

# ANNUAL REPORT

by the Chief Advocate for Residents of  
Declared Places Under the Declared Places  
(Mentally Impaired Accused) Act 2015





### Cover Image

The artwork on the front cover and throughout the Annual Report was done by a resident of the Bennett Brook Disability Justice Centre and reproduced with the kind permission of the artist.

Hon Donna Faragher MLC

MINISTER FOR DISABILITY SERVICES

In accordance with section 56(3) of the *Declared Places (Mentally Impaired Accused) Act 2015* I submit for your information and presentation to Parliament the Annual Report of the Chief Advocate for the financial year ending 30 June 2016.

The report records the activities of the Advocates who provided services to residents of the Bennet Brook Disability Justice Centre, a declared place, during the 2015-2016 year.



Debora Colvin

**CHIEF ADVOCATE**

4 October 2016

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# Foreword by the Chief Advocate

It is fair to say that the first year of operation of Western Australia's first declared place, the Bennett Brook Disability Justice Centre, has been somewhat rocky. Residents didn't arrive until 20 August 2015, there were calls for its closure in January 2016 following a short episode of unauthorised absences by two residents, there were only ever three residents admitted and, due to security upgrades caused by the January controversy, all residents were back in prison by 20 May 2016.

The importance and future of the Disability Justice Centre must not be allowed to be undermined by this rocky start. Residents of the Disability Justice Centre have cognitive and intellectual difficulties. They have not been proven guilty of a crime – but they are not fit to stand trial or have been found not guilty by reason of unsound mind. It is much harder for them to understand the way society works and what is expected of them – their lives are much tougher than ours when it comes to making sense of the world. But that does not mean that they cannot learn skills to help them lead a satisfying and productive life and one that is no risk to others – they just need the right training, support and encouragement.

The Disability Justice Centre offers the support needed to pave the way for release back into the community that is otherwise unlikely to happen. Without this the person may spend the rest of their life in prison for a crime that would have seen them released much earlier had they just pleaded guilty.

Although the controversy about the Disability Justice Centre in early 2016 caused a security upgrade which was to the detriment of the residents because they had to be returned to prison while the work was undertaken, it is hoped that this, and various information sessions, have allayed local community fears.

Having so few residents, however, can cause issues for those who are living in the Disability Justice Centre and opens up criticism on cost grounds. The main reason there are currently so few residents, is that many (and probably most) lawyers defending mentally impaired clients advise them to plead guilty rather than risk a Custody Order under the *Criminal Law Mentally Impaired Accused Act 1996*. Custody Orders are indefinite and subject to decision making by the Governor on advice from the Attorney General. Recommendations for release (conditional and otherwise) may be made by the Mentally Impaired Accused Review Board (which has members with specialist expertise), but the Department of the Attorney General can refuse to pass the recommendation onto the Governor so the release order is never made. There is no right of appeal in this process. Similarly the consent of the Minister for Disability Services must also be obtained before a person can be sent to the Disability Justice Centre. Political considerations can over-ride justice.

The most famous case evidencing the injustice of the law on Custody Orders is that of Marlon Noble who spent 10 years in prison. While now back living in the community, he remains under strict conditions for a crime he denied doing and which has never been tested in court. Mr Noble recently took his case to the United Nations Committee on the Rights of Persons with Disabilities which applies the Convention

on the Rights of Persons with Disabilities (to which Australia is a signatory). That committee concluded that Australia had violated the rights of a man with an intellectual disability who was deemed unfit to stand trial but was nevertheless detained in prison for more than 10 years, thereby “converting his disability into the core cause of his detention..... Taking into account the irreparable psychological effects that indefinite detention may have on the detained person, the Committee considers that the indefinite detention he was subjected to amounted to inhuman and degrading treatment,” members wrote.

Closer to home, the Chief Justice of Western Australia, Wayne Martin, appearing before Federal Parliament’s Community Affairs References Committee on the indefinite detention of people with cognitive and psychiatric impairment in Australia, said jailing mentally impaired people accused of serious crimes should be an “absolute last resort”, and that supervised release better protects the community in the long term.

**The *Criminal Law Mentally Impaired Accused Act 1996* urgently needs amendment and preferably replacement.**

This report mainly sets out the legislative and structural framework around the Advocacy services rather than provide detail of the advocacy services as it is important to ensure that the confidentiality of the residents is maintained. It is hoped that 2016-2017 will be a more settled year and that there will be more residents admitted to the Disability Justice Centre.



Debora Colvin  
**CHIEF ADVOCATE**



*Disability Justice Centre courtyard*



# Right of residents of a declared place to advocacy services

**Part 10 of the *Declared Places (Mentally Impaired Accused) Act 2015* (the Act) makes it a right of people who are detained in a declared place that they must have access to, and the protection of, advocacy services.**

The Act sets out principles and objectives which state that the purpose of the custody is the protection of the community and the residents of the declared place, as well the training and development of the residents. The custodial powers provided in the Act are balanced by a range of safeguards to protect resident welfare which include the provision of advocacy services.

