Indefinite detention of people with cognitive and psychiatric impairment in Australia

Submission by Legal Aid WA

RECOMMENDATIONS

1. It is recommended that legislation dealing with mentally impaired accused charged with criminal offences should:
    a. Allow for a special hearing to determine the criminal responsibility of an accused who has been found mentally unfit to stand trial.
    b. Provide that custody orders should only be imposed when all other options have been ruled out.
    c. Provide that custody orders should continue for no longer than the non-parole period that would have been applicable if the mentally impaired accused had been convicted of the offence for which they were charged.
    d. Give the judiciary discretion to impose a community program order for a person acquitted on account of unsoundness of mind or unfit to stand trial, to enable the person to be treated and or supervised as such a person may not be capable of complying with a standard community order.
    e. Allow for additional disposition options in order to ensure ongoing support and treatment can be provided to mentally impaired accused.
    f. Encourage diversion away from the justice system where appropriate.

2. The release of accused on custody orders should be determined by a court.

3. There should be a legislative imperative on the Department of Corrective Services to promote the release of mentally impaired accused through joining with other agencies in developing care plans for the safe release of accused to the community.

4. NDIS funding guidelines should promote funding for mentally impaired accused to transition from prison into the community on a care plan such as through assisting in finding accommodation and an agency to assist in supporting the individual in the community with daily activities.

5. There should be a person nominated in each State who has the responsibility of promoting the release of accused with mental illness and a separate person who has the responsibility of promoting the release of accused with intellectual disabilities. Each of those people can work with other agencies in developing a care plan for the release of mentally impaired accused. That person can also attend court to explain the care plan to the presiding judge.

INTRODUCTION

1. This submission is Legal Aid WA's response to the inquiry of the Senate Community Affairs Reference Committee into the indefinite detention of people with cognitive and psychiatric impairment in Australia.

2. Legal Aid WA provides criminal justice services throughout the State of Western Australia to people who would otherwise not be able to afford legal representation and has substantial experience in representing accused for determinations of fitness to stand trial, trials where unsoundness of mind is raised as a defence, and also for the representation of people on custody orders before WA's Mentally Impaired Accused Review Board.

3. Mentally impaired accused who come before our courts have diverse backgrounds, including people with foetal alcohol spectrum disorder who are born with cognitive and executive function impairment with poor impulse control, people with mental illness may who have lost contact with their treating psychiatrist or clinic, people with head injuries from motor vehicle accidents and people with dementia.

4. There are many different measures which may be implemented to lessen community risk concerning mentally impaired accused such as psychiatric treatment for an accused with mental illness to the establishment of a behaviour management plan and carer support for an accused with an intellectual disability. It is important that the justice system have a range of options for responding to accused with cognitive or psychiatric impairment, from diversion to custody orders, depending on what is necessary to respond to the degree and severity of the risk of harm to the community.

5. At present in Western Australia people with cognitive and psychiatric impairment are spending many years in prison beyond what they would have served if they were convicted of the offences they were charged with. For some of these accused, the charges they were originally charged with are relatively minor. Courts often indicate

that they would prefer to have more options for the disposition of mentally impaired accused who are unfit to stand trial, beyond the current alternatives of custody order or dismissal. In particular, courts would often prefer the option of promoting the treatment, programmatic intervention or supervision of an accused.

6. Under Western Australia's *Criminal Law (Mentally Impaired Accused) Act 1996* (CLMIA), the criteria for imposing a custody order refer to judging the "appropriateness" of imposing such an order by reference to the case against the accused and the antecedents of the accused but do not indicate the objective by which appropriateness may be judged.

7. As when sentencing a person without mental impairment to imprisonment, a custody order should only be imposed as a last resort when other options have been ruled out. A custody order should only be imposed when it is judged as being necessary to address a risk of serious harm to the community.

8. Where a custody order is made, there is currently no simple mechanism to have the ongoing appropriateness of a custody order or an accused's fitness for trial reviewed by a court.

9. The current release criteria for custody orders include welfare issues such as being able to protect against exploitation and such welfare issues should not be used to keep a person in prison.

10. The matters identified in this paper primarily relate to the State CLMIA. It is considered that this area of the law is one where there could be model legislation developed across Australia. The Federal government also has an important role to play through the application of funding of mentally impaired people through the NDIS to enable such people to transition from prison back into the community in a supported and safe manner.

11. There should be a legislative objective of returning mentally impaired accused to the community by pursuing treatment, programmatic intervention and support both within prison and upon the return of the accused to the community.

