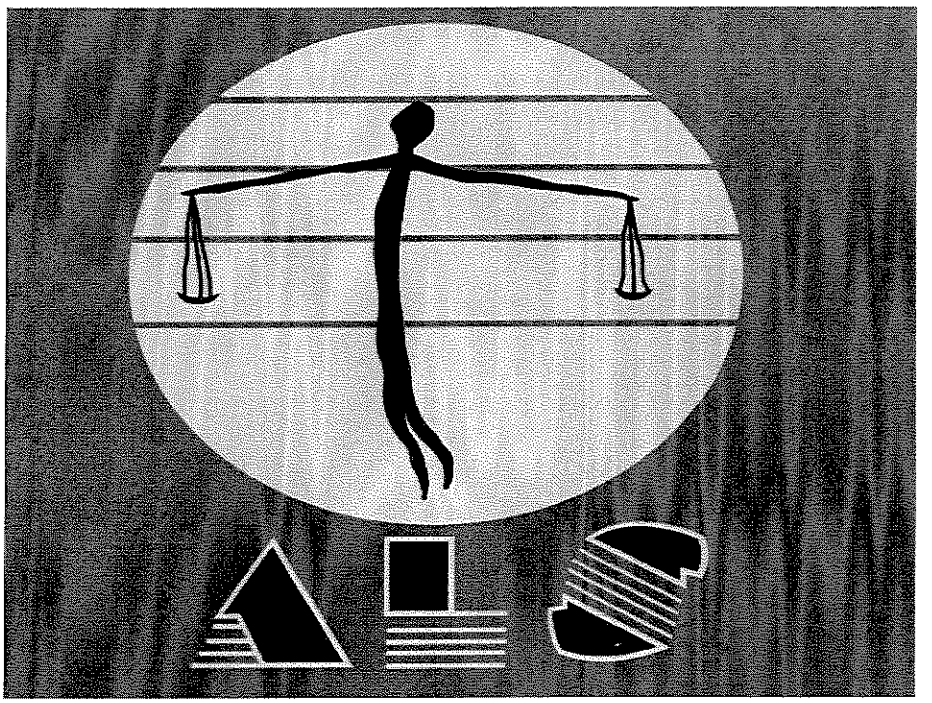
ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA (INC.)



SUBMISSION TO THE REVIEW OF THE CRIMINAL LAW (MENTALLY IMPAIRED ACCUSED) ACT 1996: DISCUSSION PAPER

10 December 2014

ABOUT THE ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA ('ALSWA')

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 Indigenous people 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, and human rights law. ALSWA also provides support services to prisoners and incarcerated juveniles. Our services are available throughout Western Australia via 14 regional and remote offices and one head office in Perth.

BACKGROUND AND APPROACH TO REFORM

On 25 September 2014 the Attorney General of Western Australia released a Discussion Paper for public comment as part of the government's review of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) ('the CLMIA Act'). Submissions are due by 12 December 2014. The Discussion Paper invites submissions in response to specific questions as well as comments in relation to the general operation of the CLMIA Act.

The CLMIA Act was reviewed a number of years ago by Professor D'Arcy Holman and this review was completed in 2003.[1] Despite continuing calls for reform from various stakeholders over the ensuing years, reform of the CLMIA Act has not yet occurred.

ALSWA highlights that the Office of the Inspector of Custodial Services ('OICS') has suggested that reform to the CLMIA Act could be a staged process because some necessary amendments to the legislation could be implemented immediately while other changes may require more detailed consideration of the best options for reform.[2] ALSWA notes that reform of the equivalent legislation in Victoria was recently considered by the Victorian Law Reform Commission (VLRC). The VLRC

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

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

received its terms of reference in August 2012 and published an extensive final report in August 2014.[3] Numerous publications were produced throughout the two-year reference and 34 submissions were received in response to the VLRC's consultation papers. Likewise, the New South Wales Law Reform Commission (NSWLRC) examined the issues of fitness to stand trial and the defence of mental impairment as part of its broader reference on *People with Cognitive and Mental Health Impairments in the Criminal Justice System*. This reference was received by the NSWLRC in September 2007 and five consultation papers and two reports were published throughout the project. A consultation paper that deals specifically with the same subject matter as the Western Australian Discussion Paper was published in January 2010 and a final report (over 500 pages) was published in 2013.

ALSWA welcomes the current Discussion Paper because it indicates that some reform to the CLMIA Act is being considered. However, ALSWA is concerned that the content and structure of the Discussion Paper is seriously deficient and does not support properly considered responses to concrete proposals for reform. Many of the organisations which are likely to respond to the Discussion Paper (including ALSWA) are subject to significant work and resourcing pressures. The task of law reform should not be left to the non-government sector – instead such agencies should be asked (and are generally always willing) to respond to well-considered options for reform. The Discussion Paper simply asks a series of questions without providing any real suggested options for improvement. Nor does it include any analysis of alternative regimes in other jurisdictions.

Having said that, because of the clear injustice of the current regime ALSWA supports immediate reform of the CLMIA Act. There are some areas which call for urgent action (ie, providing an intermediate community-based option for mentally impaired accused who are unfit to stand trial; the repeal of mandatory custody orders for Schedule 1 offences; and the removal of the indefinite nature of custody orders). In this submission, ALSWA indicates those recommended reforms that should and can be implemented immediately. Other recommended reforms may require further consideration and ALSWA would be willing to provide further comments on any draft legislation in the future.

Furthermore, ALSWA strongly supports system-wide reform – legislative reform alone will not be sufficient to ensure fair and appropriate outcomes for mentally impaired accused and for the community. The provision under the current CLMIA Act for 'declared places' is a useful example – despite legislative provision for declared places under the Act for the past 17 years, it is only in very recent times that such places have been funded for development. ALSWA is of the view that the existing services and supports available for mentally impaired accused are plainly inadequate. The establishment of disability justice centres as declared places (to accommodate up to 20 mentally impaired accused with cognitive impairment) is a welcome step. However, there are insufficient forensic beds at the Frankland Centre and the Plaistowe Ward for mentally impaired accused with a mental illness. As the OICS has observed, mentally ill accused are frequently transferred from the Frankland Centre to prison when a patient with more acute needs requires the bed or when a hospital order for assessment is made by the court.

> The consequence is that the least unwell individual is sent to prison, even if they still require acute care. As a result their mental health may deteriorate further.[4]

The services available for mentally impaired accused in prison (and for convicted prisoners with mental health issues) are seriously deficient.[5] The OICS has suggested that transitional units within

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3 See http://www.lawreform.vic.gov.au/timelines/1243.

4 Office of the Inspector of Custodial Services, *Mentally Impaired Accused on 'Custody Orders': Not guilty, but incarcerated indefinitely* (2014) 25.

prisons may assist as a 'supplement' to hospital-based services by providing rehabilitative options.[6] ALSWA strongly urges the Western Australian government to invest sufficient resources to ensure that mentally impaired accused (as well as mentally impaired offenders) receive appropriate services and support to maximise successful treatment and rehabilitation to enable mentally impaired accused to be safely released into the community as early as possible and emphasises that such services must be culturally appropriate for Aboriginal people. In this regard, it is noted that on 3 December 2014 the Western Australian government released its *Consultation Draft Metal Health, Alcohol and Other Drug Services Plan* 2015–2025. The consultation is open until 15 March 2015 and ALSWA intends to provide response to relevant components of this plan in due course.

