

Review Criminal Law (Mentally Impaired Accused) Act 1996

To

Review of the Criminal Law (Mentally Impaired Accused) Act 1996
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1 Introduction

- 1.1 The Law Society of Western Australia (Society) applauds this review of the *Criminal Law (Mentally Impaired Accused) Act 1996 (CLMIA Act)*.
- 1.2 The Society is the peak professional association for lawyers in Western Australia. Established in 1927, the Society is a not-for-profit association dedicated to the representation of its members and the enhancement of the legal profession through being a respected leader and advocate on law reform, access to justice and the rule of law.

2 Executive Summary

- 2.1 Under the *CLMIA Act*, a person may be placed under an indefinite custody order if it is found that they lacked capacity at the time of the offence or cannot understand court proceedings.
- 2.2 The *CLMIA Act* applies to persons with mental illness or cognitive impairment including acquired brain injury, foetal alcohol spectrum disorder and senility. While those who are mentally ill can be placed in a specialised psychiatric ward, the only option for people with cognitive impairment is to go to prison.
- 2.3 With indefinite detention people are often gaoled for longer periods than they would have been gaoled if convicted.
- 2.4 Custody orders made for mentally unfit people accused of crimes can exceed in length the period that it would have been appropriate for the person to spend in prison had they been mentally fit and convicted of the offences charged.
- 2.5 The Society is strongly of the view that indefinite detention for persons suffering from mental impairment is unjust and unacceptable. New laws are needed to best protect the community but without unnecessarily interfering with the liberty of persons suffering from mental impairment.

3 Fitness to stand trial

- 3.1 The common law test of fitness to plead or fitness to be tried generally involves determining whether the accused has sufficient intellectual capacity to understand the court proceedings brought against them. The issues relevant to identifying fitness were identified in *R v Pritchard*¹:
"There are three points to be inquired into: - First, whether the prisoner was mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper defence - to know that he might challenge any of you to whom he may object - and to comprehend the details of the evidence".

¹ [1836] 7 Car & P 303; 173 ER 135

Relevant provisions of the *CLMIA Act*

- 3.2 All Australian States and Territories have legislation dealing with a person's fitness to plead or fitness to stand trial in criminal proceedings. In Western Australia, fitness to plead is dealt with in the *CLMIA Act* for both summary and indictable offences.
- 3.3 The *CLMIA Act* creates a rebuttable presumption an accused is mentally fit to stand trial and provides a person is unfit to stand trial because of a mental impairment, if they are unable to:
- understand the nature of the charge;
 - understand the requirement to plead to the charge or the effect of a plea;
 - understand the purpose of a trial;
 - understand or exercise the right to challenge jurors;
 - follow the course of the trial;
 - understand the substantial effect of evidence presented by the prosecution in the trial; or
 - properly defend the charge.
- 3.4 The *CLMIA Act* distinguishes between proceedings in courts of summary jurisdiction and proceedings in the Supreme Court and District Court.

Summary Offences

- 3.5 For summary offences, the court decides the issue if the accused's mental fitness to stand trial is raised.²
- 3.6 If the court is satisfied the accused will not become mentally fit to stand trial within 6 months, the court must dismiss the charge and either release the accused or make a custody order.
- 3.7 If the court is satisfied the accused may become mentally fit to stand trial within 6 months, the court must adjourn the proceedings.
- 3.8 While proceedings are adjourned, the court is satisfied the accused will not become fit for trial within the 6 months, the court may order release of the accused or make a custody order.

Indictable offences

- 3.9 In Supreme Court and District Court proceedings³, the judge decides the accused's mental fitness to stand trial.
- 3.10 If the judge is satisfied the accused will not become mentally fit to stand trial within 6 months, the court must quash the indictment (or if there is no indictment, dismiss the charge and quash the committal) and either release the accused or make a custody order.

² CLMIA Act s 16

³ CLMIA Act s 19

- 3.11 If the judge is satisfied the accused may become mentally fit to stand trial within 6 months, the judge must adjourn the proceedings. While proceedings are adjourned, if the judge is satisfied the accused will not become fit for trial within the 6 months, the judge may release the accused or make a custody order.

