ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA (INC)

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

28 April 2016

BACKGROUND

On 8 April 2016, the Aboriginal Legal Service of Western Australia (Inc) ('ALSWA') provided a submission to the Senate Community Affairs References Committee ('the Committee') for its inquiry into the indefinite detention of people with cognitive and psychiatric impairment in Australia ('the ALSWA Submission'). Shortly after providing this submission, ALSWA became aware that on 7 April 2016 the Western Australian Department of the Attorney General had published the *Report on the Review of the Criminal Law (Mentally Impaired Accused) Act 1996 (WA)* ('the Review'). The Review is directly relevant to the Committee's terms of reference (in particular, term of reference No. 1(d)) and, accordingly on 8 April 2016, ALSWA requested (and was granted) an extension to provide a supplementary submission.

THE SUPPLEMENTARY SUBMISSION

Overview

The *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) ('the CLMIA Act') has undergone a lengthy review by the Department of the Attorney General. Following a period of stakeholder consultations, a Discussion Paper was published in September 2014; a total of 52 submissions were received including a comprehensive submission from ALSWA in December 2014. A copy of this submission has already been provided to the Committee as an attachment to the ALSWA Submission.

The Review considers the legislation in detail and includes a number of recommendations for reform. In this supplementary submission, ALSWA focuses on the most crucial aspects of the legislative regime.

To recap briefly, in the ALSWA Submission, it was recommended that there should be national minimum standards for legislation dealing with mentally impaired accused, namely:

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 should be 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 are made by a relevant qualified board or tribunal and subject to judicial oversight (eg, right of annual review by the Supreme Court).

Introduction to the Review

The Review states at the outset that:

> A key consideration of the legislation is the safety of the community and the protection of the rights of those people within it who are directly affected, in particular victims of alleged crime and their families, and the family members of people subject to the [CLMIA Act] regime.[1]

At the outset, ALSWA questions why the rights of alleged victims and their families and the family of people subject to the CLMIA Act are so clearly elevated above the rights of mentally impaired accused. ALSWA surmises that a lack of respect for the rights of mentally impaired accused and failure to properly recognise that mentally impaired accused cannot be categorised as 'offenders' has underpinned many of the recommendations in the Review. In this regard, it is highlighted that the Review states that the CLMIA Act promotes community protection 'through the *removal* of a mentally impaired accused from the community by means of imprisonment, supervision or treatment'.[2] Instead, the legislative regime should be viewed as a mechanism to enhance the protection of the community by providing mentally impaired accused with support, supervision and treatment and that the depriving a mentally impaired accused of their liberty should only occur as a last resort and where there is no other less restrictive option available. Although the Review observes that the two key objectives of the legislation are the paramount safety of the community and the fair and equitable treatment of mentally impaired accused,[3] a number of the recommendations are inconsistent with these stated principles.

Judicial discretion

The ALSWA Submission identified two key deficiencies in the Western Australian legislation in regard to judicial discretion: the absence of an intermediate community-based option for mentally impaired accused found unfit to stand trial and the mandatory nature of custody orders for those acquitted on account of unsoundness of mind for offences listed in Schedule 1 of the CLMIA Act.

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1 Department of the Attorney General, *Review of the Criminal Law (Mentally Impaired Accused) Act 1996*, Final Report (April 2016) 4.
2 Ibid 30 (emphasis added).
3 Ibid 6.

Intermediate community-based order

As explained in the ALSWA Submission, the only options available to a court for a mentally impaired accused found unfit to stand trial are unconditional release or an indefinite custody order. This means that where a custody order is clearly inappropriate the only possible outcome is unconditional release and this may not be the ideal outcome to support the accused and maximise rehabilitation. Furthermore, if the option of unconditional release is considered to be 'too risky' the court has no other choice but to detain the person indefinitely.

