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15 September 2016

Ms Jeanette Radcliffe
Secretary
Senate Standing Committee on Community Affairs
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Parliament House
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Dear Ms Radcliffe

Inquiry Into The Indefinite Detention Of People With Cognitive And Psychiatric Impairment In Australia

Thank you for your recent email confirming the arrangements relating to the evidence which I will give to the Committee on Monday, 19 September 2016.

I note that one of the topics of interest to the Committee is the review into the Criminal Law (Mentally Impaired Accused) Act. In my letter to you of 4 April 2016 I referred to the fact that the judiciary of Western Australia made a submission to the government in relation to that review. Since that letter was written, the report of the review has been published by government.

My views remain consistent with those enunciated in the submission made to the review. It occurs to me that it might expedite matters at next Monday's hearing if Committee members were made aware of those views in advance, and to that end I am attaching a copy of the submission made to the review.

Yours sincerely.

The Hon Wayne Martin AC
Chief Justice of Western Australia

REVIEW OF THE CRIMINAL LAW (MENTALLY IMPAIRED ACCUSED) ACT 1996

SUBMISSION OF THE SUPREME, DISTRICT & CHILDREN'S COURTS OF WESTERN AUSTRALIA

SUPREME COURT OF WESTERN AUSTRALIA

29 January 2014

REVIEW OF THE CRIMINAL LAW (MENTALLY IMPAIRED ACCUSED) ACT 1996

SUBMISSION OF THE SUPREME, DISTRICT & CHILDREN'S COURTS OF WESTERN AUSTRALIA

Preliminary Comments

The judicial officers of the Supreme, District and Children's Courts of Western Australia appreciate the opportunity to contribute to the current review of *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) (CLMIA Act). Concerns about this area of law, and similar regimes for indefinite preventative detention, are long standing. Over many years now issues have been ventilated by the judicial officers of this state and elsewhere[1] as well as by law reform committees and agencies,[2] but many remain unaddressed. For example, in a 1983 judgment of the Supreme Court of Western Australia, Wickham J noted:

> *I agree with the comment of the Chief Justice that many would say that the law as it stands is inappropriate and unjust. The position now is that a citizen not found guilty of any crime may be kept in prison as if he were a convicted and sentenced criminal (although he is not) and may be kept there indefinitely at the discretion of the Executive.*[3]

More than 30 years later mentally impaired citizens who have been charged but not been found guilty of a crime can continue be kept in prison as if convicted and sentenced criminals, and may be kept there indefinitely at the discretion of the Executive.

While the judicial officers of the Supreme, District and Children's Courts of Western Australia have suggested that a more detailed consideration of the treatment of young people in these circumstances is warranted, it is hoped that other reforms arising from the current review will be implemented swiftly. It is the assessment of these courts that key issues requiring urgent reform are:

- the inclusion of objects and principles in the CLMIA Act to guide its implementation and interpretation (Questions 2 & 3);
- amending the criteria for determining if an accused is mentally unfit to stand trial so that there is greater emphasis upon the accused's decision-making ability, rather than their intellectual ability to understand specific aspects of the legal proceedings, and recognising the potentially significant role of appropriate support for an accused in determining that issue (Question 4);
- requiring that a case to answer be established prior to making any custody or supervisory order under the CLMIA Act, and providing the judicial officer with an option, in the interests of justice, to direct an inquiry (not a special hearing) into whether there is a case to answer (Question 6);

[1] See, eg, Burt CJ in *Tunaj* (1984) WAR 48, 51; the High Court in *Chester* (1988) 165 CLR 611; and Martin CJ in *Tax* [2010] WASC 208.

[2] See, eg, Inter Departmental Committee on the Treatment of Mentally Disordered Offenders, *Report of the Inter Departmental Committee on the Treatment of Mentally Disordered Offenders* (15 February 1989); Law Reform Commission of Western Australia, *The Criminal Process and Persons Suffering from Mental Disorder Report* (1991); Professor C D Holman, 'The Way Forward: Recommendations of the Review of the Criminal Law (Mentally Impaired Defendants) Act 1996' (16 December 2003) ('The Holman review'); Professor Bryant Stokes, *Review of the admission or referral to and the discharge and transfer practices of public mental health facilities/services in Western Australia* (July 2012).

[3] *Wilsmore v Court* [1983] WAR 190, 201.

- expanding the range of options available for accused persons who have been found to be mentally unfit to stand trial (or not guilty by reason of unsoundness of mind) by drawing upon the range of dispositions available under the *Sentencing Act 1995* (WA) and the *Young Offenders Act 1994* (WA) (Question 8).
- abolishing the mandatory imposition of custody orders under CLMIA Act s 21 and Schedule 1 (Question 9);
- legislating so the period of imprisonment likely to have been imposed had the mentally impaired accused been convicted of the offence charged, if any, becomes the maximum duration of any custody order imposed (Questions 11, 12);
- limiting the option to impose or continue a custody (or other supervision) order to when the evidence establishes that such an order is required to protect the community (Questions 12 and 18);
- recognising that the absence in Western Australia of civil legislative and administrative arrangements to care, support and supervise cognitively impaired people in the general community, equivalent to those in other jurisdictions, cannot justify the imposition of indefinite custodial terms on mentally impaired accused (Question 14);
- providing that when a court makes a supervision order, it must specify the department that is responsible for the accused's supervision; and that the department specified is required to prepare a treatment plan for the accused (Question 14);
- removing the role of the Executive/Governor in decisions concerning the case management (including the release) of mentally impaired accused, and instead placing the responsibility in the hands of the courts and the MIARB (Additional Issues);
- using the arrangements for the review of dangerous sexual offenders under the *Dangerous Sexual Offenders Act 2006* (WA) as a model for the court supervision of the management and release of mentally impaired accused persons subject to a supervision order (Additional Issues); and
- considering the Victorian Forensic Leave Panel as a model for the revised role of the MIARB (Additional Issues).

