ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA (INC)

SUBMISSION IN RESPONSE TO THE FEDERAL SENATE COMMUNITY AFFAIRS REFERENCES COMMITTEE INQUIRY INTO THE INDEFINITE DETENTION OF PEOPLE WITH COGNITIVE AND PSYCHIATRIC IMPAIRMENT

8 April 2016

ABOUT THE ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA

ALSWA is a community based organisation which was established in 1973. ALSWA aims to empower Aboriginal peoples and advance their interests and aspirations through a comprehensive range of legal and support services throughout Western Australia. ALSWA aims to:

- Deliver a comprehensive range of culturally-matched and quality legal services to Aboriginal peoples throughout Western Australia;
- Provide leadership which contributes to participation, empowerment and recognition of Aboriginal peoples as the First Peoples of Australia;
- Ensure that Government and Aboriginal peoples address the underlying issues that contribute to disadvantage on all social indicators, and implement the relevant recommendations arising from the Royal Commission into Aboriginal Deaths in Custody; and
- Create a positive and culturally-matched work environment by implementing efficient and effective practices and administration throughout ALSWA.

ALSWA uses the law and legal system to bring about social justice for Aboriginal peoples as a whole. ALSWA develops and uses strategies in areas of legal advice, legal representation, legal education, legal research, policy development and law reform.

ALSWA is a representative body with executive officers elected by Aboriginal peoples from their local regions to speak for them on law and justice issues. ALSWA provides legal advice and representation to Aboriginal peoples in a wide range of practice areas including criminal law, civil law, family law, child protection and human rights law. Our services are available throughout Western Australia via 14 regional and remote offices and one head office in Perth.

THE SENATE INQUIRY

On 2 December 2015, the Senate referred the following matter to the Senate Community Affairs References Committee for inquiry and report:

1. The indefinite detention of people with cognitive and psychiatric impairment in Australia, with particular reference to:
    a. the prevalence of imprisonment and indefinite detention of individuals with cognitive and psychiatric impairment within Australia;
    b. the experiences of individuals with cognitive and psychiatric impairment who are imprisoned or detained indefinitely;

c. the differing needs of individuals with various types of cognitive and psychiatric impairments such as foetal alcohol syndrome, intellectual disability or acquired brain injury and mental health disorders;
d. the impact of relevant Commonwealth, state and territory legislative and regulatory frameworks, including legislation enabling the detention of individuals who have been declared mentally-impaired or unfit to plead;
e. compliance with Australia's human rights obligations;
f. the capacity of various Commonwealth, state and territory systems, including assessment and early intervention, appropriate accommodation, treatment evaluation, training and personnel and specialist support and programs;
g. the interface between disability services, support systems, the courts and corrections systems, in relation to the management of cognitive and psychiatric impairment;
h. access to justice for people with cognitive and psychiatric impairment, including the availability of assistance and advocacy support for defendants;
i. the role and nature, accessibility and efficacy of programs that divert people with cognitive and psychiatric impairment from the criminal justice system;
j. the availability of pathways out of the criminal justice system for individuals with cognitive and psychiatric impairment;
k. accessibility and efficacy of treatment for people who are a risk of harm to others;
l. the use and regulation of restrictive practices and their impact on individuals with cognitive and psychiatric impairment;
m. the impact of the introduction and application of the National Disability Insurance Scheme, including the ability of individuals with cognitive and psychiatric impairment to receive support under the National Disability Insurance Scheme while in detention; and
n. the prevalence and impact of indefinite detention of individuals with cognitive and psychiatric impairment from Aboriginal and Torres Strait Islander and culturally and linguistically diverse backgrounds, including the use of culturally appropriate responses.

2. That for the purposes of this inquiry:
    a. indefinite detention includes all forms of secure accommodation of a person without a specific date of release; and
    b. this includes, but is not limited to, detention orders by a court, tribunal or under a disability or mental health act and detention orders that may be time limited but capable of extension by a court, tribunal or under a disability or mental health act prior to the end of the order.

Submissions in response to the terms of reference are to be received by 8 April 2016.

ALSWA'S SUBMISSION

Scope of this submission

The Inquiry's terms of reference are extensive. In this submission, ALSWA does not address each term of reference and, instead, focuses on those terms of reference that are most closely aligned to ALSWA's particular experience and expertise. In addition, ALSWA has consulted with the National Aboriginal and Torres Strait Islander Legal Services (NATSILS) in the preparation of its submission and for NATSILS' contribution to First People's Disability Network composite submission. ALSWA endorses both of these submissions and highlights that the First Peoples Disability Network submission includes individual sections from a number of experts from wide-ranging disciplines.

Further, it is noted that ALSWA's submission and NATSILS' submission include the same five key principles for national minimum standards for legislative regimes dealing with mentally impaired accused (see Recommendation 1 below). These principles have been adopted from work undertaken in Western Australia in response to the urgent need for reform of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA). The Western Australian Association of Mental Health, Developmental Disability WA and many other agencies (including ALSWA) prepared an *Advocacy Brief: Priorities for Urgent Reform* in October 2015 outlining the five most critical and urgent reforms required in Western Australia.[1] A significant number of people with extensive experience and expertise in relation to individuals with cognitive or psychiatric impairment in the justice system contributed to the development of these five key reforms. ALSWA urges the Committee to give due consideration to the background work that has already been undertaken.

The term 'indefinite detention' in the Inquiry's terms of reference is stated to include all forms of secure accommodation of a person without a specific date of release including detention orders by a court, tribunal or under a disability or mental health act and detention orders that may be time limited but capable of extension by a court, tribunal or under a disability or mental health act prior to the end of the order. In Western Australia, the *Mental Health Act 2014* (WA) commenced operation on 30 November 2015. This legislation provides for, among other things, the involuntary treatment of individuals with a mental illness in a hospital. ALSWA does not generally represent clients in relation to the civil mental health regime and, accordingly, does not comment on that legislation or its associated processes in this submission. However, it is worth highlighting that the *Mental Health Act 2014* (WA) expressly recognises cultural considerations for Aboriginal[2] people. Principle 7 of the Charter of Mental Health Care Principles (set out in Schedule 1 of the Act) states that:

> A mental health service must provide treatment and care to people of Aboriginal or Torres Strait Islander descent that is appropriate to, and consistent with, their cultural and spiritual beliefs and practices and having regard to the views of their families and, to the extent that it is practicable and appropriate to do so, the views of significant members of their communities, including elders and traditional healers, and Aboriginal or Torres Strait Islander mental health workers.

1 https://waamh.org.au/assets/documents/systemic-advocacy/clmia-priorities-for-reform-advocacy-brief-final.pdf.
2 In this submission, ALSWA uses the term 'Aboriginal people' to refer to Aboriginal and Torres Strait Islander people.

In addition, s 189 of the Act provides that 'to the extent that it is practical and appropriate to do so, treatment provided to a patient who is of Aboriginal or Torres Strait Islander descent must be provided in collaboration with Aboriginal or Torres Strait Islander mental health workers and significant members of the patient's community, including elders and traditional healers'. While it is too early to analyse the effectiveness of these (and other similar provisions) under the *Mental Health Act 2014*, ALSWA commends the inclusion of specific provisions recognising and accommodating Aboriginal culture in the provision of mental health treatment.

Overview of the Criminal Law (Mentally Impaired Accused) Act 1996 (WA)

The *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) ('the CLMIA Act') governs the legal regime in Western Australia for mentally impaired accused who are found unfit to stand trial or found not guilty on account of unsoundness of mind ('mentally impaired accused[3]'). For both these categories, it is important to emphasise that these individuals have not be found criminally responsible for the relevant offence(s). Hence, the legal rules and processes that govern their treatment must be assessed constantly against this background – **mentally impaired accused are not offenders**. Unlike mentally impaired accused who are subject to a custody order under the CLMIA Act, the vast majority of offenders who are sentenced to imprisonment are sentenced to a finite term and are eventually (after serving any period on parole) free to live in the community unencumbered by any criminal justice orders.[4] Many of ALSWA's recommendations in this submission are underpinned by the view that mentally impaired accused should not be treated more severely than offenders and other accused persons.