12. Legal Aid WA considers the guiding principles for the justice system in dealing with mentally impaired accused should be:
    - Where consistent with community safety, mentally impaired accused should be diverted from the justice system to treatment and support.
    - Where it is necessary due to the need to ensure community safety for the justice system to make an order, then the order which is least restrictive of the liberty of the accused to promote community safety should be made, and courts should have a full range of community orders available to them including community program orders.
    - Community orders may be all that is necessary to promote community safety.
    - Custody orders should only be made where they are necessary to protect the community from serious harm and should be time limited to the non- parole component of a sentence that would otherwise have been imposed.
    - People should not be treated less favourably by the justice system simply because of having a mental impairment.

LEGISLATION

Objects and Principles

13. The CLMIA does not provide a statement of objects or principles. The inclusion of a statement to this effect would provide an aid to interpretation and assist in informing the performance of obligations under the Act.

Special Hearings

14. The CLMIA, unlike legislation in other States, does not allow for a special hearing to determine the criminal responsibility of an accused who has been found mentally unfit to stand trial but rather the court determines the strength of the prosecution case on a review of the prosecution brief.

15. The absence of special hearings in Western Australia puts mentally impaired accused at risk of being dealt with on an incorrect basis, or being dealt with less favourably by the justice system merely because of the accused's mental impairment. Special hearings are important in ensuring the prosecution case is properly tested by the defence so that an assessment may be made as to the reliability of witnesses, and issues such as mistaken identification can be addressed. In this regard, a prosecution case which does not establish guilt beyond reasonable doubt on the physical elements of the offence will result in a finding of not guilty.

16. It is Legal Aid WA's submission that Western Australia's legislative framework is insufficient in terms of its failure to offer special hearings. The complainant, as a key witness, should not be exempted from attending a special hearing. The following verdicts should be available following a special hearing:
    - not guilty;
    - not guilty on account of unsoundness of mind;
    - offence proven (on limited evidence); or
    - offence, which is an alternative to the offence charged, proven (on limited evidence).

Options Where Unfit to Stand Trial

17. The range of options available when an accused has been found mentally unfit to stand trial in Western Australia is inadequate, namely to order release or make a custody order (which continues until an order of release by the Governor).

18. Western Australia's CLMIA does not provide courts with the option of imposing community orders where the court would like to be assured that the accused will be supervised or supported but does not wish to impose a custody order. It is Legal Aid WA's submission that custody orders are only appropriate where they are necessary

to safeguard the community against the risk of serious harm and should only be imposed when all other options have been ruled out.

19. Community based alternatives should be available for an accused who has been determined to be unfit to stand trial, including:
    - conditional release orders ('CRO')
    - community based orders ('CBO')
    - intensive supervision orders ('ISO'); and
    - community program orders ('CPO') (a new order requiring that the accused attend specified treatment, programmatic intervention, or have ongoing supervision or support from a psychiatrist, clinic or other relevant person or agency such as a Disability Services Commission, without having to satisfy all the requirements of the above orders).

Options When Acquitted Due to Unsoundness of Mind

20. Section 21 CLMIA specifies that if an accused is acquitted by a superior court or on appeal of an offence on account of unsoundness of mind, the court –
    - if the offence is a Schedule 1 offence – must make a custody order in respect of the accused;
    - if the offence is not a Schedule 1 offence – may make an order under s 22 in respect of the accused.

21. Section 20 CLMIA specifies that if a court of summary jurisdiction finds an accused not guilty of an offence on account of unsoundness of mind the court may make an order under s 22 to impose a CRO, CBO or ISO.

22. If any of the above orders are breached, the court is required to make a custody order under s 22(3) CLMIA.

23. The operation of s 21 CLMIA restricts judicial discretion, compelling a judge to impose a custody order if an accused is acquitted on account of unsoundness of mind for a Schedule 1 offence. It should be open to the court to impose a community program order for a person acquitted on account of unsoundness of mind to enable the person to be treated, supervised, or to facilitate programmatic intervention when a person may not be capable of complying with another form of community order.

24. Further, s 22(3) CLMIA removes the ability of the judicial officer to tailor the consequences of a breach of an order to the circumstances of the breach and the personal circumstances of the accused. A court should have the full range of options open upon a breach, including making no further order, varying the order, cancelling the order or imposing a different order.

Availability of a Custody Order

25. Custody orders should only be available as an option for offences being dealt with in the District Court or Supreme Court, or before the President of the Children's Court. It should not be open to a Magistrate to impose a custody order.

26. Judicial discretion to impose a custody order should only be open where the safety of the community will be seriously endangered unless a custody order is made. In Western Australia, the Schedule 1 offences to which s 21(a) CLMIA relates is too broad.