Further detail of the courts' response to each of the Discussion Paper questions and the other matters identified in relation to the operation of the CLMIA Act follow.

Discussion Paper Questions

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

The issue raised in the Discussion Paper is that there are two definitions of 'mental illness' used in different parts of the CLMIA Act:

- one is the definition of mental illness for the purposes of unfitness to stand trial (Part 3). It is linked to the definition from the *Criminal Code* associated with the defence of 'insanity' (s 27). As such, it is the same definition of mental illness which applies to those who are acquitted by reason of unsoundness of mind and over whom the courts exercise powers as set out Part 4 of the CLMIA Act;
- the other definition is from the *Mental Health Act 1996* (WA).[4] It relates to the specific kind of detention to be made available for a mentally impaired accused with a suspected or diagnosed treatable mental illness who is refused bail or who is subject to a custody order. It is relevant to Parts 2 and 5 of the CLMIA Act.

[4] The *Mental Health Act 2014* (WA) has recently been proclaimed but its substantive provisions are yet to go into effect. The amendment of the definition of 'mental illness' appears immaterial to this question.

In its 2007 review of the laws on homicide, the Law Reform Commission of Western Australia considered this issue to the extent that it related to the insanity defence under the *Criminal Code*. It noted that the *Model Criminal Code* 'insanity' defence was quite closely modelled on the Western Australian provision.[5] The Commission commented:

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 judge. It has been observed that the absence of a medical definition of the term 'disease of the mind' (or 'underlying pathological infirmity of the mind') allows the defence a degree of flexibility to adapt to modern diagnostic practices.[6]

The Commission gave detailed consideration to these provisions and sought submissions on the issues. Although it suggested a modernisation of the language and format of the *Criminal Code* s 27, it did not recommend any substantive change.

In the absence of a complete review of the CLMIA Act, the higher courts' preference is to retain the two definitions of 'mental illness'. How an accused should be managed in custody is appropriately determined by reference to the medical definition of mental illness but this is a different issue to legal questions as to fitness or culpability.

Question 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?

The inclusion of a statement of objects and principles in legislation, to shape its development and guide its implementation and interpretation, is currently recognised as best practice. The higher courts support the inclusion of objects and principles in the CLMIA Act on that basis.

The objects and principles identified below, from the 2003 review of the then *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA) chaired by Professor C D Holman ('The Holman review'), provide a suitable foundation, although some additional suggestions follow:

Sets of objects and fundamental principles should be separately added as new sections in part 1 of the CLMID Act. The objects should include:

- *to ensure that mentally impaired [accused (MIAs)] are identified early in their contact with the justice system and that they are diverted away from corrective* services;
- *to ensure that [MIAs] receive the best possible treatment and* care;
- *to ensure that the community is adequately protected*;
- *to ensure that [MIAs] have access to health care and disability support services*;
- *to ensure that agencies responsible for servicing [MIAs] are well coordinated*;
- *to ensure that [MIAs] have legal representation; and*
- *to minimize the adverse effects of becoming a [MIA] on the family life.*

The fundamental principles should include:

- *that [MIAs] are dealt with in court and in proceedings of the Mentally Impaired [Accused] Review Board [(MIARB)] in a manner that respects their rights and dignity, and that accords with principles of natural justice;*

[5] It also noted that the definition of mental impairment draws heavily upon the definition of 'disease of the mind' which underpins the common law defence of insanity as expounded by King CJ in *Radford* ((1985) 20 A Crim R 388, 394) and approved by the High Court in *Falconer* ((1990) 171 CLR 31).

[6] Law Reform Commission of Western Australia, *Review of the Law of Homicide: Final Report* (2007) 229.

- *that the rights of [MIAs] are to be balanced with the rights of the community to be protected;*
- *that acknowledgment is given that due to their mental impairment and sometimes additional and multiple disabilities and social factors, [MIAs] have a range of needs for health care and disability support services;*
- *that access of [MIAs] to health care and disability support services is equivalent to the access of the rest of the community;*
- *that to the extent that a [MIA] does not have sufficient means to pay legal representation, it should be free of charge;*
- *that preference is given to options for care, treatment and rehabilitation of [MIAs] that cause the least restriction of their freedom that is necessary to protect the [MIA] and the community;*
- *that victims [and alleged victims[7]] have the opportunity to be acknowledged and heard*;
- *that when a [MIA] is a person of Australian indigenous background or a person from another distinct cultural or linguistic group, as far as possible, the person's case is managed in a manner appropriate and consistent with the person's cultural beliefs, practices and mores, taking into account the views of the person's family and community.*[8]

