# Submission to the Senate Inquiry: The indefinite detention of people with cognitive and psychiatric impairment in Australia

WAAMH

Western Australian Association for Mental Health

Peak body representing the community-managed mental health sector in Western Australia

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## 1. Introduction

The Western Australian Association for Mental Health (WAAMH) was incorporated in 1966 and is the peak body representing the community-managed mental health sector in Western Australia. With around 150 organisational and individual members, our vision is that as a human right, every one of us who experiences mental health issues has the resources and support needed to recover, lead a good life and contribute as active citizens.

WAAMH advocates for effective public policy on mental health issues, delivers workforce training and development and promotes positive attitudes to mental health and recovery. Further information on WAAMH can be found at http://www.waamh.org.au

This submission focuses on the indefinite detention of Western Australians with mental illness determined to be unfit to stand trial or not guilty due to unsound mind under the *Criminal Law (Mentally Impaired Accused) Act 1996* (the CLMIA Act). WAAMH has advocated on the reform of the CLMIA Act since 2001. The submission makes recommendations for this and other Australian laws that would bring these laws into accord with contemporary standards and Australia's international human rights obligations.

This submission follows extensive consultation with our members, and mental health, legal, disability and justice stakeholders conducted during the course of 2014 and 2015 to inform recent extensive advocacy for reform of the CLMIA Act in Western Australia. WAAMH acknowledges the ongoing and significant advocacy and contributions of people with lived experience and their representative organisations to this agenda.

## 2. Background

The CLMIA Act is Western Australian legislation that enables the legal administration, care and disposition of people with a mental impairment who have been determined to be either mentally unfit to stand trial or not guilty due to unsound mind.

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.

Under the CLMIA Act, mental impairment means intellectual disability, mental illness, brain damage or senility.[1] CLMIA Act enables indefinite detention of individuals under a Custody Order if they are unfit to plead or not guilty because of their disability or mental illness.

Under the CLMIA 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 the decision to make an indefinite custody order.

People without a disability or mental illness cannot usually be indefinitely detained in the same way, nor have their legal rights denied. Our State thus discriminates against people

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

with disability, causing unequal access to justice and the deprivation of liberty on the basis of mental impairment and intellectual and cognitive disability.

## 3. Political context

Successive Western Australian governments have chosen to preserve the CLMIA Act's unjust status quo despite ongoing and extensive advocacy by eminent stakeholders including the judiciary, Inspector of Custodial Services, mental health consumers and carers, disability advocates, lawyers, community legal organisations and state government departments.

Notably, Professor Darcy Holman reviewed the legislation in 2003, and placed a tortoise on the front cover to indicate the slow pace of change.[2] Since then, the previous Labor government commenced drafting instructions before the government changed and failure to act again became the order of the day.

In 2012, delegates at the Asia Pacific Conference on Mental Health hosted by Richmond Wellbeing agreed a resolution to amend the CLMIA Act put forward by Mental Health Matters 2. The advocacy of these organisations and of people with lived experience at the grassroots level led to examination of CLMIA and its impacts in a further notable review; the 'Review of the Admission or Referral to and the Discharge and Transfer Practices of Public Mental Health' by Professor Bryant Stokes (the Stokes Review). The Stokes Review stated that reform of the CLMIA Act should be a priority, including consideration of the needs of children in relation to the Act, and made recommendations about the forensic mental health system.[3]

All of this activity led to a 2013 election commitment. Subsequently, in 2014 Western Australia's Attorney General announced a Review of the Act and released a Discussion Paper for consultation. WAAMH and Developmental Disability WA (DDWA) led the development of a joint submission to which 14 organisations and individuals signed.[4]

More than a year after submissions closed, the Western Australian government released the CLMIA Act Review Report on 7 April 2016. As such, there has not been time to include analysis of its recommendations throughout this submission; however, our early analysis is that while the report makes many positive recommendations it does not address the most fundamental human rights abuses. Please refer to our media release for more information.[5]