People detained in psychiatric wards in authorised hospitals and prisoners in jail similarly have legislation which provides them with a level of protection<sup>1</sup>. This is because detention is by its very nature disempowering for the person detained and can lead to abuse.

The advocacy services provided under the Act are aimed at providing rights protection while also fostering the development of the resident, with the Advocate working alongside the resident on their Individual Development Plan.

## What is a “declared place”?

A “declared place” is a “place declared to be a place for the detention of mentally impaired accused by the Governor by an order published in the *Government Gazette*” under the *Criminal Law (Mentally Impaired Accused) Act 1996* (the CLMIA Act).

There is only one declared place in Western Australia - the Bennett Brook Disability Justice Centre (the Disability Justice Centre) in Caversham, established and managed by the Disability Services Commission (DSC) pursuant

to the Act. It is a residential-style facility which can accommodate 10 mentally impaired accused, hereafter referred to as residents.

## Who are the residents of a “declared place”?

Under the CLMIA Act the only people eligible for detention in a declared place are those who:

- are a mentally impaired accused on a Custody Order
- are over 16 years old
- have a disability as defined in the *Disability Services Act 1993* and the predominant reason for the disability is not mental illness.

“Mentally impaired accused” are people who are accused of a criminal offence but are found to be mentally unfit to stand trial or not guilty on the grounds of unsoundness of mind. The charge against them is dismissed without any finding as to guilt or otherwise but they may be put on a Custody Order under the CLMIA Act. If they are put on an Order, the person must be detained indefinitely until the Governor orders that they be released. There are 4 possible places of detention:

- an authorised hospital (when the accused has a mental illness that is capable of treatment)
- a declared place
- a detention centre (when the accused is under 18 years of age), or
- a prison.

1. See Part 20 of the *Mental Health Act 2014* establishing the role of the Chief Mental Health Advocate and advocacy services and the *Inspector of Custodial Services Act 2003* providing inspection functions and an independent visitor service in prisons and detention centres.

A "disability as defined in the *Disability Services Act 1993*" means that only those people on a Custody Order with an intellectual impairment or possibly dual diagnosis where intellectual impairment is the predominant reason for the disability, can be eligible for a place in the Disability Justice Centre. Those people on a Custody Order due to a mental illness alone are not eligible.

The aim of the Disability Justice Centre is to provide an option that is appropriate and rehabilitative for people with intellectual or cognitive disability, or autism, as an alternative to prison and to help prepare them for release in to the community. This is why the Disability Justice Centre is managed and funded by the DSC.

The Mentally Impaired Accused Review Board (the MIAR Board) and the Minister for Disability Services decide whether a person can be detained in the declared place, that is, the Disability Justice Centre.

As at 30 June 2015, according to the Annual Report of the MIAR Board, there were 40 mentally impaired accused under the Board's statutory authority. Of those, 28 people had a diagnosed mental illness (68.3%), seven people had a diagnosed intellectual impairment (17.1%) and six people had a dual diagnosis of a combined intellectual impairment and mental illness (14.6%).

The MIAR Board must be satisfied that the person meets the criteria and have regard to the degree of risk that the accused's detention in the declared place appears to present to the personal safety of people in the community or of any individual in the community. This is a prime consideration.

The MIAR Board first asks the DSC to undertake a "suitability for placement" assessment for any mentally impaired accused person who they are considering for placement at the Disability Justice Centre. The CLMIA Act also requires that a representative of the DSC must be a member of the MIAR Board making the decision so it is expected that they take a lead role in the

assessment process. A Disability Justice Centre clinician, not the person representing the DSC on the MIAR Board, undertakes the suitability for placement assessment.

The DSC process is to produce an initial assessment which is then considered by a panel comprising the DSC's representative on the MIAR Board, the Disability Justice Centre Manager (or delegate), and the clinician who carried out the assessment. The Manager of the Disability Justice Service chairs this panel. The panel then makes a recommendation to the MIAR Board as to whether or not the proposed placement should proceed.

The MIAR Board considers the DSC report and recommendation along with any other materials or expert reports available to it.

If the MIAR Board decides to detain the mentally impaired accused at the Disability Justice Centre it sends the Minister for Disability Services a statutory report containing a comprehensive and detailed summary of all of the accused's circumstances, and the MIAR Board's reasons for the recommended placement. The Minister then decides whether or not to consent to the placement. If consent is refused, the person is likely to remain in prison.

Mentally impaired accused, whether in a declared place or a prison, may be given Leave of Absence orders (LOA's). The LOAs are granted by the MIAR Board following approval by the Governor. They cannot exceed 14 days and the MIAR Board is to have regard to risk and compliance factors. LOA's are relied on by the Disability Justice Centre as central to the programs used to help prepare the residents for reintegration into the community and ultimate release. Residents therefore spend a considerable amount of time outside the Disability Justice Centre on day and overnight leave as determined by the MIAR Board. Consent to placement in the Disability Justice Centre includes this in the consideration of risk to the community.