In November 2014 ALSWA participated in the national summit of the Aboriginal Disability Justice Campaign. At this summit the *Line in the Sand Action Statement* was developed in relation to Aboriginal people with cognitive impairments before the criminal justice system. ALSWA highlights, as particularly relevant to this submission, the following statements:

- The need for 'tailored, culturally responsive sentencing options *other than prison*' and 'sustainable, secure, individualised and culturally-responsive accommodation, community support and transitional services options'.

- 'Responsive systems and agencies that adopt systemic case and risk management approaches using non-punitive, educative, least restrictive practice frameworks that leverages support from families and communities and other relevant social services'.

- 'Targeted, uniform, human-rights focused law reform' that ensures, among other things, the evidence against the accused is tested; that decision-making supports are identified and provided; that terms of detention are limited and regularly reviewed; and that the regime 'accommodates both support for people with cognitive impairment and protection of the community'.[7]

ALSWA also advises that it has considered the joint submission from the Western Australian Association for Mental Health, Developmental Disability WA and other agencies. ALSWA broadly endorses this joint submission, in particular those parts of the submission that recognise the importance of ensuring appropriate treatment and support for mentally impaired accused; guaranteeing the rights of mentally impaired accused (consistent with the rights provided for persons under the *Mental Health Act*); ensuring procedural fairness; and treating mentally impaired accused consistently with human rights standards.

Overview of the CLMIA Act

In summary, the CLMIA Act provides for an alternative process for accused persons who are mentally unfit to stand trial or who are found not to be criminally responsible for an offence on account of unsoundness of mind. One rationale for such legislation is that mentally impaired accused may be a risk to the safety of the community (because they have in fact committed an offence or, at the very least, an act or omission that would otherwise constitute a criminal offence in the absence of the relevant mental impairment). However, the requirement to protect the community must be balanced with the rights and needs of the accused because such accused may not have committed an offence

5 For example, there are no full time psychiatrists in any Western Australian prison and psychiatrics services are scarce in regional prisons.

6 Office of the Inspector of Custodial Services, *Mentally Impaired Accused on 'Custody Orders': Not guilty, but incarcerated indefinitely* (2014) 25–26.

7 Aboriginal Disability Justice Campaign, *The Line in the Sand Action Statement* (November 2014) available at http://www.pwd.org.au/what-we-do/aboriginal-disability-justice-campaign.html.

or, in the case of the accused who are acquitted on account of unsoundness of mind, are not considered morally and criminally responsible for their behaviour.

The CLMIA Act establishes different regimes for mentally impaired accused who are unfit to stand trial and mentally impaired accused who are acquitted on account of unsoundness of mind. The key difference between these two regimes is that for mentally impaired accused who are found not guilty on account of unsoundness of mind, it has been determined that the accused committed the relevant act or omission giving rise to the alleged offence. In contrast, for mentally impaired accused who are unfit to stand trial there may be some consideration of the strength of the evidence against the accused on the basis of the written papers; however, there is no determination of whether the accused committed the objective elements of the offence and the evidence is not tested in court. Despite this, for accused who are found unfit to stand trial the options available under the CLMIA Act are extremely limited. Such accused can be either released unconditionally or detained indefinitely under a custody order. As recent media reports in relation to Marlon Noble have highlighted, an accused who has been found unfit to stand trial may be detained for several years without any proof that he or she committed the relevant act or omission giving rise to the offence.

The most recent Annual Report of the Mentally Impaired Accused Review Board ('the MIARB') states that as at 30 June 2014 there were 39 mentally impaired accused under the authority of the MIARB. Of these 39 accused, there were:

- seven accused on a custody order;
- nine accused on a conditional release order; and
- 23 accused on a leave of absence order.[8]

While the overall number of people affected by the provisions of the CLMIA Act is relatively small, the impact on these individuals should not be underestimated or overlooked. The OICS has recently observed that:

> Our current system for managing mentally impaired accused is unjust, under-resourced and ineffective.[9]

ALSWA agrees and emphasises the lack of a principled approach under the CLMIA Act. Mentally impaired accused who are unfit to stand trial (ie, accused who have not been found to have committed the relevant acts or omissions) are treated more severely than mentally impaired accused who are acquitted on account of unsoundness of mind. Further, mentally impaired accused (ie, accused who have not been convicted of an offence) 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).

As observed by the OICS, lawyers often avoid arguing that an accused is mentally unfit to stand trial or relying on the defence of unsoundness of mind because of the inherent unfairness under the CLMIA Act.[10] It is incongruous that mentally impaired accused may be better off pleading guilty to offences even if they are innocent because the consequences of arguing that they are not fit to stand trial or relying on the defence of insanity are too severe.

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8 Mentally Impaired Accused Review Board, *Annual Report 2013-2014* (2014) 7.
9 Office of the Inspector of Custodial Services, *Mentally Impaired Accused On 'Custody Orders": Not guilty, but incarcerated indefinitely* (April 2014) iii.
10 Ibid 9.

Human Rights Standards

The Australian Human Rights Commission (AHRC) has recently published its findings in relation to complaints made under the *Australian Human Rights Commission Act 1986* (Cth) by four Aboriginal men detained in a maximum security prison in the Northern Territory as a consequence of being found unfit to stand trial or not guilty on account of unsoundness of mind. The position in the Northern Territory for these men was similar to the current regime under the CLMIA Act in so far as there were, at the relevant times, no alternatives to prison for mentally impaired accused subject to a custodial supervision order. However, the Northern Territory system is arguably less draconian than the Western Australian regime because, as explained by the AHRC, the ongoing review of whether a custodial supervision order is required to continue after the expiration of the term fixed by the court (ie, the term of imprisonment that would have been appropriate if the person had been convicted of the offence) is undertaken by the court (and not the Executive).[11]

The decision refers to a number of international human rights standards and makes findings in relation to whether the Commonwealth has breached those standards. An analysis of the basis of the decision is beyond the scope of this submission. However, ALSWA emphasises a number of observations that are pertinent to the reform of the CLMIA Act.

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.[12]

The AHRC 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
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> (c) detention should not continue beyond the period for which a State party can provide appropriate justification.[13]

The AHRC also referred to, among other things, Article 7 of ICCPR (and Article 15 of the Convention on the Rights of Persons with Disabilities) which relevantly provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Further, Article 10(1) of the ICCPR provides that 'all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person' and Article 2(a) provides that '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 AHRC observed that:

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11 Australian Human Rights Commission, *KA, KB, KC and KD v Commonwealth of Australia* [2014] AusHRC 80, 14.

12 See also Article 14(1) of the Convention on the Rights of Persons with Disabilities which similarly provides that: 'State Parties shall ensure that persons with disabilities, on an equal basis with others (a) enjoy the right to liberty and security of person; (b) 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'.

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

> 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.[14]

A number of systemic recommendations were made, most notably that:

- there should be an appropriate range of facilities so that mentally impaired accused with a cognitive impairment can be accommodated in places other than prisons (including secure care facilities and supported community supervision); and

- mentally impaired accused with a cognitive impairment should only be 'detained as a measure of last resort, for the shortest appropriate period of time and in the least restrictive appropriate environment'.[15]

ALSWA submits that these recommendations and the relevant human rights standards referred to above should be taken into account in reforming the CLMIA Act.

