WAAMH

Western Australian Association for Mental Health

ADVOCACY POLICY COMMUNITY

DEVELOPMENTAL DISABILITY wa

Briefing

How the 'Review of the *Criminal Law (Mentally Impaired Accused) Act 1996* – Final Report' rates against the Disability and Mental Health Sectors Five Priorities for Urgent Reform

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Purpose

The purpose of this briefing is to evaluate the recommendations of the 'Review of the Criminal Law (Mentally Impaired Accused) Act 1996 – Final Report' (the Report) against the priorities for reform articulated by the disability and mental health sectors and the laws of other Australian jurisdictions.

Background

The *Criminal Law (Mentally Impaired Accused) Act 1996* (the Act) undermines Western Australia's commitment to the rights of people with disability and mental illness. It causes profound disadvantage for people with disability and mental illness in the justice system – some of our state's most vulnerable people at their most vulnerable time.

The Act does not meet Australia's own Forensic Mental Health Standards[1], the standards of contemporary legislation that effectively manage people with mental impairment in the justice system in other Australian jurisdictions. The Act also contravenes Australia's obligations to human rights instruments including the *International Covenant on Civil and Political Rights* and the *United Nations Convention on the Rights of People with Disabilities.*

In 2015, the disability and mental health sectors, including people with lived experience, worked together with legal and forensic experts to agree their five most important priorities for urgent reform. This work was led by the Western Australian Association for Mental Health (WAAMH) and Development Disability WA (DDWA).

If progressed, these reform priorities would redress the most significant human rights abuses of the Act, and align Western Australia's legislation more closely with accepted standards in place across Australia.

In 2013, the Liberal party made an election commitment to review the Act. The 'Review of the *Criminal Law (Mentally Impaired Accused) Act 1996* – Final Report' was subsequently released in April 2016.

This paper sets out how the Report rates against the reform priorities of the disability and mental health sectors and the law in other Australian jurisdictions.

[1] National Statement of Principles for Forensic Mental Health 2002
http://www.health.wa.gov.au/mhareview/resources/documents/FINAL_VERSION_OF_NATIONAL_PRINCIPLES_FOR_FMH-Aug_2002.pdf

Reform Priorities

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.**

This reform has been PARTLY met by the Review:

WAAMH and DDWA support the Review's Recommendation 10 that disposition options for accused found unfit to stand trial be expanded based on the options under the *Sentencing Act 1995.* This will enable the courts to apply a range of orders tailored to the person's circumstances, including community-based and intensive supervision orders.

We reject the Review's position that there was an insufficient basis for recommending changes to Section 21 of the Act. Section 21 requires courts to impose an indefinite custody order for people not guilty due to unsound mind when the offence is a Schedule 1 offence.

WAAMH and DDWA reject Recommendation 13 which proposed the establishment of a working group to consider further such amendments, due to the high level of stakeholder engagement in this issue.

We rebuff the need for further consultation. We call for urgent amendment to the law which removes the requirement for a custody order for Schedule 1 offences on the basis that:

- Requiring the disposition of an indefinite detention order is against all human rights standards[2] and discriminates on the basis of mental impairment;
- There is no basis for treating all Schedule 1 offences, which range from criminal damage to murder, in the same way. Rather, the principle of proportionality should apply;
- 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 Western Australia. 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; and,
- The law in all other Australian jurisdictions, except the Commonwealth, enables judicial discretion to determine whether an order should be custodial or non-custodial taking into account individual circumstances[3]. This position was recently upheld by an extensive review of the Victorian law.[4]

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[2] Including Article 9 of the *International Covenant on Civil and Political Rights,* which 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".

[3] *Crime (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic); *Mental Health Act 2007* (NSW); *Criminal Law Consolidation Act 1935* (SA); *Criminal Code 1899* (Qld), *Mental Health Act 2000* (Qld); *Criminal Justice (Mental Impairment Act) 1999* (Tas); *Criminal Code Act* (NT); *Crimes Act 1900* (ACT)

4 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.

This reform has NOT been met by the Review:

The Review made no recommendation to change the current arrangements in respect of the indefinite nature of custody orders despite the majority of Review stakeholders recommending this. The Review notes a high level of stakeholder engagement in this issue, and recommended that a working group be established specifically to review the operation of indefinite custody orders under the Act. (Recommendation 16)

We strongly recommend urgent reform to end indefinite custody orders. **We reject Recommendation 16 and assert that there is no need for further consultation** on the basis that:

- The majority of stakeholders that made a submission to the Review expressed strong views calling for custody orders to have a limiting term[5]. These included the Inspector of Custodial Services, the Aboriginal Legal Service of Western Australia, and the Supreme, District and Children's Courts of Western Australia[6]. It was also recommended by the Mental Health Advisory Council in an earlier submission to government, prior to reform of the Mental Health Act 1996[7];
- In 2003, the Holman Review recommended the introduction of an interim custody order of a set duration, as an additional option, providing judicial officers with some discretion, except for in Schedule 1 offences;
- Indefinite detention contravenes Article 9 of the *International Covenant on Civil and Political Rights,* which stipulates that no one shall be subject to arbitrary detention[8], the UN Standard Minimum Rules of the Treatment of Prisoners, and international standards for the treatment of people with mental illness and disability;
- 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, and 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 as such detention has come under recent criticism from the United Nations, and we understand the Australian government has made a voluntary commitment to address this;and,
- 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.*

[5] 2016, Government of Westerns Australia, Department of the Attorney General, 'Review of the *Criminal Law (Mentally Impaired Accused) Act 1996* – Final Report', pp 73 - 75.
[6] 2014, Office of the Inspector of Custodial Services, Government of Western Australia, 'Mentally Impaired Accused on 'custody orders': Not guilty, but incarcerated indefinitely'
[7] Undated, Mental Health Advisory Council, 'Submission on Criminal Law (Mentally Impaired Accused) Act 1996 (WA)
[8] 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"

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 Mentally Impaired Accused Review Board proceedings.