[2] Holman CDJ. 2003, The Way Forward. Recommendations of the Review of the Criminal Law (Mentally Impaired Defendants) Act 1996. Perth: Government of Western Australia
[3] Professor Bryant Stokes, AM, 2012, 'Review of the Admission or Referral to and the Discharge and Transfer Practices of Public Mental Health', Department of Health, Government of Western Australia
[4] WAAMH et al. 'Submission to the Review of the *Criminal Law (Mentally Impaired Accused) Act 1996'* *https://waamh.org.au/assets/documents/systemic-advocacy/submissions-and-briefs/joint-clmia-submission-final-12.12.14.pdf*
[5] 7 April 2016 WAAMH and DDWA, Media release: 'CLMIA Act review a step forward but still falls short' https://waamh.org.au/assets/documents/media-releases/media-release---clmia-act-review-report-a-step-forward-but-still-falls-short----april-2016.pdf

## 4. Priorities for Law Reform

Disillusioned with the prospect of achieving extensive reform, the mental health and disability sectors came together in 2015 to formulate a minimalist reform agenda to redress immediate human rights abuses. While we will continue to advocate for extensive reform we agree the five most urgent reforms are:

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 repeal Schedule 1 of the CLMIA Act 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.

We note that our partner Consumers of Mental Health WA (CoMHWA) does not concur with detention orders being no longer than the length of time the accused may have been sentenced to if they had been they convicted. CoMHWA argues this approach aligns detention with notions of punishment that do not apply to people under mental impairment laws and accordingly criminalises mental illness. Rather, they recommend the development of a civil law framework for the least restrictive treatment and support required to reduce risk of a further act.[6]

However, WAAMH submits that limiting terms is necessary to provide a maximum time limit so that a mentally impaired accused person cannot be indefinitely detained. The law must further allow their earlier release into the community before this date, if assessed as suitable for release. We note our recommendation as a pragmatic approach to secure the end to indefinite detention, and support further consideration of the most appropriate approach that achieves this aim.

[6] Letter to the Attorney General Review of the *Criminal Law (Mentally Impaired Accused) Act 1996. 10 December 2014.* http://www.comhwa.org.au/wp-content/uploads/2014/06/CoMHWALetterReviewCLMIA1996.pdf accessed 6 April 2016.

## 5. Terms of Reference

### a. The prevalence of imprisonment and indefinite detention of individuals with cognitive and psychiatric impairment within Australia;

WAAMH commends to you the Office of the Inspector of Custodial Services (OICS) report 'Mentally Impaired Accused on 'custody orders': Not guilty, but incarcerated indefinitely'[7] which reported on the number of individuals held under the CLMIA Act in Western Australia in 2014. It concluded that the current system for managing these individuals is unjust, under-resourced and ineffective.

OICS found that 63 people had been held under the CLMIA Act since its inception. Of these, over two-thirds (68%) of people ever held under the Act had solely a mental illness. Eleven (17%) had solely a cognitive impairment and 9 (14%) had both conditions. A profile of people held under the Act is set out in the review.

The rates of people held under the CLMIA Act are lower than the rates of people held under mental impairment laws in many other Australian jurisdictions. Anecdotal evidence from lawyers, families and media reports indicates that this is, at least, partly caused by people being advised to plead guilty or electing to plead guilty to avoid indefinite detention under this law. This is simply unjust, as people not morally culpable are being convicted of offences instead of being provided with contemporary procedural safeguards appropriate to their circumstances.

### b. The experiences of individuals with cognitive and psychiatric impairment who are imprisoned or detained indefinitely;

Although the numbers of people detained under the CLMIA Act are few, fear of indefinite detention under this law is palpable for mental health consumers and families who are aware of its presence and impact. It is still the case that many families, who are not familiar with the criminal justice system, believe that the person will receive the care they would normally receive in the health system, in prison.

As OICS noted in its review, the lack of a release date is amongst the most problematic aspects of this draconian law[8]. Margaret Doherty, convenor of Mental Health Matters 2 and a family member of a person with experience of mental illness and the justice system described the impact of indefinite custody orders at a public forum in 2014:

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[7] 2014, Office of the Inspector of Custodial Services, Government of Western Australia, 'Mentally Impaired Accused on 'custody orders': Not guilty, but incarcerated indefinitely' http://www.oics.wa.gov.au/reports/mentally-impaired-accused-custody-orders-guilty-incarcerated-indefinitely/

[8] 2014, Office of the Inspector of Custodial Services, Government of Western Australia, 'Mentally Impaired Accused on 'custody orders': Not guilty, but incarcerated indefinitely'

> "Hope in the face of the possibility of indefinite detention is increasingly difficult to maintain, and yet hope is essential for the human spirit to survive."[9]

Individuals on remand in prisons and their families have a terrible fear that the person's mental health may deteriorate in prison to the point that a person previously fit to stand trial becomes unfit. This is a very real problem because the lack of appropriate and sufficient mental health treatment and support in custody can result in deterioration in mental health, with resultant impact on fitness.

