



CRIMINAL LAW (MENTALLY IMPAIRED ACCUSED) ACT 1996

Discussion Paper

The Act

The purpose of the *Criminal Law (Mentally Impaired Accused) Act 1996* (the 'CLMIA Act') is to enable the legal administration, care and disposition of people with a mental impairment who have been found to be either mentally unfit to stand trial, or not guilty by reason of unsound mind.

Review of the Act

In the lead up to the last State election a commitment was made to conduct a review of the CLMIA Act which would involve the production of a discussion paper for full public consultation.

The State Government would like to seek your feedback and comments on the operation of the CLMIA Act. Some issues and questions are set out in this Discussion Paper to provide guidance on matters you may wish to consider. You are also welcome to make submissions on any other aspect of the operation of the CLMIA Act.

As this Discussion Paper makes a number of direct references to the CLMIA Act, it is recommended that you read it together with the Act. The CLMIA Act may be downloaded from the State Law Publisher website at www.slp.wa.gov.au.

If you wish to make a submission on the issues raised in this paper, or on any other matters relating to the operation of the CLMIA Act, please do so by **12 noon, Friday 12 December 2014**. Your submission should be addressed to:

Review of the *Criminal Law (Mentally Impaired Accused) Act 1996*
Policy and Aboriginal Services Directorate
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PO Box F317
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Or emailed to CLMIAAct.Review@justice.wa.gov.au

Key Terms

Accused means a person charged with an offence.

Mental impairment means intellectual disability, mental illness, brain damage or senility.

Custody order means an order that an accused be kept in custody in accordance with Part 5 of the CLMIA Act. More information about custody orders is provided on page 15 of the Discussion Paper.

Mentally Impaired Accused Review Board means the board established under Part 6 of the CLMIA Act which is responsible for supervising mentally impaired accused subject to a custody order. More information about the Mentally Impaired Accused Review Board is provided on page 19 of the Discussion Paper.

A note on the usage of ‘mentally impaired accused’

Section 23 of the CLMIA Act defines the term ‘mentally impaired accused’ as

an accused in respect of whom a custody order has been made and who has not been discharged from the order

In previous discussions related to the CLMIA Act, it was observed that stakeholders frequently used the term ‘mentally impaired accused’ more broadly to refer to persons who are found unfit to stand trial or acquitted on account of unsound mind, regardless of whether a relevant custody order had been made. For simplicity, the phrase ‘mentally impaired accused’ is used in this broader sense in this Discussion Paper.

Issues for Consideration

Definition of 'mental illness'

A different definition of the term 'mental illness' may apply in the CLMIA Act depending on the purpose and context of the term.

For the purposes of Part 3 of the CLMIA Act, 'mental illness' is defined as –
“an underlying pathological infirmity of the mind, whether of short or long term duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary stimuli”

This definition is consistent with the definition of 'mental illness' used in the *Criminal Code Act Compilation Act 1913* ('*Criminal Code*'), and reflects the codification of well-accepted common law principles related to the meaning of mental illness for the purposes of the defence under section 27 of the *Criminal Code*.

It is a well-established principle in law that whether a particular mental condition may amount to a mental illness to which the insanity defence applies is not a medical question but a question of law for the Court. This definition of 'mental illness' was examined in some detail by the Law Reform Commission of Western Australia during the course of its review of the law of homicide in 2005 - 2007. The Law Reform Commission concluded that the current definition of mental illness as used in the *Criminal Code* (which is reflected in the CLMIA Act) was adequate for the purposes of applying the legal test under section 27 of the *Criminal Code* and did not require amendment.

In Part 5 of the CLMIA Act, the term 'mental illness' is defined for the purposes of the Part (which relates to the disposition and treatment of mentally impaired accused) to have “the same definition as in the *Mental Health Act 1996*”. Section 4 of the *Mental Health Act 1996* provides –

- (1) For the purposes of this Act a person has a mental illness if the person suffers from a disturbance of thought, mood, volition, perception, orientation or memory that impairs judgment or behaviour to a significant extent.
- (2) However a person does not have a mental illness by reason only of one or more of the following, that is, that the person —
 - (a) holds, or refuses to hold, a particular religious, philosophical, or political belief or opinion;
 - (b) is sexually promiscuous, or has a particular sexual preference;
 - (c) engages in immoral or indecent conduct;
 - (d) has an intellectual disability;
 - (e) takes drugs or alcohol;
 - (f) demonstrates anti-social behaviour.