This reform has been PARTLY met by the Review:

Excepting the lack of provisions for appeal, WAAMH supports the Review's recommendations to address procedural fairness provisions:

- The right of a mentally impaired accused to appear before and make submissions to the Mentally Impaired Accused Review Board should be reflected in the *Criminal Law (Mentally Impaired Accused) Act 1996* or practice directions (Recommendation 20);
- The right of a mentally impaired accused to be represented by legal counsel or by an advocate, notified of proceedings, and to be provided with copies of relevant materials and written reasons for decisions should be reflected in the *Criminal Law (Mentally Impaired Accused) Act 1996* or practice directions. (Recommendation 21); and
- The *Criminal Law (Mentally Impaired Accused) Act 1996* should be amended to allow the mentally impaired accused or their representative to submit a request to the Mentally Impaired Accused Review Board to review decisions made in respect of their matter. Any such request must be determined by the chairperson within a reasonable period of time. (Recommendation 33).

However, we remain very concerned that there are no recommendations to enable appeal of a judge's decision to impose a custody order, or any decision of the Mentally Impaired Accused Review Board or Attorney General about review, conditions, leave of absence or release[9].

This is a denial of natural justice and breach of international human rights obligations.

The right to an appeal is in place in all Australian jurisdictions except Western Australia and the Commonwealth[10].

WAAMH and DDWA support the Holman Review recommendation that an accused be able to appeal a decision of the Mentally Impaired Accused Review Board to the original court and then the Supreme Court.

[9] The decision that the accused is not mentally fit to stand trial can currently be appealed (Section 12(4) of CLMIA)

[10] *Crime (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic); *Mental Health Act 2007* (NSW); *Criminal Law Consolidation Act 1935* (SA); *Criminal Code 1899* (Qld), *Mental Health Act 2000* (Qld); *Criminal Justice (Mental Impairment Act) 1999* (Tas); *Criminal Code Act* (NT); *Crimes Act 1900* (ACT)

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

This reform has NOT been met by the Review:

Recommendation 9 of the Review is that sections 16(6) and 19(5) of the CLMIA Act be amended to require the judicial officer to have regard as to whether there is a case to answer on the balance of probabilities after inquiring into the question and informing himself or herself in any way the judicial officer thinks fit.

WAAMH rejects Recommendation 9. Opinion provided to WAAMH from Aboriginal Legal Service Western Australia (ALSWA) is that requiring a judicial officer to consider whether there is a case to answer does not meet our request for a special hearing to test the evidence against an accused [11].

While a person who is mentally impaired accused may not have the capacity to participate fully, a special hearing would test the prosecution evidence to ensure it proves beyond reasonable doubt that the accused committed the objective elements of the offence. This is fundamental to the right to a fair trial and occurs for all other accused. There is no justification for treating mentally impaired accused less favourably than other accused in this way.

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.

This procedure is so fundamental to the law in Victoria that the recent review by the Victorian Law Reform Commission did not even question the need for it. Instead, it recommended improvements to enable the accused to participate in the proceedings in a way more that is 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.[12]

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.

This reform has NOT been met by the Review:

The issue of which arm of Government makes decisions about the release of mentally impaired accused was excluded from the Review's Terms of Reference. Although WAAMH and other stakeholders continued to make submissions recommending the removal of executive decision making, the Review did not include this issue in its report, stating it was outside the Terms of Reference.

[11] WAAMH acknowledges the opinion provided by ALSWA, personal communication, 12 April 2016.
[12] Victorian Law Reform Commission, 2014, 'Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997, p. 307

There is strong expert and community agreement this is required. The state's highest judge, Chief Justice Wayne Martin AC, has long advocated for independent judicial officers to review whether ongoing detention of an accused is necessary for the protection of the community[13].

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 that is currently before Parliament, will, when passed likely later this year, enact this.

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. Victoria's recent review noted that the community had most confidence in the decisions of a court in these matters.

We assert our view that executive decision making is among the most problematic provisions of the Act. We recommend urgent reform to ensure decisions about review and release are made by a court, tribunal or the Mentally Impaired Accused Review Board.

Recommendations

1. The Minister for Disability Services Hon. Donna Faragher and the Minister for Mental Health the Hon. Andrea Mitchell actively advocate for the full inclusion of the five priorities for reform set out in this briefing in consultations with the Attorney General and Cabinet in order to table a Bill in parliament during this term of government;
2. Should the Government not intend to proceed with these reforms during this term, advise WAAMH and DDWA so that we may have realistic expectations of Government on this matter; and
3. Should the Government not intend to proceed with these reforms during this term, Minister Faragher and Minister Mitchell endorse all of the five reform priorities in their election commitments for the 2017 election.

[13] http://www.abc.net.au/news/2015-07-10/push-for-mentally-impaired-accused-law-change-in-wa/6611010