# The Advocacy Service

Part 10 of the Act establishes the advocacy services for residents of a declared place including a Chief Advocate and Advocates. The Chief Advocate must be informed of the arrival of every new resident in the declared place no later than 48 hours after their arrival. The Chief Advocate must then ensure that the resident is visited or otherwise contacted by an Advocate within 7 days of the resident's arrival (the statutory contact).

Residents can request visits or contact outside the statutory contact and an Advocate must contact them within 72 hours of the request being made. The Chief Advocate must also ensure that an Advocate makes contact with each resident on request and at least four times a year. Residents can, however, decline to be contacted.

The Chief Advocate must also report to the Minister on the activities of the advocates as soon as practicable at the end of a financial year and the Minister must, within 14 days after receiving the report, cause a copy to be laid before each house of Parliament.

## Role of the Advocates

The role of the Advocates is to protect residents' rights and, as the name suggests, advocate for them. In particular they must be involved in the preparation and review of a residents' Individual Development Plan and the Chief Advocate must be advised of the use of regulated behaviour management which includes medication, restraint and seclusion.

Each advocate has these functions (see s53 of the Act) —

- a. visiting or otherwise contacting residents
- b. acting as the personal advocate of residents to safeguard their health and safety and foster their development
- c. monitoring orders under section 10 of the Act restricting freedom of communication
- d. monitoring the use of regulated behaviour management
- e. inquiring into or investigating any matter relating to an environmental condition of the declared place that is adversely affecting, or is likely to adversely affect, the health, safety or wellbeing of residents
- f. inquiring into or investigating the extent to which explanations of the rights of residents have been given in accordance with the Act and the extent to which those rights are being, or have been, observed
- g. assisting residents to protect and enforce their rights
- h. inquiring into, and seeking to resolve, complaints made to Advocates about the management or care of residents
- i. assisting a resident to make a complaint to the person who operates the declared place
- j. assisting a resident to make a complaint under the *Disability Services Act 1993*
- k. being a resident's representative in respect of a complaint if recognised as the resident's representative under the *Disability Services Act 1993*
- l. liaising with the resident's enduring guardian or guardian

- m. assisting residents to access legal services
- n. referring any issues arising out of the performance of a function of the Advocate to the appropriate person to deal with those issues, including to the Chief Advocate, if the Advocate cannot resolve the issue or otherwise considers it appropriate to refer the matter
- o. participating in the planning and provision of services received by residents and the preparation of their Individual Development Plans.

### Powers of the Advocates

The advocates have substantial powers in keeping with their protection of rights and “watchdog” role which are very similar to the power of Advocates under the *Mental Health Act 2014*.

Apart from doing anything necessary or convenient for the performance of the advocate’s functions under s54 of the Act they may:

- with or without notice, at any time, and for any length of time —
  - a. visit a declared place and inspect any part of the place
  - b. visit, or otherwise have contact with, any one or more residents, except a resident who has declined to be contacted by an advocate
- ask a person who works at a declared place questions about any of these matters —
  - a. the welfare, health, care, training, safety, management or security of any resident
  - b. the operation, control, management, security and good order of a declared place, to the extent to which the matter is relevant to a matter mentioned in paragraph (a)

- inspect and copy any document at a declared place relating to the place
- inspect and copy any of the following documents, wherever held, except a document to which the advocate has been denied access by the resident —
  - a. the resident’s Individual Development Plan
  - b. any other document included, and the information recorded, in the resident’s file
  - c. any of the records listed in section 10(6) (a)(i) and (ii) of the Act that relate to the resident
  - d. any other document in the possession or control of the person who operates the declared place that relates to the resident
- require a person who works at a declared place to give reasonable assistance to the advocate for the purpose of the performance of the advocate’s functions under this Act.

It is an offence under s55 of the Act to not answer the Advocate’s questions, to hinder or fail to assist them, or give them wrong information.

The Advocates are under the control of the Chief Advocate and residents retain the right at all times to decline to be visited or otherwise contacted or to not consent or withdraw consent to the Advocate having access to their records.



## Who are the Advocates?

When the Disability Justice Centre opened in August 2015, the Act stated that the Head of the Council of Official Visitors was to be the Chief Advocate and Official Visitors were the Advocates. The Council ceased operation on 29 November 2015 when the *Mental Health Act 2014* came into operation establishing a Chief Mental Health Advocate. Contemporaneously regulations<sup>2</sup> to the Act prescribed that the Chief Mental Health Advocate and Mental Health Advocates as defined in the *Mental Health Act 2014* would be the Chief Advocate and Advocates from 30 November 2015. The functions and powers of mental health advocates under the *Mental Health Act 2014* are very similar to the functions and powers of Advocates under the Act.

The Advocates were chosen by the Head of the Council of Official Visitors, Debora Colvin, who called for expressions of interest from Official Visitors. The Visitors were asked to state any experience or background they had in working

with people with an intellectual disability or cognitive impairment. Three Official Visitors were chosen on the basis that it was anticipated there would be 3 residents and this would avoid potential conflicts of interest.