A definition consistent with that in the *Mental Health Act 1996* was considered appropriate for the purposes of addressing treatment for the mentally impaired accused in Part 5. Similarly, where the term mental illness is specifically used in the context of treatment in section 5 of the CLMIA Act, it is defined to have the same meaning as that in the *Mental Health Act 1996* (rather than that in the *Criminal Code*).

Some stakeholders have noted that having two different definitions of a term in a single Act may be confusing for readers, and suggested that the definition of 'mental illness' be reviewed with a view to developing a single definition which may be applied throughout the CLMIA Act regardless of whether the term is used in the context of a legal test for a criminal defence or medical treatment for a person.

Discussion points:

1. Should the definition of 'mental illness' be amended? Are there any other terms and definitions that should be reviewed?

Statement of objects and principles

It has been suggested that it would be helpful to readers of the CLMIA Act if it contained a set of objects and fundamental principles to provide guidance on what the values and aims of the CLMIA Act are. Such a statement of the CLMIA Act's objects and principles may also assist decision-makers in interpreting the CLMIA Act and determining how best to carry out their functions and responsibilities.

Should a statement of objects and principles be included, some stakeholders have suggested that such a statement should be primarily focused on the needs of the mentally impaired accused.

Other stakeholders, however, have suggested that any statement of objects and principles should contain recognition of victims' rights and the harm suffered by victims of crime. It has been proposed that the acknowledgment of victims of crime, the harm they have suffered and the nature of the alleged offence is information relevant to case management decisions regarding the mentally impaired accused in the contemporary justice system of a civil society. This view is reflected in section 33(5)(f) of the CLMIA Act which allows for consideration to be given to victim impact statements in determining whether the mentally impaired accused should be released into the community.

Discussion points:

2. Should a statement of objects and principles be included in the CLMIA Act? If so, bearing in mind the purpose of the CLMIA Act, what objects and fundamental principles do you think should be included?
3. If the objects and principles include victims of crime, how should the interests of victims of crime be reflected?

Unfitness to stand trial

Criteria

Section 9 of the CLMIA Act provides that --

An accused is not mentally fit to stand trial if the accused, because of the mental impairment, is –

- (a) unable to understand the nature of the charge;
- (b) unable to understand the requirement to plead to the charge or the effect of a plea;
- (c) unable to understand the purpose of a trial;
- (d) unable to understand or exercise the right to challenge jurors;
- (e) unable to follow the course of the trial;
- (f) unable to understand the substantial effect of evidence presented by the prosecution in the trial; or
- (g) unable to properly defend the charge.

The current criteria for mental unfitness to stand trial in the CLMIA Act incorporates the common law ‘Presser Criteria’. The ‘Presser Criteria’ refer to the criteria identified by Justice Smith in the case of *R v Presser* to determine a person’s fitness to stand trial. The Court noted in the case that an accused needs to –

“...be able to understand what it is that he is charged with. He needs to be able to plead to the charge and to exercise his right of challenge. He needs to understand generally the nature of the proceedings, namely, that it is an inquiry as to whether he did what he is charged with. He needs to be able to follow the course of the proceedings so as to understand what is going on in Court in a general sense, though he need not, of course, understand all the formalities. He needs to be able to understand the substantial effect of any evidence that may be given against him; and he needs to be able to make his defence or answer to the charge. Where he has counsel he needs to be able to do this by letting his counsel know what his version of the facts is and, if necessary, telling the Court what it is. He need not have the mental capacity to make an able defence: but he must... have sufficient capacity to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel, if any”.

It has been suggested that an additional criterion be added in relation to the ability of a person to instruct his or her lawyer. The rationale provided for this suggestion is that it could be unjust to the accused if the trial proceeded despite the fact that he or she was unable to participate in a meaningful manner by instructing his or her lawyer.

The addition of a criterion related to a person’s ability to instruct counsel would also bring the legislation in line with equivalent legislation regarding fitness to stand trial in Victoria, the Northern Territory and the Australian Capital Territory.

Discussion points:

4. Should the criteria for determining if a person is mentally unfit to stand trial be amended?

Forum for determining unfitness

Under the CLMIA Act, the question of fitness is determined by the presiding judicial officer in the court where the issue is raised.