Fear of the CLMIA Act, along with the desire for humane treatment and recovery, is a key driver of the longstanding advocacy by people with lived experience for appropriate mental health services in prisons.[10]

### c. The differing needs of individuals with various types of cognitive and psychiatric impairments such as foetal alcohol syndrome, intellectual disability or acquired brain injury and mental health disorders;

The CLMIA Act applies to children and young people, yet there are no specific provisions to ensure appropriate consideration and safeguards. We note for the Committee's consideration, the case of 'Jason' who has been under an indefinite custody order for more than 12 years following a determination that he was unfit to stand trial for dangerous driving causing the death of a family member at the age of 14 years.[11]

Because 'Jason' was 14 years at the time of the alleged offence, and because of the principles of juvenile justice, if he was fit to stand trial, convicted and sentenced a far lesser sentence would have been imposed. However, the CLMIA Act does not differentiate between children and adults and so, once 'Jason' was determined to be unfit to stand trial; the courts had no other option. This is in contrast to the general criminal justice system where principles require that detaining a young person in custody for an offence should only be used as a last resort and, if required, is only to be for as short a time as is necessary'.[12]

Further, even the community based dispositions that can be imposed on adults found not guilty due to unsoundness of mind in some circumstances under the CLMIA Act, are not available to children at all. As a result, children are treated more severely under the CLMIA Act than adults. This is contrary to all principles of justice and to human rights standards.

Many stakeholders in Western Australia have recommended the introduction of specific provisions regarding children and young people under the age of 18 years[13], in recognition of

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[9] Margaret Doherty speaking at the Forum 'Not Guilty due to Unsound Mind: Achieving Reform of the *Criminal Law (Mentally Impaired Accused) Act 1996*,' 27 October 2014
[10] See for example letters to the Editor, *The West Australian* 30 March 2016 and 1 April 2016.
[11] *The West Australian*, 25 January 2016, 'Two young men show justice options needed'
12 *Young Offenders Act 1994* section 7i
[13] Including the Holman Review, the Commissioner for Children and Young People and the Stokes Review.

their additional vulnerability, needs and development. These should, as far as possible, require consideration of the general principles of juvenile justice set out in the *Young Offenders Act 1994*.

**Recommendation 1: all Australian mental impairment laws include provisions that address the specific needs and circumstances of children and young people who are determined to be mentally impaired accused.**

These should include provisions that: require the courts and review bodies to prioritise the best interests and wellbeing of children and young people, emphasise the least restrictive option, presume against detention orders, allow only time-limited detention orders and require more frequent judicial review. Provisions should enable and require greater involvement of the child/young person's family, significant adults, or authorised representatives in court and review proceedings, and provide access to independent specialist child/youth advocacy.

Assessment processes by professionals qualified in child and adolescent mental health should be fast tracked to minimise time in remand. As fitness to stand trial is based on a person's level of understanding, capacity and development at a given point in time, and can develop over time and with the right supports[14] we recommend a requirement for the provision of support to enable fitness to stand trial, and periodic review of a finding of unfitness.

## d. The impact of relevant Commonwealth, state and territory legislative and regulatory frameworks, including legislation enabling the detention of individuals who have been declared mentally-impaired or unfit to plead;

The CLMIA Act is the relevant Western Australian legislation regarding the detention of people determined to be unfit to plead or not guilty due to unsound mind. In 2014, WAAMH, in partnership with others, made an extensive submission to the Review of the CLMIA Act[15]. To date, the government has not responded to the Review nor released its findings.