The CLMIA Act and Aboriginal mentally impaired accused

The OICS has recently 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.[16] However, 72% of the Aboriginal mentally impaired accused who have 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'.[17] 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).[18]

The OICS report also explains 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 is also noted that 'five Aboriginal people with solely a mental illness were predominantly placed in prison'.[19] ALSWA is gravely concerned about the treatment of Aboriginal people under the CLMIA Act.

ALSWA also highlights that issues concerning mental impairment may be compounded by language and cultural barriers. In some cases, an Aboriginal interpreter will be required in order to properly assess whether the accused is fit to stand trial or was suffering from a relevant mental impairment at the time of the alleged offence. In this regard, and more generally, ALSWA is extremely concerned about the decision of the state government to cease funding to the Kimberley Interpreting Service. As is discussed below, the determination of whether a mentally impaired accused is fit to plead should be

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14 Ibid, 42.
15 Ibid, 51.
16 Office of the Inspector of Custodial Services, *Mentally Impaired Accused On 'Custody Orders": Not guilty, but incarcerated indefinitely* (April 2014) 13.
17 Ibid, 16.
18 Ibid.
19 Ibid 19.

judged in the context of the supports available to enable the accused to participate in the trial process effectively. Without appropriate interpreting services, many Aboriginal mentally impaired accused are likely to be found unfit to stand trial.

ISSUES RAISED IN DISCUSSION PAPER

The Discussion Paper notes that pursuant to s 23 the CLMIA Act, the term 'mentally impaired accused' is defined to mean an accused in respect of whom a custody order has been made and who has not been discharged from the order.[20] For simplicity, the term 'mentally impaired accused' is used in the Discussion Paper to refer to persons who are unfit to stand trial or acquitted on account of unsoundness mind. ALSWA adopts that usage in this submission.[21]

DEFINITION OF MENTAL ILLNESS

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

Answer: ALSWA does not make any comment on this question.

STATEMENT OF OBJECTS AND PRINCIPLES

The CLMIA Act does not include an objects clause or any clear set of guiding principles. The Discussion Paper suggests that it may be appropriate for the CLMIA Act to include a statement of objects and fundamental principles in order to provide guidance to decision-makers under the legislation. Some stakeholders indicated that such a statement should focus on the needs of mentally impaired accused while others argued for any statement of objects and principles to include 'recognition of victim's rights and the harm suffered by victims of crime'.[22] In this regard, the Discussion Paper notes that s 33(5) of the CLMIA Act currently permits consideration to be given to victim impact statements when determining whether a mentally impaired accused should be released into the community.

Although there is no specific section in the CLMIA Act dealing with fundamental principles, the existing provisions provide some indication of the values that underpin the legislation. For example, in deciding whether to recommend the release of a mentally impaired accused who is subject to a custody order, the MIARB is required to consider a number of factors including the degree of risk posed by the accused (ie, community protection) and the objective of imposing the least restriction on the accused that is consistent with the need to protect the health or safety of the accused or any other person (ie, least restriction).[23] And, as noted above, the MIARB can consider any statement provided by a victim. Further, when deciding to make a custody order, the court must consider (along with other considerations) the public interest.[24]

The 2003 Holman Review recommended the inclusion of a set of objects and fundamental principles in the CLMIA Act. The recommended objects were:

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20 This definition applies only to Part 5 of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) which deals with issues arising once a custody order has been made.
21 Government of Western Australia, Criminal Law (Mentally Impaired Accused) Act 1996: Discussion Paper (2014) 2.
22 Ibid, 5.
23 *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 33(5).
24 *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 19(5).

- To ensure that mentally impaired [accused] are identified early in their contact with the justice system and that they are diverted away from corrective services;

- To ensure that [mentally impaired accused] receive the best possible treatment and care;

- To ensure that the community is adequately protected;

- To ensure that [mentally impaired accused] have access to health care and disability support services;

- To ensure that agencies responsible for servicing [mentally impaired accused] are well coordinated;

- To ensure that [mentally impaired accused] have legal representation; and

- To minimise the adverse effects of becoming a [mentally impaired accused] on the family life.[25]

It was recommended that the fundamental principles should include:

- That [mentally impaired accused] are dealt with in court and in proceedings of the [Mentally Impaired Accused Review Board] in a manner that respects their rights and dignity, and that accords with principles of natural justice;

- That the rights of [mentally impaired accused] are to be balanced with the rights of the community to be protected;

- That acknowledgment is given that due to their mental impairment and sometimes additional and multiple disabilities and social factors, [mentally impaired accused] have a range of needs for health care and disability support services;

- That access of [mentally impaired accused] to health care and disability support services is equivalent to the access of the rest of the community;

- That to the extent that a [mentally impaired accused] does not have sufficient means to pay legal representation, it should be free of charge;

- That preference is given to options for care, treatment and rehabilitation of [mentally impaired accused] that cause the least restriction of their freedom that is necessary to protect the [mentally impaired accused] and the community;

- That victims have the opportunity to be acknowledged and heard;

- That when a mentally impaired accused is a person of Australian indigenous background or person from another distinct cultural or linguistic group, as far as possible, the person's case is managed in a manner appropriate and consistent with the person's cultural beliefs, practices and mores, taking into account the views of the person's family and community. [26]

The Mental Health Law Centre (WA) ('the MHLC') produced a comprehensive submission in relation to the CLMIA Act in 2013. The MHLC emphasised that 'best practice contemporary legislation must

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25 Holman D, *The Way Forward: Recommendations of the Review of the Criminal Law (Mentally Impaired Defendants) Act 1996* (Government of Western Australia, 2003) 2–3.
26 Ibid, 3.

be based on clear principles, which shape its development and guide its implementation and interpretation'.[27] It recommended that the legislation contain an objects clause (and it proposed 12 separate objects). In addition, the MHLC recommended that the CLMIA Act include a statement of rights to ensure that the rights of people affected by mental impairment are protected in the criminal justice system.[28] These recommendations were broadly consistent with the recommendations of the Holman Review.

In its 2014 *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) the Victorian Law Reform Commission (VLRC) articulated the general principles that underpin the legislation in that jurisdiction. The VLRC stated that the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) 'seeks to strike a balance between the protection of the community and the rights and clinical needs of accused who are unfit to stand trial or not guilty because of mental impairment' and it described this fundamental principle as the principle of least restriction.[29] The VLRC recommended the inclusion of the following statutory principles:

- Proceedings should be conducted in a way that acknowledges the need for support and involves those affected by the proceedings (ie, accused, family member or victim of the offence).

- If the accused is a child at the time of the alleged offence, the proceedings should be conducted as far as possible in accordance with the specialised principles that apply in the Children's Court.[30]

- The need to protect the community.

- The need to recognise all people affected by the offence including the accused, a family member and the victim.

- The principle of least restriction, ie, that 'restrictions on a person's freedom and personal autonomy must be kept to the minimum consistent with the safety of the community.[31]

ALSWA notes that the *Declared Places (Mentally Impaired Accused) Bill 2013* (WA) (which seeks to establish disability justice centres as declared places under the CLMIA Act) contains a provision dealing with fundamental principles. The Bill provides that under the CLMIA Act in determining whether a mentally impaired accused will be detained in a Disability Services Commission declared place, the Board must consider 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 any individual in the community'.