Section 12 of the CLMIA Act provides that the question of whether an accused is not mentally fit to stand trial is determined on the balance of probabilities, and the judicial officer may inform himself or herself in any way the judicial officer thinks fit. To this end, the judicial officer may –

- (a) order the accused to be examined by a psychiatrist or other appropriate expert;
- (b) order a report by a psychiatrist or other appropriate expert about the accused to be submitted to the court;
- (c) adjourn the proceedings and, if there is a jury, discharge it;
- (d) make any other order the judicial officer thinks fit.

Some stakeholders from the mental health sector have noted that expert evidence may be crucial to the question of unfitness to stand trial. As such, they have suggested that relevant accused who appear to be unfit to stand trial be referred by the Court to a specialist mental health or disability tribunal instead to make the determination on the accused's unfitness to stand trial.

On the other hand, stakeholders from the legal field have argued that while expert evidence is often influential in the determination of unfitness to stand trial, the notion of unfitness to stand trial is ultimately a legal concept fundamental to criminal proceedings, which has significant legal implications, not least the shielding of the accused from the ordinary criminal justice processes and obligations. As such, the court must not lightly abdicate its responsibility on this issue to an expert medical witness and refer findings of unfitness to a mental health or disability board.

On a practical level, allowing the question of unfitness to stand trial to be determined in court may also have the advantage of avoiding a lengthy separate process in another tribunal. Having the issue dealt with in the court where it was raised would avoid the duplication of evidence and processes, thereby reducing the level of stress on the accused, victims and witnesses.

Discussion points:

5. Should the determination of an accused's unfitness to stand trial be modified? What alternative forums could be utilised?

Special hearing

The key focus of the Court in addressing the issue of unfitness to stand trial is the mental capacity of the person at the time of the hearing (rather than at the time of the alleged offence). If the accused is found on the balance of probabilities to be mentally unfit, the judicial officer must determine whether the accused is likely to become fit within six months. If the accused person is unlikely to, or has not become fit within six months, the Court must, without deciding the guilt or otherwise of the accused, quash the indictment or committal. The Court must then decide whether to release the person unconditionally or make a custody order.

In determining the appropriate disposition to impose, the CLMIA Act requires the Court to consider the following factors:

- (a) the strength of the evidence against the accused;
- (b) the nature of the alleged offence and the alleged circumstances of its commission;
- (c) the accused's character, antecedents, age, health and mental condition; and
- (d) the public interest

The considerations set out in (a) and (b) allow for formal judicial review of the case against the accused by the Court. However, some stakeholders have suggested that this provision is inadequate, and that the CLMIA Act should be amended to introduce a more extensive consideration of the case against the accused following the finding that the accused is mentally unfit to stand trial.

In some Australian jurisdictions such as Victoria and New South Wales, a special hearing may be conducted following a finding of mental unfitness to stand trial to test the strength of the evidence and ensure the court gives due consideration to the likelihood that the accused committed the objective elements of the offence charged. Such a special hearing would provide an opportunity for the accused to put forward a defence or explanation in relation to the offence, notwithstanding the fact that the accused has been found unfit to stand trial and cannot be convicted of the offence.

The concept of the special hearing was developed in Victoria and New South Wales to address a perceived weakness in the legislative framework at the time which did not allow the mentally unfit person the opportunity for acquittal. This meant the accused was detained indefinitely at the Governor's pleasure without any consideration of whether they had actually committed the objective elements of the offence. The special hearing was seen as an opportunity for the accused to be acquitted and released unconditionally.

It has also been suggested that another important purpose of the special hearing in jurisdictions that have them is to help give a sense of closure to victims and preserve their access to victims' compensation. Conversely, requiring victims of crime to present evidence may result in unnecessary re-traumatisation.

In Western Australia, the Court already has the option to release the accused person unconditionally following a finding of mental unfitness to stand trial. The *Criminal Injuries Compensation Act 2003 (WA)* also specifically provides that victims may apply for compensation where the accused is found to be mentally unfit to stand trial for the alleged offence. Given arrangements already in place, it has been suggested that there is no clear need for the introduction of a special hearing for accused found unfit to stand trial. Moreover, it was noted that requiring an accused who has been found unfit to stand trial to participate in a hearing appears inconsistent.