When the question of mental fitness may be raised

- 3.12 The question of whether an accused is mentally fit to stand trial may be raised⁴ by the prosecution, defence or the presiding judicial officer on his or her own initiative and can be raised more than once in a trial. In a court of summary jurisdiction, the question may be raised at any time before or during the trial of the accused. In the Supreme Court or the District Court, the question may be raised at any time —
- before an indictment is presented to the court against an accused committed to the court for trial;
 - after an indictment is presented to the court against an accused and before a jury is sworn; or
 - at any time after a jury is sworn and during the trial of the accused.
- 3.13 The question of whether an accused is not mentally fit to stand trial⁵ is to be decided by the presiding judicial officer on the balance of probabilities after inquiring into the question and informing him or herself in any way the judicial officer thinks fit.
- 3.14 For the purpose of the inquiry the judicial officer **may** —
- order the accused to be examined by a psychiatrist or other appropriate expert;
 - order a report by a psychiatrist or other appropriate expert about the accused to be submitted to the court;
 - adjourn the proceedings and, if there is a jury, discharge it;
 - make any other order the judicial officer thinks fit;
- and **may** make a report about the accused available to the prosecutor and to the accused, on such conditions as the officer thinks fit.

Comment and recommendations

- 3.15 While it is arguable that a panel of experts should determine fitness to stand trial rather than a judicial officer, the notion of unfitness to stand trial is ultimately a legal concept and therefore should ultimately be determined by a judicial officer. However, the judge should have the benefit of appropriate expert opinion.
- 3.16 The *CLMIA Act* should be amended to set clearer standards for assessing fitness to stand trial.
- 3.17 Clearer standards for deciding the question of mental fitness ought to make it mandatory for the judicial officer to take expert advice relevant to the impairment of the accused person, including multi-disciplinary assessment and advice where appropriate, once satisfied at a prima facie level that the accused may not be fit to stand trial. Reports should have to be obtained from relevant professionals in psychiatry and psychology and if the person has a cognitive or intellectual disability,

⁴ CLMIA Act s 11

⁵ CLMIA Act s 12

from a clinician with experience in disability. For example, an accused person with an intellectual disability who scores less than 80 in an intelligence quotient (IQ) test would be found unfit to plead but could still be functioning and a person scoring slightly higher could be non-functioning.

- 3.18 Intellectually disabled cognitively impaired accused should have the same options of conditional release orders available to them as people found to be unsound of mind.
- 3.19 Judicial officers should also be able to take into account other relevant evidence (e.g. from a guardian or family member) when determining fitness to stand trial together with the provision of supports that are appropriate to the nature of the accused's impairment.
- 3.20 All persons on remand for assessment orders should have a right to independent adequately resourced legal representation. Persons who are found unfit to plead due to intellectual or cognitive disability and who would be detained in a declared place under the *CLMIA Act*, are given a right to independent legal advocacy.
- 3.21 There should be provision in the *CLMIA Act* to allow the accused to be remanded in the community with supports pending a determination of fitness.
- 3.22 The *CLMIA Act* should make provision for extending the timeframes for determining fitness to stand trial, within a maximum cap, where expert advice indicates that a person could be fit to stand trial with supports or treatment.
- 3.23 Under the current provisions of the *CLMIA Act*, persons found unfit to stand trial are denied the opportunity to have the evidence against them tested in court. It is recommended that consideration be given to introducing a requirement for a special hearing. The prosecution must be frank with the court regarding prospects and evidence, and be the model litigant in such a hearing. It is suggested that the court take a more inquisitorial approach involving relevant experts, guardians and family members.
- 3.24 If the evidence is found not to satisfy the normal threshold for proceeding with a prosecution (ie. that there is a *prima facie* case), then any charges should be dismissed and the person released.

4 Definition of mental illness

- 4.1 *Mental illness* in Part 5 of the *CLMIA* has the same definition as in the *Mental Health Act 1996* (MHA):

Section 6 MHA - *When a person has a mental illness*

- (1) A person has a mental illness if the person has a condition that —
 - (a) is characterised by a disturbance of thought, mood, volition, perception, orientation or memory; and
 - (b) significantly impairs (temporarily or permanently) the person's judgment or behaviour.

- 4.2 In the *Criminal Code*:

- The term *mental illness* means an underlying pathological infirmity of the mind, whether of short or long duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary stimuli.

- The term *mental impairment* means intellectual disability, mental illness, brain damage or senility.

Comment

- 4.3 While the two tests are used for different purposes, consideration should be given to consistency or harmonisation of the meanings of *mental illness* and *mental impairment* across relevant Western Australian legislation following consultation with medical and psychiatric professional associations.