Clause 5 provides for the principles that are applicable to 'residents' (mentally impaired accused who are detained in a declared place). It provides that:

> (1) These are the paramount considerations in performing a function under this Act, in order of priority –

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27 Mental Health Law Centre (WA), *Interaction with the Western Australian Criminal Justice System by People Affected by Mental Illness or Impairment* (2013) 11.
28 Ibid, 11–13.
29 Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, Report (2014) 30.
30 Additional principles specific to children were also recommended (eg, need to strengthen and preserve the relationship between the child and the child's family; the desirability of the child remaining at home; promotion of uninterrupted education, training or employment for the child; and the need to minimise stigma).
31 Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, Report (2014) 37.

(a) the protection and safety of the community;

(b) the protection and safety of residents;

(c) the best interests of residents who are not adults.

Further, clause 5 provides that residents are to be provided with appropriate training and development programs and must have access to appropriate care.

In summary, there must be a balance between the need to protect the community and the rights and needs of mentally impaired accused. The principle of least restriction is crucial. However, ALSWA is of the view this requires the provision of adequate support and services to enable mentally impaired accused to safely live in the community. It is unacceptable for mentally impaired accused to be detained indefinitely simply because the government has not provided sufficient resources to deliver treatment, support and rehabilitation programs to persons suffering from mental impairment.

Question 2: Should a statement of objects and principles be included in the CLMIA Act? If so, bearing in mind the purpose of the CLMIA Act, what objects and fundamental principles do you think should be included?

Answer: ALSWA recommends that the CLMIA Act (or any future legislation) include a clear statement of objects and fundamental principles to guide the operation of the Act and decision-makers. ALSWA is broadly supportive of the objects and principles that were recommended by the Holman Review and the Mental Health Law Centre, in particular the principle of least restriction and the requirement to ensure that mentally impaired accused are treated fairly and receive appropriate treatment and support. If the overriding purpose of the legislation is to protect the community without imposing any more restriction on the liberty of a mentally impaired accused than is necessary, it is essential that mentally impaired accused are provided with the necessary supports to ensure that they do not present a risk to the community or themselves.

ALSWA also specifically recommends the inclusion of the following principles:

> That mentally impaired accused who are found unfit to stand trial or who are acquitted on account of unsoundness of mind are not treated any more severely than a person would be treated if they had been convicted of the offence.
>
> That for Aboriginal mentally impaired accused the treatment, care and support provided under the Act must be culturally appropriate and recognise the importance of the accused's culture, family and community.

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

Answer: ALSWA is of the view the principles under the CLMIA Act should acknowledge the right of victims of alleged crimes to be afforded respect and support throughout the justice process. Further, victims should be informed of decisions such as the outcome of proceedings and the release of mentally impaired accused from custody, if they so wish.

UNFITNESS TO STAND TRIAL

Criteria

Section 9 of the CLMIA Act sets out the criteria for determining whether a person is unfit to stand trial. It provides that:

> An accused is not mentally fit to stand trial for an offence if the accused, because of mental impairment, is —
>
> (a) unable to understand the nature of the charge;
> (b) unable to understand the requirement to plead to the charge or the effect of a plea;
> (c) unable to understand the purpose of a trial;
> (d) unable to understand or exercise the right to challenge jurors;
> (e) unable to follow the course of the trial;
> (f) unable to understand the substantial effect of evidence presented by the prosecution in the trial; or
> (g) unable to properly defend the charge.

The CLMIA Act also provides that an accused is presumed to be mentally fit to stand trial until the contrary is found; however, once an accused is found to be not mentally fit to stand trial he or she is presumed to remain not mentally fit until the contrary is found.[32]

The Discussion Paper queries whether an additional criterion should be added to the list in s 9 of the CLMIA Act, namely, that the accused is unable to properly instruct his lawyer. The reason suggested is that it would be 'unjust to the accused if the trial proceeded despite the fact that he or she was unable to participate in a meaningful manner by instructing his or her lawyer'. It is also stated that this is the position in Victoria, the Northern Territory and the Australian Capital Territory.[33]

The VLRC examined the test for unfitness in its 2014 report. It noted that the basis for the doctrine is the 'fundamental right of an accused to have a fair hearing'.[34] The VLRC considered the option of a test that is based on decision-making capacity ie, whether the accused can make decisions regarding and participate in the trial process; however, this option was rejected because it would be too subjective and difficult to assess.[35] Nonetheless, the VLRC recognised that there are some 'crucial' decisions that an accused should be capable of making and recommended the inclusion of a criterion that the accused must have the capacity to decide whether to give evidence and be capable of giving

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32 *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 10.
33 Government of Western Australia, Criminal Law (Mentally Impaired Accused) Act 1996: Discussion Paper (2014) 6.
34 Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, Report (2014) [3.2].
35 Ibid [3.24]–[3.30].

evidence if he or she wishes to do so.[36] The recommended criteria for determining fitness to stand trial are whether the accused is, or at some time during the hearing, will be:

(a) Unable to understand the nature of the charge;

(b) Unable to understand the actual significance of entering a plea to the charge;

(c) Unable to enter a plea to the charge;

(d) Unable to understand the nature of the hearing (that it is an inquiry as to whether the person committed the offence);

(e) Unable to follow the course of the hearing;

(f) Unable to understand the substantial effect of any evidence that may be given in support of the prosecution;

(g) Unable to decide whether to give evidence in support of his or her case;

(h) Unable to give evidence in support of his or her case, if he or she wishes to do so; or

(i) Unable to communicate meaningful instructions to his or her legal practitioner.

The MHLC recommended in its 2013 submission that the criteria under s 9 of the CLMIA Act include that the accused can adequately instruct his or her legal representative. This echoed the recommendation of the Holman Review in 2003.[37] The MHLC also recommended that a mentally impaired accused should not be considered fit to stand trial unless he or she 'is meaningfully – and rationally – able to participate in proceedings'.[38] In a submission prepared for the VLRC, the Victorian Criminal Bar Association emphasised the importance of an accused being capable of providing instructions to counsel:

> The value of acting on instructions cannot be underestimated. Any legal representative relies very substantially on the client being able to understand advice, grapple with the evidence and bring to mind his or her memory and understanding of the surrounding circumstances when instructing his or her lawyer. Whilst a trial may be conducted efficiently and seemingly well from the point of view of an outsider, without the accused person's understanding of the full trial process, such a trial may not in fact be a fair trial of that particular accused. Neither will counsel be in a position to know what the accused knows unless the accused has an adequate understanding of the whole trial and can consequently bring matters to the attention of his or her representative that otherwise (from the outside) might not be apparent.[39]

Very recently, the Australian Law Reform Commission (ALRC) published its final report on *Equality, Capacity and Disability in Commonwealth Laws*. The ALRC expressed the view that the legal test for unfitness to stand trial needs to 'maintain the integrity of criminal trials' but also ensure that people with disability are 'entitled to equal recognition before the law, and to participate fully in legal

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36 Ibid [3.36].
37 Holman D, *The Way Forward: Recommendations of the Review of the Criminal Law (Mentally Impaired Defendants) Act 1996* (Government of Western Australia, 2003) 6.
38 Mental Health Law Centre (WA), *Interaction with the Western Australian Criminal Justice System by People Affected by Mental Illness or Impairment* (2013) 26.
39 Victorian Criminal Bar Association, *Submission to the Victorian Law Reform Commission: Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*(September 2013) 1–2.

processes'.[40] With these overriding principles in mind, the ALRC observed that existing tests of unfitness to stand trial 'do not consider the possible role of assistance and support for defendants'.[41] It recommended the *Crimes Act 1914* (Cth) should be amended to provide that a person cannot stand trial if the person cannot be supported to:

> (a) understand the information relevant to the decisions that they will have to make in the course of the proceedings;
>
> (b) retain that information to the extent necessary to make decisions in the course of the proceedings;
>
> (c) use or weigh that information as part of the process of making decisions; or
>
> (d) communicate the decisions in some way.[42]

ALSWA agrees the test for unfitness to stand trial should include, as one of the criteria, that the accused is unable to communicate meaningful instructions to his or her legal practitioner. However, ALSWA is also of the view that in determining whether an accused is unfit to stand trial it should also be considered whether the accused would have the relevant capacity if afforded culturally appropriate support and assistance (eg, support person, communication assistant or interpreter). In this regard, ALSWA refers to the following case study.