A new section should be added to the end of part 1 of the CLMID Act, after the statement of objects and fundamental principles of the Act, which requires the Minister, any judicial officer, members of the [MIARB] and any other person performing any function under this Act or otherwise, in relation to the care and rehabilitation of [MIAs] to seek to ensure that the objects of the Act are achieved as far as it is relevant to the performance of his or her functions under this Act.[9]

It is suggested that there should also be:

- an object and principle to ensure that due consideration is given to the strength of evidence against the accused and the absence of any judicial determination as to the accused's guilt. Specifically the object should require recognition that, in cases of unfitness to be tried, there has been no judicial determination that the accused committed the offence and, in cases of acquittal due to unsoundness of mind, the accused has been found to be not culpable for the offence;
- in addition to the principle relating to the cultural or linguistic background of a mentally impaired accused person, a broader requirement to take into account diversity, drawn from an earlier suggestion of the Mental Health Law Centre (WA):

  To ensure that all persons and authorities performing functions under the Act are sensitive and responsive to diverse individual circumstances including but not limited to those relating to gender, age, culture, spiritual beliefs, family and life style choices…[10]
- consideration be given to adapting and adopting the Victorian Law Reform Commission's recent recommendations relating to specific principles that:
  - recognise the broader impact of such cases:

[7] See discussion in response to Question 3 below.
[8] The Holman review, 2-3.
[9] Ibid, 3.
[10] Mental Health Law Centre (WA) Inc, 'Interaction with the Western Australian Criminal Justice System by People Affected by Mental Illness or Impairment A Policy and Law Reform Submission: *Criminal Law (Mentally Impaired Accused) Act 1996 (WA)*' (2013) 12.

- proceedings should be conducted and, where appropriate and consistent with the rights of the accused, modified in a way that acknowledges the need for support and involves the people affected by the proceedings, including the accused, a family member or a victim [or alleged victim[11]] of the offence.[12]

- apply when a young person is the accused:
  - *proceedings involving an accused who was a child at the time of the alleged offence should as far as possible be conducted in accordance with the specialised principles that apply to an accused in the Children's Court…*
  - *the need to strengthen and preserve the relationship between the child and the child's family*
  - *the desirability of allowing the child to live at home*
  - *the desirability of allowing the education, training or employment of the child to continue without interruption or disturbance, and*
  - *the need to minimise stigma to the child resulting from a court determination…*
  - *that the best interests principles in section 10 and decision-making principles in sections 11 and 12 [of the Children, Youth and Families Act 2005 (Vic)] apply to matters in the Children's Court where unfitness or the defence of mental impairment is raised*[13]
- address issues of unreasonable delay:
  - *[by amendments reflecting] the principle that unreasonable delay is to be avoided and particular consideration is to be given to prioritising matters involving unfitness to stand trial and the defence of mental impairment where:*
    - *the accused is a child or was a child at the time of the alleged offence*
    - *unreasonable delay would be inconsistent with the accused's rights, or*
    - *to support therapeutic outcomes for the accused, victims and family members…*[14]
- address the use of suppression orders through:
  - *A statutory principle … that outlines that the purpose of making a suppression order is to enable the long-term recovery of people subject to the Act and to facilitate community reintegration for the protection of the community.*[15]

Question 3: If the objects and principles include victims of crime, how should the interests of victims of crime be reflected?

The Discussion Paper notes that some stakeholders have suggested that any statement of objects and principles should contain recognition of victims' rights and of the harm suffered by victims of crime. It also notes proposals for this information to be relevant to 'to case management decisions regarding the mentally impaired accused in the contemporary justice system of a civil society' and consistently with s 33(5)(f) of the CLMIA Act.

The qualification in s 33(5)(f) is of note: it refers to the victim of the 'alleged offence' (and s 33(6) also refers to the 'alleged offender'). The alleged nature of the offending is also noted in ss 16(6) and 19(5) and was referred to in the explanatory memorandum in relation to the inclusion of s 33(5)(f) in the CLMIA Act in 2006.

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[11] See discussion in response to Question 3 below.
[12] Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (2014) xxxvi.
[13] Ibid, xxxvi-xxxvii.
[14] Ibid, xxxvii.
[15] Ibid, liii.

While it is recognised by the higher courts that it is appropriate to specifically acknowledge victims in the CLMIA Act, any object and principle to that effect should, consistently with the current legislative provisions, refer to 'victims of alleged offences' at least in relation to an accused who is unfit to stand trial.

If such recognition is to go beyond providing that 'victims [and alleged victims] have the opportunity to be acknowledged and heard' as suggested in the Holman review, it is important that any decision affecting the accused also give due weight to the absence of any judicial determination that the accused committed the offence charged, or to the finding that the accused is not culpable for the offence (see Question 2).