27. Alternatively, the list of offences to which this provision applies should be limited to murder, manslaughter, attempt to murder, sexual penetration without consent and aggravated sexual penetration without consent.

28. Before imposing a custody order, the court should be required to satisfy itself that:

- the safety of the community will be seriously endangered unless a custody order is made; and
- no other option would adequately address the risk of serious harm.

Duration of Custody Orders

29. In Western Australia, persons on custody orders often spend many years in custody beyond that which they would have spent in custody had they entered a plea of guilty to the offence(s) for which they were charged. The practical effect of this is that those persons are being punished more severely as a consequence of their mental impairment than those without mental impairment as a result of their being unfit to stand trial or acquitted on account of unsoundness of mind. This is particularly problematic for those deemed unfit to stand trial in the context of there being no trial or special hearing in which to test the prosecution case.

30. Persons with cognitive or psychiatric impairment find it particularly distressing having no set date for release. Prisons normally structure sentence plans so as to prepare a prisoner for release. Without a set date for release, persons on custody orders do not have the opportunity to participate in these sentence plans. Further, persons with mental impairments are often deemed unsuitable for programs within the prison as a consequence of their mental impairment.

31. It is Legal Aid WA's submission that, when a custody order is made, it should be a compulsory requirement of the governing legislation that a maximum duration for the order must be specified on the order, which should equate to no longer than the non-parole period that would have been applicable if the mentally impaired accused had been convicted of the offence for which they were charged.

Risk management

32. It is Legal Aid WA's submission that courts need to be provided with additional disposition options in order to ensure ongoing support and treatment can be provided to mentally impaired accused. This is necessary to minimise the risk of deterioration in the accused's mental condition, thereby ensuring community safety where a custody order would not be necessary or appropriate.

The Mentally Impaired Accused Review Board

33. Given the interests at stake in relation to custody orders, namely the liberty of a person, it is considered that the supervision of people on custody orders should be performed by the superior court that imposed the custody order rather than the Mentally Impaired Accused Review Board which reports to the Attorney General on the way to the Governor.

34. The process of periodic review should involve the automatic provision of a report (including an individual treatment and risk management plan) from the department that has the immediate custody of the accused (mostly the Department of Corrective Services), and either the Health Department (for persons with a psychiatric impairment) or the Disability Services Commission (for persons with a cognitive impairment).

35. The report should also include the results of consultation with other relevant people such as the Office of the Public Advocate, where the accused has a guardian and the family of the accused.

36. The provision of programs or treatment while an accused is in custody should be coordinated by the department with the custody of the accused with services being delivered by that agency and other agencies to address identified treatment needs such as substance abuse counselling or sex or violent offender treatment.

37. All reports should be provided to the defence and submissions addressing the release considerations can then be made. Following review, an order should be made either for leave of absence or for release, either unconditionally or upon conditions. If no order is made then the court should provide a decision setting out what matters need to be attended to and who has responsibility for attending to those matters prior to the next review. Review decisions should be open to appeal. A similar process applies for dangerous offender applications in the Supreme Court.

38. Alternatively, the Mentally Impaired Accused Board ("the Board") should be allowed make decisions in its own right over leaves of absence and release. In Western Australia, the Board makes recommendations for allowing the Board to make leave of absence orders or to allow release, which are received by the Attorney General who then considers the recommendations and makes a decision for them. The information relied upon to make decisions and the decision making process, at each decision making level, is not always clear. This means opportunities to correct erroneous information can be limited. In Western Australia, statutory reports are not provided until after they have been reviewed by the Attorney General. Aside from seeking review by contacting the relevant decision makers, the only other avenue for seeking review is the judicial review process.

39. A state's legislative framework should provide that all materials provided to the Board should be made available to the lawyer representing the accused in advance of the hearing, upon request. Following review, an order should be made either for leave of absence or for release, either unconditionally or upon conditions. If no order is made then the court should provide a decision setting out what matters need to be attended to and who has responsibility for attending to those matters prior to the next review. There should also be a specific statutory right of appeal for review decisions.

40. At the very least, under a legislative framework like that in Western Australia, statutory reports relating to release should be conducted every 6 months and these reports should be provided to the accused and his or her counsel at the same time it is provided to the Attorney General. Further, the Attorney General should have 28 days

in which to make his or her recommendations to the Governor, and the Governor should be required to notify the accused of his or her decision within a further 28 days. There should be a statutory right to appeal the ultimate decision on leaves of absence or release to the Supreme Court. The accused should be advised of the ultimate decision as to his or her release within 56 days of the statutory review date.

