



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

**Submission regarding the
Criminal Law (Mentally Impaired Defendants) Act (CLMIDA) 1996**

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Your Details

Name of person completing submission: David Bodeker
Name of Service (if applicable): Legal Aid WA
Address: 55 St Georges Terrace, Perth.
Contact Number: 9425 2288.

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Closing Date

The closing date for submissions is **Friday 28 February 2003**. Please send your submission to:

Ms Sylvia Meier
Executive Officer
Review of the MHA and CLMIDA
11th Floor, Dumas House
2 Havelock St
WEST PERTH 6005

Or to ReviewofMHA@health.wa.gov.au
Or to Fax: (08) 9222 5450

This Review is about the operations and effectiveness of the existing Act and not about writing a new Act. Therefore you do not need to re-write sections of the Act, this will occur after the Review has been completed and is the responsibility of the Parliamentary Counsel's Office.

Please address those areas that are of concern and how you think the Act may be altered. The following is not a comprehensive list of all aspects of the Act. You do not need to comment on all areas. Please use the space available or add pages to include other areas of importance.

RECOMMENDATIONS IN BRIEF

The main recommendations of this submission are summarised at the outset then discussed in more detail in the body of the submission. The main recommendations are

1. The *Sentencing Act 1995* should not be used when dealing with defendants who are unfit to stand trial or acquitted on account of unsoundness of mind; there is a fundamental problem in sentencing unconvicted persons. Judicial officers dealing with these defendants should be able to choose from a range of orders specifically drafted with these defendants in mind. The orders might range from unconditional release, through the imposition of conditions and various levels of supervision, to a custody order. A custody order should only be made where the court is satisfied, after adequate inquiry, that it is not appropriate to make any other order. The court must also specify whether a person under a custody order is to be detained in a prison and give reasons why.
2. Given the limited applicability of the custody order for defendants charged with simple offences, it is not considered appropriate for magistrates to have the power to make custody orders. It is recommended that the power to make custody orders be removed from magistrates in Petty Sessions and replaced with the power to commit a matter to the District Court where a custody order may be appropriate.
3. Schedule I to the *Criminal Law (Mentally Impaired Defendants) Act 1996* (CLMIDA) makes a custody order mandatory for defendants charged with certain offences but acquitted for unsoundness of mind. It removes discretion from a decision that demands the utmost judicial care and discretion. It is recommended that Schedule I be repealed.
4. Under s.22 CLMIDA judicial officers cancelling a community release order (CRO), community based order (CBO) or intensive supervision order (ISO) must make a custody order. This is entirely inappropriate. There will often be situations where a relatively mild CRO should be cancelled and it is appropriate to simply impose a more serious order. This problem would be addressed by adopting recommendation 1 above. In any case, a judicial officer cancelling an order must have the same options as they had when first making that order.
5. CLMIDA was drafted as if there existed a declared place in which mentally impaired defendants might be detained. There is no such place. This must be addressed immediately by careful consultation considering all available options from the use of existing facilities to the construction of new purpose-built facilities. Particular attention must be given to the needs of juveniles with a mental impairment.

BROADER SUBMISSIONS ON REVIEW OF CRIMINAL LAW (MENTALLY IMPAIRED DEFENDANTS) ACT 1996

General Provisions (Part 2) (eg Relationship to the Mental Health Act 1996)

Hospital orders

Part 2 of the *Criminal Law (Mentally Impaired Defendants) Act 1996* (CLMIDA) gives magistrates the capacity to refer defendants to be examined by a psychiatrist to determine whether they should be declared an involuntary patient. This function is ordinarily performed in the community by medical practitioners under the *Mental Health Act 1996* (MHA).

The provision retains confidence in the system in place under the MHA, namely that persons in the community in need of referral to a psychiatrist are referred by medical practitioners under the MHA.

Together these provisions cover the field: MHA deals with persons in the community and Part 2 CLMIDA deals with those on remand in custody.

In practice, Part 2 does not always operate as intended. Section 6(1) CLMIDA provides that involuntary orders (unlike findings as to fitness to plead) do not affect the operation of CLMIDA or the operation of the criminal law. Nevertheless the common practice is that hospital orders punctuate proceedings so that everything goes on hold while the defendant is sent to Graylands for a week. Magistrates may be reluctant to take pleas, read complaints or hear bail applications whereas, in accordance with the presumption as to mental fitness (s.10 CLMIDA), the matter ought to proceed as normal until there is a finding to the contrary.