5 Powers of the Court – Custody orders

Accused acquitted on account of unsoundness of mind

- 5.1 If a court of summary jurisdiction finds an accused not guilty on account of unsoundness of mind, the court may⁶ release the accused unconditionally if it considers that it is just to do so having regard to the nature of the offence and the circumstances of its commission, the accused's character, antecedents, age, health and mental condition, and the public interest.
- 5.2 Despite the fact that the accused is not an offender under the *Sentencing Act 1995*, the court may make a conditional release order (CRO), a community based order (CBO), or an intensive supervision order (ISO) in respect of the accused OR make a custody order in respect of the accused, if under the *Sentencing Act 1995*, such an order could have been made in respect of the accused had he or she been found guilty of the offence.
- 5.3 If an accused is acquitted by a superior court⁷ or on appeal of an offence on account of unsoundness of mind, the court —
- (a) if the offence is a Schedule 1 offence — must make a custody order in respect of the accused;
 - (b) if the offence is not a Schedule 1 offence — may make an order under section 22 in respect of the accused.
- 5.4 A custody order includes detention in an authorised hospital, a declared place, a detention centre or a prison as determined by the Mentally Impaired Accused Review Board, until released by an order of the Governor. The Governor may release the accused unconditionally or on conditions, which may be imposed indefinitely.
- 5.5 An accused is not to be detained in a hospital unless they have a mental illness capable of being treated and the following apply:
- the treatment is required to protect the health or safety of the accused or any other person or to prevent the accused doing serious damage to property;
 - the accused has refused or is unable to consent to the treatment;
 - the treatment can only satisfactorily be provided in a hospital.

⁶ CLMIA Act s 22

⁷ CLMIA Act s 21

Comments and recommendations

- 5.6 It is inequitable that the court must impose a custody order when a person has been found not guilty by reason of mental illness for a Schedule 1 offence.
- 5.7 The range of options available to a court once a finding of unfitness is made must be broader and more nuanced so that the best outcome is achieved, with flexibility to respond to specific circumstances.
- 5.8 The *CLMIA Act* should be amended to enable the court to look at the circumstances of the case or of the individual when making a disposition, as the court would do were the person found guilty of the offence. The court should also take into account the person's treatment, support and developmental needs and independent expert advice on the risks posed by the individual, including advice on the risk posed with supports and treatment and, where applicable, cultural advice.
- 5.9 Custody orders should only apply to offences for which the statutory penalty includes imprisonment, both for people found unfit to stand trial or not guilty due to unsound mind.
- 5.10 Custody orders must be no longer than the period the person would have likely received, had they been found guilty of the offence.
- 5.11 Mentally impaired accused should not be denied release only because they are unable to look after themselves. If this is the case the person should be able to receive health and disability supports in the community. It is not the role of the criminal law to perform such a function but rather that of mental health and other community support services.
- 5.12 Prison and juvenile detention as a form of custody order ought to be avoided. Persons should be held in secure mental health facilities if there is a real threat to themselves or others. Holistic supports should be preferred, including cooperation with other service providers and family or guardian supports.
- 5.13 Special consideration should be given to children and the different treatment and support options available to them. They should not be detained in a prison or juvenile facility other than as a last resort. The best interests of the child should be a factor to ensure children are able to be reunited with family as far as possible, but also with supports provided. Specialist treatment by experts in child welfare (not only from a psychiatric and psychological perspective, but also in relation to neurological issues e.g. the plasticity of the brain, ability to address and minimise effects of FADS) should be provided.
- 5.14 There should be a maximum cap on the application of any orders (custody or otherwise) to a person to whom the *CLMIA Act* applies, which is the minimum term applicable to the offence.
- 5.15 In every case there must be annual reviews. There should be expert and familial contribution to any review and there ought to be a positive obligation on the State to support, treat, rehabilitate and maximise opportunities for early release with reasonable external supports.