The Review recommended that the dispositions available to the court when addressing an accused found mentally unfit to stand trial should be expanded to include 'intermediate' sentencing options (such as a community based order and an intensive supervision order).[4] ALSWA strongly supports this recommendation and considers that it will rectify one of the clear impediments under the CLMIA Act to ensuring the protection of the community and the fair and equitable treatment of mentally impaired accused, consistent with the principle of least restriction. Similarly, ALSWA supports the recommendation that the dispositions available to juveniles found unfit to stand trial be expanded to include the various sentencing options under the *Young Offenders Act 1994* (WA)[5] and the recommendation to provide courts with discretion to impose the full range of orders in the event of non-compliance with a community-based disposition.[6]

Mandatory custody orders

While supporting the abovementioned recommendations that enhance judicial discretion under the CLMIA Act, ALSWA is extremely concerned about the Review's conclusion with respect to mandatory custody orders. Currently, for any mentally impaired accused acquitted on account of unsoundness of mind of an offence listed in Schedule 1, the only option available is an indefinite custody order. As explained in the ALSWA submission, Schedule 1 includes serious offences such as murder and aggravated sexual penetration; however, it also includes less serious offences of assault occasioning bodily harm, assault public officer, indecent assault and criminal damage.

The Review notes that a 'significant majority of submissions that responded to this issue called for the abolition of the mandatory imposition of custody orders under section 21' of the CLMIA Act.[7]

> Specifically, stakeholders argued that mandatory custody orders impose unacceptable restrictions on judicial discretion and independence, are inconsistent with the rule of law principles, and undermine confidence in the justice system.[8]

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4 Ibid Recommendation 10.
5 Ibid Recommendation 11.
6 Ibid Recommendation 14.
7 Ibid 65.
8 Ibid.

The Review also observed that the operation of s 21 and Schedule 1 of the CLMIA Act 'appear to have the policy intention of ensuring that mentally impaired accused acquitted of very serious offences on account of unsound mind do not simply 'walk free' without any supervision'.[9] Further, the Review commented that this regime is related to the broader issue about which arm of government should be responsible for the release of mentally impaired accused. It is stated that:

> [T]he basis for the legislature reposing such decisions in the Executive is the ability of that office to consider broader public interest considerations such as the gravity of the charge, the accountability of that office to the community, and the preservation of confidence in the administration of justice.[10]

It is later observed in the Review, that Executive decision-making is consistent with the principle of community protection underlying the CLMIA Act and that it enables a broad range of public interest considerations to be taken into account including 'the likely reaction of the community to the release of the mentally impaired accused'.[11]

The Review did not recommend that s 21 and Schedule 1 be repealed or modified with respect to adults; however, it did recommended that mandatory custody orders should not apply to juveniles. It was also recommended that a working group should be established, comprising a range of stakeholders, to consider further possible amendment to s 21 and Schedule 1 of the CLMIA Act.[12]

ALSWA obviously supports the recommendation in regard to juveniles; however, the overall approach is flawed. First, when discussing the indefinite nature of custody orders the Review observes that the 'time an individual accused requires to safely reintegrate to the community varies from person to person'.[13] Yet, this concept has been completely overlooked in relation to the mandatory nature of custody orders for offences listed in Schedule 1.

Consider, for example, a mentally impaired accused acquitted of assault police officer on the basis of unsoundness of mind. The offence involved the accused pushing a police officer during a psychotic episode. Since the time of the offence, the accused has been treated by psychiatrists for her mental illness and is now on medication and is stable. The accused has no criminal record and appears to pose a very low risk to the community. She has been on bail prior to the disposition of the charge. The accused also has strong family and community support. The court has no choice but to impose a custody order because the offence is listed in Schedule 1 of the CLMIA Act. This will mean that she will be taken into custody immediately. Under s 25(2)(b) of the CLMIA Act the accused will be placed in a prison because she was not being held in an authorised hospital immediately before the custody order was made. Within five working days, the Board is required to determine the place where the

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9 Ibid 67.
10 Ibid.
11 Ibid 83.
12 Ibid Recommendations 11 & 13. It is noted that the hypothetical example provided in the Review in regard to an acquittal on account of unsoundness of mind is incorrect (see Scenario Two, p 71). It states that the proposed system in relation to the young adult is that the judge is no longer limited to by s 21 of the CLMIA Act and can consider whether to release the young adult or make a community order. This is patently wrong because there has been no recommendation for any amendment to s 21 or Schedule 1 of the CLMIA Act.
13 Ibid 76.

accused is to be detained. She can only be placed in a hospital if she has a mental illness that is capable of being treated. Depending on the availability of forensic beds, she may be placed in a prison despite suffering from a mental illness because she is currently stable and more urgent cases may require treatment in hospital. In any event, this accused will spend at least eight weeks before the Board reviews her case. Even if the Board recommends that this accused should be released from the custody order, the process of reporting to the Attorney General and the Governor and the final decision-making process will take a significant period of time. Even one day in custody in these circumstances is too long. The principle of community protection does not demand that this accused be kept in custody.