It is feared that Part 2 may be used as a convenient way of not dealing with a defendant whom a judicial officer suspects has a mental illness by remanding them in custody for a week for a psychiatrist to deal with the problem. Without necessarily being satisfied that the criteria in section 5(2) are met, and without first considering the question of bail, it is feared that magistrates can make hospital orders where a defendant has been living in the community and bail is, in fact, appropriate.

Furthermore, Part 2 can become an *ad hoc* form of determining fitness to stand trial while the defendant waits in custody. Indeed the reports that come back from Graylands Hospital generally state that the defendant is or is not fit to plead, without actually addressing the criteria for fitness to stand trial set out in s.9 CLMIDA. This is not appropriate. There is a formal avenue to determine fitness and the presumption of fitness operates in the interim.

Fitness to stand trial is a legal question and is separate to the issue of whether the defendant should be an involuntary patient. The finding as to fitness to stand trial is not the sole domain of psychiatrists. The opinions of experts at their highest can only be evidence which the judicial officer is required to take into account, critically examine and give such weight as is appropriate in making a determination as to fitness to plead at the appropriate proceedings inquiring into that question: *R v Dunne* [2002] WASC 196 per Roberts-Smith J. Part 2 must not be used as a convenient avenue to force civil detention while the serious and difficult question of fitness to plead is summarily plumbed.

There is also concern over the fact that these orders are invariably made for the full period of seven days. When a patient is referred under the MHA, there is an initial period of 24 hours for which the patient may be detained. That may be extended by a further 72 hours if considered necessary by a psychiatrist. No obvious reason requires the defendant to be detained longer under Part 2 CLMIDA than they would be under s.29 MHA.

The concern is that this part of CLMIDA is capable of being misused. Orders are sometimes made in circumstances where there is no real need for a defendant to be made an involuntary patient, where the defendant is presumed to be fit to plead, is apparently eligible for bail but where there is a degree of uncertainty as to their mental state. It can be used as a way of conveniently removing mentally impaired defendants from court and placing them in custody to obtain a perfunctory and possibly inaccurate view on fitness to plead.

It is noted that the introduction of the Community Forensic Mental Health Service at the Perth Court of Petty Sessions is significantly assisting in ensuring that hospital orders are not being made inappropriately from that court.

RECOMMENDATION

The aim should be to allow those defendants who are refused bail to be referred to a psychiatrist for assessment as to whether they require involuntary treatment.

It may be possible to remove from magistrates the power to refer a defendant for examination and replace it with the power to refer a defendant to a psychiatric nurse, registrar or other appropriate officer on call or in the court building. These officers would then have the authority to refer a

defendant to be examined by a psychiatrist under s.29 MHA. The court could then proceed with the matter in the usual way and allocate remand dates around the processes of MHA.

This recommendation may be seen as somewhat drastic and unnecessary, particularly in light of the positive effect of the Community Forensic Mental Health Service. However the fact is that defendants are still being remanded on hospital orders when bail would otherwise be appropriate because judicial officers do not consider bail before considering the mental state of the defendant. Redrafting the legislation in more explicit terms is not recommended: it clearly states that Part 2 is intended only to determine if defendants should be made involuntary patients under the MHA. It may simply be a matter of educating magistrates and counsel in the proper use of Part 2.

Mental Unfitness to Stand Trial (Part 3)

Custody orders

The custody order stands in the background of any discussion of Parts 3 and 4. Under a custody order a defendant is detained in an authorized hospital, a declared place, a detention centre or a prison until released by an order of the Governor. Under a custody order defendants generally go to prison because, under s.24:

- A defendant should not be detained in an authorized hospital unless
 - they have a mental illness that requires treatment in order to protect the health or safety of them or another or to prevent them doing damage to property; and
 - the defendant has refused or cannot consent to that treatment; and
 - that treatment can only be provided in an authorized hospital: s.24(3).
- A defendant cannot be detained in a detention centre unless they are under 18: s.24(5).
- There is no declared place.