The value of any verdict from a special hearing has also been a subject of debate, given that the evidence presented may be severely limited by the accused's lack of capacity to participate in a meaningful manner. It was suggested that the introduction of the requirement for a special hearing might place the lawyer for the accused in the difficult and potentially untenable position of taking instructions from a client who has been shown to be unable to understand the charge or proceedings, and is unlikely to be able to provide instructions.

Discussion points:

6. Should a special hearing to determine the criminal responsibility of an accused who has been found mentally unfit to stand trial be introduced? If so, what verdicts should be available following a special hearing?
7. If special hearings are adopted, should victims of crime have a right to decline any involvement in such a hearing?

Range of Available Options

The range of options available to the court in relation to mentally impaired accused varies depending on whether the accused was found mentally unfit to stand trial or acquitted on account of unsoundness of mind.

Unfit to Stand Trial

Under section 9 of the CLMIA Act, an accused is unfit to stand trial if the accused, because of mental impairment, is unable to –

- (a) understand the nature of the charge;
- (b) understand the requirement to plead to the charge of the effect of a plea;
- (c) understand the purpose of a trial;
- (d) understand or exercise the right to challenge jurors;
- (e) to follow the course of the trial;
- (f) understand the substantial effect of evidence presented by the prosecution in the trial; or
- (g) properly defend the charge.

The CLMIA Act sets out the proceedings which apply when a court finds that an accused is mentally unfit to stand trial. The CLMIA Act also sets out what orders the court can make in such a situation.

Where the accused is found unfit to stand trial and the court believes that the accused is unlikely to become fit to stand trial within six months, the court only has two options open to it. The court must either release the accused without any conditions, or make a custody order in relation to the accused.

The CLMIA Act also provides that the court cannot make a custody order unless the statutory penalty for the alleged offence is or includes imprisonment, and the court is satisfied the custody order is appropriate having regard to a range of factors.

In light of the complex needs of people with severe mental impairment, it has been suggested that a court may require greater flexibility than that offered by the two orders currently available under the CLMIA Act to take into account the special needs of mentally impaired accused found mentally unfit to stand trial.

The CLMIA Act provides a wider range of dispositions the court can make under section 22 in relation to mentally impaired accused who are acquitted by reason of unsound mind.

Under section 22 of the CLMIA Act, the court may make orders similar to a conditional release order, a community based order or an intensive supervision order under the *Sentencing Act 1995*. Such orders allow a person to be supervised in the community under different levels of restrictions.

Some mental health service providers have suggested that as a matter of consistency the same range of disposition options as that set out in section 22 in relation to mentally impaired accused acquitted due to unsound mind

should be made available to a court addressing mentally impaired accused found unfit to stand trial.

Discussion points:

8. Should the range of options available to the court when addressing an accused who has been found mentally unfit to stand trial be expanded? If so, what options should be considered?

Acquittal on Account of Unsound Mind

A court may find that some people are not criminally responsible for their actions because at the time of the alleged offence, they suffered from a mental impairment which deprived them of the capacity to:

- understand what they were doing ;
- understand the implications of their actions; or
- control their actions.

The CLMIA Act sets out what orders the court can make if it finds that the person is not guilty because of his or her unsound mind at the time of the alleged offence.

Section 20 of the CLMIA Act provides that the Magistrates Court and Children's Court may make an order under section 22 in respect of an accused who is acquitted due to unsound mind for any offence.

Section 21 of the CLMIA Act provides that the District Court and Supreme Court may only make an order under section 22 if the relevant offence is not an offence listed in Schedule 1 of the CLMIA Act. Where the relevant offence is an offence listed in Schedule 1, section 21(a) states the court must make a custody order.

Schedule 1 Offences

The offences listed in Schedule 1 include some of the most serious violent and sexual offences, such as murder, manslaughter, sexual penetration without consent and sexual coercion. Schedule 1 also includes property offences such as criminal damage (section 444 of the *Criminal Code*), and other offences such as indecent assault (which attracts a maximum penalty of five years' imprisonment).

The issue of mandatory custody orders in relation to Schedule 1 offences has sparked considerable interest in the community. Given the complexities which may arise in matters involving people with severe mental impairment who are charged with offences, a number of mental health stakeholders have suggested the District and Supreme Courts would benefit from having the flexibility of a wider range of options to deal with the nuances of individual matters. Removing the requirement to impose a mandatory custody order by abolishing Schedule 1 was proposed as an option for consideration.