The CLMIA Act has been subject to continuing calls for reform with a comprehensive review being undertaken in 2003.[5] In September 2014 the Attorney General of Western Australia released a Discussion Paper for public comment as part of his ongoing review of the CLMIA Act. ALSWA provided a comprehensive submission in December 2014 (a copy of the ALSWA 2014 submission is attached to this submission). Despite continuing demands for urgent reform of the CLMIA Act by a number of prominent individuals and agencies,[6] to date the Western Australian government has not provided any response to the submissions it received in 2014 or any details of its proposed reform.

The CLMIA Act establishes different systems for mentally impaired accused who are unfit to stand trial and mentally impaired accused who are acquitted on account of unsoundness of mind. The

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3 For ease of reference in this submission, ALSWA uses the phrase 'mentally impaired accused' to refer to persons who have been found unfit to stand trial or not guilty on account of unsoundness of mind, unless otherwise indicated.

4 Indefinite detention of *offenders* is permitted under Western Australian law in the following circumstances: under s 98 of the *Sentencing Act 1995* (WA) if the court is satisfied that upon release from the finite sentence the offender would be a 'danger to society' because of the exceptional seriousness of the offence; the risk that the offender will commit other indictable offences' and the character of the offender; under the *Dangerous Sexual Offenders Act 2006* (WA); and when an offender is sentenced to life imprisonment (eg, for murder). In all of these situations, the decision to impose an indefinite period of imprisonment is made by a judicial officer.

5 Holman CDJ, *The Way Forward: Recommendations of the Review of the Criminal Law (Mentally Impaired Defendants) Act 1996* (Government of Western Australia, Perth, 2003).

6 See https://waamh.org.au/assets/documents/systemic-advocacy/clmia-priorities-for-reform-advocacy-brief-final.pdf; Office of the Inspector of Custodial Services, *Mentally Impaired Accused on 'Custody Orders': Not guilty, but incarcerated indefinitely* (2014).

options available for mentally impaired accused who are unfit to stand trial are more limited than those available for mentally impaired accused who are acquitted on account of unsoundness of mind. Mentally impaired accused who are unfit to stand trial are often treated more severely than mentally impaired accused who are acquitted on account of unsoundness of mind. Further, mentally impaired *accused* are potentially (and in many cases, in reality) far worse off than mentally impaired *offenders* and non-mentally impaired offenders (ie, persons who have pleaded guilty or been convicted after trial). ALSWA is of the view that the current legislative regime is unprincipled and unfair. As observed by the Western Australian Office of the Inspector of Custodial Services ('OICS'), lawyers may avoid raising the issue of fitness to stand trial or relying on the defence of unsoundness of mind because of the inherent unfairness of the system provided for under the CLMIA Act.[7] It is incongruous that mentally impaired accused may be better off pleading guilty to offences because the consequences of arguing that they are not fit to stand trial or relying on the defence of insanity are too severe.

Disability Justice Centres

One of the longstanding issues in relation to the CLMIA Act has been that, in practice, mentally impaired accused could only be detained in an authorised hospital or a prison/detention centre. The CLMIA Act specifies that mentally impaired accused subject to a custody order can only be detained in an authorised hospital if they have a treatable mental illness.[8] Thus, for individuals with cognitive impairment, indefinite detention in a prison or detention centre was the only possible outcome. Although the legislation provided for mentally impaired accused to be detained in a 'declared place', there was no declared place in existence for almost a decade.

In August 2015 the Bennett Brook Disability Justice Centre ('the Centre') was opened and is the first declared place under the CLMIA Act. It caters for up to 10 mentally impaired accused; however, as at March 2016 it had only received three residents.[9] Under the CLMIA Act, the Mentally Impaired Accused Review Board ('the Board') determines the place of custody for mentally impaired accused subject to a custody order. Before determining that a mentally impaired accused should be detained in the Centre, the Board is required to be satisfied that the accused has a disability as defined under s 3 of the *Disability Services Act 1993*; be satisfied that the accused has reached the age of 16 years; and have regard to the 'degree of risk that the accused's detention in the declared place appears to present to the personal safety of people in the community or of any individual in the community'.[10] When making such a determination, the Board must include a member who is employed by the Disability Services Commission.

However, even if the Board determines that a mentally impaired accused should be detained in a declared place, the accused cannot be detained in the Centre unless the Minister for Disability

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7 Office of the Inspector of Custodial Services, *Mentally Impaired Accused on 'Custody Orders': Not guilty, but incarcerated indefinitely* (2014) 9.

8 *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 24(2).

9 Independent Analysis by the Hon. Peter Blaxell and Professor Colleen Hayward AM of Individual Plans, Programmes and Services for Residents at the Bennett Brook Disability Justice Centre (2016) 1.

10 *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 24(5A).

Services consents.[11] A recent independent review of the Centre observed that the Board provides the Minister with a report 'containing a very comprehensive and detailed summary of all of the accused's circumstances and the Board's reasons for the recommended placement'. It is further stated that, from the materials available, it appears 'that the Minister does not always agree with the Board's determination' and is 'quite cautious in granting her consent'.[12]

The operations of the Centre are governed by the *Declared Places (Mentally Impaired Accused) Act 2015* (WA). As observed in the recent review,

> As the Centre has been operating for only five months with no more than three residents, we have difficulty in arriving at any firm conclusions as to the effectiveness of its plans, programmes and services.[13]

Nevertheless, the review found that the Centre is 'amply resourced' and 'equipped with excellent facilities and infrastructure'; that the staff at the Centre have appropriate qualifications and experience and are well trained; that the Centre's operating procedures are comprehensive; that the staff at the Centre are appropriately advised of all relevant information; and that the Disability Services Commission is 'doing all that reasonably can be done to meet its statutory obligations' in relation to risk assessment and management at the Centre.[14] A number of relatively minor recommendations were made by the review team and accepted by the Disability Services Commission.

ALSWA welcomes the establishment of the Centre because it provides a necessary alternative to prison or detention for mentally impaired accused with cognitive impairments. However, it is too early to judge its effectiveness and whether the legislative provisions governing its application to mentally impaired accused are appropriate. ALSWA is concerned that the decision whether an accused will be detained in the Centre is ultimately made by the Minister. For other mentally impaired accused, the final placement decision is made by the Board. The discussion below emphasises the need for accountability, transparency and procedural fairness under the CLMIA Act – ALSWA doubts this can be achieved via Executive decision-making. The fact that in April 2015 there were 13 mentally impaired accused being kept in a prison but only three residents have been afforded the opportunity to be detained in the Centre to date supports this view.

ALSWA also observes that any concerns in the community about the potential risks of placing mentally impaired accused at the Centre should be addressed by ensuring that the public are aware that the reason this cohort has historically been detained in prison is simply that there was no other place for them to go. Successive governments failed to build or develop a declared place or places as envisaged under the legislation. Finally, the Centre does not accommodate young people under the

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11 *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 24(5C).
12 Independent Analysis by the Hon. Peter Blaxell and Professor Colleen Hayward AM of Individual Plans, Programmes and Services for Residents at the Bennett Brook Disability Justice Centre (2016) 3.
13 Ibid 18.
14 Ibid 18–19.

age of 16 years and there is a pressing need for a suitable declared place for young people aged 16 years or less.

Submissions in response to specific terms of reference

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

While the exact prevalence of cognitive and psychiatric impairment in the criminal justice system is not fully known, the available data indicates that 'people with mental illness and cognitive impairment are overrepresented in the criminal justice system'.[15] It is also well understood that many individuals caught up in the justice system experience both mental illness and cognitive impairment. It has been reported that internal modelling in Western Australia has estimated that 59% of the adult prison population and 65% of the juvenile prison population has a mental illness (and this is almost three times the prevalence in the general population).[16] As at 31 May 2015 there were 5,534 adults in Western Australian prisons[17] and 148 young people in detention.[18] On that basis in May 2015 there would be approximately 3,265 adult prisoners and 96 juvenile detainees with a mental illness. This does not include the number of prisoners/detainees with cognitive impairment. There is generally less data available in regard to cognitive impairment, particularly for Aboriginal people because cognitive impairments often remain undiagnosed due to a lack of services (especially in remote areas) and because there is a tendency for disability to be masked by the multitude of other disadvantages experienced in some Aboriginal communities. This is an area requiring further research and ALSWA notes that a current study being undertaken by the Telethon Kids Institute is examining the prevalence of FASD among juvenile detainees in Western Australia.