Case Study 1

A 16-year-old Aboriginal boy ('Q') faced two charges of sexual penetration of a child under the age of 13 years. One of the offences allegedly occurred when Q was 15 years and the other when he was 13 years. Q suffered from intellectual disability and cognitive impairment. In the proceedings before the Children's Court to determine his fitness to stand trial, conflicting expert evidence was presented. Two experts considered that Q was unfit to stand to trial. However, a third expert expressed the view that Q had a basic understanding of 'guilty' and 'not guilty' and was capable of communicating his wishes in this regard to his lawyer. This expert also observed that although Q may have some difficulties in understanding the proceedings due to cultural and language difficulties and limited attention and concentration, these difficulties may be overcome with additional personal and legal support, education and an interpreter. Q's lawyers also considered that he was capable of providing instructions in relation to the alleged offences and he had indicated that he was not guilty of the offences. The court found that Q was mentally unfit to stand trial and would not become fit within the next six months. Q was under the care of the Department for Child Protection and Family Support and following the development of a comprehensive community care plan he was unconditionally discharged.

In the absence of a comprehensive support plan prepared by a government department, it is likely that Q would have received an indefinite custody order. However, Q's instructions indicated that he was not guilty of the offences and with the provision of culturally appropriate and effective supports he may well have been mentally fit to stand trial.

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40 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Final Report (August 2014) [7.13].
41 Ibid [7.35].
42 Ibid, Recommendation 7.1.

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

Answer: ALSWA submits that the criteria for determining fitness to stand trial under the CLMIA Act should be reformulated in line with the recommendations of the Victorian Law Reform Commission in 2014 and, further, that consideration be given to including a test that enables a determination of whether the accused would have the relevant capacities if he or she was provided with appropriate and effective supports (including culturally appropriate supports for Aboriginal accused persons).

Forum for determining unfitness

Whether an accused is unfit to stand trial is determined by the court which is dealing with the charge. The issue may be raised by the prosecution, the defence or by the presiding judicial officer on his or her own initiative.[43] Section 12 of the CLMIA Act provides that whether an accused is not mentally fit to stand trial is to be decided on the balance of probabilities and the presiding judicial officer may inform himself or herself in any way the judicial officer thinks fit. This includes ordering an examination by and/or a report from a psychiatrist or other appropriate expert. Section 12(4) of the CLMIA Act provides that the prosecution or an accused may appeal against a judicial officer's decision that the accused is not mentally fit to stand trial. It is noted, however, that there is no right to appeal the decision to release the accused unconditionally or to impose a custody order (this is discussed further below).

According to the Discussion Paper, stakeholders from the mental health sector have suggested that the question of unfitness to stand trial may be more appropriately determined by a specialist mental health tribunal. In contrast, legal stakeholders argued that although expert evidence is an important component the question is ultimately a legal one and the decision has significant legal implications. The Discussion Paper also notes that a separate tribunal for this purpose would be likely to cause delay and duplication of evidence and processes and this, in turn, would cause additional stress to the accused, the victim and witnesses.[44]

ALSWA notes that under the Victorian legislation, juries may be involved in the determination of fitness to stand trial and the VLRC determined that fitness to stand trial is a pre-trial issue and should be determined by the magistrate or judge.[45] ALSWA agrees that fitness to stand trial is essentially a legal question and it does not have any specific concerns in relation to the current forum for determining fitness to stand trial because it is open, transparent and the parties retain the right to appeal any determination made by the presiding judicial officer (in respect to unfitness to stand trial). Furthermore, as discussed below, ALSWA supports a process to test the evidence against the accused as part of the inquiry into fitness to stand trial and this is an appropriate task for a judicial officer.

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43 *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 11.
44 Government of Western Australia, Criminal Law (Mentally Impaired Accused) Act 1996: Discussion Paper (2014) 8.
45 Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, Report (2014) [7.5].

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

Answer: ALSWA does not recommend any changes to the current forum for determining fitness to stand trial.

Special hearing

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,[46] 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:

(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.[47]

The Discussion Paper notes that these provisions enable the court to consider the case against the accused. However, ALSWA highlights that the strength of the evidence against the accused can only be assessed on the written brief of evidence – no witnesses are called to give evidence, nor can they be cross-examined.

In other jurisdictions (eg, Victoria and New South Wales) 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'.[48] The Discussion Paper also states that such a special hearing would provide an opportunity for the accused to provide an explanation or put forward a defence and would also assist in giving victims 'a sense of closure'. In contrast, it was stated that requiring victims to give evidence 'may result in unnecessary re-traumatisation'.[49]

The VLRC examined the special hearing process in Victoria in its 2014 report. Under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) if an accused is found to be 'permanently'[50] unfit to stand trial a special hearing must be conducted and this process is similar to an ordinary criminal trial.[51] ALSWA notes that such a process would, to some extent, be akin to a trial where an accused has no memory of the alleged events and is, therefore, unable to provide his or her

46 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.
47 *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) ss 16(6) and 19(5).
48 Government of Western Australia, Criminal Law (Mentally Impaired Accused) Act 1996: Discussion Paper (2014) 9–10.
49 Ibid.
50 That is, unlikely to be fit to stand trial within 12 months from the initial finding of unfitness.
51 Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, Report (2014) [9.7].

lawyer with any meaningful instructions. The VLRC recommended that a mentally impaired accused should be able to be excused from attending the special hearing with the consent of both parties in recognition of the distress it may cause to some mentally impaired accused. Nonetheless, for those accused who attend a special hearing, it was also suggested that additional supports such as a communication assistant or support person should be provided to maximise the accused's participation in the process.[52]

In Victoria, there are three possible outcomes of a special hearing: a finding that the accused is not guilty; a finding that the accused is not guilty because of mental impairment; or a finding that the accused committed the offence. The VLRC recommended two changes to more appropriately reflect the meaning of these findings. First, the finding that an accused 'committed the offence' should be changed to a finding that 'the conduct is proved on the evidence available'. Second, the finding that an accused is not guilty because of mental impairment should be changed to a finding that 'the conduct is proved but the accused is not criminally responsible because of mental impairment'.[53]

Part 8A of the *Criminal Law Consolidation Act 1935* (SA) deals with mental impairment. Section 269L provides that if an investigation into an accused's mental fitness to stand trial is ordered the court has discretion to determine that issue first or, alternatively, after the trial of the objective elements of the offence. Section 269M provides that if there has been a finding that the accused is not fit to stand trial the court must hear evidence and representations from the prosecution and defence about whether there should be a finding that the objective elements of the offence are established. If the objective elements of the offence are not established beyond reasonable doubt there must be a finding of not guilty. The trial in relation to the objective elements of the offence cannot consider any potential defences available to the accused. If the objective elements of the offence are established then the accused will be liable to supervision under the statutory scheme. If the issues are determined in the reverse order and the accused is not found to be unfit to stand trial then the trial may continue and deal with the outstanding issues or the court can decide to restart the trial.