Training was given to the 3 Official Visitors prior to the first residents arriving. See further below under Other Activities.

When the *Mental Health Act 2014* came into operation the 3 Official Visitors were all engaged by the new Chief Mental Health Advocate, Debora Colvin, as Advocates for the new Mental Health Advocacy Service (MHAS) so continued to work as Advocates under the Act with residents at the Disability Justice Centre. Since then one Advocate has resigned. He was not replaced as the number of residents reduced to 2 people at about the same time.



Disability Justice Centre entrance

<sup>2</sup>. Declared Places (Mentally Impaired Accused) Regulations 2015.

# Other residents' rights

One of the most fundamental requirements of the Act and therefore right of residents of a declared place is that they are to be provided the best possible training including development programmes that promote their physical, mental, social and vocational abilities (see s5(2) of the Act).

Furthermore, pursuant to s6 of the Act programmes and services for residents must be designed and administered so as to:

- respect the rights of residents to be treated with dignity, courtesy and compassion; without discrimination or stigma; and with equality of opportunity
- be sensitive and responsive to the diverse and individual circumstances and needs of residents taking into account their age, gender, spiritual beliefs, culture or linguistic background, family and lifestyle choices
- reduce the risk of residents offending or re-offending
- assist residents to live, work and participate in the community and be as independent as possible
- maximise quality of life for residents
- assist residents to be trained, developed and cared for in a manner that is the least restrictive option in the circumstances taking into account the need for protection and safety of residents and the community.

The Act also stipulates that an Individual Development Plan is to be prepared for each resident, and the resident is to be managed and is to receive "care, support and protection" as required by that plan. The Advocates must be consulted as part of the preparation of a resident's Individual Development plan and this is a major part of their work with residents.

Other rights include:

- the right to be told their rights
- freedom of lawful communication – though this right may be restricted in certain circumstances in which case the order must be made and the resident's Advocate advised (and the restriction cannot deny the resident access to the Advocate, lawyer or Guardian)
- confidentiality
- the right to not be ill-treated
- process and procedure around:
  - incident reporting
  - regulation of behaviour management including seclusion and restraint and notifying the Chief Advocate
  - searching residents.



# Activities of Advocates

**There have been three residents in the Disability Justice Centre since the first residents arrived on 21 August 2015. From 20 May 2016 to 30 June 2016, however, all 3 residents were detained back in prison.**

The Chief Advocate was notified on 21 August 2015 of the first 2 residents who arrived that same day, in accordance with s52 of the Act. The third resident arrived on 18 December 2015. The Chief Advocate was formally notified on 21 December 2015 after reminding the DSC of the s52 requirement that the Chief Advocate must be notified of the arrival of all new residents within 48 hours. One resident was sent back to prison in January 2016. The other two residents were sent back to prison on 20 May 2016 while renovations were undertaken to the Disability Justice Centre fencing. The Advocates' functions and powers do not apply while the residents are in prison.

During the 9 months prior to 30 June 2016 in which there were residents in the Disability Justice Centre, Advocates made 27 visits and met with residents on 23 occasions. The first contacts were to introduce themselves and their role to the residents, build up a level of trust and understanding. In most cases it took several visits to build a rapport with the resident.

Later contacts involved preparation for and attendances in meetings to discuss the residents' Individual Development Plans and submissions to the MIAR Board for scheduled reviews. Issues for the residents included boredom and social friction due to there being so few other residents.

## Individual Development Plans

The Act stipulates that programmes and services at the Disability Justice Centre are to be delivered in accordance with an Individual Development Plan for each resident. The plan, which must be in writing, must be reviewed before the expiry of 6 months after it is first prepared and then every 12 months. Residents

can also request a review because of changed circumstances.

The contents of Individual Development Plans are specified by the Act (s13) to include an outline of the proposed arrangements for programmes and services which will:

- promote the resident's development, habilitation, rehabilitation and quality of life
- provide for the resident's management, care, support and protection
- reduce the intensity, frequency and duration of the resident's behaviour that places at risk the health or safety of the resident or others, including positive behaviour support
- support the resident's reintegration into the community.

In addition the Individual Development Plan must include:

- an outline of the proposed plan for the resident's transition to participation and inclusion in the community
- details of any medication and provision for the review of the resident's health care medication
- what constitutes appropriate or inappropriate regulated behaviour management for the resident's case
- details of any medication prescribed as behaviour management medication
- details of each emergency when a restraint was used on the resident or the resident was placed in or returned to seclusion
- strategies for avoiding, reducing and eliminating any further use of a regulated behaviour management.

The Act also requires that all residents be assessed (for the purposes of each Individual Development Plan) by at least two persons with appropriate qualifications or experience from two different disciplines. An assessment by a qualified behaviour support specialist is also required if the Individual Development Plan has a positive behaviour support component.