However, there is data in Western Australia about the prevalence of indefinite detention of individuals with cognitive and psychiatric impairment as a result of being found unfit to stand trial or being acquitted on account of unsoundness of mind. Relatively speaking, the figure is small. In its 2014 report the OICS observed that from the time that the CLMIA Act commenced until January 2013 there had been 64 mentally impaired accused who had received a custody order.[19] In Western Australia, during the period 1 July 2014 to 30 June 2015, there were 41 mentally impaired accused under the statutory authority of the Board (some of these individuals would be subject to release orders in the community). Thirty six of

15 See for example, Gooda M, Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Mental Illness and Cognitive Disability in Aboriginal and Torres Strait Islander Prisons – a human rights approach' (National Mental Health Conference 2012: Recovering Citizenship', Cairns, 23 August 2012) 2.

16 Mental Health Commission of Western Australia, *Western Australia Mental Health, Alcohol and Other Drug Services Plan 2015–2025* (2015) 16.

17 See http://www.correctiveservices.wa.gov.au/_files/about-us/statistics-publications/statistics/2015/quick-ref/201505-qrs-adult-custody.pdf.

18 https://www.correctiveservices.wa.gov.au/_files/about-us/statistics-publications/statistics/2015/quick-ref/201505-qrs-youth-custody.pdf.

19 Office of the Inspector of Custodial Services, *Mentally Impaired Accused On 'Custody Orders": Not guilty, but incarcerated indefinitely* (April 2014) 13.

these accused were male and five were female. Fourteen of these accused were Aboriginal (34%). It has also been reported that during 2013–2014, there was a total of 39 mentally impaired accused on custody orders: 18 in prison, 10 in a hospital, seven in the community and four interstate.[20] In addition, it was stated in Parliament that as at 30 April 2015 there were 13 prisoners held in Western Australian prisons under the CLMIA Act.[21]

By referencing these relatively small numbers, ALSWA in no way undervalues the enormous impact of indefinite detention for each individual, their families and communities. However, in addition to the impact on these individuals, it is important to understand the broader consequences of indefinite detention regimes. These are discussed below.

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

Understanding the experiences of individuals with cognitive and psychiatric impairment who are imprisoned or detained indefinitely is a crucial aspect of this inquiry. In this regard, ALSWA expects that the Committee is aware of high profile cases such as Marlon Noble[22] and Rosie Fulton. Their stories are heartbreaking. The absolute frustration and injustice felt by those who are detained indefinitely, especially in a prison, must not be overlooked. The OICS referred to a case involving a middle-aged Aboriginal man with serious cognitive impairments who had been found unfit to stand trial in 2008 on charges of damage, street drinking and obscene acts in public. He said '*I just want a date. Everyone else has a date. It's not fair*'.[23] The Inspector stated that this man

> knew he had to stay in prison but he wanted something his fellow prisoners had – a date when his time in prison would end. A poignant and despairing request, but one that nobody could help with.[24]

The Aboriginal and Torres Strait Islander Social Justice Commissioner contends that these cases and others 'represent some of the most egregious human rights violations in Australia'.[25] ALSWA does not intend to refer to the various case studies that are already in the public domain and urges the Committee to consider these cases in its deliberations.[26] It is

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20 Mental Health Commission of Western Australia, *Western Australia Mental Health, Alcohol and Other Drug Services Plan 2015–2025* (2015) 97.

21 Western Australia, *Parliamentary Debates*, Legislative Council, 20 May 2015, 3996 (Hon Ken Baston).

22 See report by Robert Cock QC prepared for the Minster for Corrective Services at http://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3813779a43f34a6e5328b2e6482578f000254715/$file/3779.pdf

23 Office of the Inspector of Custodial Services, *Mentally Impaired Accused on 'Custody Orders': Not guilty, but incarcerated indefinitely* (2014) i.

24 Ibid ii.

25 Gooda M, Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Mental Illness and Cognitive Disability in Aboriginal and Torres Strait Islander Prisons – a human rights approach' (National Mental Health Conference 2012: Recovering Citizenship', Cairns, 23 August 2012).

26 See in particular the various case studies set out in Baldry E et al, *A Predictable and Preventable Path: Aboriginal people with mental and cognitive disabilities in the criminal justice system* (University of New South Wales (October 2015); Gooda M, Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Mental Illness and Cognitive Disability in Aboriginal and Torres Strait Islander Prisons – a human rights approach' (National Mental Health Conference 2012: Recovering Citizenship', Cairns, 23 August 2012).

also highlighted that there are a number of case studies included in the attached 2014 ALSWA submission to the Western Australian Attorney General.

In addition to these cases, ALSWA emphasises the broader effects of the indefinite detention regimes including the impact on individuals who are involved in proceedings under the CLMIA Act but who are not subject to indefinite detention and on the individuals who do not raise unfitness to stand trial or rely on the defence of insanity because of the risk of indefinite detention.

As explained above, in Western Australia there are only two options for mentally impaired accused who are found unfit to stand trial: unconditional release or indefinite detention. In practice, the court typically requires a detailed community support plan before considering releasing a mentally impaired accused unconditionally. Depending on the seriousness of the charges, in the absence of evidence that the accused will have the necessary supports in the community, an indefinite custody order becomes the more likely outcome. Alternatively, the accused may spend lengthy periods in custody on remand waiting for a support plan to be finalised as evidenced by Case Study A below. The imprisonment or detention of mentally impaired persons, even for finite periods, may be detrimental to their mental health and wellbeing and likely to lead to further entrenchment in the justice system.

Case Study A

AB resides in a remote area of Western Australia. A number of years ago, AB had been found unfit to stand trial. In mid-2015, AB was charged with two offences of assault public officer, one offence of aggravated common assault and one offence of being armed in a manner that may cause fear. A psychological report indicated that AB was unfit to stand trial. At this time, the WA Disability Services Commission (DSC) did not have a specific disability service provider located in the town. Despite this, and after significant efforts by ALSWA and a men's outreach service, a community support plan was developed for AB. As a result, the charges were discontinued by the prosecution. From the time he was charged until the matters were finally dealt with AB spent 10 weeks in custody.

In the latter part of 2015, AB was again charged with a number of offences, including assault public officer, damage and carrying an article with intent to cause fear or injure. A further psychological report confirmed that AB remained unfit to stand trial and this report also indicated that there were no feasible plans for his release into the community. It is important to note that at the time AB was released in respect of the first set of charges there was no government agency responsible for his ongoing support. ALSWA has been advised that there is now a local disability service provider for DSC but a further six weeks is required to develop a community support plan for AB. There is no guarantee that AB will be released unconditionally but, even if he is released, he will have spent approximately six months in custody awaiting the outcome.

ALSWA also considers that there would be a significant number of individuals with cognitive or psychiatric impairment who do not rely on unfitness to stand trial or the defence of insanity because the potential consequences are so extreme[27] or because their impairment has not been identified. These individuals are convicted and sentenced and will often cycle in and out of prison and the justice system with insufficient support and services to address their complex needs.

Furthermore, if the existence of the cognitive or psychiatric impairment is not identified and/or has never been previously diagnosed the options of raising mental impairment as a defence or arguing that the accused is unfit to plead are unlikely to be investigated. In this regard, there are a significant number of accused who are unrepresented, especially in lower courts. If police, corrections staff, court staff and judicial officers do not identify the existence of cognitive or psychiatric impairment, the individual may plead guilty and walk out of court with little understanding of the penalty imposed, the requirements of any order or the outcome. Even where an accused is legally represented, the impairment may not be identified especially in busy court lists. ALSWA submits that resources should be provided to ensure that there is relevant education for police, lawyers, judicial officers and other court-based staff to enable the earlier identification of cognitive and psychiatric impairment and for appropriate assessments to be undertaken.

Finally, ALSWA draws the Committee's attention to the extreme consequences for some Aboriginal offenders who have been detained indefinitely under alternative regimes. In 2008 a 63-year-old Aboriginal man died in custody after serving over 22 years in prison as a result of being sentenced to six years' imprisonment coupled with an order for indefinite detention at the Governor's pleasure. Of particular relevance is the fact that the Parole Board repeatedly deferred consideration of his possible release because he refused to participate in sexual rehabilitation programs. Yet, there were no culturally appropriate programs made available to this prisoner. By 2007, this man's supporters had indentified a highly respected Aboriginal male psychologist who was willing to assist and the prisoner agreed to engage in 'therapeutic and rehabilitative work'.[28] Sadly, he passed away before the Parole Board could reconsider his case. In *Yates v The Queen*[29] a 25-year-old intellectually impaired Aboriginal man was sentenced in 1987 to seven years' imprisonment for sexual offending and thereafter was detained at the Governor's pleasure. The High Court overturned that order in 2013 after he had served 26 years in prison.