Under the *Mental Health (Forensic Provisions) Act 1990* (NSW) the question of fitness to stand trial is determined by a judge alone. Following a determination that an accused is mentally unfit to stand trial and will remain so for 12 months, a special hearing is conducted to determine if, on the limited evidence available, the person committed the offence. This special hearing is conducted as closely as possible to the normal criminal trial process. Section 21(2) specifically provides that the mentally impaired accused can be legally represented. The verdicts available after a special hearing are: not guilty; not guilty on the ground of mental illness; on the limited evidence available the accused committed the offence (or an alternative offence).

Question 6: Should a special hearing to determine the criminal responsibility of an accused who has been found mentally unfit to stand trial be introduced? If so, what verdicts should be available following a special hearing?

Answer: ALSWA is strongly of the view that the CLMIA Act 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).

52 Ibid, Recommendation 66 and [9.32].
53 Ibid, Recommendations 68 & 69.

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

Answer: ALSWA does not consider that victims should have a right to decline involvement in a special hearing. The consequences of a victim failing or neglecting to attend a special hearing to give evidence should be the same as for victim failing or neglecting to attend an ordinary criminal trial.

Range of options available

As highlighted in the Discussion Paper, the range of options available for mentally impaired accused are different for accused who are found unfit to stand trial and accused who are acquitted on account of unsoundness of mind.[54] For accused who are found unfit to stand trial (and where it has been determined that the accused is unlikely to become fit to stand trial within six months), there are only two options available to the court: unconditional release or an indefinite custody order.

The CLMIA Act provides that a court cannot make a custody order if the statutory penalty for the offence does not include imprisonment. Therefore, the only option for a mentally impaired accused who is found unfit to stand trial in respect of an offence that carries a penalty of a fine only is unconditional release and the charge will be dismissed.

For other offences, the choice between unconditional release and an indefinite custody order is stark. 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).

As Chief Justice Wayne Martin commented in *The State of Western Australia v Tax*:[55]

> The first significant deficiency, as it seems to me, is that under s 19(4) I have only two choices, being unconditional release or a custody order. There is no intermediate course available to the court such as conditional release in terms which would enable the court to fashion conditions which would enhance the protection and safety of the community and perhaps enhance the treatment program that a mentally unfit accused person might need in order to be properly cared for.

A number of instances of serious injustice have been highlighted in the media in recent years (in particular, the cases of Marlon Noble and Rosie Fulton). In his 2014 report, the OICS highlighted a case of a middle-aged Aboriginal man with serious cognitive impairments who was found unfit to stand trial on charges of damage, street drinking and obscene acts in public. A custody order was imposed and this man remained in prison some five and half years after the order was made (although he had been released from custody during this period and subsequently returned to prison). The man spoke with the Inspector of Custodial Services and specifically stated 'I just want a date. Everyone else has a date. It's not fair'. 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.[56]

54 Government of Western Australia, Criminal Law (Mentally Impaired Accused) Act 1996: Discussion Paper (2014) 11.
55 [2010] WASC 208, [18].

It was further observed:

> If he had been well enough to be tried and convicted he would not have served anything like this period. He might not have been sent to prison at all. If he had been sent to prison, he certainly would never have been imprisoned indefinitely: he would have had a 'date', and that date would have been some years ago.[57]

Case Study 2

ALSWA represented 'B', 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 B seeking unwelcome contact with the complainant and her two daughters. It appears that B 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 B's mental fitness to stand trial was raised pursuant to the CLMIA Act. The expert medical evidence demonstrated that B suffers from both a mental illness (schizophrenia) and an intellectual disability. The material before the court also showed that B 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 B 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 B'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 opined that custody would not be conducive to developing the skills needed to manage future risk and that B'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 B 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 B was found unfit to stand trial and the making of a custody order was strongly opposed by ALSWA.

Upon finding that B 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 B 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 B, the complainants and other members of the community.

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

As stated at the outset of this submission, the OICS has argued that although wholesale reform of the CLMIA Act is necessary, there are a number of key reforms that could be effected immediately and these reforms should not be delayed because of the time required to provide comprehensive reform. One of these key reforms identified by the OICS is the need to ensure that mentally impaired accused who are found unfit to stand trial can be 'released under community supervision'.[58]

Further, the OICS has observed that the original rationale for distinguishing between mentally impaired accused who have been found unfit to stand trial and mentally impaired accused who have been acquitted on account of unsoundness of mind is that

> [I]t would be wrong in principle to allow the courts to impose an order that required community supervision on a person found unfit to stand trial. They argued that this would be akin to imposing a sentence on a person who had not even been placed on trial. Such legal subtleties are lost on 'consumers' who find they cannot be released under supervision but can be indefinitely incarcerated.[59]

ALSWA agrees 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 a mentally impaired accused can be detained indefinitely because they are perceived to pose a risk to the community but cannot be provided with support and assistance in the community to reduce that risk in appropriate cases. If the proposal for the inclusion of a special hearing process for mentally impaired accused who are unfit to stand trial is implemented (ie, to enable the evidence against the accused to be properly tested)—any theoretical objection to treating accused who are unfit to stand trial differently, would be removed.

ALSWA is strongly of the view that the provision for intermediate options for mentally impaired accused who are unfit to stand trial is the one crucial reform that should be implemented as a matter of urgency. Such reform is unquestionably fair and in the public interest. In this regard, it is emphasised that for cases where a custody order is clearly inappropriate, it is not always conducive to enhancing community protection to release a mentally impaired accused without any support or supervision. This reform can quickly and easily be achieved by amending the CLMIA Act to include a provision modelled on s 22(1)(b) of the Act to apply to mentally impaired accused who are unfit to stand trial. This would enable the option of a CRO, CBO or ISO for this cohort.

In the longer term, ALSWA is of the view that consideration should be given to providing for specific supervision orders for mentally impaired accused that involve monitoring and support by appropriate mental health workers rather than community corrections officers under the provisions of the *Sentencing Act 1995*.[60] For Aboriginal mentally impaired accused, monitoring and support should be provided by Aboriginal mental health workers and other culturally appropriate support persons.

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

59 Office of the Inspector of Custodial Services, *Mentally Impaired Accused On 'Custody Orders": Not guilty, but incarcerated indefinitely* (April 2014) 8.

60 See Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Final Report (2007) Recommendation 37.

Question 8: Should the range of options available to the court when addressing an accused who has been found mentally unfit to stand trial be expanded?

Answer: ALSWA is strongly of the view that the CLMIA Act should be immediately amended to include a provision modelled on s 22(1)(b) of the Act to enable a court to impose the option of a Conditional Release Order, Community Based Order or Intensive Supervision Order for mentally impaired accused who are found unfit to stand trial. In the longer term, the Western Australian government in consultation with relevant government and non-government agencies (in particular, the Department of Health, Mental Health Commission, Disability Services Commission and Aboriginal community-based organisations) should consider the option of a special supervision order for mentally impaired accused that enables the monitoring and support of Aboriginal mentally impaired accused to be undertaken in a culturally appropriate manner and by appropriately skilled mental health and disability support workers.