Furthermore, while ALSWA strongly supports judicial discretion for juveniles, the basis for the distinction between adults and juveniles in this context is somewhat illogical. What the Review has effectively concluded is that it is acceptable for the outcome to be determined by a judicial officer taking into account all of the circumstances of the case for juveniles but, for adults, it is only the Executive that is properly placed to make the appropriate determination. In addition, the arguments in favour of Executive decision-making in this context are baffling. In particular, the 'likely reaction of the community to the release of a mentally impaired accused' is irrelevant – the only relevant consideration is whether the accused is suitable for release. Whether the community reacts irrationally or emotionally to a well-informed and considered decision to release a mentally impaired accused from custody should not be a relevant factor in the decision-making process. ALSWA also highlights that members of the community who react negatively to the release of a mentally impaired accused are likely to do so because they have not been provided with all of the relevant information available to the decision-maker. If there is an issue to be dealt with in regard to the community's reaction to the release of mentally impaired accused from custody it is the need to ensure that the public are properly informed of the relevant facts.

Also, as noted above, the Review presumes that the policy intention behind mandatory custody orders is to ensure that mentally impaired accused acquitted of very serious offences on account of unsound mind do not simply 'walk free' without any supervision. This sounds very much like punishment and retribution yet, at a different part of the Review, it is argued that the regime under the CLMIA Act is not intended to detain individuals for the purpose of punishment. Instead the regime is meant to detain mentally impaired accused for treatment, care or rehabilitation and for the protection of the community. If a particular mentally impaired accused can be effectively treated, cared or rehabilitated in the community and does not pose any significant risk to the community, detention should not be ordered.

Finally, the Review has made a recommendation that s 22 of the CLMIA Act should be amended to provide that a custody order may only be made if the statutory penalty for the alleged offence is, or includes, imprisonment.[14] This recommendation was made in order to align the provisions dealing

14 Ibid Recommendation 12.

with unfitness to stand trial and unsoundness of mind (currently, s 16 prohibits the making of a custody order for a mentally impaired accused unfit to stand trial unless the statutory penalty is or includes imprisonment). In support of this recommendation it is stated that:

> There does not appear to be any persuasive policy rationale for the difference in availability of custody orders under the Act in respect of findings of unfitness and acquittal on the basis of unsound mind. Given that both findings seek to balance the same interests and achieve the same policy objective, it is appropriate that both findings should equally enliven the same disposition options.[15]

Nevertheless, under the proposed reforms to the CLMIA Act in the Review, the available dispositions and criteria for imposing those dispositions are significantly different. For unfitness to stand trial, the court will have discretion to release the accused unconditionally, impose a community-based disposition or impose an indefinite custody order. For those acquitted on the basis of unsound mind, the court has the same options unless the offence is listed in Schedule 1 – if so, there is no discretion and an indefinite custody order must be imposed.

ALSWA submits that legislation dealing mentally impaired accused should ensure judicial discretion in all cases. Judicial officers are well equipped to assess risk and determine appropriate dispositions in this context.[16]

Special hearings

Under the current legislative regime, if an accused is found unfit to stand trial and the court is satisfied that the accused will not become fit to stand trial within the following six months,[17] the court is then required to decide whether to release the accused unconditionally or impose an indefinite custody order. 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 the strength of the evidence against the accused; the nature of the alleged offence and the alleged circumstances of its commission; the accused's character, antecedents, age, health and mental condition; and the public interest.[18] ALSWA recommended the inclusion of a special hearing process for cases dealing with unfitness to stand trial in order to test the evidence against the accused.