The CLMIA Act results in numerous human rights violations. In this section of this submission, WAAMH highlights the most pressing problems with the law. We encourage the Committee to view our full Submission to the CLMIA Review.[16]

[14] The Victorian Law Reform Commission states "unfitness to stand trial is not a 'black and white' issue, but is decision-specific, time-specific and support-dependent." Victorian Law Reform Commission, 2014, Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 – Report, Page xxvi.
[15] WAAMH et al. 'Submission to the Review of the *Criminal Law (Mentally Impaired Accused) Act 1996'* *https://waamh.org.au/assets/documents/systemic-advocacy/submissions-and-briefs/joint-clmia-submission-final-12.12.14.pdf*
[16] Available at https://waamh.org.au/assets/documents/systemic-advocacy/submissions-and-briefs/joint-clmia-submission-final-12.12.14.pdf

Various provisions of the CLMIA Act do not allow the judiciary the discretion afforded to people in many other circumstances (notwithstanding the requirements for mandatory sentencing.

It allows only indefinite detention or unconditional release when people are found unfit to stand trial. The lack of a legal, community based, supervision option for people found unfit to stand trial means some people are released without any conditions, potentially a missed opportunity for the provision of mental health support and treatment and/or ongoing supervision. However, if an accused is acquitted on account of unsoundness of mind, in some circumstances the court may make a conditional release order, a community based order, or an intensive supervision order under the *Sentencing Act 1995*. These options are not available if the person is unfit to stand trial.

Schedule 1 of the CLMIA Act sets out an extensive range of offences for which a custody order must be made ranging from serious assaults and criminal damage to more serious offences such as murder. Yet there is no basis for treating all of these offences in the same way. At times, Judges have been required to impose an indefinite custody order under Schedule 1, where they remark that an alternative disposition would be more appropriate in the circumstances.

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.

Removing judicial discretion is fraught with difficulties because it does not enable individual circumstances to be taken into account.

Additionally, the CLMIA Act affords people no rights of review or appeal, no right to appear, and no right to information or written reasons for a decision. Western Australia 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.[17]

[17] *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)

Amongst the most problematic provisions is the requirement for involvement of the executive arm of government in decisions about whether an individual may be released and under what conditions; people may only be released by approval of the Governor under the advice of the Attorney General. There are no legislated provisions about how and when this should occur and what these officials must consider to support timely and impartial decision making. The decision should lie with the either the Mentally Impaired Accused Review Board, a specialised mental health court or a Mental Health Review Board.

The CLMIA Act is lacking in objects and guiding principles which set out what should be taken into account in the application of the law. Objects should include: giving primary regard to the treatment and care needs of the accused, applying the least restrictive intervention, and the need to protect the community. Among most pertinent of the principles include upholding human rights and procedural fairness, the least restrictive disposition, cultural security, recovery and transition to community, and access to services and supports equal to those available to people in the community.

**Recommendation 2: all Australian mental impairment legislation and any model laws developed should be contemporary, meet the national principles underpinning forensic services, provide for human rights and meet the following minimum standards:**

1. **Judicial discretion to impose a range of options depending on the circumstances**
2. **Removal of indefinite detention so that if a detention order is imposed there is a maximum limit**
3. **Procedural fairness (e.g. right to appeal/review, right to appear, right to reasons for decision)**
4. **Special hearings to test the evidence against an accused found unfit to stand trial to ensure that an individual who is mentally impaired cannot be dealt with more harshly than an individual who is not mentally impaired i.e. charge dismissed if insufficient evidence.**
5. **Removal of executive decision making – decisions to be made by open and accountable bodies such as the Mentally Impaired Accused Review Board, special tribunal or court**

## e. Compliance with Australia's human rights obligations;

The CLMIA Act criminalises mentally impaired accused, who are people that have not been convicted of a crime, by detaining them indefinitely, often in prison, and discriminates against them by providing them fewer rights than other people with mental disorders and other defendants[18].

[18] Dr Sophie Davison, FRCPsych, FRANZCP, Consultant Psychiatrist, Clinical Research Centre, North Metro Mental Health Service MHS MH, personal correspondence 2 March 2016

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 *United Nations Convention on the Rights of People with Disabilities*. The CLMIA Act 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.

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). If a person is found unfit to stand trial and made subject to an indefinite custody order there is no trial and no testing of the facts as to whether they committed the act they are accused of. This could lead to them spending many years in prison for a crime they did not commit.