Advocates reported that the Individual Development Plans were comprehensive (up to 30 or more pages long) and that two clinicians took part in the process. Picture cards and other methods were used to ascertain the resident's wishes and enhance their understanding of the plan.

Advocates contributed to the Individual Development Plans in various ways including:

- making suggestions regarding activities which were more culturally appropriate
- ensuring that all secondary goals were aimed at achieving the primary goal so that the activities were about more than just keeping the resident occupied
- using their experience with mental health issues to suggest contacts and reviews of medication and other therapies.

All of the residents had LOAs made by the MIAR Board which allowed the Individual Development Plans to include a programme of absences from the Disability Justice Centre with a view to a staged, gradual and supervised transition back into the community as this is the ultimate goal for all residents.

## Mentally Impaired Accused Review Board

Residents are required to be reviewed by the MIAR Board and a report sent to the Minister at least once a year and whenever it thinks there are special circumstances which justify doing so. During the course of the year Judge Robert Cock, Chairman of the MIAR Board, agreed to keep the Chief Advocate advised in advance of all Board hearings scheduled for Disability Justice Centre residents. Letters are also sent to the Chief Advocate following a hearing by the MIAR Board containing the decision of the Board, any reasons for that decision, and the next date the matter will be considered by the Board.

Advocates were involved in two MIAR Board reviews for two of the three residents during the period to 30 June 2016. Written submissions were provided to the MIAR Board in each case as prepared by the Advocate on behalf of the resident. The submissions highlighted the positive work done with and by the resident at the Disability Justice Centre.

In addition the MIAR Board held further reviews in May 2016 as orders needed to be amended to allow the residents to be returned to prison while security renovations were undertaken at the Disability Justice Centre (see below).



# Systemic Advocacy

## Community concerns

In January 2016 there was considerable controversy when two of the three residents went absent without leave on New Year's Eve by climbing over the fence which resulted in various parties calling for the Disability Justice Centre to be shut down. One resident was returned to the Disability Justice Centre the next day and the other resident was returned by their family on 3 January 2016, hungry and dehydrated. The major concern by the Advocates during this period was for the health and welfare of the residents who were very vulnerable to abuse due to the nature of their impairment.

Local members of the community near the Disability Justice Centre complained that they were not kept informed about the residents being absent without leave, wanted to know more about the residents and the crimes they had been alleged to have committed, and said they were concerned for the safety of themselves and their families. There were complaints that the Disability Justice Centre had been built too close to a primary school. Calls were made to shut down the Disability Justice Centre. It was unfortunate that there were reports of police helicopters and dogs being used to search for the residents which exacerbated the fear of people living near to the Disability Justice Centre.

Repeated assurances were given by the then Minister for Disability Services, Helen Morton, and others that the residents were no risk to public safety. It was also explained by the Minister that the residents had the right to the same confidentiality as prisoners on pre-release programs so individual information could not be released.

Some of the rhetoric being used on talk-back radio and social media, was so concerning however that the Chief Advocate issued a media

release on 6 January 2016. She also spoke to journalists and on the radio about the issue. A copy of the media release is set out below.

The Chief Advocate for residents at the Bennett Brook Disability Justice Centre has described some of the dialogue around recent incidents at the Centre as divisive and dangerous for a humanitarian society.

Chief Advocate under the Declared Places Act, Debora Colvin, said that calls for schools to go into lock-down if a resident goes absent without leave, reflect a deep misunderstanding about the purpose of the Centre and the type of residents living there.

Ms Colvin said that there is no need to move the Centre. If it gives local community greater comfort then the problem with the fence that led to the two leaving the Centre could be easily fixed. *"If the Centre is closed down, there is no way that another Centre will be built any time soon given the economic climate"*, she said, *"It will mean that these very vulnerable people, who have not in fact been convicted of a crime, will be back in prison with no end date for their release."*

Ms Colvin said that the residents who have been assessed as ready to move into the Centre are not dangerous and are regularly walking around in the community on leave from the Centre. *"To get placement in the Centre they have been rigorously assessed by experts including those on the Mentally Impaired Accused Review Board to ensure their safety in the community,"* she said.

*"Other people who have the capacity to understand court processes and accused and convicted of similar or far worse crimes are released from prison all the time on the completion of their sentence,"* Ms Colvin said. *"The residents of the Disability Justice Centre have not been convicted – they were found not fit to plead because they could not understand the case against them and have as a result been given an indefinite sentence."*

*"In a humanitarian society we cannot keep people locked up like this. There are therapies, techniques and strategies which can and are being used to allow the residents to return to live in the community. We are not talking about hardened criminals here.*

*"My concern when I heard that the residents were missing was that they were probably more vulnerable themselves due to their intellectual or cognitive disability, than a threat to anyone else. They need protection and support, not vilification and a prison cell with no end date. "*

On 20 January 2016 the Minister announced that she had commissioned an independent analysis of the individual plans, programs and services for residents of the Disability Justice Centre as well as external and Government reviews of security at the centre.