The Review acknowledged that the requirement to consider the strength of the evidence against the accused does not involve any formal testing of the prosecution evidence. It was also observed that the position is different in most other Australian jurisdictions.[19] Nevertheless, after considering the views received from stakeholders, the Review concluded that a special hearing process was not

15 Ibid 65.
16 For example, the Supreme Court of Western Australia is tasked with making determinations as to risk under the *Dangerous Sexual Offenders Act 2006* (WA).
17 If the court is not satisfied that the accused will not become mentally fit to stand trial within the following six months, the matter must be adjourned.
18 *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) ss 16(6) and 19(5).
19 Department of the Attorney General, *Review of the Criminal Law (Mentally Impaired Accused) Act 1996*, Final Report (April 2016) 51.

warranted. Instead, it recommended that the CLMIA Act be amended to require a judicial officer to have regard to whether there is a case to answer on the balance of probabilities after inquiring into the question and informing himself or herself in any way the judicial officer thinks fit.[20]

A number of arguments against the adoption of a special hearing process were mentioned in the Review. First, it was stated that a special verdict (such as a verdict that 'the conduct is proved on the evidence available') was problematic because of the inability of the mentally impaired accused to participate in the special hearing process.[21] There were also concerns about subjecting a mentally impaired accused to a 'process aimed at approximating a trial' and that such a process would be inherently flawed. A further argument relied on was that victims may be re-traumatised by a special hearing process.[22]

ALSWA does not find any of these arguments convincing. First, as ALSWA explained in its submission to the Department of the Attorney General, a special hearing could be conducted without the need for the mentally impaired accused to actively participate (and provisions could be made to excuse the accused in appropriate cases). Further, additional supports such as a communication assistant or support person could be provided to maximise the accused's participation in the process. Second, the phrasing of the special verdict could properly reflect that the accused has not been convicted of the offence charged. Finally, while it is acknowledged that any victim who is required to give evidence in court may be re-traumatised, ALSWA does not accept that an alleged victim of an offence involving a mentally impaired accused should be relieved of this requirement over and above any other victim.

The Review concluded that:

> On balance, while there appears to be some merit in expanding on the requirement for the Court to consider the strength of the evidence against the accused, requiring an accused who has been found unfit to stand trial to undergo a trial process cannot be justified by the limited potential benefits of introducing such a system.[23]

It was recommended that the concerns about the lack of proper consideration of the case against the accused should be addressed by requiring the 'judicial officer to have regard to whether there is a case to answer on the balance of probabilities after inquiring into the question and informing himself or herself in any way the judicial officer thinks fit.[24] It is also stated in the Review that this recommendation is consistent with the existing requirement for the court to have regard to the strength of the evidence against the accused.

In ALSWA's view the effect of this recommendation is arguably worse for mentally impaired accused than the current requirement to consider the strength of the evidence against the accused. In this

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20 Ibid Recommendation 9.
21 Ibid 52.
22 Ibid 52–3.
23 Ibid 53.
24 Ibid Recommendation 9.

regard it is vital to note that if there is no case answer, the accused shouldn't even be in court in the first place because the Director of Public Prosecutions should have discontinued the prosecution.

Whether there a 'case to answer' is determined by asking if, on the available evidence, the accused *could* be convicted (rather than would be convicted). As a simple example, for a charge of assault occasioning bodily harm one of the elements of the offence is that there must have been bodily harm caused to the victim. If there is no evidence in the victim's statements of any bodily injury, pain or discomfort etc and no other evidence such as photos, medical records etc then it would be argued that there is no case to answer on the charge because the accused could not be convicted of the offence charged. In other words, the question is whether there is evidence with respect to every element of the offence charged which, if accepted, could prove that element beyond reasonable doubt.

ALSWA is advocates for a special hearing where the state's evidence is tested. This may involve cross examination of prosecution witnesses but would not involve the accused giving evidence or calling witnesses. While a mentally impaired accused may not have the capacity to fully participate in the special hearing, the prosecution evidence could be tested and deficiencies in the state's case exposed. For example, assume the main prosecution witness has provided a statement to police stating that the accused assaulted him in the street. The accused is unknown to the witness and the witness has identified the accused from a photo board provided by the police. The only other significant evidence is from a second witness who knows the accused and says that he was in the general vicinity of where the assault took place but didn't see the actual assault or the accused and victim together. The remaining evidence consists of police officers providing statements about the photo board process and in relation to the arrest of the accused. The accused didn't say anything when he was arrested by police other than 'I don't understand what you are talking about'. There is a case to answer because if the evidence of the victim is accepted there is sufficient evidence to convict the accused of assault. However, at a special hearing the victim could be cross examined about the photo board identification process, the circumstances of the assault including how long the victim viewed the alleged assailant, whether the victim may have seen the accused earlier and mistaken him for the assailant etc. Depending on the answers, the result may be that the victim says he isn't sure whether it was the accused who assaulted him – If so, the accused would be acquitted.