Another view which has also been expressed emphasises that as a matter of public safety special attention should be focused on cases where very serious offences have been alleged. Additionally, community safety needs to be paramount in the Court's consideration of these cases. From this perspective, it has also been suggested there is value in retaining a prescribed list of key serious offences in Schedule 1, provided the list was reviewed to ensure that it reflects community views on what serious offences warrant special measures.

Discussion points:

9. Should section 21 and Schedule 1 be amended or abolished?
10. Should any of the current offences in Schedule 1 be removed or new offences added to Schedule 1?

Custody Orders

Overview

The custody order is one of the dispositions a court may make in relation to a mentally impaired accused under the CLMIA Act. It is an order which requires the mentally impaired accused to be detained in an authorised hospital, a declared place, a detention centre or a prison.

If a custody order is made in relation to the mentally impaired accused, he or she remains subject to the custody order until he or she is released by an order of the Governor. The accused may be released either unconditionally or subject to conditions determined by the Mentally Impaired Accused Review Board (the 'Board').

Section 25 of the CLMIA Act provides that the Board must review the case of the mentally impaired accused and determine the place of custody for the accused within five days of the custody order being made.

Under the CLMIA Act, the accused may be placed in an authorised hospital, a declared place, a detention centre or a prison. Section 26 of the CLMIA Act also provides that the Board may change the place where the mentally impaired accused is to be held depending on their individual needs.

As at 30 June 2014 there were 39 mentally impaired accused under the supervision of the Board. Under the current provisions of the CLMIA Act, the Board must review the accused and submit a written report to the Attorney General within eight weeks of the imposition of the custody order and at least once every year.

The CLMIA Act also provides that a report may be made whenever the Board receives a request from the Minister to do so or on its own initiative whenever there are circumstances which justify doing so. This allows the Board flexibility in allocating its resources effectively to conduct more frequent reviews of particular cases where appropriate.

The Board applies a graduated approach to release in relation to the supervision of mentally impaired accused. Under this approach, the Board may grant successively longer periods of leaves of absence to mentally impaired accused where they have demonstrated the ability to maintain a validated level of stability and compliance in the community. While on a leave of absence the accused may be subject to conditions imposed by the Board. The behaviour of the accused during these limited periods of community access under a leave of absence order is taken into account by the Board in determining whether to recommend the release of the accused into the community under a conditional or unconditional release order.

As at 30 June 2014, there were ten accused in an authorised hospital, 18 accused in a prison, and no accused in a declared place or juvenile detention centre.

Availability of Custody Orders

Under the current provisions of the CLMIA Act, the court's power to impose a custody order in relation to a mentally impaired accused depends, in part, on whether the accused was found unfit to stand trial or not guilty by reason of unsound mind.

In relation to an accused found mentally unfit to stand trial the court may only make a custody order if the statutory penalty for the alleged offence is, or includes, imprisonment, and the court is satisfied the custody order is appropriate having regard to -

- a) the strength of the evidence against the accused;
- b) the nature of the alleged offence and the alleged circumstances of its commission;
- c) the accused's character, antecedents, age, health and mental condition; and
- d) the public interest.

No such limitation on the availability of custody orders applies in relation to an accused found not guilty by reason of unsound mind under section 22 of the CLMIA Act. Some stakeholders consider this difference an anomaly and have suggested that section 22 be amended to include a limitation similar to that which applies where the accused is found unfit to stand trial.

An alternative approach to addressing this perceived anomaly is to remove the limitation on the court's ability to impose a custody order in relation to an accused who is mentally unfit to stand trial.

Discussion points:

11. Should the court always have the option of imposing a custody order regardless of what offence the mentally impaired person was charged with? If not, what limitations should apply?

Duration of Custody Order

A matter which has consistently sparked interest and community debate is the issue of the duration of the custody order. A mentally impaired accused remains subject to the custody order until he or she is released by order of the Governor. This means the custody order remains in effect for an indefinite period.

It has been argued the indefinite duration of the custody order may be unfair to the mentally impaired accused as such persons may potentially remain in custody longer than someone who had been convicted of the offence.