The fact that most defendants under a custody order go to a prison is alarming. Prison is very often a fertile bed of violence, sexual predation, standover rackets and drug abuse. Moreover, the loss of liberty does not foster the recovery of those whose mental impairment might otherwise wane with time, treatment and care. Prison is not an appropriate place for the mentally impaired who are not merely scared, imprisoned in their own minds and emotionally needy. They are vulnerable and susceptible to victimisation, abuse, coercion and moral corruption.

Furthermore, it must be stressed that a custody order is a form of civil detention. Under a custody order, a citizen who has been acquitted of an offence or who cannot stand trial and test the evidence of the state is held in a prison because of a disability and has their liberty placed in the hands of a body to whom it cannot make submissions and before whom it cannot be legally represented.

It follows that the most stringent restrictions must limit the application of a custody order.

Custody orders are not generally being made by magistrates in Courts of Petty Sessions. It would seem to follow that it is not seen as an appropriate disposition for the less serious matters that arise in that court. While the power for magistrates to make such orders remains, there is the risk that defendants charged with simple offences can be made subject to a custody order. Given the extremely limited scope for appropriate custody orders in Courts of Petty Sessions, this is considered an unacceptable risk.

RECOMMENDATION

It is recommended that the power to make a custody order be removed from magistrates sitting in Courts of Petty Sessions. In its place, where a magistrate considers that a custody order might be appropriate, they should have the power to commit a matter to the District Court.

Sections 16 & 19: options where a defendant is unfit to stand trial

Where a defendant is ultimately found unfit to stand trial the judicial officer (after possibly adjourning the matter to determine whether the defendant will become fit) must make an order

either releasing the defendant or making a custody order: ss. 16(5) and 19(4). In contrast, a judicial officer dealing with a defendant acquitted on account of unsoundness of mind has a greater range of options: despite the fact that the defendant is not an offender, they may be dealt with as if under the *Sentencing Act 1995* and placed on a conditional release order, a community based order or an intensive supervision order: s.22(1)(b).

There are similarities between dealing with a defendant acquitted on account of unsoundness of mind and dealing with a defendant found unfit to stand trial. Furthermore both tasks resemble the sentencing process:

- The judicial officer is required to consider the nature of the (alleged) offence, matters personal to the defendant and the public interest: ss. 16(6), 19(5) and 22(1)(a).
- The disposition options range in gravity from unconditional release to a custody order, a form of indeterminate imprisonment: ss. 16(5), 19(4) and 22.
- Defence counsel's submission will resemble a plea in mitigation.
- The Crown may make submissions as to the appropriate disposition.
- The task requires a careful balancing of the issues and the judicial officer must ensure that the outcome is appropriate in all the circumstances.

The imposition of sentences appropriate in law is facilitated by providing judicial officers with a broad range of options under the *Sentencing Act 1995*. Likewise, the disposition of defendants found unfit to stand trial requires judicial officers to have a greater repertoire than simply unconditional release or indeterminate imprisonment.

It will be recommended, therefore, that judicial officers have a broader range of options when dealing with defendants found unfit to stand trial. It might be tempting to achieve this by opening up the same options as are available under the *Sentencing Act 1995* when dealing with defendants acquitted for unsoundness of mind, but there are ideological problems in sentencing unconvicted persons. It resorts to a legal fiction to sentence a person "despite the fact that the defendant is not an offender under the *Sentencing Act 1995*": CLMIDA s.22(1)(b).

The argument that unconvicted persons should not be sentenced is a sound one, but it should not prevent judicial officers from having a wide range of options when dealing with unconvicted persons under CLMIDA. A simple and practical solution would be to create a range of orders (not sentences) specifically designed to address the likely needs of defendants found unfit to stand trial. These orders might also be available when dealing with defendants acquitted for unsoundness of mind as discussed below.

RECOMMENDATION

It is recommended that CLMIDA be amended to allow judicial officers more options when dealing with defendants who are not fit to stand trial. The preferred option would be to draft a range of orders which a judicial officer may make upon finding that a defendant is unfit to plead. Some or all of these options might also be open to the judicial officer when dealing with defendants acquitted for unsoundness of mind.

In drafting these orders, the Victorian Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (CMIUTA), is considered a useful model. Under s.26 CMIUTA, a supervision order may or may not be in custody. A custodial supervision order may commit the person either to an "appropriate place" or to a prison. Under a non-custodial supervision order the person is released on conditions decided by the court and specified in the order.