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27 See Independent Analysis by the Hon. Peter Blaxell and Professor Colleen Hayward AM of Individual Plans, Programmes and Services for Residents at the Bennett Brook Disability Justice Centre (2016) 30–31. The review recommended that the 'Disability Services Commission undertake an education program directed at the legal profession and at members of the Criminal Lawyers Association in particular. Lawyers should be invited to visit the Centre to gain a full understanding of the programmes it has to offer'.

28 Lindsay R, 'Punishment without Finality: One year in the life and death of Alan Egan' (2009) *Brief* 19, 21.

29 [2013] HCA 8.

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

The CLMIA Act

An in-depth analysis of the reforms required under the CLMIA Act is beyond this submission; however, ALSWA examines below a number of critical issues with the current Western Australian regime. Some of these deficiencies also apply in other jurisdictions. For this reason, ALSWA submits that the Commonwealth government should develop national minimum standards for legislation[30] dealing with mentally impaired accused and ensure that these standards comply with international human rights standards and basic tenets of fairness, transparency and accountability. ALSWA submits that compliance by each jurisdiction with these national minimum standards should be monitored by an independent body such as the Human Rights Commission. As explained at the beginning of this submission, ALSWA recommends five key minimum standards for legislation (all of which are lacking in Western Australia). The continuing efforts at advocating for these five standards/principles should not be seen as suggesting that other reforms should not be considered.[31] Other reforms suggested by ALSWA are included in the attached 2014 submission.

30 It has been argued elsewhere that 'Commonwealth leadership is required to address the situation and needs of Indigenous Australians with cognitive impairment, for example in developing model legislation and service system standards: Sotiri et al, *No End in Sight: The imprisonment and indefinite detention of Indigenous Australians with a cognitive impairment* (Aboriginal Disability Justice Campaign, September 2012) 16.

31 For example, others have suggested national minimum standards that include an obligation to provide reasonable access to appropriate services; an assessment of needs; an obligation to develop and implement a service plan; the circumstances where a custody order can be made (ie, only where no reasonable or practicable less restrictive alternative is available; regular reviews including a three-month return date and annual reviews: Keyzer P & O'Donovan D, 'Imprisonment of Indigenous People with Cognitive Impairment: What do professional stakeholders think? What might human rights-compliant legislation look like? (2016) 8(22) *Indigenous Law Bulletin*, 17.

Recommendation 1

The Commonwealth Government develop **national minimum standards** for legislation dealing with mentally impaired accused and these standards comply with relevant international human rights standards and include, at a minimum, the provision for:

1. **Judicial discretion** to impose the appropriate order/disposition based on the individual circumstances of the case (ie, no mandatory custody/detention orders and a full range of appropriate community-based dispositions).

2. **Special hearings** to test the evidence against an accused in cases where unfitness to stand trial is raised so that a mentally impaired accused who is unfit to stand trial is not treated more severely than other accused (ie, if there is insufficient evidence to prove that the accused committed the relevant act or omission, the charge is dismissed).

3. **Finite terms for custody/detention orders** so that mentally impaired accused cannot be detained for any longer than they would have been imprisoned if convicted of the offence (ie, no indefinite detention of mentally impaired accused).

4. **Procedural fairness** (eg, right to appear, right to appeal/review, right to reasons for decision and right to legal representation).

5. **Accountability and transparency** so that determinations about the release of mentally impaired accused and any conditions attached that their release is made by a relevant qualified board or tribunal and subject to judicial oversight (eg, right of annual review by the Supreme Court).

Unfitness to stand trial

As explained above, a key issue with the provisions under the CLMIA Act dealing with unfitness to stand trial is the absence of an intermediate community-based option.[32] The only

32 See in particular the observations of the Chief Justice of Western Australia in *State of Western Australia v Tax* [2010] WASC 208, [18].

options are unconditional release or indefinite detention.[33] In contrast, under the CLMIA Act, the options for mentally impaired accused who are acquitted on account of unsoundness of mind include a Conditional Release Order (CRO), Community Based Order (CBO) and an Intensive Supervision Order (ISO) under the *Sentencing Act 1995* (WA).

In ALSWA's experience, the outcomes for a considerable proportion of mentally impaired accused who are unfit to stand trial (especially those from regional and remote areas) are largely dependent on the level of resources available as well as family and community supports. In the absence of agencies/providers to provide care and support for cognitively impaired accused in the community, courts are left with the unenviable position of releasing the accused unconditionally or imposing a custody order. An intermediate option of a community-based order (as is currently available for mentally impaired accused who are found not guilty by reason of unsoundness of mind) is one important reform that would improve this situation. If such an order is made, the Department of Corrective Services would have the responsibility for monitoring the accused and encouraging other relevant agencies to provide the necessary supports. Furthermore, issues of non-compliance that may indicate a risk to the community can be monitored and acted upon. It is in the interests of the protection of the community and the interests of individual mentally impaired accused, that a community supervision order option is available. ALSWA makes this specific recommendation below.

33 Except if the offence is one where the only available penalty is a fine. In this situation a custody order cannot be imposed and the mentally impaired accused will be unconditionally released.

Case Study B

ALSWA represented 'BC', a 16-year-old female, in the Children's Court in relation to 35 charges that occurred over a nine-month period. In summary, the nature of the alleged offending involved BC seeking unwelcome contact with the complainant and her two daughters. It appears that BC developed a fascination with one of the daughters and her mother intervened, by obtaining a violence restraining order, to prevent contact between her two daughters and B. The charges included common assault, breaching a violence restraining order and breaching protective bail conditions. The majority of the alleged offences involved nuisance telephone calls although there were some allegations of low-level violence and threatening behaviour.

During the course of the criminal proceedings the question of BC's mental fitness to stand trial was raised. The expert medical evidence demonstrated that BC suffers from both a mental illness (schizophrenia) and an intellectual disability. The material before the court also showed that BC had a history of severe childhood trauma and neglect and she had possibly been exposed to excessive alcohol *in utero*. A psychiatrist's report indicated that after BC had been taking anti-psychotic medication for a period of 4-6 weeks she reported decreased intensity and frequency of her psychotic symptoms. The psychiatrist stated that BC's risk of future stalking type behaviour is high but her risk of associated violence appears to be low and recommended that the least restrictive measure be considered. It was further observed that custody would not be conducive to developing the skills needed to manage future risk and that BC's mental health and compliance with medication should be jointly managed by Mental Health Services, Corrective Services and Disability Services. It was also noted that B should be given an opportunity to further her education and socialise with peers.

It was submitted to the court that BC was not mentally fit to stand trial and given her severely comprised cognitive functioning she would be unlikely to become fit to stand trial within the next six months. The State indicated that it would seek a custody order in the event that BC was found unfit to stand trial; however, the making of a custody order was strongly opposed by ALSWA.

Upon finding that BC was unfit to stand trial, the only two options available to the court were to make an indefinite custody order or dismiss the charges unconditionally. The charges were dismissed. Without commenting on whether the relevant agencies provided support to BC upon her release from court it would clearly have been preferable for the court to make a community-based supervision order to ensure that her compliance with medication and other obligations were appropriately monitored and supported. This would have been in the best interests of BC, the complainants and other members of the community.

ALSWA is of the view that there is no sound basis for depriving mentally impaired accused who are unfit to stand trial with the opportunity of community supervision, support and monitoring. If the underlying premise of the legislation is to protect the community, such options are clearly justified. It makes no sense that some mentally impaired accused can be detained indefinitely because they are perceived to pose a risk to the community but others cannot be provided with support and assistance in the community to reduce that risk in appropriate cases. In this regard it has been argued that:

> A continuum of service options that include intensive and supported community supervision should always be available as an alternative option to custody.[34]

Recommendation 2

Consistent with the recommended national minimum standards above, legislation dealing with mentally impaired accused must enable judicial officers to impose a range of options for mentally impaired accused including community supervision orders. Ideally, in the long term such orders should involve monitoring and supervision by appropriate mental health and disability support workers rather than community corrections officers. For Aboriginal mentally impaired accused, monitoring and support should be provided by Aboriginal mental health workers and other culturally appropriate support workers.

