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Advocacy Brief

Criminal Law Mentally Impaired Accused Act 1996:

Priorities for Urgent Reform

Background

The *Criminal Law (Mentally Impaired Accused) Act 1996* (the CLMIA Act) is Western Australian legislation that enables the legal administration, care and disposition of people with a mental impairment who have been found either mentally unfit to stand trial or not guilty due to unsound mind. Under the CLMIA Act, mental impairment means intellectual disability, mental illness, brain damage or senility.¹

Under the Act, people with disability or mental illness can be detained indefinitely without ever being convicted of a crime. They may not have had the evidence against them tested in court, and have no right to appeal this decision.

People with disability, mental health consumers, lawyers, judges, advocates and organisations have been calling for reform to the CLMIA Act for more than a decade.

Following extensive consultation and practice experience, the community-managed mental health, disability and community sectors stand united to call for reform to the CLMIA Act.

In this document, we set out the most critical reforms for urgent change.

Critical priorities for urgent reform

We are clear that wholesale reform of the Act is necessary. However as successive governments have failed to implement extensive reforms, we propose a staged approach.

We advocate for the following reforms to occur immediately, and **request that this government put a Bill to Parliament before the end of the 2015 calendar year** to:

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

¹ *Criminal Law (Mentally Impaired Accused) Act 1996*, Section 8
http://www.slp.wa.gov.au/legislation/statutes.nsf/main_mrtitle_228_homepage.html

stand trial, and repealing Schedule 1 to make Custody Orders no longer compulsory for some offences.

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

Why these changes, now?

The following points explain why we agree that these changes are the most urgent reforms to meet internationally accepted human rights standards, bring Western Australia into line with standards in other states and territories, and result in improved outcomes for people with mental illness and disability in the criminal justice system.

1. The CLMIA Act undermines the progressive mental health and disability reforms implemented by the Western Australian government.
2. This government made an election commitment to amend the Act. Although the government has restated its commitment to reform, we are deeply concerned about the time that has passed and the lack of publicly available information about the Review.
3. To meet the election commitment, a Bill to reform CLMIA must be introduced to Parliament by the end of the 2015 calendar year.
4. Procedural fairness and independent judicial oversight are fundamental to our justice system, and available to everyone else in our community. It is deplorable that the same basic standards of procedural fairness and judicial oversight are not available to people with disability and people with mental illness under this legislation.
5. This law undermines Australia's commitment to the rights of people with disability and mental illness and our obligations as a signatory to the *UN Convention on the Rights of People with Disabilities*. The CLMIA Act is in breach of the Convention - it discriminates on the basis of disability, it does not provide equal access to justice and it not only enables but in some circumstances requires deprivation of liberty by reason of mental impairment.
6. 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).

7. The *International Covenant on Civil and Political Rights* also stipulates that no one shall be subject to arbitrary detention (Article 9). To meet the arbitrary detention standards 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”². None of these standards are met by the CLMIA Act.
8. 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. In fact, even for people charged with the most serious offence - 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.
9. Providing judicial officers with the option of conditional release for mentally impaired accused who are unfit to stand trial will support the protection of the community. Without this option, people who are mentally impaired accused may be released into the community unconditionally, that is, without appropriate supports or supervision requirements.
10. As the judiciary has recently highlighted, the Act in its current form hampers the role of courts to keep the community safe and ensure people accused are dealt with fairly.
11. What we ask for is nothing new - the procedural fairness provisions we request are based on the values of justice and fairness that we all share. They are in place and work well in other Australian states and territories³.
12. The Act is critically outdated and needs to be stepped up in line with the standards implemented in other Australian jurisdictions.

To take action

Contact WAAMH to add your voice to our campaign via the details below.

Contact the Western Australian Attorney General, the Honourable Michael Mischin MLC

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² United Nations Human Rights Committee, 2014, ‘General Comment No. 35 Article 9 (Liberty and security of person)’, page 6 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/244/51/PDF/G1424451.pdf?OpenElement> accessed 3 July 2015

³ Mental Health Law Centre ‘Comparative Law’ available at: <http://www.mhlcwa.org.au/latest-news/criminal-law-mentally-impaired-accused-act-1996-wa-comparative-law-table/>