The analysis was carried out by the Hon Peter Blaxell, retired Justice of the Supreme Court of Western Australia, and Professor Colleen Hayward AM of Edith Cowan University. As part of their analysis Mr Blaxell and Professor Hayward were also asked to examine whether due consideration was given by the Minister in determining resident suitability for the Disability Justice Centre.

The report was presented to the Minister on 22 January 2016 (the Blaxell Hayward Report). The conclusions of the Blaxell Hayward Report were very positive regarding the operation of the Disability Justice Centre. However, the authors provided five recommendations which were accepted in full as set out in annexure 1 to this report.

While the Chief Advocate welcomed the findings of the Blaxell Hayward Report, concerns were raised with the Minister that neither the Advocates nor Developmental Disability WA, the peak organisation in WA for people with intellectual and developmental disability and their families and the people who support them, had been consulted. A meeting was held with the Minister about this. The response was that how the analysis was conducted, who was interviewed and the process undertaken was determined by Professor Hayward and Mr Blaxell.

The Minister also announced that the DSC and the WA Police had finalised a memorandum of understanding to ensure that both agencies had a clear understanding of the process to be implemented in cases of unauthorised absences from the Disability Justice Centre.

### **Additional security - impact on residents**

In addition to the commissioning of the Blaxell Hayward report, the DSC contracted external security consultants and the Department of Corrective Services' Security and Response Service also commenced a security analysis at the Disability Justice Centre. The result was a decision to improve security by building up the height of the internal perimeter fence from 2.1 metres to 4.5 metres, installing an anti-dig plinth, providing additional security to external facing windows in residential units and the common room and making enhancements to the security and communication system. This work began after 20 May 2016.

It was hoped that the residents could remain at the Disability Justice Centre while the work was undertaken but the Chief Advocate was advised by the Director General of the DSC, Dr Ron Chalmers, that they had been advised the work would take three months and could only be done a stage at a time so the residents would have to be returned to prison.

Initially the plan was that the residents be sent to Wandoo prison, which is a minimum security facility for men aged 18 to 28, with LOA arrangements remaining in place. Programs and therapies offered by DSC staff however were not expected to be able to be continued. Concerns about this were raised as it would be better from the point of view of trust and continuity issues that the residents continued to work with staff from the Disability Justice Centre. Discussions about this were ongoing with Corrective Services Department but there were complications because Wandoo prison was run by a private operator.

Disappointingly the position became worse when Advocates were told that the residents would first have to go to Casuarina Prison, a maximum security prison. Advocates raised concerns



again about this as both residents had previously been assaulted in prison. Eventually they were transferred to Karnet Prison, a minimum security prison, on 7 June 2016. The time it took for the transfer from the maximum security prison was of concern. According to MIAR Board correspondence LOAs recommenced from 8 June 2016 and Disability Justice Centre staff were able to visit the residents in Karnet Prison.

### Urgent need to amend the CLMIA Act

As noted in the foreword to this Report, with so few residents, the viability of the Disability Justice Centre is open to criticism but the real issue is the urgent need to amend the CLMIA Act. The Blaxell Hayward Report acknowledged this and recommended that the DSC undertake an education program directed at the legal profession to encourage lawyers to consider pleading that a person is not fit to stand trial or not guilty by reason of unsound mind. This is unlikely to be successful unless and until the CLMIA Act is amended.

The Chief Advocate, Debora Colvin, has been active over the years in relation to both types of mentally impaired accused (those who have an intellectual impairment and those with mental illness) adding to the many other voices calling for the CLMIA Act to be amended.

In July 2015 Ms Colvin, then Head of the Council of Official Visitors, supported to the release of an Advocacy Brief noting the priorities for reform as agreed to by 21 other stakeholders involved in the sector. This was released in August 2015 and followed a major Submission signed by the same parties on the amendments needed to the CLMIA Act which had been submitted in December 2014 (the Joint Submission). Ms Colvin had been a party to the Joint Submission.

The 5 critical areas of reform of the CLMIA Act noted in the Advocacy Brief were:

1. Allow judiciary the discretion to impose a range of options through introducing a community based order for mentally impaired accused found unfit to stand trial, and repeal Schedule 1 of the CLMIA Act to make Custody Orders no longer compulsory for some offences.

2. Limit Custody Orders to no longer than the term the person would likely have received, had they been found guilty.
3. Introduce new procedural fairness provisions, which provide for rights to appear, appeal, review, and rights to information and written reasons for a decision in court and MIAR Board proceedings.
4. Introduce a special hearing to test the evidence against an accused found unfit to stand trial.
5. Ensure decisions to release mentally impaired accused from custody, and any conditions attached, are made by the MIAR Board with a right of review before the Supreme Court on an annual basis.

In April 2016 the long awaited review report of the CLMIA Act by the Attorney General was released with 35 recommendations for legislative, procedural, or systemic change. There were many welcome recommendations but not all the Joint Submission recommendations were accepted. Calls to impose limits on the length of Custody Orders, give Courts more discretion and remove the role of the Governor were not accepted.