41. The process of periodic review should involve the automatic provision of a report (including an individual treatment and risk management plan) from the department that has the immediate custody of the accused (mostly the Department of Corrective Services), and either the Health Department (for people with mental illness) or the Disability Services Commission (for people with an intellectual disability). The report should also include consultation with other relevant people such as the Office of the Public Advocate, where the accused has a guardian and the family of the accused. The provision of programs or treatment while an accused is in custody should be coordinated by the department with the custody of the accused with services being delivered by the agency with the custody of the accused and a range of other agencies to address identified treatment needs such as substance abuse counselling or sex or violent offender treatment. All reports should be provided to counsel for the accused.

Leave of Absence

42. It is Legal Aid WA's submission that accused should be permitted to have leave in the community to assist in their transition from custody to the community while on a custody order as is presently the case in Western Australia.

Right of Appearance

43. Accused should have a right of appearance and to legal representation at any hearings concerning them.

Release Conditions

44. The ongoing appropriateness of a custody order should turn on whether an accused remaining in custody is necessary to ensure the safety of the community from serious harm. In Western Australia, persons on custody orders may not be released due to the commission of relatively minor prison offences or may be returned to custody after relatively minor offences or breaches of conditions and then be subject to the custody order over long periods of time.

45. It is inappropriate to keep a person in prison on the basis that it is considered the best way of meeting their needs or to prevent them from being exploited. Twenty nine percent of persons on custody orders are Aboriginal (Inspector of Custodial Services, 2014, p 13). Some of these people are from traditional communities. The lack of available support in these communities should not be the basis upon which a mentally impaired accused is kept in prison.

46. Under the CLMIA, it is not a release consideration that a mentally impaired accused has since become fit to stand trial, nor is there a mechanism to cancel a custody order should an accused become fit due to improvement in his or her cognitive functioning or psychiatric state.

47. The release considerations for custody orders should encompass the following:
    - whether a custody order is necessary to protect the community from serious harm; and
    - whether conditions may be imposed on the release of the accused to promote community safety, bearing in mind the objective of imposing the least restriction on the freedom of choice and movement of the accused that is consistent with the need to promote the safety of the community.

48. Further, if there is a prima facie case that the accused has become fit to stand trial, the case should be referred to a superior court to make a determination as to whether the accused is in fact now fit to stand trial. If the accused is deemed such, the original order imposed should be cancelled by the court and the DPP should advise whether the accused will be indicted again on the original charge(s), in light of the period that the accused has already spent detained as a consequence of those charges.

Review of Decisions

49. The CLMIA does not provide for a specific process of appeal against a decision of the Mentally Impaired Accused Review Board.

50. Under the CLMIA the Board may seek the power to issue leaves of absence and may make recommendations concerning the release of an accused. It is Legal Aid WA's submission that the Supreme Court should have a supervisory jurisdiction to conduct a merits review of a decision concerning a mentally impaired accused, following a request for review within 28 days of notification of a decision (with the possibility for an extension of time), with the right to seek review being limited to once per calendar year. The Supreme Court should be empowered to order the release of an accused either conditionally or unconditionally.

Specific Provisions for Juveniles

51. The only specific provision relating to juveniles under the CLMIA is that, under s 24(5), a mentally impaired accused who is subject to a custody order is not to be detained in a detention centre unless they are under 18.

52. It is Legal Aid WA's submission that for mentally impaired accused under the age of 18:

- There is a presumption against imposing custody orders for children.

- Schedule 1 of the Act should not apply to children.
- Where a custody order is imposed then fitness should be reviewed at 18.
- Community orders and community program orders should be available as a disposition.
- Custody orders should be time limited.

CARE PLANS - ACCOUNTABILITY, FUNDING, AND COOPERATION BETWEEN AGENCIES

53. Apart from having a strong legislative framework in relation to mentally impaired accused there is a need for:
    - The allocation of responsibility to promote release of accused within relevant government agencies, which in Western Australia are the Department of Corrective Services, the Disability Services Commission and the Mental Health Commission. A specific person in each of these agencies should be charged with promoting the release of a mentally impaired accused and with developing a care plan for the transition of the accused from custody to the community over a period of time. At present there is a particular need for someone to fulfil that role for accused with mental illness in Western Australia. The care plan would address where a person would live, do during the day, the source of support for the individual, risk management and what action could be taken by whom if there is a difficulty with the individual.
    - The person or persons allocated to this role should be charged with identifying what program or treatment should be provided to the individual while they are in custody, facilitating cross agency cooperation in the development of the care plan, and present the care plans to the court or reviewing body, considering the release of the accused.
    - The National Disability Insurance Scheme should be utilised to support accused to transition from prison into the community through funding agencies to provide support and assist in the organising of day activities for individuals.