Defendants acquitted on account of unsoundness of mind (Part 4)

Schedule I: removal of judicial discretion

In superior courts, a defendant who is acquitted for unsoundness of mind must be made subject to a custody order if the alleged offence is listed in Schedule I of CLMIDA. This removal of judicial

discretion is of great concern. Dealing with mentally impaired defendants calls for greater subtlety and judicial discretion rather than less.

It is easy to imagine instances of grave injustice arising out of findings of unsoundness of mind where defendants are charged with offences such as assault occasioning bodily harm or deprivation of liberty. Such offences may consist of a single act committed in a few short moments of psychosis. They may be isolated incidents in an otherwise crime-free life. They might cause very little or no fear or injury to victims, often friends or family members, who have since reconciled with the defendant. There may be very powerful mitigatory circumstances. Without the finding of unsoundness of mind, many offenders sentenced for these offences do not receive a term of imprisonment. It is simply inappropriate to tie the hands of the judicial officer in those situations when dealing with a person who, at the time of committing the offence (not necessarily at the time of appearing in court), was so impaired as not to be criminally liable.

This complaint is not answered by amending Schedule I so that only the most serious offences appear in the list. The problem is not that the offences listed in Schedule I are not serious – they are all serious matters. The problem is that it removes judicial discretion in an area calling for the utmost judicial care, caution and discretion.

The effect of Schedule I is to discourage their clients from raising the insanity defence. This raises an ethical dilemma for their lawyer in that it will often be in the client's best interests to plead guilty notwithstanding that they have a defence in law. A guilty plea with the mitigatory effect of mental impairment will often result in a non-custodial sentence whereas a successful insanity defence will not only prolong the tiring and stressful court process, it will ultimately secure the defendant an indefinite term of civil detention.

RECOMMENDATION

It is recommended that Schedule I to CLMIDA be entirely repealed or, if not entirely repealed, then amended to include only those offences that carry a mandatory life term.

Section 22(1): disposition of persons acquitted for unsoundness of mind

Where a defendant is acquitted for unsoundness of mind and Schedule I does not apply, a court may make a range of orders, including the imposition of a conditional release order (CRO), a community based order (CBO) or an intensive supervision order (ISO) under the *Sentencing Act 1995*. Section 22 CLMIDA enlists the *Sentencing Act 1995* to govern the way these orders operate.

This arrangement is awkward simply because the *Sentencing Act 1995* refers to convictions, sentences, offences and offenders, none of which exists in the case of persons acquitted for unsoundness of mind. It is the same awkwardness described above when discussing defendants found unfit to stand trial and should be addressed by prescribing a range of orders that a judicial officer can make upon an acquittal for unsoundness of mind. It is simply inappropriate to use the *Sentencing Act 1995* to deal with unconvicted persons.

RECOMMENDATION

It is recommended that the legislation be amended by drafting a range of orders (not sentences) which can be made in respect of a defendant acquitted for unsoundness of mind. Some or all of these orders might also be made in respect of a defendant found unfit to plead.

Section 22(3)(b): amending or breaching an order

The awkwardness of sentencing an unconvicted person extends to those provisions dealing with applications amending an order, re-offending while subject to an order and breaching an order. Section 22(3)(b) CLMIDA provides that if a court decides to cancel a CRO, CBO or ISO, it must make a custody order. Ordinarily, a court cancelling an order would sentence the person as if it had just convicted the person for the original offence. It cannot do that because a person acquitted for unsoundness of mind was never convicted. The drafters of CLMIDA get around the problem by making a custody order mandatory in that situation.

This is another instance of removing discretion in circumstances actually requiring a very careful and balanced exercise of discretion. It breeds a range of problems.

Amending an order. Section 127 of the *Sentencing Act 1995* allows various parties, including the offender, prosecutors and a community corrections officer, to apply to amend an order. This might happen where circumstances have altered since sentencing to the point where the person cannot comply with the order. An offender suffering a disabling injury, for instance, may not be able to complete the hours of community work allotted under the order. This section is designed to allow some flexibility in the way these orders operate.

These applications will vary widely and a judicial officer dealing with such an application must have the full range of options open. If the correct finding in the circumstances is that the order should now be cancelled then the court must be free to make that order without being compelled to make a custody order.