ACQUITTAL ON ACCOUNT OF UNSOUNDNESS OF MIND

If a court of summary jurisdiction (ie, Magistrates Court or Children's Court) finds an accused 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.[61] In contrast, if a superior court (Supreme Court or District Court) finds an accused not guilty on account of unsoundness of mind the court must make a custody order if the offence is included in Schedule 1 of the CLMIA Act.[62] If the offence is not contained in Schedule 1 the court can make any of the orders noted above. As discussed immediately above ALSWA is of the opinion that consideration should be given to a specialist supervision order for mentally impaired accused.

Schedule 1 offences

The Discussion Paper highlights the differing views in relation to mandatory custody orders. Some stakeholders argued that there should be flexibility so that the individual circumstances of the case can be considered by the court. Others argued that public safety demands custody for serious scheduled offences.[63] In addition, it is noted that the offences listed in Schedule 1 may need revision to ensure that they only reflect the most serious offences. Schedule 1 contains the most serious offences such as murder, manslaughter and attempted murder but also includes assault occasioning bodily harm, assaulting public officers, indecent assault and criminal damage.

Repeal or reformulation of Schedule 1 has been previously recommended by other agencies. The OICS recently recommended that consideration be given to 'repealing or restricting the scope of Schedule 1'.[64] In its 2007 report on homicide the Law Reform Commission of Western Australia recommended that the mandatory requirement to impose a custody order for Schedule 1 offences 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:

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61 *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) ss 20 & 22.
62 *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 21.
63 Government of Western Australia, Criminal Law (Mentally Impaired Accused) Act 1996: Discussion Paper (2014) 13.
64 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. [65]

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

Answer: ALSWA considers that, ideally, Schedule 1 of the CLMIA Act should be abolished and full discretion provided to the court to determine if a custody order is appropriate for a mentally impaired accused who is acquitted on account of unsoundness of mind. Alternatively, if Schedule 1 is to remain it should be amended to include only the most serious offences (ie, those that carry a maximum of life imprisonment or 20 years' imprisonment) and a custody order should be presumed for such offences but not mandatory.

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

Answer: See response to Question 9 above .

CUSTODY ORDERS

A custody order requires a mentally impaired accused to be detained indefinitely in an authorised hospital, a declared place, a detention centre or a prison. Since the commencement of the CLMIA Act there have been no declared places; however, this serious deficiency is soon to be rectified by the establishment of two declared places to be operated by the Disability Services Commission. Until the opening of the first disability justice centre, mentally impaired accused will continue to be detained in either a prison or detention centre unless they have a treatable mental illness (and can therefore be placed in an authorised hospital subject to availability of forensic beds).

Ideally, ALSWA considers that mentally impaired accused should never be detained in a prison or detention centre. Sufficient and culturally appropriate secure facilities 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. However, in the short term it is acknowledged that there is likely to continue to be a shortfall in forensic hospital beds and other suitable places and, therefore, the following observations and submissions are made in regard to custody orders.

The Discussion Paper notes the anomaly in relation to the making of a custody order for mentally impaired accused who are found unfit to stand trial in comparison to mentally impaired accused who are acquitted on account of unsoundness of mind. For the former, the court can only make the order if the statutory penalty includes imprisonment and if the court considers that a custody order is

65 Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Final Report (2007) 242.

appropriate taking into account the stipulated relevant considerations.[66] However, for mentally impaired accused who are found not guilty on account of unsoundness of mind there is no such restriction. In other words, a custody order could be made in relation to an offence that does not carry imprisonment as a penalty. It is suggested that a similar requirement could be imposed under s 22 of the CLMIA Act or, alternatively, the restriction for unfitness to be stand trial could be removed.

Question 11: Should the court always have the option of imposing a custody order regardless of what offence the mentally impaired person was charged with? If not, what limitations should apply?

Answer: ALSWA is of the view that a custody order should never be imposed in relation to a mentally impaired accused (irrespective of whether the accused is mentally unfit to stand trial or has been acquitted on account of unsoundness of mind) if the offence does not carry imprisonment as penalty. It is absurd that a mentally impaired accused who has not been convicted of an offence could be liable to custody while a person who has been proved to have committed the offence could never be. Accordingly, s 22 of the CLMIA Act should be amended to include the proviso that a custody order must not be made unless the statutory penalty for the offence is or includes imprisonment.

The Discussion Paper also mentions the potential unfairness created by the indefinite nature of a custody order because mentally impaired accused may remain in custody for longer than a person who was convicted of the offence. On the other hand, victim advocacy groups highlighted that a mentally impaired accused may in fact be released much sooner than a person convicted of the offence and this may be considered 'disproportionate to the gravity of the offence' and 'disrespectful to victims'.[67] It is also explained that the purpose of a civil detention order is principally 'supervision, care and rehabilitation of the individual and the protection of the community'. In contrast, the main purpose of sentences of imprisonment is punishment and deterrence. Hence, the sentence that may have been imposed on a convicted person is not necessarily an accurate guide as to the maximum period that a mentally impaired accused should be kept in custody.

While ALSWA agrees that it is possible for a mentally impaired accused to be released from custody sooner than a person who had been convicted of the offence, the purpose of a custody order is not punishment. If a mentally impaired accused (ie, an accused who has not been convicted of an offence) is considered suitable and safe for release into the community he or she should be released at the earliest possible time.

The OICS commented that 'it is clear that some people held under the Act have been in custody longer than their offence would normally warrant. They are typically Aboriginal and placed in prison.'[68] A number of examples were provided including an Aboriginal man who was charged with trespassing and performing an indecent act with intent to insult or offend (he has been in prison for more than

66 Government of Western Australia, Criminal Law (Mentally Impaired Accused) Act 1996: Discussion Paper (2014) 16.
67 Government of Western Australia, Criminal Law (Mentally Impaired Accused) Act 1996: Discussion Paper (2014) 17.
68 Office of the Inspector of Custodial Services, *Mentally Impaired Accused On 'Custody Orders": Not guilty, but incarcerated indefinitely* (April 2014) 21.

three years) and an Aboriginal man who was arrested for street drinking and obscene acts in public and damage (he has been in prison for more than four years).[69]

In March 2014 the shadow Attorney General introduced the *Criminal Law (Mentally Impaired Accused) Amendment Bill 2014* which proposed an amendment to enable the court to set a finite term when imposing a custody order. The finite term would be the length of imprisonment that the court would have imposed if the mentally impaired accused had pleaded guilty or been convicted.[70] During Parliamentary debates, it was argued that after the expiration of the finite term, the provisions of civil mental health legislation could be invoked if it was necessary to detain the accused to ensure the safety of the community or the safety of the accused (ie, an involuntary treatment order). In response, others argued that civil mental health legislation was insufficient because it could not be used for a person with cognitive impairment or intellectual disability and that indefinite detention is appropriate because it provides for rehabilitation and treatment and a graduated approach to release.

