WAAMH
Western Australian Association for Mental Health

ADVOCACY POLICY COMMUNITY
DEVELOPMENTAL DISABILITY wa

1 March 2016

Hon. Mark McGowan MLA
WA Labor Leader
Parliament House
Perth WA 6000

Dear Mr McGowan

RE: ALP Commitment to Reform of the *Criminal Law (Mentally Impaired Accused) Act 1996*

Thank you for meeting with Alison Xamon, Chelsea McKinney and Rod Astbury on 19th November 2015 to discuss reforming the *Criminal Law (Mentally Impaired Accused) Act 1996* (the Act).

WAAMH was delighted to hear the ALP's commitment to reform the Act extensively. We write to seek formal confirmation of your undertaking to progress the recommended reforms set out in this letter.

During 2014, WAAMH and DDWA consulted extensively with our members, and key legal and forensic organisations to form our joint submission to the Attorney General's Review of the Act.

In 2015 we undertook further consultation with the result that stakeholders agreed a shortlist of the most urgent and essential reforms, which are set out in the appendix. More than twenty organisations and individuals formally endorsed this list.

The priority reforms reflect the input of people with lived experience of mental illness and disability, their families and representative organisations. They also reflect the concerns of legal organisations and the judiciary; we have expert opinion on our side.

This shortlist of reforms is the absolute minimum our community demands.

The recommended reforms are founded on our sectors' view that the Act should protect community safety, the rights of mentally impaired accused, and align with the principles of procedural fairness that apply within our justice system. They also reflect our expectation that the Act be consistent with other state legislation relating to the treatment of people who experience mental illness and disability by the State.

We acknowledge that a primary purpose of the Act is to achieve community safety and we support this aim. A law that enables procedural fairness, judicial discretion in making dispositions, and the recovery and development of mentally impaired accused, will better achieve this purpose than the current law.

We note the current Community Affairs References Committee Senate Inquiry into indefinite detention of people with cognitive and psychiatric impairment in Australia. The inquiry's Terms of Reference include examination of relevant laws and will report in July 2016. We will make a submission and we will send you a copy of this.

Successive Western Australian governments have chosen to preserve this unjust status quo. Our State thus discriminates against people with disability, causing unequal access to justice and the deprivation of liberty on the basis of mental impairment and intellectual and cognitive disability.

When Labor was last in power, a Bill was drafted to end this injustice, yet the opportunity was lost with a change of government. Urgency is required. We request your written statement of commitment to commence detailed reforms in the first 100 days of a Labor government.

This is a unique opportunity to demonstrate leadership and implement long-awaited reform that has the strong backing of stakeholders. Our membership of people with lived experience of disability and mental illness, their families, and sector organisations will be pleased to support ALP reforms that address our concerns and priorities.

We strongly urge you to commit to these reforms as a matter of urgency. I look forward to receiving written confirmation of your commitment.

Yours faithfully

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Cc. Hon. Stephen Dawson MLC, Shadow Minister for Disability Services; Mental Health; Child Protection

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Appendix

The shortlist of the most urgent and essential reforms

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

The background

This law undermines Western Australia's commitment to the rights of people with disability and mental illness and breaches Australia's obligations as a signatory to the 'UN Convention on the Rights of People with Disabilities'.

The media has published a number of cases where Judges and magistrates have noted their decisions to release an accused person without conditions, due to the lack of appropriate dispositions available. This may compromise community safety. Without reform, this situation will continue; we note increasing evidence of the prevalence of Foetal Alcohol Spectrum Disorder.

We further draw your attention to Judges who have imposed indefinite custody orders where they remark that an alternative disposition would be more appropriate in the circumstances. Schedule 1 does not allow the discretion afforded to all others in our community; it discriminates on the basis of mental impairment. This is unacceptable.

The evidence

There is a precedent for judicial discretion on the type and length of sentence handed down for people without a disability or mental illness in WA. Even for murder, life imprisonment is no longer compulsory but presumptive, allowing a judge to take community safety and the circumstances of the person and the offence into account. Yet under CLMIA, such discretion is not available even for far less serious offences.

The law in all Australian jurisdictions, barring WA and the Commonwealth, enables courts to determine the most appropriate order in the circumstances. The Victorian Law Reform Commission recently upheld the status quo, in place since 1997, in which judges determine whether an order is custodial or non-custodial[1].

This same review found that of 149 orders made under the Victorian law in 2000 – 2012, a non-custodial supervision order was made in 68% of cases. Non-custodial orders were made for some serious offences including causing serious injury intentionally. Notably, Judges decided that just under one third of cases warranted custodial detention.

[1] Victorian Law Reform Commission, 2014, 'Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997

2. Limit terms - Custody Orders should be no longer than the term the person would likely have received, had they been found guilty of the offence

The background

The Mentally Impaired Accused Review Board (MIARB) has noted the lack of appropriate facilities and services to enable effective operation of its gradual approach to enable safe, supported release of an accused.[2] This, combined with indefinite orders, has enabled the detention of people under the Act for far longer than were they convicted of the offence and sentenced. This is simply unjust.

Indefinite orders have allowed West Australian governments to avoid responsibility for the development of an effective system of supports and treatments that facilitate recovery, development and progressive return to community living. The evidence shows these can be effective[3]. They would enable your government to meets its commitments to all members of our community.