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"[19] . None of these standards are met by the CLMIA Act.

Indefinite detention of people found not guilty by reason of unsoundness of mind is also in direct contravention of the UN Standard Minimum Rules of the Treatment of Prisoners and internationals standards for the treatment of people with mental illness and disability.

### f. The capacity of various Commonwealth, state and territory systems, including assessment and early intervention, appropriate accommodation, treatment evaluation, training and personnel and specialist support and programs;

People detained under the CLMIA Act can be held in prisons, juvenile detention, authorised hospitals or a declared place. If they have a treatable mental illness, they can be placed in an authorised hospital, as is the situation in in most Australian jurisdictions. However, many are detained in prison due to the dire lack of forensic beds and other appropriate services. This is in breach of the *United Nations Standard Minimum Rules* for the treatment of prisoners, which plainly states that people found not guilty due to unsound mind should not be detained in prison.

The OICS report sets out the location of all individuals held under the CLMIA Act in 2014.[20]

[19] 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]
[20] 2014, Office of the Inspector of Custodial Services, Government of Western Australia, 'Mentally Impaired Accused on 'custody orders': Not guilty, but incarcerated indefinitely'

**Recommendation 3: prison should cease to be a legal place of detention for mentally impaired accused.**

There are 30 secure and 8 open forensic inpatient hospital beds in WA, the same numbers as in 1995 when the prison population was 2197. These beds now serve more than double the prison population of about 5000. The lack of beds has been highlighted in the Stokes Inquiry into mental health services in WA, by the Mentally Impaired Accused Review Board in their annual reports[21] and by the Office of the Inspector of Custodial Services, among others.

At an individual level, indefinite orders prevent people from accessing the services they need to reduce risk, improve their mental health and help them return to productive community life. The OICS review of mentally impaired accused persons in 2014 found that people detained in prison were less likely to progress towards conditional or unconditional release than those in hospital.

Of even more concern, the existence of indefinite orders has allowed West Australian governments to abdicate 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[22].

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.[23] This, combined with indefinite orders, has enabled the detention of people under the Act for far longer than would have been the case if they had been convicted of the offence and sentenced. This is simply unjust.

Numerous reports have noted the dire limit to forensic mental health services in Western Australia, notably the Stokes review. In 2015, the Government of Western Australia released ‘Better Choices. Better Lives. Western Australian Mental health, Alcohol and other Drug Services Plan 2015 – 2025’ (the Plan).[24]

The Plan is the most current summary of the needs in the forensic mental health system in WA. It estimated that the number of forensic beds was less than half those needed to meet demand in 2014.

The Plan endorses the 13 principles in the *National Statement of Principles for Forensic Mental Health (2006)* and sets out a commendable set of plans to expand and improve the

[21] Mentally Impaired Accused Review Board , *Mentally Impaired Accused Review Board Annual report 2012-2013 for the year ended 30 June 2013*. 2013, Government of Western Australia
[22] 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.
[23] The Government of Western Australia, Mentally Impaired Accused Review Board, ‘Annual Report 2012-2013’
[24] http://www.mentalhealth.wa.gov.au/ThePlan.aspx

forensic mental health system and its intersection with the rest of the criminal justice system.

Notable supports for people are intended to include community-based alternatives to prison and hospital for mentally impaired accused with a mental illness who are subject to a custody order under the CLMIA Act. WAAMH is wholly supportive of these plans, yet remains concerned to see their effective and timely implementation in keeping with best practice forensic services and recovery principles.

We understand that business case development and discussions between the Department of Health, Department of Corrective Services and the Mental Health Commission are ongoing to address current service gaps and the implementation of the Plan. We also understand that funding has not been secured for any of these developments.

**Recommendation 4: a range of support and treatment options, including declared places, are developed for the detention, supervision, recovery, treatment, development and support of mentally impaired accused and people being assessed under mental impairment laws, in consultation with all stakeholders.**

These should be contemporary in practice, supporting the recovery and development of individuals.

Problems in the broader criminal justice system for people with mental health issues are extensive, and although not the focus of this submission warrant brief comment. Mandatory sentencing applies to a range of offences in Western Australia, resulting in imprisonment of people with mental health problems when diversion out of the justice system and into contemporary mental health treatment and support would be far more appropriate.