ALSWA considers that there is no justification for treating mentally impaired accused less favourably than other accused in this context. That is why a special hearing process is required. If the prosecution evidence does not prove beyond reasonable doubt that the accused (whether mentally impaired or not) committed the objective elements of the offence, the accused will be acquitted. ALSWA suggests that the process should enable legal counsel to concede that the evidence on the written brief is sufficient to establish that the objective elements of the offence are proven beyond reasonable doubt (and this would mean no special hearing is required); however, such a concession should be subject to the overriding discretion of the court to require a special hearing to proceed if the court considers that it is in the interests of justice to do so.

Finite terms for custody/detention orders

ALSWA has strongly advocated for the repeal of indefinite custody orders under the CLMIA Act and, instead, for the imposition of finite maximum term for custody orders so that mentally impaired accused cannot be detained for any longer than they would have been imprisoned if they had been convicted of the offence. The Review rejected the strong views of a significant majority of submissions in concluding that the duration of custody orders should remain indefinite.[25]

One issue raised in support of its conclusion is that the 'continued availability of indefinite custody orders recognises that the time an individual accused requires to safely reintegrate to the community varies from person to person' and that a finite term is arbitrary.[26] ALSWA again highlights the obvious inconsistency with the conclusion reached in the Review in regard to mandatory custody orders. If the time needed to safely reintegrate into the community varies from person to person how can the imposition of mandatory custody orders for certain offences without any consideration of the actual risk posed to the community be justified?

The main determining factor underpinning the Review's conclusion is that a finite term might mean that a mentally impaired accused would be 'released prematurely in relation to their readiness to reintegrate into the community. This risk was considered particularly acute in respect of certain mentally impaired accused, such as accused with mental illness that cannot be treated or cognitive impairment only, who may not be able to be transferred into a civil regime under mental health legislation as an 'involuntary patient'.[27] As explained in the ALSWA submission, there are other mechanisms available to respond to issues of risk (eg, civil mental health legislation and guardianship orders) and if there is a deficiency in regard to these mechanisms they should be reformed rather than using the existence of a criminal charge to hold a person in custody indefinitely.

In reaching its conclusion, the Review relied in part on the report of the New South Wales Law Reform Commission (NSWLRC) in 2013. The NSWLRC found that there was likely to be a small but not insignificant cohort of mentally impaired accused who may present a serious risk of harm if released at the expiration of their finite custody order. It noted that some, but not all, of these forensic patients could be appropriately accommodated under civil mental health legislation, under guardianship arrangements or by the provision of intensive support services.[28]

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25 Department of the Attorney General, *Review of the Criminal Law (Mentally Impaired Accused) Act 1996*, Final Report (April 2016) Recommendation 16. It was recommended that a working party be established to consider indefinite detention orders.

26 Ibid.

27 Ibid 75. It was also noted that the Inspector of Custodial Services argued that setting of a nominal term on the basis of the sentence that would have been imposed is problematic because sentencing involves a consideration of culpability as well as harm caused. Therefore, it was said that any nominal term would be 'artificial'. However, ALSWA argues that even if the nominal term is potentially inflated because reduced culpability cannot properly be considered, it is preferable to an indefinite term. Further, a nominal term does not prevent the mentally impaired accused being released if and when it is appropriate to do so.

28 New South Wales Law Reform Commission, *People with Cognitive and Mental Impairment in the Criminal Justice System: Criminal Responsibility and Consequences*, Report No. 138 (2013) 315–321.