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

The Discussion Paper suggests that the criteria might be amended to include whether the accused is able to instruct his or her lawyer, the rationale being that it would be unjust for the trial to proceed if an accused could not participate in a meaningful manner by instructing his or her lawyer. The Discussion Paper indicates that such a ground is included in the equivalent legislation in Victoria, Northern Territory and ACT. A similar recommendation was also made in the Holman review.[16] Currently in Western Australia however it is already the case that, as Miller J noted in *Dunne*:

although s 9 [of the CLMIA Act] requires that the accused be able to properly defend the charge, it does not require that the accused should know or understand the law. Nor does it require, where the accused is represented by counsel, that she alone must be able to mount a defence.[17]

More broadly, a recent report by the Australian Law Reform Commission (ALRC) suggested that the common law test of unfitness to stand trial, which largely corresponds to the legislative provisions under the CLMIA Act, has been criticised for placing undue emphasis on a person's intellectual ability to understand specific aspects of the legal proceedings and trial process, and 'too little emphasis on a person's decision-making ability'.[18] A risk was also identified that innocent people plead (or are advised to plead) guilty, in order to avoid the consequences of unfitness.

The ALRC further noted that because the test focusses on intellectual ability it sets too high a threshold for unfitness; it is difficult to apply to defendants with mental illness; and even if courts view an accused as incapable of making decisions in their own interests, it did not necessarily mean an accused was unfit to stand trial.[19] Moreover, it noted that the existing tests of unfitness to stand trial do not consider the possible role of assistance and support for defendants.[20]

Drawing upon recent recommendations of the Law Commission of England and Wales and the New South Wales Law Reform Commission, the ALRC recommended that the relevant legislation dealing with unfitness for trial be amended to provide that:

a person cannot stand trial if the person cannot be supported to:

(a) understand the information relevant to the decisions that they will have to make in the course of the proceedings;

(b) retain that information to the extent necessary to make decisions in the course of the proceedings;

[16] Ibid, 6.
[17] [2001] WASC 263, [40].
[18] ALRC, *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (August 2014) 195.
[19] Ibid, 197.
[20] Ibid, 199.

(c) use or weigh that information as part of the process of making decisions;

or

(d) communicate the decisions in some way.[21]

The recommendation is supported for adoption in Western Australia, subject to clarification that where an assessment is made that the person can meet the criteria with support, that support will be available.

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

The Discussion Paper indicates that some mental health sector stakeholders have suggested that the issue of fitness should be referred by the court to a specialist tribunal for determination because 'expert evidence may be crucial to the question of unfitness to stand trial'. The Discussion Paper notes however that stakeholders from the legal field have argued 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.

In the absence of any further information it is difficult to evaluate this proposal; expert evidence is a common feature of court proceedings and, as indicated in the response to Question 1, the issue of fitness to stand trial is ultimately a legal one and not a medical one. No case for change has been made out on this issue.

Question 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?

The Discussion Paper notes that 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.

It also indicates that 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.

The same regime does not apply in Western Australia (although it did previously) and all criminal courts here now have a discretion to release the accused unconditionally if he or she is unlikely to, or has not, become fit to be tried within six months. Other differences identified in the Discussion Paper include that the *Criminal Injuries Compensation Act 2003* (WA) specifically provides that victims may apply for compensation where the accused is found to be mentally unfit to stand trial for the alleged offence, and as a result that issue does not arise in this jurisdiction.

There are two significant concerns about the proposed special hearings to determine the criminal responsibility of an accused who has been found mentally unfit to stand trial. First, such hearings are problematic when conducted by a court purporting to assess and determine the criminal responsibility of the person charged although there is an

[21] Ibid, 200-201.

absence of procedural fairness with the inability of the person charged to participate in any meaningful way in the process. Second, a determination with respect to the criminal responsibility of the person charged carries the risk that the orders made by the court will be seen as a form of punishment for the guilt of the accused, deflecting the focus away from the assessment of risk, which ought to be the focus of any proceedings under the Act, at least in circumstances where the responsibility of the accused has not been established according to a process which is procedurally fair.

Although the strength of the evidence is identified as a factor to be considered by the court before imposing a custody order, it is agreed that there is nonetheless some difficulty in allowing for the detention of an accused person in the absence of any specific determination as to the strength of the evidence against him or her. The Holman review recommended that:

prior to making any form of custody order or order for structured supervision or support, the presiding judicial officer must hear a statement of the alleged offence from the prosecution and determine whether or not the facts are disputed. In addition, sections 16 and 19 of part 3 of the [CLMIA] Act should be amended so that the judicial officer, although the [MIA] is not an offender, has access to a victim impact statement in accordance with division 4 of the Sentencing Act 1995. The same should apply to section 22 of part 4 of the Act.[22]

This recommendation is supported, but it is suggested by a majority of judicial officers that the case against the accused must meet the standard of establishing a case to answer (some preferred a higher standard of proof).

It is also recognised that prosecution cases are often not as strong when evidence is called as appears from the papers. It is suggested that in addition to the above, there should be an option, where the judicial officer considers it to be in the interests of justice, to direct an inquiry into whether there is a case to answer, and include the power to invite the prosecution to call witnesses. The discretion to conduct an inquiry would not normally be exercised when it was clear from the depositions that there was a case to answer. Because the only question that would be addressed in an inquiry is whether there is a case to answer, the difficulties identified with the 'special hearing' process are mitigated.

Question 7: If special hearings are adopted, should victims of crime have a right to decline any involvement in such a hearing?