The wider family and community costs at individual and systems levels caused by a lack of effective diversionary programs are extensive and significant.

WAAMH supports the establishment of the Disability Justice Centre[25] run by the Disability Services Commission under the *Declared Places (Mentally Impaired Accused) Act 2015*[26]. However, we are appalled at the community campaign against the centre is its current location. Community based services are a central component of the long term appropriate service mix as well as required to enable the safe and supported transition from custody orders to community living.

[25] http://www.disability.wa.gov.au/individuals-families-and-carers/for-individuals-families-and-carers/disability-justice-centre/
[26] https://www.slp.wa.gov.au/legislation/statutes.nsf/main_mrtitle_13631_homepage.html

## g. The interface between disability services, support systems, the courts and corrections systems, in relation to the management of cognitive and psychiatric impairment;

Detention in prison occurs in large part because there are far too few forensic mental health beds in WA as set out in section f of this submission. While we all agree more beds are needed, investment and focus on prevention and early intervention in forensic mental health is woefully inadequate.

The integration or lack of, between relevant departments and systems has long been highlighted as problematic. The OICS report highlights the need for specific arrangements to be developed to address the needs of this population; we understand that despite recommendations the Department of Corrective Services has not yet developed specific policies and procedures to manage this unique cohort, which has differing needs and requirements under international law.

The treatment and support provided to individuals held under CLMIA differs depending on where the person is detained or resides. This can be:

- in prisons operated or contracted by the Department of Corrective Services
- in secure hospitals operated by the Department of Health
- mentally impaired accused with intellectual or cognitive disability can be detained in the Disability Justice Centre, operated by the Disability Services Commission which opened in 2015
- some are under supervision orders and living in the community.

Individuals on Custody Orders can be moved between detention locations designated under the CLMIA Act on order of the Mentally Impaired Accused Review Board according to the circumstances including the person's health, security rating and management needs, community transition arrangements and not least of all the availability of forensic mental health beds and other appropriate services.

Despite the complexity of multi-agency organisational arrangements, the differing legal status of mentally impaired accused to that of convicted persons, and the high rates of very complex needs, WAAMH understands that there are no specific policies regarding the management of people on custody orders in prison.

WAAMH supports the OICS recommendation that:

> *The Department of Corrective Services, in collaboration with other agencies, should develop specific policies for managing people under the Act, both in custody and in the community. These should include protocols for enhancing care and treatment, managing challenging behaviour, initiating leave of absence and developing release plans. Appropriate staff training should also be provided.*

We also understand there to be no formal clarity about organisational roles and responsibilities for people affected by the CLMIA Act and limited coordination to improve

the treatment, support and release planning for people held under the Act. Joint agency planning has been recommended since the Holman Review of 2003.

We understand that the Department of Health, Mental Health Commission and Department of Corrective Services are now working more closely to identify and plan responses to people held under the CLMIA Act. However, WAAMH has been advised that no further information is available at this time.

**Recommendation 5: the Western Australian government clarify the roles, responsibilities and resourcing arrangements for its agencies for people under the CLMIA Act.**

**Recommendation 6: all relevant government agencies be required to develop policies and procedures appropriate to the needs of mentally impaired accused, their vulnerability within prisons, their status as non-convicted offenders, and inclusive of the engagement of families and carers in support and transition planning.**

Non-government stakeholders that support people with mental illness and disability returning from prison to the community have advised that the information, assessments and reports they require to best support these individuals are not available, and where they do exist, are not provided due to information sharing restrictions. The assessments and reports needed include literacy and numeracy, life skills assessments, physical health, risk assessment, psychological and psychiatric assessments, child protection reports etc.

**Recommendation 7: Memoranda of Understanding are developed which clarify the roles, responsibilities, resourcing and joint planning of all agencies to best enable to safe management and support of mentally impaired accused.**

This must include Department of Health, Mentally Impaired Accused Review Board, Mental Health Advocacy Service, Mental Health Commission, Department of Corrective Services, Disability Services Commission, Department of Housing, Department for Child Protection and Family Support and non-government organisations contracted to support individuals under the CLMIA Act.

## h. Access to justice for people with cognitive and psychiatric impairment, including the availability of assistance and advocacy support for defendants;

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 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.