It was observed that the preventative detention of mentally impaired accused by way of indefinite custody orders 'may violate the 'prohibition on arbitrary detention contained in article 9 of the International Covenant on Civil and Political Rights (ICCPR), unless it is based on grounds and procedures established by law, reasons are given and court control of the detention is available'.[29] The NSWLRC concluded that 'the need for community protection justifies making provision to extend a person's forensic patient status, subject to careful safeguards'.[30] The recommended model included the following features:

- The decision to extend a mentally impaired accused's detention beyond the expiration of the maximum finite term would be made by the Supreme Court.
- The Supreme Court could only make such an order if satisfied to a high degree of probability that the person poses an unacceptable risk of causing serious physical or psychological harm to others if released and the risk cannot be adequately managed by other less restrictive means.
- The Supreme Court would be informed by independent expert reports.
- The maximum duration of any such order would be five years with the possibility of further orders being made upon application and the order could be cancelled at any time upon an application by the forensic patient.[31]

ALSWA is deeply concerned that the Review has ignored this recommendation and a similar suggestion in the submission provided to the Review by ALSWA to further investigate such a scheme if considered necessary for the protection of the community. The critical difference between the NSWLRC option and the current position in Western Australia is that the determination about whether further preventative detention is required is made close to time the person is due for release, is based on strict criteria and is made by a court with ongoing rights of review. A mentally impaired accused in Western Australia may be subject to indefinite detention on the basis of a decision made by a court at the time the criminal charge is dealt with. This decision cannot be subsequently reviewed by a court. Moreover, for some mentally impaired accused, indefinite detention results from mandatory legislative provisions again without any scope for reconsideration by a judicial officer in the future. This is simply unacceptable.

Procedural fairness

ALSWA recommended that the CLMIA Act should include procedural fairness provisions including the right to appear before the Mentally Impaired Accused Review Board ('the Board'), the right to legal representation, the right to obtain reasons for decision and rights of review/appeal. Fortunately, the Review has recommended some important procedural safeguards for mentally impaired accused, including:

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29 Ibid 321.
30 Ibid 333.
31 Ibid.

- Right to appear before and make submissions to the Board;[32]
- Right to be represented by legal counsel or by an advocate, notified of proceedings, and to be provided with copies of relevant materials and written reasons for decisions;[33] and
- Right for a mentally impaired accused to submit a request for the Board to review decisions made in respect of their matter and that any such request must be considered within a reasonable time.[34]

ALSWA notes that the Review stated that the right to appear before and make submissions to the Board; and the right to legal representation and associated recommendations could either be contained in legislation or under practice directions. It is submitted that such fundamental rights must be contained in legislation because practice directions may be altered at any time by the Board.

Accountability and transparency

As discussed earlier, the Review has clearly rejected submissions advocating for a removal of the role of the Executive in decision-making under the CLMIA Act. In fact the Review suggests such consideration was beyond the scope of the Review yet supported the continued role of the Executive on the basis that the Executive can take into account 'broader' considerations. ALSWA is supportive of the continued role of the Board in managing mentally impaired accused and reviewing their continued status; however, it is imperative that mentally impaired accused have the right to have their matter reviewed by a court on an annual basis.

Conclusion

The Review concluded that prison should continue to be available as a place of detention for mentally impaired accused despite the strong submission that:

> [D]etaining mentally impaired accused in prison was punitive and failed to recognise the vulnerabilities and treatment needs of such persons. Further, detaining mentally impaired accused in prison 'may actually heighten the risk to the community in the longer term' since the person's mentally disorders were likely to deteriorate in prison due to 'lack of access to appropriate individualised treatment and rehabilitation plans that reduce that risk.[35]

The Review also recommended that, subject to available resources, 'concrete steps should be taken to improve the coordination and delivery of services to mentally impaired accused who are detained in prison and ensure that custodial staff receive appropriate training in issues relating to persons affected by cognitive impairment and mentally illness'.[36] While ALSWA does not oppose this sentiment per se, it is strongly of the view that the a recommendation should also be made that, subject to available resources, sufficient community-based secure places for mentally impaired

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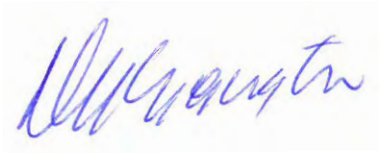
32 Department of the Attorney General, *Review of the Criminal Law (Mentally Impaired Accused) Act 1996*, Final Report (April 2016) Recommendation 20.
33 Ibid Recommendation 21.
34 Ibid Recommendation 33.
35 Ibid 92.
36 Ibid.

accused must be provided to ensure that prison is not utilised as a place of custody. Furthermore, sufficient resources must be provided to ensure that there are culturally competent treatment programs and support services available for individuals with cognitive and psychiatric impairment.



Dennis Eggington
Chief Executive Officer
Aboriginal Legal Service of Western Australia (Inc)