The higher courts suggest that the judicial officer have a discretion, in the interests of justice, to direct an inquiry into whether there is a case to answer if required. When such an inquiry is directed, material witnesses would be required to give evidence. In most cases the victim of an alleged crime would be a material witness and therefore could not decline to give evidence.

In those cases in which the judicial officer does not consider that an inquiry is required in the interests of justice, witnesses including victims of the alleged crime would not be called to give evidence.

Question 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?

The Discussion Paper notes the limited options available to the courts if an accused is found unfit to plead and is unlikely to become fit within six months. The only options are to release the accused without condition or to issue a custody order – the latter only if the offence includes a term of imprisonment and after considering a number of specified factors. The Discussion Paper notes that in light of the complex needs of people with severe mental

[22] The Homan review 6.

impairment, it has been suggested that a court may require greater flexibility than that offered by the two options currently available.

It is of note that the courts have more options should an accused be acquitted by reason of an unsound mind, and in addition to the above release or custody, may make orders similar to a conditional release order, a community based order or an intensive supervision order. The Discussion Paper records that some mental health providers state that for the sake of consistency the range of disposition options should be the same. When dealing with an accused who was found unfit to stand trial in *Tax*, Martin CJ commented that the court does not have access to 'the range of remedies that the court must have to deal with complex and multifaceted situations such as this'.[23]

The range of options available for an accused who has been found to be mentally unfit to stand trial should be expanded and draw upon the range of dispositions available under the *Sentencing Act 1995* (WA) (adults) and the *Young Offenders Act 1994* (WA) (young people). The options for an accused acquitted by reason of unsoundness of mind should be extended to encompass the same range of dispositions.

Question 9: Should section 21 and Schedule 1 be amended or abolished?

The Discussion Paper notes that, 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 higher courts would benefit from having the flexibility of a wider range of options to deal with the nuances of individual matters. In contrast, however, the Discussion Paper also notes the counter argument that the 'matter of public safety' warrants that 'special attention should be focused on cases where very serious offences have been alleged' and that 'community safety needs to be paramount in the Court's consideration of these cases'.

The statutory requirement that certain charges against a person who has been acquitted by reason of unsoundness of mind, regardless of any other considerations, result in a mandatory custodial order is problematic. Like any mandatory sentencing it risks injustice because it does not allow for a court to properly consider the circumstances of the mentally impaired accused person. As was noted by the Law Reform Commission of Western Australia almost 15 years ago:

The mandatory imposition of detention, whether in a hospital or in a prison, is unjustified because it is based on an assumption that a person who succeeds with a defence of insanity is dangerous and in need of restraint at the time of the trial, a prediction that is apparently based on the commission of the alleged offence.[24]

The importance of protecting the community is not inimical to there being an assessment, rather than an assumption, of the dangerousness which may be posed by an accused. Section 21 and Schedule 1 should be abolished.

Question 10: Should any of the current offences in Schedule 1 be removed or new offences added to Schedule 1?

See the response to Question 9 above, Schedule 1 should be abolished.

[23] [2010] WASC 208 [19].
[24] Law Reform Commission of Western Australia, *The Criminal Process and Persons Suffering from Mental Disorder Report* (1991) 26.

Question 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?

Currently the court can only impose a custody order on a person who is unfit to stand trial if the offence includes a custodial sentence. This limitation does not apply to those acquitted due to unsoundness of mind. The Discussion Paper notes that stakeholders consider this an anomaly and s 22 should include the same limitation that applies to unfitness to stand trial. An alternative proposed in the Discussion Paper would be to remove the limitation for those unfit to stand trial.

It should be noted that the power to impose a custody order upon a mentally impaired accused exists only because that person is subject to criminal charges. Criminal courts have no free floating power to detain people regarded as dangerous; such courts (except under the CLMIA Act) have no jurisdiction over a person who is not guilty of an offence. Even the jurisdiction over those who have been *convicted* of an indictable offence, as elaborated in *Chester*,[25] is only to be exercised in 'very exceptional cases'.

It is the higher courts' recommendation that any custody order imposed on a mentally impaired accused should be limited by reference to the potential sentence which is likely to have been imposed had they been convicted. Specifically if the offence which brings a mentally impaired accused to the attention of the court does not carry a custodial term, the court should not have capacity to make a custody order.

Question 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?

The Discussion Paper notes the argument that 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. It goes on to point out, however, that 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. According to the Discussion Paper, 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.

To reiterate, however, other than for mentally impaired accused who are the subject of a special verdict, there is no judicial determination that an offence has been committed; even a special verdict means that the accused is not culpable – that is, the accused is not to blame. Victims and alleged victims are entitled to be respected, and as previously suggested should be heard and acknowledged, but it is difficult to appreciate how detaining a person for an offence for which they are not culpable, let alone for an offence they may not even have committed, is respectful of victims.

In its discussion of the limits of detention for mentally impaired accused, the ALRC referred to two Western Australian cases, of Mr Marlon Noble and Ms Rosie Anne Fulton, as causing significant public concern about the outcomes of unfitness to stand trial rules.[26] It commented on the absence of statutory limits on the period of detention under the CLMIA Act,[27] and continued that:

[25] (1988) 165 CLR 611.
[26] ALRC, *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (August 2014) 206-207.
[27] Ibid, 209.