Another serious deficiency under the CLMIA Act is that for fitness to stand trial proceedings, the evidence against the accused is not tested in any meaningful way. This effect of this is that an accused may be found unfit to stand trial and detained indefinitely in circumstances where there was insufficient evidence to support a conviction. The provisions of the CLMIA Act provide that a custody order must not be imposed unless the penalty for the offence includes imprisonment and the court is satisfied that a custody order is appropriate having regard to:

(a) the strength of the evidence against the accused;

(b) the nature of the alleged offence and the alleged circumstances of its commission;

(c) the accused's character, antecedents, age, health and mental condition; and

(d) the public interest.[35]

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34 Sotiri et al, *No End in Sight: The imprisonment and indefinite detention of Indigenous Australians with a cognitive impairment* (Aboriginal Disability Justice Campaign, September 2012) 14.

35 *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) ss 16(6) and 19(5).

While this provision enables the court to consider the case against the accused, the strength of the evidence is only assessed on the written brief of evidence – no witnesses are called to give evidence, nor can they be cross-examined. In other jurisdictions a special hearing is conducted 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'.[36] For non-mentally impaired accused who plead not guilty, if the offence charged is not proven beyond reasonable doubt the charge will be dismissed. There is no sound basis for treating mentally impaired accused less favourably than other accused in this regard.

Recommendation 3

Legislation dealing with mentally impaired accused should provide for a special hearing process so that there can be a determination on the evidence available that the accused committed the objective elements of the offence. If it cannot be proven that the accused committed the objective elements of the offence the accused should be discharged (as would be the case for an accused who is fit to stand trial).

Acquittal on account of unsoundness of mind

As noted earlier, if an accused is found not guilty on account of unsoundness of mind the court may make an order releasing the accused unconditionally; a conditional release order, community based order or intensive supervision order under the *Sentencing Act 1995*; or a custody order. However, if the court is a superior court (Supreme Court or District Court) the court *must* make a custody order if the offence is included in Schedule 1 of the CLMIA Act.[37] The repeal or reformulation of Schedule 1 has been previously recommended by other agencies.[38] Schedule 1 contains very serious offences such as murder, attempted murder and aggravated sexual penetration without consent; however, it also includes less serious offences such as assault occasioning bodily harm, assault public officers, indecent assault and criminal damage. Nevertheless, even for murder, the Law Reform Commission of Western Australia (LRCWA) previously recommended that the mandatory requirement to impose a custody order should be removed and replaced with a presumptive regime to mirror the recommended changes to the sentencing regime for persons convicted of homicide. It was specifically stated that:

36 Government of Western Australia, *Criminal Law (Mentally Impaired Accused) Act 1996: Discussion Paper* (2014) 9–10 (emphasis added). See also *Criminal Law Consolidation Act 1935* (SA) Part 8A; *Mental Health (Forensic Provisions) Act 1990* (NSW).

37 *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) ss 20–22.

38 See for example, Office of the Inspector of Custodial Services, *Mentally Impaired Accused On 'Custody Orders": Not guilty, but incarcerated indefinitely* (April 2014) Recommendation 1.

> While the Commission appreciates that homicide offences are extremely serious, there may be some—such as mercy killing or infanticide-type killing—where a mentally impaired accused has suffered a temporary (or since-treated) mental illness and where a custody order should not automatically follow a qualified acquittal. [39]

ALSWA recommends, in accordance with the principles outlined above in relation to national minimum standards, that Schedule 1 of the CLMIA Act should be repealed. At the absolute minimum, if Schedule 1 is to remain, the list of included offences should be significantly diminished so as to only include the most serious offences and a custody order should be presumed, rather than mandatory for those offences.

Recommendation 4

That legislation dealing with mentally impaired accused should not include the provision for mandatory custody orders.

Custody Orders

If a custody order is made under the CLMIA Act, the place of custody will be either a prison/detention centre, authorised hospital or declared place. Ideally, ALSWA considers that mentally impaired accused should *never* be detained in a prison or detention centre. Sufficient and culturally appropriate secure facilities/declared places for Aboriginal mentally impaired accused who are not suitable for release in the community (whether for mentally impaired accused who suffer from a mental illness or cognitive impairment) should be established. ALSWA recommends that resources must be provided to ensure that there are appropriate and sufficient places for mentally impaired accused to be detained outside the prison context.[40]

Furthermore, ALSWA is vehemently opposed to the indefinite nature of custody orders in Western Australia. As a number of well known cases evidence, some mentally impaired accused have spent considerably longer in prison than they would have spent if they had been convicted of the offence. In this regard, the OICS observed that mentally impaired accused in this category are 'typically Aboriginal and placed in prison.'[41] A number of examples were provided by the OICS including an Aboriginal man who was charged with

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39 LRCWA, *Review of the Law of Homicide*, Final Report (2007) 242.

40 It is noted that the Western Australia Mental Health, Alcohol and Other Drug Services Plan 2015–2025 indicates that the Western Australian government plans on expanding the number of forensic services for mentally impaired accused. The Frankland Centre at Graylands only accommodates 30 acute forensic beds and eight subacute forensic beds and this has remanded static since 1995. At that time, the adult prison population reached just over 2,000 but is now well over 5,000. It is also recognised that there are no dedicated forensic services for women and children. The plan is to increase the number of forensic acute beds to 62 and 30 subacute by 2025 as well as provide for 70 subacute forensic beds in prisons (currently there is zero). It is also stated that the intention is to provide increased services in the community: Mental Health Commission, *Western Australia Mental Health, Alcohol and Other Drug Services Plan 2015–2025* (2015) 85-86 & 92.

41 Office of the Inspector of Custodial Services, *Mentally Impaired Accused On 'Custody Orders": Not guilty, but incarcerated indefinitely* (April 2014) 21.

trespassing and performing an indecent act with intent to insult or offend (who at that time had been in prison for more than three years) and an Aboriginal man who was arrested for street drinking and obscene acts in public and damage (he had been in prison for more than four years).[42]

One argument that has been raised in support of indefinite detention under the CLMIA Act is that it provides a mechanism to ensure the safety of the community from individuals with cognitive impairment because civil mental health legislation (ie, an involuntary treatment order under the *Mental Health Act* 2014) cannot be invoked unless the person is suffering from a mental illness. ALSWA does not accept this argument. There are human services systems in the community designed to support persons with cognitive impairment (eg, the provision of services by the Disability Services Commission) and to accommodate situations where such persons may be at risk to themselves or to others (eg, guardianship orders for persons over 18 years;[43] child protection interventions in certain circumstances[44]). If there is any deficit in these systems, it is these systems that should be reformed and better resourced rather than utilising a vulnerable person's contact with the criminal justice system as a mechanism to remove them from the community indefinitely. It has been observed that 'prison is too often the institution of default; the place people end up because there is nowhere else for them to go'.[45] However, as argued by the Aboriginal Disability Justice Campaign 'prisons are increasingly the institution of *choice* by government for the 'management' of complex needs populations'.[46] It is also emphasised that others in contact with the criminal justice system, such as those who have been proven to have committed an offence and are hence far more morally culpable, are not detained indefinitely other than in the most extreme circumstances.

Other Australian jurisdictions impose a limit on the duration of custody orders for mentally impaired accused. The Australian Law Reform Commission (ALRC) recently recommended that 'state and territory laws governing the consequences of a determination that a person is ineligible to stand trial should provide for 'limits on the period of detention that can be imposed' and 'regular periodic review of detention orders'.[47] The ALRC further commented that the 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' and that:

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42 Ibid.

43 Section 43 of the *Guardianship and Administration Act 1990* (WA) provides that a guardianship order can be made in respect to a person who has attained the age of 18 years and who is 'is need of oversight, care or control in the interests of his own health and safety or for the protection of others' and who is in need of a guardian.

44 Pursuant to s 28 of the *Children and Community Services Act 2004* (WA) a child may be found to be in need of protection if, amongst other things, the child is likely to suffer harm as a result of the child's parents being unable to provide, or arrange the provision of, effective medical, therapeutic or other remedial treatment for the child.

45 Sotiri et al, *No End in Sight: The imprisonment and indefinite detention of Indigenous Australians with a cognitive impairment* (Aboriginal Disability Justice Campaign, September 2012) 11.

46 Ibid.

47 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Final Report (August 2014) Recommendation 7.2.