On the other hand, some victim advocacy groups have expressed concerns that a mentally impaired accused on a custody order may be released back into the community after only a short period (relative to a sentence a person may have received on conviction) under supervision. These groups have argued that such an outcome may be considered disproportionate to the gravity of the offence, its impact on the community and be disrespectful to victims.

An important factor to consider in discussions on the duration of the custody order is the nature and key purposes of a civil detention order imposed under the CLMIA Act as opposed to a criminal sentence of imprisonment imposed following conviction.

Sentences of imprisonment which are imposed following a conviction are often focused primarily on punishment and deterrence. Civil detention on the other hand is aimed primarily at the supervision, care and rehabilitation of the individual and the protection of the community. Given the different focus and key purposes of the orders, the criminal sentence a person (who does not have the same impairment as the mentally impaired accused) may have received on conviction may not necessarily be a suitable guide for when a mentally impaired accused should be unconditionally released from a civil detention order.

Some stakeholders have also suggested that the offence the accused was charged with should have little or no bearing on the period of supervision the mentally impaired accused is subject to, since people who have been found unfit to stand trial have not had a full trial of the charged offence, and people who have been found not guilty by reason of unsound mind are not criminally responsible for the offence charged.

Discussion points:

12. Should the duration of the custody order be limited in any way by the court? If so, what factors should be taken into account in determining the appropriate duration of a custody order?
13. Should there be a minimum period of detention for a person who is held under the CLMIA Act?

Risk Management

An advantage of the current approach of the indefinite custody order is that it focuses attention on the needs of mentally impaired persons, allowing for the supervision of these persons until such time as they are no longer determined to be a risk to the community or to themselves. From this perspective, the introduction of a requirement to release mentally impaired accused on the expiration of a fixed term may result in some people being released prematurely in relation to their readiness to reintegrate safely into the community. This may pose a serious risk to community safety.

It has been suggested that any risk posed by releasing mentally impaired accused who are assessed as a danger to the community or a threat to themselves at the expiry of a proposed capped term can be managed under the 'involuntary patient' provisions of the *Mental Health Act 1996*.

Section 26 of the *Mental Health Act 1996* provides that a person can only be made an 'involuntary patient' if that person has a mental illness requiring treatment and is considered a danger to self, another person, or property. A person who is made an involuntary patient under the *Mental Health Act 1996* becomes the responsibility of the Chief Psychiatrist, and may be either treated in the community or detained in an authorised hospital. Some commentators have suggested the availability of 'involuntary patient' provisions are sufficient to address any fears about the potential risk to community safety which might result from the introduction of a maximum limit on custody orders.

However, a potential limitation of relying on the *Mental Health Act 1996* to manage such risk is that it fails to cater for the situation of mentally impaired accused who do not have a treatable mental illness, such as accused with a cognitive impairment or intellectual disability. Consequently, a protective order which could apply to all relevant mentally impaired accused regardless of whether they have a treatable mental illness may be required.

Discussion points:

14. What legislative arrangements should be made to manage the risk posed by mentally impaired accused who are assessed as being a danger to themselves or others if they are unconditionally released?

Mentally Impaired Accused Review Board

Overview

The Mentally Impaired Accused Review Board (the 'Board') plays a central role in the operation of the CLMIA Act. The functions of the Board are set out in Part 5 of the CLMIA Act. The constitution of the Board as set out in section 42 of the CLMIA Act provides that the chairperson and community members of the Prisoners Review Board are members of the Board. Membership of the Board also includes a psychiatrist and psychologist, appointed by the Governor.

The Board is responsible for mentally impaired accused who are subject to a custody order under the CLMIA Act. A key role of the Board is to make a written report on each mentally impaired accused within eight weeks of the custody order being made, and thereafter at least once a year to the Attorney General. Each statutory report must include recommendations to the Governor as to whether the accused should be released and if so whether such release should be subject to any conditions.

Part 5 of the CLMIA Act also sets out powers the Board may exercise to facilitate the performance of its functions and responsibilities. For example, section 40 of the CLMIA Act provides that the Board may require the mentally impaired accused to be examined by a psychiatrist or other relevant expert.

The Board is also responsible for determining the place of custody for each mentally impaired accused.