In [its] Discussion Paper, the ALRC proposed that state and territory laws governing the consequences of a determination that a person is unfit to stand trial should provide for limits on the period of detention … The Law Council suggested that the period of detention should be stated as not exceeding 'the period for which a court determines the individual would have been detained if convicted, bearing in mind all the circumstances which the court would have taken into account in sentencing the individual'.

The ALRC agrees that limits on the period of detention should be set by reference to the period of imprisonment likely to have been imposed, if the person had been convicted of the offence charged. If they are a threat or danger to themselves or the public at that time, they should be the responsibility of mental health authorities, not the criminal justice system. The framework for detention and supervision orders should be flexible enough to ensure that people transition out of the criminal justice system, in a way consistent with principles of community protection and least restriction of rights.[28]

The point is made again that the only basis upon which the criminal courts can depart from usual legal processes and dispose of a charge by ordering an unconvicted accused into custody is if the accused:

- is mentally impaired;
- has been charged with a criminal offence; and
- has not been convicted.

It is untenable that mentally impaired individuals who have not been convicted may be subject to worse outcomes than apply to those who are not considered mentally impaired and who have been tried and found guilty. The potential custodial term which is likely to have been imposed had the mentally impaired accused been convicted of the charge should properly provide the maximum limit to this extraordinary jurisdiction. Specifically any custody order that may be imposed on a mentally impaired accused should be limited by reference to the period of imprisonment likely to have been imposed had the accused been convicted of the offence charged. Similar limitations should apply to any non-custodial supervision order.

Moreover, the court should only have the option of imposing a custody (or other supervision) order on a mentally impaired accused if the evidence establishes custody is required in order to protect the community. The Discussion Paper states elsewhere that custody under the CLMIA Act is aimed primarily at the supervision, care and rehabilitation of the individual and the protection of the community. However considerations of the protection of the accused, his or her treatment or training needs, and capacity to care for themselves or resist exploitation are only specified as relevant to the Mentally Impaired Accused Review Board's (MIARB's) consideration of release (CLMIA Act, s 33(5)). Such considerations are not included in the provisions related to the making of a custody order, which are specified as being: the strength of the evidence against the accused, the nature of the alleged offence and its circumstances, the accused's character, antecedents, age, health and mental condition and the public interest (CLMIA Act, ss 16(6), 19(5)).[29] Indeed in those instances in which a custody order is mandatory the court is to give consideration to nothing other than the offence alleged (CLMIA Act, s 21, Sch 1).

In 2013, the New South Wales Law Reform Commission noted:

an argument can be made that it is inappropriate to use the coercive apparatus of the criminal justice system (and the associated forensic mental health system) solely for the purpose of preventing an offender, who has not been

[28] Ibid,210.

[29] Such considerations are largely based on the provisions of the original s 622 of the *Criminal Code*, which was enacted in 1918. Section 622 provided for the detention of persons convicted of an indictable offence at the Governor's Pleasure 'having regard to the antecedents, character, age, health, or mental condition of the person convicted, the nature of the offence or any special circumstances of the case'.

convicted of a crime, from harming him or herself. This is particularly so in light of the detailed civil legislative and administrative arrangements that exist to care, support and supervise people in the general community …[30]

More recently the Victorian Law Reform Commission review of the equivalent legislation found that:

The main justification for preventive detention, and the imposition of a CMIA order more specifically, is for the protection of the community. In the Commission's view, where the person does not pose an unacceptable risk to the community, the justification for CMIA intervention ceases to exist. If a person is at risk of harming themselves, and not other people in the community, this risk may be more properly managed within the civil system instead of the CMIA.[31]

As is explained in more detail in the response to Question 14, Western Australia currently lacks the civil legislative and administrative arrangements of other jurisdictions to care, support and supervise cognitively impaired people in the general community. The courts' regime for dealing with mentally impaired accused, however, is not a suitable vehicle to redress this lacuna.

Question 13: Should there be a minimum period of detention for a person who is held under the CLMIA Act?

The only argument raised in the Discussion Paper specifically on this point appears to be related to the position of victim advocacy groups that releasing impaired accused into the community under supervision after only a short period (relative to the 'sentence') is 'disproportionate to the gravity of the offence, its impact on the community and [is] disrespectful to victims'.

However, even for offenders who have been found guilty of an offence there is, in most cases, no mandatory minimum period of detention. No case has been made out for imposing a minimum custodial term on a person who is unfit to stand trial. To do otherwise implies that the legal processes for determining guilt are optional. Arguably the circumstances of an accused who has been found to be not culpable but to have committed the objective aspects of the offence is less clear-cut, but nevertheless it is difficult to reconcile a minimum term of custody with a finding that a person is not culpable. The higher courts do not support minimum terms of detention under the CLMIA Act.

Question 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?