> 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.[48]

The LRCWA also concluded in its 2008 report on homicide that custody orders should not be indefinite.[49] The LRCWA recommended that the CLMIA Act provide that 'when imposing a custody order the court should be required to nominate a limiting term that is capped at the term of imprisonment that the court would have imposed had the person been found guilty of the offence'. It was also stated that this limiting term should be subject to a right to appeal.[50]

Recommendation 5

When imposing a custody/detention order for a mentally impaired accused the court should nominate a limiting term as the maximum period under which the mentally impaired accused can be kept in custody and this term should be determined by considering the likely term of imprisonment that would have been imposed if the accused had been convicted of the offence. That limiting term should be subject to a right of appeal by either the prosecution or the defence.

Executive decision-making under the CLMIA Act

The Mentally Impaired Accused Review Board ('the Board') is responsible for making recommendations about the release of mentally impaired accused subject to custody orders. However, the decision-making power (ie, whether to grant leave of absence, conditional release or unconditional release) rests with the Governor (after receiving the recommendation of the Attorney General). Further, under the new provisions covering the Bennett Brook Disability Justice Centre, the final decision about whether a mentally impaired accused can be detained in the centre rests with the Minister for Disability Services.

The OICS has commented that most other jurisdictions have removed the involvement of the Executive in decisions about release of mentally impaired accused. For example, in New South Wales the Mental Health Review Tribunal has replaced the Governor.[51] ALSWA considers that in order to ensure accountability, transparency and procedural fairness determinations about the place of custody, release from custody and conditions attached to

48 Ibid, [7.91].
49 LRCWA, *Review of the Law of Homicide*, Final Report (2007) 243.
50 Ibid Recommendation 36.
51 Office of the Inspector of Custodial Services, *Mentally Impaired Accused On 'Custody Orders": Not guilty, but incarcerated indefinitely* (April 2014) 10.

such release (if any) should be made by the Board but with a right of review before the Supreme Court on an annual basis.

Recommendation 6

That decision-making power in relation to the placement and release from custody of mentally impaired accused should be vested in an appropriate tribunal with a review available before a superior court.

Procedural fairness

There is lack of procedural fairness under the CLMIA Act. For example, there is no right for mentally impaired accused and/or their advocates to appear before the Board. Bearing in mind the significance of the decisions made by the MIARB and general principles of procedural fairness, ALSWA considers that there should be statutory right for mentally impaired accused to appear before the MIARB and/or be represented by a legal representative or advocate. For these rights to be effective in practice, they must be accompanied by other provisions that ensure that mentally impaired accused are notified of proceedings, provided with copies of all relevant documentation and provided with written reasons for decisions. As noted above, ALSWA also considers that there should be a right of review to the Supreme Court of Western Australia on an annual basis which is conducted as a review of the merits. Furthermore, ALSWA is of the view that in addition to the current provisions, mentally impaired accused should be entitled to request a review at any time if his or her circumstances have changed since the last review was undertaken and that reviews should be held at least as frequently as are provided for under civil mental health legislation.

Recommendation 7

Legislation dealing with mentally impaired accused should provide for a statutory right for the accused to appear and be legally represented before the relevant decision-making tribunal and contain other important procedural safeguards.

Juveniles

Contrary to accepted principles of justice and international human rights standards, the CLMIA Act does not distinguish between adults and juveniles. In fact, the CLMIA Act treats juveniles more harshly by not providing for community based dispositions under the *Young Offenders Act 1994* (WA) for accused who are under 17 years and who are found not guilty

on account of unsoundness of mind. ALSWA recommends that the CLMIA Act be immediately amended to enable the court to impose any of the sentencing options available under the *Young Offenders Act 1994* for mentally impaired accused who are under the age of 18 years. Furthermore, legislation should ensure that the specific needs and vulnerabilities of children are recognised and addressed.

Recommendation 8

Legislation dealing with mentally impaired accused should ensure that persons under the age of 18 years are appropriately accommodated by providing for youth-based community dispositions and ensuring that the special needs and vulnerabilities of children are recognised.

Other legislation impacting on individuals with cognitive or psychiatric impairment

As explained above, the CLMIA Act provides a regime to deal with individuals with cognitive or psychiatric impairment in circumstances where such individuals are unfit to stand trial or not criminally responsible because of unsoundness of mind. In relative terms, the number of these individuals is considerably smaller than the number of individuals with cognitive impairment who are otherwise dealt with by the justice system. There are a number of specific legislative instruments in Western Australia that impact disproportionately and unfairly on Aboriginal people with cognitive or psychiatric impairment. These are discussed below:

Mandatory sentencing

Mandatory sentencing exists in Western Australia for repeat burglary offences,[52] assault public officer,[53] reckless driving during a police pursuit[54] and breaches of violence restraining orders/police orders.[55] Mandatory sentencing laws remove (or restrict) judicial discretion and, accordingly, do not allow the individual circumstances of the offence and/or the offender to be taken into account. The inherent unfairness of such schemes is heightened for individuals with cognitive or psychiatric impairment. Although the existence of the impairment may not result in a finding of unfitness to stand trial or a successful defence of insanity, it will often significantly reduce an offender's moral culpability for the offending behaviour. As previously

52 *Criminal Code* (WA) s 401.
53 *Criminal Code* (WA) s 318(2) & 318(4).
54 *Road Traffic Act 1978* (WA) s 60(5).
55 Section 61A of the *Restraining Orders Act 1997* (WA) provides for a presumptive penalty of imprisonment/detention if the offender has been convicted of two or more prior offences of breaching a violence restraining order or a police order within two years

highlighted by the Western Australian Association for Mental Health there are 'instances of people receiving mandatory sentences for assault to police officers when resisting arrest during psychotic episodes'.[56] ALSWA is also particularly concerned about the impact of mandatory sentencing on Aboriginal people with cognitive impairments such as FASD. The presence of FASD may significantly impair judgement and decision-making such as the inability to recognise the consequences of one's actions.[57] Mandatory sentencing does not enable the judicial officer to take into account reduced culpability and the special circumstances in these instances. Any theory that mandatory sentencing is an effective deterrent for would-be offenders is completely misguided with regard to individuals with mental impairment (especially if co-existing with substance abuse and other disadvantages) because such individuals are not in a position to make reasoned and logical decisions about their behaviour. ALSWA urges all mandatory sentencing laws to be repealed. However, at a minimum, mandatory sentencing laws should not apply to offenders with cognitive or psychiatric impairment.

Recommendation 9

Mandatory sentencing laws should not apply to individuals with cognitive or psychiatric impairment.

Prohibited Behaviour Orders

The *Prohibited Behaviour Orders Act 2010* (WA) provides for civil injunctive-style orders against persons (aged over 16 years) who have had at least two convictions for anti-social behaviour within a three-year period. Prohibitive Behaviour Orders (PBOs) may prevent persons from undertaking lawful activities such as attending specific locations. There is also a 'name and shame' website with the names and photographs of persons subject to PBOs publicly displayed.[58] Applications for PBOs are made by the Western Australia Police and heard in the Magistrates Court. The penalty for a breach of a PBO includes imprisonment: if the order was made in the Children's Court, the penalty is a fine of $2,000 or two years' imprisonment (or both); if it was made in the Magistrates Court a fine of $6,000 or two years' imprisonment (or both); and if it was made by a superior court, a fine of $10,000 or five years' imprisonment (or both).[59]

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56 Western Australian Association for Mental Health, Contributions for submissions to Senate Finance and Public Administration Committee inquiry (17 April 2015).

57 See further Closing the Gap Clearinghouse, *Fetal Alcohol Spectrum Disorders: A review of interventions for prevention and management in Indigenous communities* (2015) Resource Sheet No 36, 10; Parliament of Australia, House of Representatives Standing Committee on Social Policy and Legal Affairs, *FASD: The Hidden Harm* (November 2012); Submission of Catherine Crawford to the House of Representatives Standing Committee on Indigenous Affairs inquiry into the harmful use of alcohol in Aboriginal communities (June 2014).

58 http://www.pbo.wa.gov.au/PBOWebSite/Home/Index.

59 *Prohibited Behaviour Orders Act 2010* (WA) s 35.