Constitution of the Board – Community Members

The membership of the Board is set out in section 42 of the CLMIA Act –

- (1) The members of the Board are —
 - (a) the person who is the chairperson of the Prisoners Review Board appointed under section 103(1)(a) of the *Sentence Administration Act 2003*;
 - (b) the persons who are community members of the Prisoners Review Board appointed under section 103(1)(c) of the *Sentence Administration Act 2003*;
 - (c) a psychiatrist appointed by the Governor; and
 - (d) a psychologist appointed by the Governor.

Section 42(1)(b) provides that persons who are appointed as 'community members' of the Prisoner Review Board under the *Sentence Administration Act 2003* are automatically 'community members' of the Mentally Impaired Accused Review Board. The attributes of these community members is set out in the *Sentence Administration Act 2003*, which provides that each community member must have one or more of the following attributes –

- (i) the person has a knowledge and understanding of the impact of offences on victims;
- (ii) the person has a knowledge and understanding of Aboriginal culture local to this State;

- (iii) the person has a knowledge and understanding of a range of cultures among Australians;
- (iv) the person has a knowledge and understanding of the criminal justice system;
- (v) the person has a broad experience in a range of community issues such as issues relating to employment, substance abuse, physical or mental illness or disability, or lack of housing, education or training.

Discussion points:

15. Is the membership of the Mentally Impaired Accused Review Board an appropriate mix? Should the membership include people with other qualifications?

Leaves of Absence

The CLMIA Act provides that the Governor may permit the Board to grant leaves of absence to mentally impaired accused. A leave of absence may not exceed 14 days at any one time, and may be either unconditional or subject to conditions determined by the Board. The kinds of conditions that may be included in the leave of absence order may require that the mentally impaired accused –

- (a) undergoes specified treatment or training or other measures that alleviate or prevent the deterioration of the accused's condition;
- (b) resides at a specific place;
- (c) complies with the lawful directions of a supervising officer designated by the Board.

Section 28(3) of the CLMIA Act provides that in determining whether to make a leave of absence order, the Board must have regard to –

- (a) the degree of risk that the release of the accused appears to present to the personal safety of people in the community or of any individual in the community; and
- (b) the likelihood that, if given leave of absence on conditions, the accused would comply with the conditions.

Some stakeholders have noted the listed considerations for making a leave of absence order are less extensive than the prescribed considerations in relation to recommending a general release order under section 33(5) of the CLMIA Act.

Discussion points:

16. Are there any other factors the Board should consider in determining whether to make a leave of absence order?

Board Review Process – Right to Appear

The way the Board conducts reviews of persons under its supervision has been consistently raised as a key issue of concern in the operation of the CLMIA Act.

Section 33 of the CLMIA Act requires the Board to provide reports to the Attorney General which contain the release considerations set out in section 33(5) of the CLMIA Act.

The statutory reports must be provided:

- (a) within eight weeks after the custody order was made in respect of the accused;
- (b) whenever it gets a written request to do so from the Minister;
- (c) whenever it thinks there are special circumstances which justify doing so; and
- (d) in any event at least once in every year.

Section 40 provides that the Board may require a mentally impaired accused to appear before the Board for the purposes of performing its functions. In practice, the Board accepts written submissions from the mentally impaired accused as a matter of course, and the accused's advocate may make submissions in writing or in person to the Board.

While generally supportive of the current practice of the Board in allowing input from mentally impaired accused and their advocates, some stakeholders have pointed out that this approach is at the discretion of the Board and may be subject to change since there is no express right contained in the CLMIA Act for mentally impaired accused or their advocates to appear before the Board while their case is being considered.

Given the potentially severe consequences of the Board's decisions on the lives of the mentally impaired accused, it has been suggested that the accused (and their representative or support person where appropriate) should be provided with an explicit right to appear before the Board whenever their matter is being considered for the purposes of preparing a written report to the Minister. The view has also been put forward that allowing the mentally impaired accused the right to appear would assist in the Board's decision-making processes by increasing transparency, procedural fairness and the quality of information available to the Board.

Discussion points:

17. Should there be a formal process where the mentally impaired accused has a right to appear before the Board? Who should be entitled to appear to represent the accused's interests or provide information to the Board?

Release Considerations

The CLMIA Act provides that the Governor may at any time order that a mentally impaired accused be released by making a release order. Such a release order may be unconditional, or on conditions determined by the Governor. The Governor may be assisted in making release decisions by reports from the Board to the Attorney General under section 33 of the CLMIA Act, which must include a recommendation on whether the Governor should be advised to release the mentally impaired accused.