- 5.16 Reviews of whether a mentally impaired accused person remains unfit to plead or stand trial are carried out by the Mental Impaired Accused Board. Alternative review bodies have been mooted. One is that the original court should have oversight of the ongoing appropriateness of the order, with advice provided to it by a specialist body such as a mental health and disability board or tribunal. Another is that a specialist tribunal or court is established which itself has oversight of orders. In both cases, appeal rights to a higher court would apply.
- 5.17 The Chief Justice the Hon Wayne Martin AC has supported calls by the Aboriginal Legal Service WA for the same court which made the initial ruling to carry out the review and that there be finite detention orders and regular two-yearly reviews in open court, where a person would be provided with legal representation. *"I think it creates safeguards against somebody, as it were, being detained for a very long period as a result of decisions made by administrative officials, not by courts,"* the Chief Justice said.⁸ There is no objection to this proposal but in the interests of justice, annual reviews are advocated.
- 5.18 It is reported by the Office of the Inspector of Custodial Services:⁹
- "Other states provide greater judicial discretion and more alternatives to custody orders. For example, in New South Wales, Northern Territory, Victoria, Tasmania and South Australia, the court has the ability to unconditionally release the individual, or provide some form of conditional release order, regardless of the offence. In Queensland and the ACT, the court may order the individual to undergo treatment by mental health services, which may take place in the community.
- Western Australia also differs from Victoria, New South Wales, South Australia, and the ACT by not having some form of time limit or 'limiting term' that an individual can be detained under their custody order. As one cognitively impaired prisoner held under the Act poignantly put it: 'I want a date. Everyone else has a date. It's not fair'.
- These issues are compounded by the fact that Western Australia performs poorly compared to other states in providing placement options, in particular for people with an intellectual disability. In Victoria and South Australia, people with an intellectual disability are not to be remanded in prison unless there is no practicable alternative. Instead, they are placed in a residential institution or treatment facility.
- In Queensland, recent changes to the law mean people subject to a 'forensic order' due to an intellectual disability are placed in a specialised forensic disability service or a mental health service. Prisons are not listed as a potential location to be detained.
- In summary, flexibility is essential to doing justice and achieving community safety where the accused has a mental impairment. This is especially true where the impairment is so profound that the person cannot even be placed on trial. At present the courts' powers are too restrictive."
- 5.19 These findings show that Western Australia is lagging behind other jurisdictions and support the need for reform of the *CLMIA Act*. The judiciary must have discretion to determine the most appropriate disposition in the circumstances of the case, regardless of the type of offence the person has been charged with, and the nature of

⁸ ABC News Online

⁹ Report - *Mentally impaired accused on 'custody orders': Not guilty, but incarcerated indefinitely*, April 2014

the accused's impairment. Whether a mental illness is deemed 'treatable' or not should not limit the person's right to an appropriate place of detention and appropriate recovery oriented services and supports. The dispositions available should include Community Release Orders, Community Treatment Orders and Intensive Supervision Orders in line with the options available under the *Sentencing Act 1995*.

6 Mentally Impaired Accused Review Board

- 6.1 The members of the Mentally Impaired Review Board¹⁰ (Board) are the Chairperson of the Prisoners Review Board, the community members of the Prisoners Review Board, a psychiatrist and a psychologist appointed by the Governor.

Comments and recommendations

- 6.2 Should the powers of the Board under the *CLMIA Act* remain as they are, the community members of the Board, given the disproportionate representation of Aboriginal people to which the *CLMIA Act* applies, should include an Aboriginal person. Consideration should also be given to having an additional ex-officio member who understands the relevant cultural group. A person from the South West may not be able to speak for the issues of relevance to someone from the Kimberley.
- 6.3 Consideration should also be given to additional ex officio representation, as needed, to address specific requirements of cultural groups. People from more than 200 different countries live, work and study in Western Australia, speak as many as 270 languages and identify with more than 100 religious faiths. Cultural diversity creates opportunities and challenges for the public sector in providing policies, programs and services that successfully meet the needs of all Western Australians.¹¹
- 6.4 There should be an obligation in connection with any review by the Board to consult with the accused, family members, guardian or advocate, with funding for advocacy/legal representation.
- 6.5 In the context of leave of absence, consideration should be given to broader criteria and to include the reason for leave e.g. cultural and familial obligations.

7. Should a statement of objects and principles be included in the CLMIA Act?

Comments and recommendation

- 7.1 The inclusion of a statement of objects and principles is supported and recommended.
- 7.2 The current provisions for indefinite detention of mentally impaired accused charged with Schedule 1 offences suggest the objects of the *CLMIA Act* are community protection and punishment. These are very important considerations but so too is proper provision for the protection of the rights of the mentally impaired accused.

¹⁰ CLMIA Act s 42

¹¹ Public Sector Guide – Engaging Culturally and Linguistically Diverse Communities

- 7.2 "It must be remembered that dispositions for mentally impaired accused are not intended to be punishment-based. They reflect the fairness and social control policies underlying the insanity defence and, therefore, must balance the treatment and care needs of the mentally impaired accused with the safety and protection needs of the wider community."¹²
- 7.3 In anticipation that the *CLMIA Act* will be amended to provide decision-makers with options respecting the rights of the mentally ill and mentally impaired, for clarity, this should be acknowledged in the legislation. (See statements of principles and objectives, *Declared Places (Mentally Impaired Accused) Bill 2013*).



Konrad de Kerloy
President

11 December 2014

¹² Law Reform Commission of Western Australia Report on the Law of Homicide