An internal review of PBO respondents represented by ALSWA in 2013 (a total of 59 respondents) showed that 56% were homeless, 65% had a mental health issue; 52% were cognitively impaired and 96% had substance abuse issues. Of the overall number of applications for PBOs lodged by the state by July 2013 (114 applications), 52% were against Aboriginal people. Thirty-two of those applications were successful and seven of the successful applications were against Aboriginal (21%).[60]

While ALSWA was able to successfully defend a number of the applications, the impact of PBOs on Aboriginal people with cognitive or mental impairment is extreme. While a cognitively or psychiatrically impaired person may be unfit to stand trial in relation to a criminal charge (eg, because he or she is unable to understand the purpose of a trial, unable to understand the substantial effect of evidence presented by the prosecution or unable to properly defend the charge) no such concessions exist in relation to these type of proceedings. Although a PBO is a civil order, non-compliance results in a criminal charge.

A cognitively or psychiatrically impaired respondent to an application for a PBO may not understand why the application is being made; may not understand the evidence that is presented to support the application; and may not understand the consequences of the order if it is made. There is no scope for the existence of a cognitive or psychiatric impairment to be taken into account when determining whether the order should be made.[61] Moreover, the legislative requirement to provide an explanation to the person about the meaning and consequences of the order does not expressly accommodate cognitive or psychiatric impairment.[62] The following is a pertinent example of the impact of this law on Aboriginal people with cognitive impairment. ALSWA calls for the repeal of the *Prohibited Behaviour Orders Act 2010* (WA).

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60 ALSWA, Submission to the Department of the Attorney General Statutory Review of the *Prohibited Behaviour Orders Act 2010* (May 2014).

61 When considering whether to make a PBO the court must have regard to the desirability of protecting other persons and properly from acts that constitute relevant offences and the degree of hardship that may be caused by the PBO; however, the former factor must be given primary importance: *Prohibited Behaviour Orders Act 2010* (WA) s 9.

62 Section 14 of the *Prohibited Behaviour Orders Act 2010* (WA) provides that the court must give an explanation of the terms and effect of the PBO to the person constrained. If the person does not readily understand English or the court is not satisfied that the person understood the explanation the court must, as far as is practicable, arrange for the explanation to be given in a way that the person can understand. However, a PBO is not invalid because the explanation was not given.

Case Study CD

CD was a homeless, alcoholic, Aboriginal man with a cognitive impairment caused by sniffing solvents. CD's criminal history largely comprised low-level public order type offending. He had 16 convictions for breaching a move on order, 23 convictions for breaching bail, as well as 48 convictions in regard to regularly transport offences. The PBO application sought to exclude CD from entering Northbridge and the Perth CBD for 18 months. The offences relied on in support of the PBO were two offences of failing to obey a move-on notice. The first involved CD being found sitting on bench a few hours after being asked to leave the area. For the other offence, CD was asked to move 1 km from Northbridge and he was found a few hours later sniffing glue and drinking alcohol almost 1 km away. A PBO was granted in the terms sought. CD has breached the PBO on at least two occasions and further breaches may result in a period of imprisonment. His circumstances strongly suggest that he is unable to understand the terms of the PBO and has little capacity to comply with the order.

Move-on Notices

In Western Australia, police have the power to issue a 'move-on notice' to persons in public places in a number of circumstances. These orders require the person to move on from the specified area for 24 hours. The potential circumstances include if the police officer reasonable suspects that the person is committing a breach of the peace; is hindering, obstructing or preventing any lawful activity that is being, or is about to be, carried out by another person; or intends to commit an offence.[63] The penalty for a breach of a 'move-on notice' is $12,000 or 12 months' imprisonment.[64] Data in relation to 'move-on notices' was presented to Parliament in 2014. The data shows that for the six-year period from 2008–2013 there was a total of 137,050 'move-on notices' issued and 47,763 of these were against Aboriginal people (34%). In 2013 the proportion of 'move-on notices' issued against Aboriginal people reached a high of 40%. It was reported in the media in 2014 that one homeless Aboriginal man has received a total of 463 'move-on notices' including at a CBD park where a charity was operating a soup kitchen. The former Attorney General, Jim McGinty, who introduced the laws reportedly, stated that these laws were not intended to be used in this manner and were meant to give the police power to 'diffuse anti-social behaviour that was threatening to escalate into a danger to people or property'.[65] For the same reasons as outlined above, these types of orders are discriminatory and ineffective for individuals with cognitive or psychiatric impairment and ALSWA has been calling for their repeal for many years.

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63 *Criminal Investigation Act 2006* (WA) s 27.
64 *Criminal Investigation Act 2006* (WA) s 153.
65 Emerson D, "Move-on Notices 'used wrongly'", *The West Australian*, 2 December 2013.

Recommendation 10

Legislation that clearly discriminates against Aboriginal people with cognitive or psychiatric impairment should be immediately repealed.

Police Orders

ALSWA is also gravely concerned about the impact of police-issued violence restraining orders (police orders) upon Aboriginal people with cognitive or psychiatric impairments. Under Division 3A of the *Restraining Orders Act 1997* (WA) police have the power to issue a police order in circumstances where there a reasonable belief that there are grounds for a restraining order due to family and domestic violence. Once issued, the police order remains in force for between 24 to 72 hours and, if breached, constitutes a criminal offence with a penalty of $6,000 or two years' imprisonment. Further, as noted above, repeat offenders are liable to a presumptive mandatory sentence of imprisonment.

ALSWA acknowledges the importance of providing immediate protection to victims of family and domestic violence; however, police orders are not subject to any judicial review and are issued in circumstances where a lack of understanding of the consequences of the order may have a profound impact. The LRCWA observed that police orders are issued against Aboriginal people without the assistance of an interpreter and often at a time when the person is intoxicated.[66] It is unlikely that in the midst of an alleged incident of family and domestic violence (and, in particular, if the alleged perpetrator does not speak English as his or her first language and/or is intoxicated) the attending police officers would even appreciate the existence of a cognitive or psychiatric impairment. Such persons are likely to fail to appreciate the serious consequences of a failure to comply with the order (which will often include conditions preventing them from returning home or contacting the person protected in any manner). Moreover, the person bound by the order has no defence to an offence of breaching the order even where the person protected initiates the contact or communication. To expect that an individual with cognitive or psychiatric impairment will appreciated this subtlety in the law is absurd.

Community Protection (Offender Reporting) Act 2004

The *Community Protection (Offender Reporting) Act 2004* (WA) establishes a scheme whereby child sex offenders are required to register with and report to police. Similar, although not identical, schemes exist in other states and territories and the national child sex offender register is known as ANCOR. In general terms, there is a requirement to report an

66 LRCWA, *Enhancing Laws Concerning Family and Domestic Violence*, Discussion Paper (December 2013) 74.

extensive list of personal details (eg, name, date of birth, address, employment details, phone numbers, email addresses, internet server providers, vehicle details, details of children ordinarily residing with the person etc) as well as an ongoing requirement to notify police of any changes to these details. In addition, reportable offenders will be required to report periodically irrespective of any changes to their circumstances and this is at least annually but often far more frequently. Depending on the seriousness of the relevant offence(s), adults are required to report for eight years, fifteen years or life and children are required to report for either four years or seven years.

In its reference on this scheme, the LRCWA found that there were particular difficulties in respect of compliance for Aboriginal reportable offenders from remote and regional areas and for reportable offenders who were cognitively or mentally impaired.[67] Furthermore, it is important to highlight that the mandatory nature of the scheme in Western Australia means that some reportable offenders include children who have been convicted of consensual underage sexual activity (eg, a 14-year-old convicted of sexual penetration of a child under the age of 16 years) as well as cognitively impaired young adults who are convicted of consensual underage sexual activity (eg, a 19-year old cognitively impaired person with a mental age of 13 years convicted of sexual penetration of a child under the age of 16 years).

ALSWA echoes the concerns in relation to the capacity of cognitively or psychiatrically impaired reportable offenders to comply with the strict legislative requirements, especially those from remote areas where there is a clear of lack of support services. ALSWA frequently represents persons who are repeatedly charged with failing to comply with their reporting obligations because they do not understand or remember what they required to do. Appropriate reforms including the provision of resources to support reportable offenders in these circumstances are required.

d. Compliance with Australia's human rights obligations

ALSWA considers that the treatment of mentally impaired accused in Western Australia constitutes a breach of human rights. Rule 82 of the *United Nations Standard Minimum Rules for the Treatment of Prisoners* indicates that the detention of individuals who are found to be insane or otherwise suffering from mental diseases or abnormalities should not be detained in prisons. The *Convention on the Rights of Persons with Disabilities* contains many provisions to ensure that individuals with disability are not discriminated against. Specifically, in regard to the justice system, Article 14(1)(b) provides that all State Parties shall ensure that persons with disabilities, on an equal basis with others:

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67 LRCWA, *Community Protection (Offender Reporting) Act 2004* (WA), Discussion Paper (2011) 115 & 150.

> Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR) provides that:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Articles 10(1) and (2) of the ICCPR provide:

> All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
>
> Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons.

The Australian Human Rights Commission (AHRC) has explained that the following principles apply to arbitrary detention under article 9 under ICCPR:

> (a) lawful detention may become arbitrary when a person's deprivation of liberty becomes unjust, unreasonable or disproportionate to a legitimate aim justifying the person's initial detention;
>
> (b) arbitrariness is not to be equated with 'against the law'; it must be interpreted more broadly to include elements of inappropriateness, injustice or lack of predictability; and
>
> (c) detention should not continue beyond the period for which a State party can provide appropriate justification.[68]

The AHRC observed that:

> The inappropriateness of maximum security prison for people with mental health issues is relevant both to whether detention was arbitrary (in the sense of inappropriate, unnecessary or disproportionate) and whether the conditions of detention were consistent with the standard required by article 10 of the ICCPR.[69]

The United Nations Committee on the Rights of Persons with Disabilities has responded in regard to Australia's treatment of mentally impaired accused and stated that Australia should end 'the unwarranted use of prisons for the management of un-convicted persons with disabilities, with a focus on Aboriginal and Torres Strait Islander persons with disabilities, by establishing legislative, administrative and support frameworks that comply with the Convention'.[70]

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68 Australian Human Rights Commission, *KA, KB, KC and KD v Commonwealth of Australia* [2014] AusHRC 80, 6.
69 Ibid, 42.

70 Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Australia, adopted by the Committee at its tenth session (2–13 September 2013).

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

ALSWA refers to and endorses the material contained in NATSILS submission for this inquiry in relation to general issues concerning access to justice for Aboriginal people with cognitive and psychiatrist impairment.

Specifically, ALSWA wishes to highlight that due to limited funding it currently does not provide legal advice to persons in regard to proceedings before the Board or the Mental Health Tribunal. As ALSWA contends above, mentally impaired accused should have a right of appearance and a right to legal representation before the Board. If such reform were to be effected, ALSWA submits that in order for Aboriginal mentally impaired accused to receive culturally competent legal advice and representation, additional funding for this purpose would be required.

Another issue which impacts upon access to justice for Aboriginal people with cognitive or psychiatric impairments is the ability to access experts who can provide culturally appropriate assessments. Expert reports are expensive and ALSWA is often not in a position to fund such reports/investigations in the absence of evidence of the existence of a cognitive or psychological impairment from previous reports (eg, psychological reports, presentence reports) or medical/hospital records; or where the client is demonstrably mentally impaired. ALSWA believes that there are a significant number of Aboriginal people who are cognitively or psychiatrically impaired who remain undiagnosed.

ALSWA also specifically endorses NATSILS comments in regard to Aboriginal interpreter services. There is no state-wide Aboriginal interpreter service in Western Australia. Appropriate diagnosis and access to justice is significantly hampered by the absence of interpreters for Aboriginal people who speak English as a second language or are not proficient English language speakers. An assessment of whether a particular individual is fit to stand trial or was not criminally responsible because of mental impairment, cannot be effectively made in such circumstances without the provision of an appropriately qualified interpreter. Furthermore, assessments conducted by experts in without the provision of an interpreter may well be flawed.

f. The availability of pathways out of the criminal justice system for individuals with cognitive and psychiatric impairment

The first point of contact between an individual with cognitive or psychiatric impairment and the criminal justice system is typically the police. If the individual is charged by police, under the current Western Australian regime, there exists a significant risk of indefinite detention if

that individual's impairment is known, discovered or relied upon in the criminal justice process. For this reason, ALSWA strongly advocates for greater diversion by police so that individuals with cognitive and psychiatric impairments are not placed in this unenviable position. Accordingly ALSWA recommends that the Western Australian Government develop a program to divert low-level alleged offenders with cognitive or psychiatric impairment away from the formal criminal justice system. For low-level offences, where police reasonably believe that an individual suffers from a cognitive or psychiatric impairment they should have processes that enable immediate referral to disability programs/services or mental health services in the community without the need to institute formal criminal proceedings.

g. The prevalence and impact of indefinite detention of individuals with cognitive and psychiatric impairment from Aboriginal and Torres Strait Islander and culturally and linguistically diverse backgrounds, including the use of culturally appropriate responses.

In its 2014 report the OICS observed that from the time that the CLMIA Act commenced until January 2013 there had been 64 mentally impaired accused who had received a custody order. Of these, 18 were Aboriginal (29%) and it was noted that in comparison the proportion of Aboriginal people sentenced to imprisonment, Aboriginal people are underrepresented in relation to custody orders under the CLMIA Act.[71] Nevertheless, it is clear that Aboriginal people are still considerably overrepresented in terms of their overall proportion of the general population.

Significantly, 72% of the Aboriginal mentally impaired accused who had been subject to custody orders suffered from a cognitive impairment. It was also stated that generally, 'Aboriginal people are being held under the Act for less serious offences than non-Aboriginal people'.[72] Further, the data reveals that of the 18 Aboriginal people subject to a custody order, 14 of these were found unfit to stand trial with the remaining four acquitted on account of unsoundness of mind. The most serious offence listed for five of the 14 accused who were unfit to stand trial was assault public officer (3), damage (1) and trespass (1).[73]

The OICS report also explained that of the 18 Aboriginal people detained on a custody order only one has been placed in an authorised hospital. Although this is partly explained by the high proportion of Aboriginal mentally impaired accused who suffer from cognitive impairment, it was also noted that 'five Aboriginal people with solely a mental illness were predominantly

71 Office of the Inspector of Custodial Services, *Mentally Impaired Accused On 'Custody Orders": Not guilty, but incarcerated indefinitely* (April 2014) 13.
72 Ibid, 16.
73 Ibid.

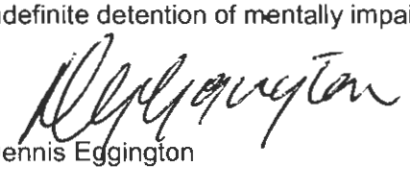
placed in prison'.[74] ALSWA is gravely concerned about the discriminatory treatment of Aboriginal people under the CLMIA Act.

As foreshadowed earlier in this submission, ALSWA also considers that legislation dealing with mentally impaired accused should explicitly recognise for Aboriginal people that the treatment, care and support provided must be culturally appropriate and recognise the importance of culture, family and community. The provisions under the *Mental Health Act 2014* are a useful example of how this can be achieved.

CONCLUSION

ALSWA has not commented on a number of the terms of reference for this Inquiry, in particular those that deal with the nature, extent and provision of services to individuals with cognitive or psychiatric impairments. There are many other agencies and individuals who are more equipped to respond to those issues. However, ALSWA emphasises that the appropriate response to Aboriginal people with cognitive or psychiatric impairment in the criminal justice system must start with effective and culturally appropriate early intervention and preventative strategies (that recognise the many layers of disadvantage in addition to mental impairment) in order to minimise the likelihood that Aboriginal people with cognitive and psychiatric impairments become caught up in the criminal justice system in the first place. Furthermore, sufficient resources are required to ensure that cognitive impairment is diagnosed early 'using culturally appropriate assessments so that accurate diagnoses are made, and to put in place targeted, culturally appropriate clinical support'.[75] As recently highlighted, 'Aboriginal people with mental and cognitive disabilities are forced into the criminal justice system early in life in the absence of alternative pathways'.[76] For those who unfortunately end up in contact with police for alleged offending, immediate and effective pathways out of the justice system should be the first response. Where this is not feasible, there must be sufficient and appropriate community-based interventions within the justice system.

Finally, in circumstances where criminal proceedings are required and justified, and an individual is found unfit to stand trial or not guilty on account of unsoundness of mind, the continued option for the indefinite detention of mentally impaired accused in prisons must come to an end.



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74 Ibid 19.
75 Gooda M, Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Mental Illness and Cognitive Disability in Aboriginal and Torres Strait Islander Prisons – a human rights approach' (National Mental Health Conference 2012: Recovering Citizenship', Cairns, 23 August 2012).
76 Baldry E et al, *A Predictable and Preventable Path: Aboriginal people with mental and cognitive disabilities in the criminal justice system* (University of New South Wales (October 2015) 12.