There were two areas of consideration where the Review Report did not come to any final conclusions and it instead recommended that:

**Recommendation 13:** *A Working Group should be established, comprising the range of stakeholders, to consider further possible amendment of section 21 and Schedule 1 of the Criminal Law (Mentally Impaired Accused) Act 1996.*

**Recommendation 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.*

The Chief Advocate was invited onto that Working Group (on 28 July 2016).

## Other activities

During the course of the year the following other activities took place relating to the Disability Justice Centre and its residents:

- In-house training was conducted with the Advocates by the Chief Advocate. This principally included training on the Act and the admission procedures and policies of the Disability Justice Centre. The 3 Advocates chosen were already familiar with the CLMIA Act and role of the MIAR Board from their training as Official Visitors and their work with people on Custody Orders in authorised hospitals. The DSC also organised a disability awareness information session and security orientation when the Advocates first attended the Disability Justice Centre.
- An Advocacy Service Information sheet was drafted by the Advocates for residents with feedback from staff at the Disability Justice Centre. A copy of the current information sheet is contained at annexure 2.
- Meetings and discussions were held with Taryn Harvey, CEO of Developmental Disability WA. These discussions revolved around sharing information and issues concerning the operation of the Disability Justice Centre.
- Ms Harvey and the Chief Advocate, Ms Colvin, attended a meeting with the then Minister for Disability Services, Helen Morton, about the Blaxell Hayward Report, prior to the report being publicly released, having raised concerns with her about not being consulted as part of the report.
- A meeting was held with the President of the MIAR Board, Judge Robert Cock, and the Director General of the DSC, Dr Ron Chalmers, at the request of the Chief Advocate to discuss concerns about the process for managing LOAs.
- There was correspondence around the making of the *Declared Places (Mentally Impaired Accused) Regulations 2015* in readiness for when the Council of Official Visitors ceased to operate.
- In June 2016 the new Minister for Disability Services, Donna Faragher, invited a group of community members to discuss issues associated with the Disability Justice Centre, proposed changes and explain programs including LOAs. The Chief Advocate was invited to take part in this meeting (which was held in July 2016).
- Funding arrangements of the advocacy services provided to the Disability Justice Centre were agreed with DSC. In summary the Council of Official Visitors and, after 30 November 2015, the MHAS, invoiced the DSC at the same rates as were being paid to Official Visitors and later MHAS Advocates. Official Visitor rates were \$231 for a half day and \$336 for a full day plus mileage and superannuation. MHAS Advocate rates are \$50 per hour, or part thereof, plus superannuation and mileage for travel. The Advocates are also paid travel time if travelling to or from another (MHAS) facility or a one hour "call-out fee" if they are required to attend the Disability Justice Centre and have no other work that day. The Advocates supply their own car, mobile phone and computer and are not office-based. Other costs associated with undertaking the requirements of the Act are also on-charged. This includes the costs associated with time spent by MHAS Senior Advocates and the Chief Advocate. There is also a 10% overhead charge for the administrative time spent on work related to the Act by MHAS office staff. This work includes taking phone calls, processing the pay claims of the Advocates and production of the Annual Report.

# Annexure 1

## Recommendations of the Blaxell Hayward Report into the Disability Justice Centre and the Government's responses

### 1. Goal setting in Individual Development Plans.

We recommend that the goals in each IDP be structured and expressed in a way that the resident will readily understand (when read out to him). Ideally there should be a single long term goal expressed in very simple terms (e.g. "To live at home with my family", or "To live in a unit near my family"). There should then be as few as possible subsidiary goals of a milestone character (e.g. "I will not use drugs", "I will not breach my LOAs") which are necessary precursors to achieving the long term goal. During preparation of the IDP, these goals should be set out diagrammatically and/ or pictorially so that the resident readily understands them and gains a clear visual perception of what he will have to do if he is to live in the community. We also suggest that the details of programs which will be undertaken to achieve these goals should not be incorporated into the goal structure, but should be set out in a separate section of the IDP.

#### **Government Response to (1) – accepted.**

The Disability Services Commission will modify the goal setting approach in individual development planning to ensure that residents clearly understand their long term goal and will separate plan strategies from goals.

### 2. Timelines for completing Individual Development Plans.

We recommend that the deadline for completing IDPs be extended from 20 days after residents arrive at the Centre to three months. We do not suggest any change to existing procedures during the first 20 days, but recommend that the document produced at the end of that period should be called an "Interim Individual Development Plan". We believe that a three month period for completion of each IDP will result in goals being more closely attuned to the resident's 'vision of a good life'. It will also allow the resident more time to develop a sense of 'ownership' of his plan. (viz. so that he can feel that the IDP goals are his own rather than something that is being imposed upon him).

#### **Government Response to (2) – accepted.**

The Disability Services Commission has agreed to extend the timeline for preparing Individual Development Plans.

### 3. Programmes of activities.

We recommend that during the development of each IDP there should be a greater focus on finding activities which excite the interest of the particular resident. The aim should be to develop programmes of day to day activities which each resident is eager to be involved in.