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.[27]

The CLMIA Act 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. 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 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. 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.

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.[28] 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[29].

Impartial decision making and separation of powers are fundamental to justice in a democratic society. 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.

[27] *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)

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

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

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.

**Recommendation 8: all states laws are amended to ensure equitable access to justice for people with mental illness.**

In WA, involuntary patients under the *Mental Health Act 2015* (MHA), residents of the Disability Justice Centre, and mentally impaired accused detained in an authorised hospital are supported by independent advocacy through the Mental Health Advocacy Service. However, people held under the CLMIA Act and who are held in in prisons have no such right to this same service.

**Recommendation 9: all people held under the CLMIA Act have access to independent advocacy.**

## 6. Other – family members

Under Article 12 of the UNCRPD, people with disability (including mental illness) have an equal right with other persons to have their rights, will and preferences respected. For people subject to the CLMIA Act, explicit provisions are needed to clarify their right to decisions regarding confidentiality, supported decision-making and advocacy/representation arrangements. In addition, the Convention stipulates that the role of family members should be protected, and they should receive the necessary protection and assistance to enable them to support the person with disability to assert their rights.

It must be understood that being unfit to stand trial, or not culpable for the offence, does not equate to a lack of capacity in decision-making, in nominating a representative, or refusing the sharing of information or involvement of others in decisions that affect them. These rights for individuals must be protected.

We have also heard of significant distress from family members and carers who described difficulties in accessing information; providing information to the courts, MIARB or prisons; accessing the individual to provide supports in prisons; and being recognised as a valid interested party or advocate. Many, although not all, of these instances occurred in the context of prisons' policy and the operations of the Mentally Impaired Accused Review Board. Significant distress for the family, and detrimental impacts on the accused such as worsening mental illness, was often the result.

**Recommendation 10: provisions which balance the rights of individuals to enjoy legal capacity on an equal basis with others and to have their rights, will and preferences respected in the exercise of their legal capacity; with the rights of carers, family members or other personal support persons to be notified, informed and involved.**

## 7. Summary of Recommendations

Recommendation 1: all Australian mental impairment laws include provisions that address the specific needs and circumstances of children and young people who are determined to be mentally impaired accused.

Recommendation 2: all Australian mental impairment legislation and any model laws developed should be contemporary, meet the national principles underpinning forensic services, provide for human rights and meet the following minimum standards:

1. Judicial discretion to impose a range of options depending on the circumstances
2. Removal of indefinite detention so that if a detention order is imposed there is a maximum limit
3. Procedural fairness (e.g. right to appeal/review, right to appear, right to reasons for decision)
4. Special hearings to test the evidence against an accused found unfit to stand trial to ensure that an individual who is mentally impaired cannot be dealt with more harshly than an individual who is not mentally impaired i.e. charge dismissed if insufficient evidence.
5. Removal of executive decision making – decisions to be made by open and accountable bodies such as the Mentally Impaired Accused Review Board, special tribunal or court

Recommendation 3: prison should cease to be a legal place of detention for mentally impaired accused.

Recommendation 4: a range of support and treatment options, including declared places, are developed for the detention, supervision, recovery, treatment, development and support of mentally impaired accused and people being assessed under mental impairment laws, in consultation with all stakeholders.

Recommendation 5: the Western Australian government clarify the roles, responsibilities and resourcing arrangements for its agencies for people under the CLMIA Act.

Recommendation 6: all relevant government agencies be required to develop policies and procedures appropriate to the needs of mentally impaired accused, their vulnerability within prisons, their status as non-convicted offenders, and inclusive of the engagement of families and carers in support and transition planning.

Recommendation 7: Memoranda of Understanding are developed which clarify the roles, responsibilities, resourcing and joint planning of all agencies to best enable to safe management and support of mentally impaired accused.

Recommendation 8: all states laws are amended to ensure equitable access to justice for people with mental illness.

Recommendation 9: all people held under the CLMIA Act have access to independent advocacy.

Recommendation 10: provisions which balance the rights of individuals to enjoy legal capacity on an equal basis with others and to have their rights, will and preferences respected in the exercise of their legal capacity; with the rights of carers, family members or other personal support persons to be notified, informed and involved.

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