Article 9 of the International Covenant on Civil and Political Rights stipulates that no one shall be subject to arbitrary detention. To meet this standard, the United Nations Human Rights Committee advises that "any deprivation of liberty must be necessary and proportionate … applied only as a measure of last resort … for the shortest appropriate period of time, and must be accompanied by adequate procedural and substantive safeguards established by law"[4] . The CLMIA Act does not meet these standards; a limiting term would partially achieve this.

The evidence

A limiting term is in place in the majority of Australian jurisdictions including NSW, ACT, SA and the Commonwealth. Victoria has a nominal term in place for custodial and non-custodial orders; at the end of this term, the person's case is subject to a major review.

The Senate is currently investigating indefinite detention in Australia; such detention has come under recent criticism from the United Nations and which we understand the Australian government has made a voluntary commitment to address.

Should ongoing detention be necessary, people with mental illness may still be detained under the Mental Health Act 2014. If people with disability are considered dangerous, there are other mechanisms for ongoing detention such as the *Dangerous Sex Offenders Act 2006*.

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 MIARB proceedings

The background

Procedural fairness and independent judicial oversight are fundamental to our democracy and justice system. Our community supports these as tenets of a contemporary society. They are available to

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[2] The Government of Western Australia, Mentally Impaired Accused Review Board, 'Annual Report 2012-2013'

[3] Fazel, S. et al. (2014) Anti-psychotics, mood stabilisers and risk of violent crime. The Lancet online. http://dx.doi.org/10.1016/S0140-6736(14)60379-2; McCausland R, Johnson S, Baldry E, Cohen A. People with mental health disorders and cognitive impairment in the criminal justice system: cost-benefit analysis of early support and diversion. University of New South Wales, PwC; 2013.

[4] UN Human Rights Committee, *Draft General comment No. 35, Article 9: Liberty and security of person*, UN Doc CCPR/C/107/R.3 (28 January 2013), at [19]

everyone else in our community, but the same basic standards are not available to people with disability and people with mental illness under this law. This is deplorable.

The evidence

WA is the only Australian jurisdiction that does not uphold the person's right to be heard in mental impairment laws. The Victorian law, recently reviewed, upholds these basic rights: a right to be heard, a right to legal representation, a right to reasons for a judge's decision, and a right to appeal.

The right to request a review is in place in NSW, SA, QLD and the ACT. The right to a six monthly review is in place in NSW, QLD, NT, ACT and the Commonwealth. The right to written reasons for a decision exists in Victoria and the ACT.[5]

4. Introduce a special hearing to test the evidence against an accused found unfit to stand trial

The background

This law is in breach of the *International Covenant on Civil and Political Rights,* which stipulates that everyone is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law, and to be presumed innocent until proven guilty by law (Article 14).

To avoid the injustice of unnecessarily detaining or supervising a person where the case would not stand up in court, most Australian jurisdictions hold a special hearing for unfit accused.

Western Australian people have been detained under the CLMIA Act in cases where review of the evidence showed it would be unlikely to have led to a conviction. Such cases attracted significant media attention and community support.

The evidence

WA and QLD are alone in Australia by not holding a special hearing or *prima facie* case to determine that an unfit accused committed the offence. Every other jurisdiction's law has relevant provisions to ensure people are not detained without just cause.

Western Australian stakeholders agree that the introduction of a special hearing to test the evidence against an unfit accused person is one of the most urgent and critical reforms to the CLMIA Act. We established this agreement through extensive consultation.

This procedure is so fundamental to the law in Victoria that the recent review did not even question the need for it. Rather, the Victorian Law Reform Commission recommended improvements to enable the accused to better able to participate in the proceedings in a way more equal to those who are fit. It further noted that the need to do this was one of the strongest themes to emerge from the review.[6] We further commend to you the Aboriginal Legal Service submission to the review of CLMIA, which provides a summary of the situation in other jurisdictions[7].

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[5] *Crime (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic); *Mental Health (Forensic Provisions) Act 1990* (NSW); *Criminal Law Consolidation Act 1935* (SA); *Criminal Code 1899* (Qld), *Mental Health Act 2000* (Qld); *Crimes Act 1900* (ACT); *Criminal Code Act* (NT)

[6] Victorian Law Reform Commission, 2014, 'Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997, p. 307

[7] http://www.als.org.au/index.php?option=com_content&view=article&id=357%3Aalswasubmissiontoclmiaactdp&catid=14%3Asubmissions-articles&Itemid=50

5. Ensure determinations about the release of mentally impaired accused from custody, and the conditions to be attached to such release (if any), are made by the Mentally Impaired Accused Review Board but with a right of review before the Supreme Court on an annual basis.

The background

Impartial decision making and separation of powers are fundamental to justice in a democratic society. As Australians, we hold dear the values of fairness.

The evidence

Victoria, NSW, South Australia, Tasmania, the Northern Territory and the ACT have abandoned the executive model of decision making to ensure custody orders are always subject to judicial discretion. Queensland's Bill currently before Parliament, when passed likely later this year, will enact this.

Victoria's recent review noted that the community had most confidence in the decisions of a court in these matters. Victoria threw out the 'Governor's pleasure' process and upheld people's right to judicial decisions in 1997, only one year after proclamation of the CLMIA Act. Our community has been calling for the same change since then.