Breaching an order or re-offending. Sections 130 and 133 of the *Sentencing Act 1995* respectively deal with an offender re-offending while subject to an order and breaching the requirements of an order. Under that legislation, if the order is in place when an offender breaches or re-offends, the court may either confirm, amend or cancel the order. If the court cancels the order then it must sentence the offender for the offence for which the order was imposed as if it had just convicted the offender. Under s.22(3)(b) CLMIDA, if the court cancels the order then it must make a custody order.

This is an unacceptable anomaly: where an order is cancelled a convicted offender can call upon the court to exercise discretion as to the appropriate disposition (for instance a suspended sentence or a short prison term), but an (unconvicted) defendant acquitted for unsoundness of mind in the same situation must receive an indeterminate term of civil detention.

There will be many occasions when a CRO (a relatively mild “sentence” generally in the form of a good behaviour bond) is cancelled but it is not appropriate to imprison a person. In such a case, a court should be free to impose more serious orders with a greater degree of supervision as the circumstances require, rather than simply making a custody order.

RECOMMENDATION

This problem could be addressed by providing that a court cancelling a CRO, CBO or ISO then has the same range of options as when it imposed that order. This range would include everything from unconditional release to a custody order. However it is submitted that this would be tinkering with a section that needs overhaul.

It is recommended that s.22 CLMIDA be repealed and replaced with a section creating a range of orders appropriate to persons who have been found not criminally liable by virtue of their state of mind. These orders might range from unconditional release to a custody order but they should not be governed by the provisions of the Sentencing Act 1995.

Mentally Impaired Defendants (Part 5)

Declared place

Underpinning any discussion of Part 5 CLMIDA must be the fact that there is no “declared place” as defined in CLMIDA. The legislation was clearly drafted to operate on the basis that there will be a declared place. Yet there is no such place and apparently there is no plan to declare one. CLMIDA is therefore not operating as intended.

The mention of a declared place is comforting because it sounds different to prison. It sounds like a place that caters for the needs of those defendants too mentally impaired to be tried or held

criminally culpable. In place of their liberty, a declared place will offer these unconvicted citizens dignity, appropriate care and possibly training and rehabilitation.

CLMIDA implies all this because if it were simply intended to imprison these defendants, there would be no need to talk about a declared place. Everyone under a custody order could be detained in a prison and receive whatever social, medical or psychiatric help is available to the general prison population. A declared place, therefore, must be more than a prison.

To simply demand the immediate creation of a declared place ignores many practical difficulties. Orders under CLMIDA can be made in respect of defendants with head injuries, dementia, intellectual disabilities, mental illnesses and other mental impairments. The needs of individuals will clearly be very different. It is feared that a rush to create a declared place might simply create another prison where the inmates happen to be mentally impaired.

Six years of the operation of CLMIDA must yield some information about mentally impaired defendants. The setting up of declared places should rely upon this information to explore alternatives to simply building one facility designed to accommodate all persons in the State under a custody order.

The Victorian equivalent to a “declared place” under CMIUTA is the term “appropriate place”, defined to mean an approved mental health service or a residential service provided by the Department or its contractors. This definition includes mental institutions, services provided under other legislation for intellectually disabled persons as well as services provided by contractors to the department. It gives more options when it comes to accommodating those defendants under a custody order and the intention is apparently to detain mentally impaired defendants where most appropriate.

Not everyone under a custody order will require maximum security detention. Some defendants on a custody order may be assessed as representing little security risk. If they can be identified they might be detained in existing mental health facilities, hostel-type accommodation for the intellectually disabled, special units or hostels within minimum security prisons or under other similar arrangements.

There may be scope to develop existing human and material resources to create declared places. Proper training and recruitment of staff might allow crisis care units within some prisons to cater for the needs of mentally ill people under a custody order. There may be scope for creating or expanding secure units or wards within existing hospital or health services. These and similar options should be explored.

Ultimately it is hoped that a purpose-built facility will be developed to cater for as many mentally impaired defendants as possible.

One very concerning feature of mentally impaired defendants being detained in prison is that they have no access to the training and rehabilitation programs available to the general prison population. Although it is hoped that review of the legislation will mean that their numbers will decrease, mentally impaired defendants who remain in prison under custody orders should have full access to training and rehabilitation programs or to programs designed specifically to meet their own needs.

