always well understood (Ierace 1989). There is also a lack of knowledge about the differences between the services that have developed to support people with cognitive disabilities and services that treat people with mental illness.

Research has indicated that people with intellectual disabilities have an initial arrest rate similar to that of the general population (Cockram & Underwood 1999). Only a small proportion of these will be considered unfit to stand trial. Some people present with a dual diagnosis of mental illness and intellectual disability or with a combination of disabilities. Some present with behavioural symptoms which make them difficult to diagnose.

PRINCIPLES

It is suggested that the *Criminal Law (Mentally Impaired Defendants) Act 1996* provides some general principles at the beginning of the Act. These should include some reference to the 'least restrictive alternative' as a principle to be used in deciding upon the disposition of people under the Act. These should also include:

- ◆ same human rights; and
- ◆ a reference to the needs of special groups, including people with disabilities, for example:

'a commitment to provide services that are inclusive and equitable and protect the rights of people with disabilities, people from indigenous backgrounds, people from culturally and linguistically diverse backgrounds and people from remote areas'.

Recommendation 1

It is recommended that the *Criminal Law (Mentally Impaired Defendants) Act 1996* include a set of Principles.

Part 2 – GENERAL PROVISIONS ABOUT MENTALLY ILL DEFENDANTS

This section is concerned with mentally ill defendants who can be sent on a hospital order for examination and treatment. People with mental impairment who come before the courts may present with behavioral symptoms or with a dual diagnosis. It is important that the impact of their disability is considered when a judgement is made about the person's health and safety. The cumulative impact of the person's disability, when combined with a mild or reactive mental illness, will place the person at risk. Many people with disabilities choose to live independent lives and may not be in touch with appropriate community services. The Disability Services Commission does not

provide emergency medical and mental health services for people with disabilities.

Recommendation 2

It is recommended that consideration be given to the impact of the person's disability when assessing a person on a hospital order.

PART 3 - MENTAL UNFITNESS TO STAND TRIAL.

In **s.8** definitions are given. The definition used contains out dated terminology such as senility. This requires updating. The definition section does not explain what is meant by the term "intellectual disability". The definition used in Western Australia and most Western Countries is that of the American Association on Mental Retardation (AAMR).

"Intellectual disability refers to substantial limitations in present functioning. It is characterised by significantly sub-average intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work. Intellectual disability manifests before age 18." (AAMR 1992)

The definition of eligibility for Commission services under the Disability Services Act 1993 is "that the persons have, in addition to some impairment, a substantially reduced capacity for the tasks of daily living and a need for continuing support services. This is a much narrower definition than that of "mental impairment" under the *Criminal Law (Mentally Impaired Defendants) Act 1996*.

Some people present with a mixed diagnostic picture. They may present with symptoms of a mental illness and have a mild intellectual disability or they may have an acquired brain injury as a result of substance abuse. The definition does not mention dual or multiple diagnosis defendants.

Recommendation 3

It is recommended that the term mental impairment be replaced with the definition used in *the Guardianship and Administration Act 1990 (2002 amendments)* Section 3: that is

` "Mental impairment" means intellectual disability, mental illness, brain damage or senility;' is replaced with

` "mental disability" includes an intellectual disability, a psychiatric condition, an acquired brain injury and dementia or a combination of these conditions;'

Mental unfitness to stand trial: definition

Unlike the person in an acute episode of a mental illness, a person with an intellectual disability may be able to stand trial in some contexts and not on others, depending upon the level of information and teaching given and the complexity of the case. Unfortunately, the issue of the assistance required for the person to be able to comprehend has not been considered and the person may be dismissed without these issues being addressed (Ierace 1989). A service similar to the Child Witness Program should be considered to ensure that people with disabilities are given the assistance that they need to understand the process of a trial.

Recommendation 4

It is recommended that the Department of Justice develop strategies to ensure that people with disabilities are given the assistance that they need to understand the process of a trial.

It is suggested that further consideration be given to **s 9**: the definition of 'mental unfitness to stand trial'. There is currently no requirement for the defendant to be able to instruct his/her lawyer. This may be an important issue for people with disabilities

Recommendation 5

It is recommended that **s 9** be amended to include:
“(i) unable to instruct his/her lawyer”.