When there are difficulties in finding providers willing to come into the Centre to deliver particular services, consideration should be given to using Leave of Absences so that the resident can pursue activities externally. (It will be for the Board to decide whether it is willing to include conditions in LOA orders to this effect). A full programme of activities for each resident should commence within three months of his arrival at the Centre

#### **Government Response to (3) – accepted.**

The Disability Services Commission will focus on offering activities and developmental opportunities that will be attractive to residents.

#### 4. Records of breach of Leave of Absences and of breaches generally.

The one flaw that we have identified in the Centre's generally excellent record keeping is that we were unable to locate any single document for each resident which listed any breaches of conditions and the consequences which then ensued. We recommend that a standard record of this nature be created showing the date of the breach, the nature of the breach, any resulting sanction (or other consequences), and the date that the latter was imposed. Obviously this record should not include minor infractions, but should be limited to breaches which had the potential to cause any risk to the community, to staff or other residents, or to the resident himself.

##### **Government Response to (4) – accepted.**

The Disability Services Commission will modify the Centre's record keeping system to track any substantial Leave of Absence breaches and to record the consequences of such breaches.

#### 5. Continuous improvement in service delivery.

The task faced by DSC in operating the Centre in compliance with the DP Act is a complex, sensitive and difficult one. There is no precedent which can be applied by way of guidance, and the true effectiveness of the current ways of delivering services will only become known in hindsight. In these circumstances it is necessary that there be regular reviews of the Centre's operations as well as candid assessments of what is working and what is not. It appears to us that key personnel do have the willingness and flexibility to be open to change if that should be shown to have merit. It also appears to be part of the DSC culture that there are frequent, open and frank exchanges of views. Nevertheless we recommend that formal internal reviews of the effectiveness of Centre operations be conducted at least annually.

##### **Government Response to (5) – accepted.**

Accepted. The Disability Services Commission will conduct a formal internal review of the effectiveness of the Centre's operations on an annual basis, with the first review to be scheduled for January 2017.

### Addendum to Report

#### **Recommendation**

That the Disability Services Commission undertake an education program directed at the legal profession and at members of the Criminal Lawyers Association in particular. Lawyers should be invited to visit the Centre to gain a full understanding of the programmes it has to offer.

##### **Government Response to (5) – accepted.**

The Disability Services Commission will liaise with Legal Aid WA.

# Annexure 2

## Information sheet for residents about the advocacy services

### Advocacy Service for Residents



We can visit you  
We can help you with any concerns



**Advocates**  
Are there to speak up for you and help you say what you want to say



**Advocates**  
Are independent. You can talk to them confidentially



**Advocates**  
Are people who understand the issues you face.



**Advocates**  
Can visit you or talk to you on the phone



**Advocates**  
Can help you know your rights and make sure others know and observe your rights. They can check any restrictions on your rights



**Advocates**  
Can help you if you have a complaint. They can make sure your complaint is heard



**Advocates**  
Will check any behaviour management requirements you are under



**Advocates**  
can help you take part in making your Individual Development Plan **IDP**



**Advocates**  
Can help you get a Lawyer

# It's Up To You!

An advocate will visit you within 7 days of you arriving at the Disability Justice Centre. You don't have to talk to them if you don't want to. If you change your mind and want to talk to them later, you can call and ask for an advocate to visit. You can also ask a staff member to call an advocate for you and they must call the advocate. The advocate will visit you as soon as they can but no more than 72 hours after you ask for the visit.



**Mental Health Advocacy Service**  
Address: Unit 6, 18 Harvest Toe, West Perth WA 6005  
Phone: 1800 999 057 or 6234 6300  
Email: [contactus@mhas.wa.gov.au](mailto:contactus@mhas.wa.gov.au)

# Glossary

<b>The Act</b>	<i>Declared Places (Mentally Impaired Accused) Act 2015</i>
<b>Blaxell Hayward Report</b>	Analysis of the individual plans, programs and services for residents of the Disability Justice Centre commissioned by the Minister carried out by the Hon Peter Blaxell, retired Justice of the Supreme Court of Western Australia, and Professor Colleen Hayward AM of Edith Cowan University
<b>CLMIA Act</b>	<i>Criminal Law (Mentally Impaired Accused) Act 1996</i>
<b>Disability Justice Centre</b>	The Bennett Brook Disability Justice Centre in Caversham
<b>DSC</b>	Disability Services Commission
<b>LOA</b>	Leave of Absence Order made by the MIAR Board on approval of the Governor
<b>MHAS</b>	Mental Health Advocacy Service
<b>MIAR Board</b>	Mentally Impaired Accused Review Board
<b>Residents</b>	Mentally impaired accused (as defined in the Act) living at the Disability Justice Centre
<b>Statutory contact</b>	Contact by an Advocate within 7 days of the resident's arrival as required by the Act



**MENTAL HEALTH ADVOCACY SERVICE**

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