RECOMMENDATION

It is recommended that a project be launched immediately to establish a declared place or places. That project must begin with an inquiry into all aspects of the need for a declared place including:

- *the range of mental impairments represented amongst those on custody orders,*
- *the needs of those persons,*
- *the extent to which they can be catered for within existing facilities, and the development, training or recruitment necessary to facilitate this,*
- *the security requirements of mentally impaired defendants,*

- *ways to streamline the processes of the legislation in the design of any new facilities,*
- *whether and how such facilities might integrate or be integrated into general health or justice services.*

Where mentally impaired defendants are detained in prisons, they must have access to training and rehabilitation programs.

Sections 24-26: place of custody

In making custody orders the judge can consider the place where the defendant will be detained as relevant in satisfying the court that a custody order is appropriate (*R v Garlett* [2002] WADC 87; see also *Ryan* unrep. Lib No. D980032). Although counsel can make inquiries and frame submissions, in practical terms there may be little that the court can do to determine where a defendant will be detained. The court certainly has no duty and few resources to inquire into the matter.

If, as recommended above, a range of facilities becomes available for the detention of defendants, it will become more important for the court to consider where the defendant will be detained. Just as the Victorian legislation anticipates defendants being detained in a broader range of facilities it also creates a duty for the court to consider where a defendant is to be detained.

Unlike CLMIDA, CMIUTA requires the court to specify where the defendant will be detained. This gives the court a duty of inquiry. The court must not make a supervision order committing a defendant to custody in an “appropriate place” (ie not a prison) unless it has received a certificate stating that the facilities necessary for the order are available. Further, the court must not commit a defendant to custody in a prison unless satisfied that there is no practicable alternative in the circumstances. This appropriately shifts responsibility for the place of detention from the administrative to the judicial arm.

RECOMMENDATION

The reasoning of Viol DCJ in Garlett is respectfully adopted, in that the fact that a defendant is to be detained in a prison should be taken into account when considering whether a custody order is appropriate. This is meaningless unless the court can be satisfied as to where the person will be detained. It is recommended that the legislation require the court making a custody order to specify, after proper inquiry, the place in which the person is to be detained. Such an order might be amended subsequently by application to the Board or the judicial officer making the order.

Need for official visitors. Under Part 9 of MHA, official visitors are to visit authorised hospitals to hear, refer and resolve complaints, to ensure that patients are informed of their rights and that conditions are safe and suitable, and to report to the Minister. There is no good reason why there is no such provision for mentally impaired defendants.

RECOMMENDATION

It is recommended that CLMIDA be amended to establish a council of official visitors to visit prisons and declared places with a similar function to that performed under MHA.

Mentally Impaired Defendants Review Board (Part 6)

The board’s role is, among other things, to ultimately determine when and the conditions under which a mentally impaired defendant is released from a custody order. The board is the only thing standing between a mentally impaired defendant and indeterminate imprisonment. It is submitted that such decisions must be made carefully, with full judicial consideration and without concern for party politics or trends in community scaremongering. This should be a judicial or quasi-judicial task.

Specifically, there should be a greater representation of judges (currently sitting as judges) on the board. There should be allowance for applicants to make submissions to the board and to be legally represented. The board should be informed broadly, from reliable and professional sources. The board should be accountable to principles of natural justice and subject to appeal.

RECOMMENDATION

Again, the Victorian legislation is a useful model. In creating the forensic leave panel, Part 7 and Schedule 2 of CMIUTA are generally endorsed and the following recommendations borrow from that act:

- *The board should operate in a more judicial manner and should be predominantly constituted by judges.*
- *Any psychiatrist or psychologist sitting on the board or employed by the board should be required to have experience in forensic practice.*
- *The board should have power to appoint members or employ staff to assist on a long or short term basis.*
- *The board should be bound by the laws of natural justice.*
- *The board should permit legal representation of those appearing before it and hear submissions made by or on behalf of applicants.*
- *The board should not be required to conduct proceedings in a formal manner or be bound by rules of evidence, but the proceedings should take on a more forensic and inquisitive nature, with the board having power to summons persons to give evidence or produce documents and to examine them.*
- *The board should be required to give reasons for its decisions.*
- *There should be provision for notice to be given to the applicant of sitting times and other matters of relevance to the applicant.*