The Discussion Paper argues that an advantage of the current approach, with indefinite custody orders, is that it focuses attention on the needs of mentally impaired persons. This purported focus is difficult to reconcile with the available regime for mentally impaired accused persons, such as Mr Marlon Noble, who may be held in prison for many years with little access to appropriate treatment or training. A submission from the Mental Health Advisory Council, published in 2013, indicates that Mr Noble's predicament may not be an isolated one.[32]

The higher courts' positon is that an end-date for the detention of a mentally impaired accused would be far more likely to bring the needs of the impaired accused into focus. This focus on the needs of the accused would be further strengthened by the adoption of recommendations from the Victorian Law Reform Commission that, should a court

[30] New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Consultation Paper No 6 (2010) 159.
[31] Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (2014) 384.
[32] Mental Health Advisory Council, 'Submission on Criminal Law (Mentally Impaired Accused) Act 1996 (WA)' (2013) 10-11.

make a supervision order, it is required to specify the department that is responsible for the person's supervision; and that the department must prepare a treatment plan for the person.[33]

The Discussion Paper noted that any concerns associated with a mandated release date could be addressed if the accused then became the subject of the involuntary patient regime under the *Mental Health Act*. The problem, as also noted by the Discussion Paper, is that this alternative regime applies only to those who have a treatable mental illness and not to those with cognitive impairment or intellectual disability.

The establishment of a regime equivalent to the *Mental Health Act* involuntary patient regime for accused with cognitive or intellectual impairment who pose a serious risk to themselves or others, as is available in other jurisdictions, is a matter for government. The consequences of its absence in Western Australia was highlighted in the recent case of *AH v WA.*[34] As was noted in that judgment, the only services currently available to assist individuals with intellectual disabilities in the community in Western Australia are voluntary.[35]

The courts' regime for dealing with mentally impaired accused is not a suitable vehicle to redress this lacuna. It cannot match the reach of the involuntary regime under the *Mental Health Act* as it is restricted to only those who are brought before the court on criminal charges, who are so impaired as not to be fit for trial, and it is focussed more on the protection of the community than on the needs of the accused.

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

There is a division of views amongst the judicial officers of the higher courts in relation to the composition of the Mentally Impaired Accused Review Board (MIARB). One view is that there is a practical benefit arising from the current membership of the MIARB, including a serving judge of the District Court, with the majority of members sitting on both the MIARB and the Prisoners Review Board. The judicial officers holding this view consider existing arrangements mean that members have knowledge of community services and funding sources and experience in assessing the degree of risk an accused presents to the personal safety of people in the community.

The alternative view is that there is a real risk that the presence of a serving judge on an executive body such as the MIARB will create the false impression that the body conforms to judicial standards of independence, transparency, and acts in accordance with the standards of procedural fairness expected of a court, when in the case of the MIARB, none of these things are true. Also, having regard to recent jurisprudence with respect to Chapter III of the Constitution, it is generally undesirable for serving judges to perform executive roles. The view of these judicial officers is that the role of chairperson of the MIARB should be filled by a retired judicial officer of sufficient seniority or a person who would be eligible for appointment as a judge of a superior court in Western Australia.

[33] Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (2014) lx. Treatment plans include the treatment to be provided, the expected benefit of the treatment, any restrictive interventions and compulsory treatment that may be used, the level of supervision that will be required to ensure participation in the treatment and the proposed process for transition from the person being a resident of a facility or institution to living in the community and (at 411).
[34] [2014] WASCA 228.
[35] Ibid, [64].

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

The Discussion Paper identifies the issue here as being that the criteria for considering a leave of absence are more limited than the criteria for a general release order.

Decisions as to both leave of absence and general release must take into consideration the degree of risk that the release of the accused appears to present and their likelihood of complying with any conditions imposed. The specified conditions which may apply to both leave or release are also the same, and are relevant to other factors that the Board is required to consider when determining whether to recommend release: the benefits of treatment or training, and the likelihood of an accused being able to take care of their needs. Additional factors relevant to release which appear to have no equivalent in relation to leave are the requirement to consider any statement from a victim of the alleged offence and the principle of least restriction.

The higher courts can see no difficulty in making the factors to which the MIARB currently must have regard when deciding whether to recommend release the same as those which apply to consideration of leave.

Question 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?

The Discussion Paper indicates that at present the MIARB role is to make recommendations to the Minister and the CLMIA Act provides a power for the Board to require an accused to appear before it. It also notes that 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. The Discussion Paper reports concerns that this is a discretionary process and that it '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'.

The Holman review recommended that the CLMIA Act be amended to include a 'new subsection, stating that the [MIA] has a right to appear, to be represented, to hear evidence and to view reports before the [MIARB]'.[36] The higher courts support this recommendation. In accordance with the principles supported in the response to Question 2, to the extent that a mentally impaired accused does not have sufficient means to pay legal representation, it should be provided free of charge.

Question 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?

The Discussion Paper refers to suggestions that the factors to be considered by the Board as set out in s 33(5) in determining whether to recommend the release of the mentally impaired accused should be reviewed and in particular, should be confined to criteria solely and specifically related to the safety of the community. It also refers to the contrary view 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 and as such 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.

[36] The Holman review, 14.

For the reasons already advanced concerns about the potential safety and welfare of the mentally impaired accused in the community would be better advanced by considering the suggestions made in response to Question 14. The criteria for release should be confined solely and specifically to those relevant to the safety of the community as suggested in the response to Question 12.