Presumptions as to mental fitness to stand trial.

s 10 (2) This presumes that a person remains unfit unless found otherwise. This is of concern for people with an intellectual disability who may be unfit to stand trial because of the complexity of the current case in the Supreme Court, but fit for a Petty Sessions trial where the legal issues are far less complex and the outcomes less serious.

Recommendation 6

It is recommended that **s 10** (2) be amended to read:
A defendant found under this part to be not mentally fit to stand trial might be presumed fit in relation to another matter.

Deciding the question of mental fitness.

s 12 (2) makes specific reference to assessment by a psychiatrist or other appropriate expert. Where the person has a mental impairment or disability as opposed to mental illness it is important that an assessment is made that includes a range of expertise. This will include knowledge of the person's language and cultural background and assessment of their levels of disability. Prior to the introduction of the *Criminal Law (Mentally Impaired Defendants) Act 1996*, it was usual for a person with an intellectual disability to be assessed by a clinical psychologist with expertise in disability.

Recommendation 7

It is recommended that **s 12** (2) be amended to include “a psychologist with experience of disability or other appropriate expert to ensure an assessment of the person’s level and range of disability and the impact of the disability.

s 12. (4) refers to the right to appeal a decision of fitness to stand trial but makes no determination as to when in the process of the trial this can happen or how this can take place.

Recommendation 8

It is recommended that the process for appeal be included in **s 12** (4).

Simple offences and indictable offences to be tried summarily

s 16. (5) provides only two alternatives to a judicial officer on a finding of unfit to stand trial. These are: to release the defendant or to make a custody order. It is suggested that the options open to a person found ‘not guilty because of unsoundness of mind’ be provided where a person is found ‘unfit to stand trial’. This would allow the court access to a range of sentencing options from the Sentencing Act, including the imposition of intensive supervision orders. Such options were available under previous legislation.

Recommendation 9

It is recommended that in **s 16** (5) the judicial officer is given the range of sentencing options from the *Sentencing Act 1995*.

s 16. (6) details conditions to be considered before a custody order is made. In South Australia there is a requirement for a trial of the facts to occur before any conditions are imposed. It is important for victims and for the family of the offender that there is transparency in the decision to place a person with a mental impairment in custody. A trial of the facts would allow for an examination of the information that was known to all parties of the proceedings. A custody order is a serious matter given that the person will possibly be sent to prison.

Recommendation 10

It is recommended that a trial of facts take place before a person is given a custody order.

Recommendation 11

It is recommended that a custody order is only to be made by a Judge and that a Magistrate be limited to non-custodial dispositions. Where a Magistrate decides a custody order is appropriate he/she should remand the case to the District Court for a trial of the facts.

Division 3 - proceedings in superior courts.

It is important that the judge has a range of sentencing options available, including a range of orders such as 'conditional release', 'community based orders' and 'intensive supervision orders' as is the case in **s 22 (2)**.

Recommendation 12

It is recommended that a judge in the superior court has a range of sentencing options as set out in **Recommendation 9**.

Part 4 - DEFENDANTS ACQUITTED ON ACCOUNT OF UNSOUNDNESS OF MIND

People with mental impairment/disability do not often come under this provision. There are some people with a dual diagnosis who are jointly seen with the Mental Health Services.

It is important to note differences between the service provision of the Disability Services Commission and the mental health system. The Commission is not given powers under the *Disability Services Act 1993* to compel people with disabilities to comply with treatment. In fact people with disabilities have the same rights as anyone else to make decisions about their lives unless they are found to have a decision-making disability under the *Guardianship and Administration Act 1990*.

Not all people with disabilities wish to have contact with staff of the Disability Services Commission and this may be true of those who come into contact with the criminal justice system. Sometimes a court order provides an opportunity to engage with people with disabilities who would not usually seek services. However, even with a court order it is not always possible to intervene successfully with people who are unwilling to participate in services. For some individuals with a dual diagnosis, it is appropriate for a joint approach to take place with other services. The Commission does not have facilities for emergency treatment as is available through the health system. People with disabilities in crisis access the full range of community services that are available in the community, including hospital emergency facilities.