Section 33(5) of the CLMIA Act sets out the factors which the Board is to have regard to in deciding whether to recommend the release of a mentally impaired accused. These factors are –

- (a) The degree of risk that the release of the accused appears to present to the personal safety of people in the community or of any individual in the community;
- (b) The likelihood that, if released on conditions, the accused would comply with the conditions;
- (c) The extent to which the accused's mental impairment, if any, might benefit from treatment, training or any other measure;
- (d) The likelihood that, if released, the accused would be able to take care of his or her day to day needs, obtain any appropriate treatment and resist serious exploitation;
- (e) The objective of imposing the least restriction of the freedom of choice and movement of the accused that is consistent with the need to protect the health or safety of the accused or any other person;
- (f) Any statement received from a victim of the alleged offence in respect of which the accused is in custody.

It has been suggested that the factors to be considered by the Board as set out in section 33(5) in determining whether to recommend the release of the mentally impaired accused should be reviewed. In particular, it has been suggested the factors should be confined to criteria solely and specifically related to the safety of the community.

A contrary view is that given the potential vulnerability of mentally impaired persons, the Board has an obligation to ensure the safety and welfare of the mentally impaired accused in the community. From this perspective, it may be appropriate for the Board to consider criteria related to the accused's welfare and their ability to care for themselves in the community in determining the accused's readiness to reintegrate safely back in the community.

Discussion points:

18. Are the current criteria set out in section 33(5) of the CLMIA Act appropriate to determining whether the mentally impaired accused should be released? Is there other information the Board needs to consider?

Review of Board decisions

Section 34 of the CLMIA Act provides that as soon as practicable the Board is to give a copy of its report recommending the release or otherwise of the accused to the accused and on request to the accused's lawyer or guardian.

As no specific right of review or appeal is provided in the CLMIA Act, the only avenue for the mentally impaired accused to seek review of the Board's decision is to seek leave for judicial review of the decision by the Supreme Court.

It has been suggested that the grounds for judicial review of administrative decisions are very narrow and that seeking review by the Supreme Court may be a confusing and expensive process for the mentally impaired accused.

Discussion points:

19. Should there be a specific process for appealing against the Board's decisions? Which type of Board decisions should be subject to appeal?

Specific provisions for juveniles

The CLMIA Act applies to juveniles in the same way as it applies to adults. It has been suggested that it would be more appropriate to treat juveniles differently from adults since juvenile mentally impaired accused may have special needs due to their youth and immaturity. In particular, it has been suggested the CLMIA Act should be amended to provide more flexibility for the courts and the Board to take into account the special needs and circumstances of children.

Disposition Options for Juveniles

Under section 22 of the CLMIA Act, the court may make a conditional release order (CRO), a community based order (CBO) or an intensive supervision order (ISO) in relation to a mentally impaired accused found not guilty by reason of unsound mind. However, the court may only make a CRO, CBO or ISO if such orders would have been available under the *Sentencing Act 1995* had the accused been convicted of the offence.

Under Part 7 of the *Young Offenders Act 1994*, the *Sentencing Act 1995* would not apply in relation to a person under the age of 17. As such, a court cannot make a CRO, CBO or ISO in relation to a mentally impaired accused under the age of 17. In such circumstances, the court must either release the juvenile unconditionally or make a custody order in relation to the accused.

Discussion points:

20. Should the CLMIA Act be amended to include specific provisions for juveniles? What juvenile-specific issues should be addressed?

Making your submission

The Department of the Attorney General would appreciate your feedback and comments on the operation of the CLMIA Act. You are welcome to make submissions on the issues raised in this Discussion Paper or on any other aspect of the operation of the CLMIA Act.

We understand that in providing submissions, you may need to provide confidential information. If this is the case, please clearly identify which information is confidential and we will do our best to protect that confidentiality subject to our other legal obligations.

If you wish to make a submission on the CLMIA Act, please do so by **12 noon, Friday 12 December 2014**. Your submission should be addressed to:

Review of the *Criminal Law (Mentally Impaired Accused) Act 1996*
Policy and Aboriginal Services Directorate
Department of the Attorney General
PO Box F317
PERTH WA 6841

Or emailed to CLMIAAct.Review@justice.wa.gov.au