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

The Discussion Paper notes that the CLMIA Act provides only that the accused, and on request their lawyer or guardian, be given the MIARB's report recommending the accused's release or otherwise. There is no specific right or review or appeal.

The Holman review recommended:

A new section should be placed in part 5 of the CLMID entitled Appeals, in which it should state that, where sufficient grounds exist, an appeal against a decision of the MIDRB lies to the court of original jurisdiction and an appeal against a decision of the court of original jurisdiction lies to the Supreme Court. The section should also clarify that appeals may be made by any person judged by the courts to have a sufficient interest in the matter. [37]

The higher courts' support the adoption of the Holman review recommendation.

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

The inclusion of specific principles applicable to young people falling under the provisions of the CLMIA has been recommended in the response to Question 2. The expansion of the range of options for accused young people who have been found to be mentally unfit to stand trial has been recommended in the response to Question 8. As highlighted in the Discussion Paper, options for the disposition of young offenders who have been acquitted by reason of unsoundness of mind are currently restricted and the higher courts support the view that these should also be extended to include the range of dispositions available under the *Young Offenders Act 1994* (WA).

Those reforms together with the more broadly applicable recommendations included in this submission would address many of the more urgent issues relating to mentally impaired young people who are charged. However, the higher courts suggest that a more detailed consideration of the treatment of young people in these circumstances is warranted and recommends that the government undertake a dedicated review of this area.

Additional issues

The role of the Executive/Governor, the MIARB and the criminal courts

The role of the Executive/Governor, the MIARB and the criminal courts in the management of mentally impaired accused requires substantial reform. The ALRC recently commented on the absence of effective review mechanisms for those detained in Western Australia, noting that mentally impaired accused persons are 'essentially detained at the "Governor's pleasure"'.[38] The higher courts support the Holman review recommendation that the role of the

[37] Ibid, 12.
[38] ALRC, *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (August 2014) 209.

Executive/Governor in decisions concerning the case management of mentally impaired accused should be removed, and instead the responsibility placed in the hands of the courts and the MIARB.[39]

The Victorian structure for managing mentally impaired accused, including the recent recommendations of the Victoria Law Reform Commission, appears to have much to commend it by way of a model for the distribution of powers between the courts and the MIARB and should be considered for adoption in Western Australia. That structure consists of:

- criminal courts which make decisions regarding extended leave, as well as whether a person should be supervised (which includes both in custody and on conditional release), the type of supervision order and any conditions, and the review, variation and revocation of supervision orders; and
- a Forensic Leave Panel which makes the majority of decisions regarding a person's ability to take (shorter-term) leave of absence while under a supervision order, and which is supported by an Internal Leave Review Committee that consists of the Chief Psychiatrist, senior clinical staff and heads of treating teams which consider leave applications, associated treatment plans and ensures relevant clinical issues are considered.

The role of the criminal courts in Victoria appears to a large extent to reflect the role of the criminal courts in the management of Dangerous Sexual Offenders (DSOs) in Western Australia. The *Dangerous Sexual Offenders Act 2006* (WA):

- was intended to provide for the detention or supervision of DSOs to ensure adequate protection of the community and to provide for their control, care or treatment;
- allowed for a continuing detention or supervision order if the court was satisfied that the person is a serious danger to the community in the absence of a continuing detention or supervision order;
- defined a serious danger to the community as an unacceptable risk that the person would commit a serious offence if the person were not subject to a continuing detention or a supervision order;
- provided for annual reviews by the court and for the person subject to a continuing detention order to apply for review at any time; and
- provided for procedural rights and psychiatric reports for reviews and for appeals to the Court of Appeal.

The higher courts recommend that the DSO review arrangements be used as a model for the courts' supervision of the management and release of mentally impaired accused persons subject to a supervision (including custody) order (although limited by a finite maximum term as discussed in response to Question 12). The Victorian Forensic Leave Panel should be considered as a model for the revised role of the MIARB.

Hospital and assessment orders

The Holman review noted that there was a need:

for a simplified approach that relies on a unitary concept of assessment order, rather than distinguishing between an assessment order and a hospital order. Under this recommendation, what was a hospital order becomes one possible form of assessment order. The review also considers that the criteria in subsection 5(2)(b) and (c) (ie, in order to protect health or safety or to prevent damage to property; and refusal or inability to consent to treatment) are an unnecessary complication in this new format, because they do not apply to mental impairment other than mental illness. The recommended approach makes it clear that it is for a psychiatrist, not the judicial officer, to determine if a defendant sent to an authorized hospital for assessment should become an involuntary patient. The review has accepted argument that the initial time limit for return of the defendant to court should be retained as seven days, as

[39] The Holman review, 11.

the availability of an extension for up to another 14 days should be sufficient to solve the problem of premature return, without encouraging inefficiencies in the system …

The use of audiovisual means to perform an assessment anticipates the future availability of such facilities in declared places in rural and remote areas. The Disability Services Commission does not support the recommendation to enable assessments to occur in declared places (other than an authorized hospital), albeit that the Commission has acknowledged that the recommendation is potentially beneficial to MIDs in rural and remote areas.[40]

The higher courts support the adoption of the Holman review recommendations in relation to CLMIA Act s 5.

[40] Ibid, 17.