PART 5 - MENTALLY IMPAIRED DEFENDANTS

Division 2 - Place of custody

s 24 (1) A custody order may only be imposed if imprisonment is the statutory penalty for the offence. There is no limit placed on the duration of the custody. While this may fit with the mental health model of treatment this does not apply in the case of intellectual disability where the disability itself is untreatable. The equivalent South Australian legislation stipulates that no penalty should be more severe than that which could have been imposed for the crime. The Western Australian legislation has no such safeguard.

Recommendation 13

It is recommended that there is a limit placed upon a custody order to the effect that no penalty should be more severe than that which would have been imposed for the crime.

The Issue of the 'Declared Place'

The *Criminal Law (Mentally Impaired Defendants) Act 1996* proposed four alternative places of custody: an authorised hospital, a declared place, a detention centre or a prison. A mentally impaired/disabled defendant may only be detained in an authorised hospital if he or she has a treatable mental illness. A person with an intellectual disability, an acquired brain injury or dementia is seen as 'untreatable'. If found unfit to stand trial and given a custody order, the person will be sent to a detention centre, if a juvenile, or a prison if an adult.

A "declared place" is defined as "a place declared to be a place for the detention of mentally impaired defendants by the Governor by an order published in the Gazette." Such a place would be a place of detention for those found unfit to stand trial. This is decided by the presiding officer on the basis of the nature and circumstances of the offence, the nature of the person and the public interest that the person should be kept in custody. At the time of the drafting of the legislation no thought was given to the provision of a 'declared place'.

There has been some discussion between the Disability Services Commission (the Commission) and the Department of Justice regarding the provision of a 'declared place'. The Commission position is that it is not appropriate for the Commission to develop and run a place of custody. This is not authorised by the *Disability Services Act 1993* and is inconsistent with contemporary practice and could have human rights implications for the disability sector, where the inclusion of people with disabilities into the wider community is promoted.

The Commission provides and funds some services for people with disabilities in the community. Most importantly, the Commission assists other government agencies to develop more appropriate services that are suitable for people with disabilities. The role of the Commission would be to assist in the development of appropriate community options for people with disabilities who have received a custody order under the *Criminal Law (Mentally Impaired Defendants) Act 1996*. It is considered important to use an interagency approach when plans are made for 'Mentally Impaired Defendants'.

Commission staff have expertise in assisting people with intellectual disability to develop skills to live as independently as possible. This is best done in the place where the person is to live and with the people who will be involved in the person's future support. If a custodial facility is to be developed the Commission would have a role to consult with the custodial staff in relation to the disability related aspects of the service. The preference of the Commission would be for a "declared service" that would provide a range of options specifically tailored to the needs of the individual. These options would include elements such as targeted supervision, community access and supervised accommodation facilities. They would also provide flexibility of treatment,

supervision and movement that would not be available in a specific purpose secure residential unit.

People with disabilities are not a homogeneous group. The experience of the Commission is that people in custody under this Act range from juveniles through to adults of both sexes. To place such a group together in an institution is not respectful of their individual needs and is not consistent with current thinking in the disability field (Tang & Scully 1996).

Some of the people under the Act are from remote locations throughout the State and the practice of holding these people in Perth away from their family and community is not useful to maintain the family and community bonds that support their future release plans. Establishing a metropolitan facility such as a 'declared place' could have the unintended consequence of encouraging the detention of people from the country in metropolitan detention centres. It is important that local communities and the local justice systems develop the appropriate facilities and programs to deal with people with intellectual disabilities within their communities.

Some of the people dealt with under the Act are juveniles and they require special consideration in order to ensure that not only are their rights protected, but that they receive appropriate education and support when they come in contact with the justice system. It is also important that young people are maintained, whenever possible, close to their community and to family.

Recommendation 14

It is recommended that the Department of Justice develop 'secure services' for people with disabilities in different locations throughout the State.

Recommendation 15

That culturally responsive plans be developed for people with disabilities from Indigenous backgrounds and from remote areas.

Recommendation 16

That special facilities and services be developed to protect the rights and to meet the needs of juveniles, particularly those from remote areas.

Division 3 - Leave of absence.

s.27 It is important that leave provisions are flexible to support options available for access to the community in order to maintain the skills of 'mentally impaired defendants' on custody orders. People with disabilities learn skills better in the setting where they will be used. An important element of transitions from custody to the community in country areas is flexibility.

Recommendation 17

It is recommended that additional leave conditions be applied to mentally impaired defendants on custody orders to support community access during their custody.

Division 4 – Reports about mentally impaired defendants

s.31 (1) The Mentally Impaired Defendants Board is required to give a copy of any report to the mentally impaired defendant, who may not have either a legal guardian or a lawyer. Most people with a mental impairment will require considerable assistance to understand the report and any expert assessments which led to the report. It is therefore important that mentally impaired defendants have access to an advocate who can assist them with information about the report. If the person has a decision-making disability, it is important that a guardian is appointed. If this is not appropriate then the person should have access to an independent advocate or a legal advocate.

Recommendation 18

It is recommended that where appropriate an application on behalf of the mentally impaired defendant is made to the Guardianship and Administration Board for the appointment of a guardian.

Recommendation 19

It is recommended that where it is not possible to appoint a guardian it is important that an alternative independent advocate or legal advocate is appointed.

There has been some discussion about the current process for the release of mentally impaired defendants. Concern has been expressed that such decisions may be subject to political or public pressure where there are high profile cases. It has been suggested that the Mentally Impaired Defendants Board should make these decisions. While acknowledging these concerns the Commission does not have a recommendation in relation to this issue.

Part 5 Division 6 - Miscellaneous

s. 40 Throughout the document language such as “examination” has been used although given the range of presenting conditions it may be appropriate to use terminology that is more generic and inclusive. It is suggested that the term ‘assessment’ be used in the place of examination. It might be useful to expand the list of practitioners to ensure that assessments include examination of the psychological and health status of the person, their social circumstances and taking account of the person’s cultural and language requirements and any existing disability.

Recommendation 20

It is recommended that **s.40**

(2) (a) is amended to replace the term ‘examine’ with ‘assessed’; and that (1) (b) expands the list of practitioners to include Psychologists with expertise in expert assessment of disability, Social Workers and people with knowledge and experience of the impact of cultural and linguistic identity on disability, including family and carers.

Mentally Impaired Defendants Review Board

Currently the membership of the Review Board is heavily weighted with members of the Parole Board. This provides experience of the release of convicted offenders. There is a need to expand the experience base of the Review Board to include people with expertise and experience in working with people with conditions coming under the Act. There is also a need to include some members with experience working in the community and with a knowledge of current community services for this group of people. Given the range of possible disabilities the Board should be able to co-opt specialist expertise and to maintain several deputies with expertise in intellectual disability, acquired brain injury and dementia and with knowledge of cultural issues.

Recommendation 21

It is recommended that the Mentally Impaired Defendants Review Board membership include additional members with experience of intellectual disability, acquired brain injury and dementia and with knowledge of cultural and Indigenous issues.

People with disabilities are vulnerable within the justice system and mentally impaired defendants are particularly vulnerable. A few may spend considerable amounts of time in prison while arrangements for their release are being made. It is important that people with disabilities are not disadvantaged because of their disability and that there are open and transparent processes to manage their progress through the system. Some of the people known to the Commission who are in custody under this Act are people with multiple diagnosis and behaviour problems that make their management in current community facilities difficult. Others are referred from prison and are not known to Commission staff, which can make planning for their release a difficult and lengthy process. Some have offended within the family or community where they were living and this makes planning for release difficult when the natural support systems are no longer in place. What is required is an endorsed system of planning for these people to ensure that they do not remain in prison or juvenile detention centres where they are likely to lose skills.

Recommendation 22

It is recommended that a small team is set up to case manage a planning process to arrange release plans for mentally impaired defendants on custody orders.

References

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