Other Australian jurisdictions impose a limit on the duration of custody orders for mentally impaired accused. The 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:

> (a) limits on the period of detention that can be imposed; and
>
> (b) regular periodic review of detention orders.[71]

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:

> 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.[72]

The Law Reform Commission of Western Australia (LRCWA) also concluded in its 2008 report on homicide that custody orders should not be indefinite.[73] It noted that in many Australian jurisdictions there is a cap or limit on the period of custody that can be imposed on a mentally impaired accused. In some jurisdictions, the limit is determined by considering the term of imprisonment that would have been imposed if the accused had been convicted of the offence and, in others, the limit is determined by reference to the maximum statutory penalty for the offence.[74] 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.[75]

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69 Ibid.
70 Western Australia, Parliamentary Debates, Legislative Assembly, 19 March 2014, 1578 (Mr John Quigley).
71 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws,* Final Report (August 2014) Recommendation 7.2.
72 Ibid, [7.91].
73 LRCWA, *Review of the Law of Homicide*, Final Report (2007) 243.
74 Ibid 243–244.
75 Ibid Recommendation 36.

Question 12: Should the duration of the custody order be limited in any way by the court? If so, what factors should be taken into account in determining the appropriate duration of a custody order?

Answer: ALSWA is strongly of the view that when imposing a custody 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. This limiting term should be subject to a right to appeal by either the prosecution or the defence.

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

Answer: Bearing in mind that mentally impaired accused have not been convicted of an offence, ALSWA is of the view that there should not be a minimum period of detention for a person who is held under the CLMIA Act because a mentally impaired accused may have a mental illness that is treated successfully at any time or sufficient community supports may become available to enable a mentally impaired accused with cognitive impairment or intellectual disability to be released safely into the community. ALSWA highlights that this approach is consistent with the principle of least restriction and to set a minimum period of detention would suggest that custody orders were in fact a form of punishment.

Risk management

The Discussion Paper states that:

> [T]he introduction of a requirement to release mentally impaired accused on the expiration of a fixed term may result in some people being released prematurely in relation to the readiness to reintegrate safely into the community. This may pose a serious risk to community safety.[76]

It is further noted that some stakeholders have argued that the provisions of the *Mental Health Act 1996* are sufficient to accommodate these concerns because mentally ill persons can be involuntarily detained. On the other hand, it is also argued that there is a gap because civil mental health legislation does not apply to persons who do not have a treatable mental illness such as those with cognitive impairment or intellectual disability. Therefore, it is suggested that a 'protective order' which could apply to all mentally impaired accused may be required.[77] The recent OICS report suggested that there should be a 'time limit on the duration of custody orders so that unless the most exceptional

76 Government of Western Australia, Criminal Law (Mentally Impaired Accused) Act 1996: Discussion Paper (2014) 19.
77 Ibid.

of circumstances exists, the order cannot run for longer than the alleged offences, if proved, would have justified. Detention after this time could only be on the basis of a court order'.[78]

In order to properly assess these conflicting arguments, and in recognition that the protection of the community is an appropriate consideration, ALSWA is of the view that it is useful to consider the current mechanisms for detaining *offenders* indefinitely. Indefinite detention of offenders essentially detains the person in custody after they have served the appropriate punishment for the offence because of the level of risk posed to the community. The criminal justice system in Western Australia provides for the indefinite detention of offenders is two ways. Under s 98 of the *Sentencing Act 1995* (WA) the court can impose an indefinite sentence of imprisonment upon an offender (to commence at the expiration of the nominal sentence imposed for the offence). Section 98(2) provides that:

> Indefinite imprisonment must not be ordered unless the court is satisfied on the balance of probabilities that when the offender would otherwise be released from custody in respect of the nominal sentence or any other term, he or she would be a danger to society, or a part of it, because of one or more of these factors:
>
> (a) the exceptional seriousness of the offence;
>
> (b) the risk that the offender will commit other indictable offences;
>
> (c) the character of the offender and in particular —
>
> (i) any psychological, psychiatric or medical condition affecting the offender;
>
> (ii) the number and seriousness of other offences of which the offender has been convicted;
>
> (iii) any other exceptional circumstances.

The determination of if, and when, an offender who is subject to an indefinite detention order will be released from custody is similar to the provisions applicable to mentally impaired accused. The Prisoner's Review Board provides reports to the Minister and the decision to release is an Executive decision.[79] A similar process applies to offenders subject to life imprisonment. A clear difference between this regime and the regime under the CLMIA Act is that the initial decision to impose indefinite imprisonment is made by a judicial officer. In contrast, under the CLMIA Act the imposition of a custody order is mandatory in cases that fall within Schedule 1 and, in reality, unavoidable for the vast majority of mentally impaired accused who are found unfit to stand trial in respect to a serious offence (because in the absence of an intermediate community-based order the unconditional release of such accused is invariably untenable).

Under the *Dangerous Sexual Offenders Act 2006* (WA) the Director of Public Prosecutions can apply to the Supreme Court of Western Australia for a continuing detention or supervision order for persons who are considered to be a danger to the community in terms of serious sexual offending. An order cannot be made unless the court is satisfied to a high degree of probability that the person is a serious danger to the community (ie, that there is an unacceptable risk that the person, if not subject to the order, would commit a serious sexual offence).

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

79 *Sentencing Act 1995* (WA) s 101.

ALSWA suggests that if concern exists about the potential release of some mentally impaired accused into the community without adequate supervision or control, consideration could be given to establishing a regime for enabling the prosecution to apply for an additional finite custody order or supervision order at the expiration of the original custody order. This regime should be modelled on the dangerous sex offender provisions so that the decision to impose an additional custody order or supervision order can only be made by the Supreme Court and only if there is cogent evidence to satisfy the court to a high degree of probability that the mentally impaired accused poses a serious danger to the community in terms of serious violent or sexual offending. The starting point should always be a supervision order and an additional finite custody order should only be imposed as a last resort.

Question 14: What legislative arrangements should be made to manage the risk posed by mentally impaired accused who are assessed as being a danger to themselves or others if they are unconditionally released?

Answer: ALSWA suggests consideration be given to enabling the Supreme Court to impose an additional finite custody order or supervision order at the expiration of the original custody order for those mentally impaired accused who are clearly a serious danger to the community. Appropriate safeguards must be included to ensure that this option is only utilised in the most extreme cases and that detention in a prison, rather than a special purpose facility, is not the default position. For Aboriginal mentally impaired accused it is imperative that culturally appropriate secure facilities are established to ensure that such accused are not detained in prisons.

MENTALLY IMPAIRED ACCUSED REVIEW BOARD

Executive decision-making under the CLMIA Act

The MIARB is responsible for making recommendations about the release of mentally impaired accused who are 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).

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.[80] It noted that there are four potential options: maintain the current system of Executive decision-making; vest decision-making authority to the MIARB; transfer the decision-making authority to the Mental Health Review Board; or vest responsibility in the courts.[81] In this regard, it is highlighted that although at the time of the enactment of the CLMIA Act courts did not 'get involved in decisions to release people from custody' or in the review of court orders the position has now changed significantly. Courts are frequently involved in the monitoring and review of their orders in specialist or problem-solving courts and the Supreme

80 Office of the Inspector of Custodial Services, *Mentally Impaired Accused On 'Custody Orders": Not guilty, but incarcerated indefinitely* (April 2014) 10.
81 Ibid, 11.

Court is responsible for decisions about the imposition of indefinite detention and subsequent release of dangerous sexual offenders under the *Dangerous Sexual Offenders Act 2006* (WA).[82]

ALSWA is of the view that determinations about the release of mentally impaired accused from custody and the conditions to be attached to such release (if any) should be made by the MIARB but with a right of review before the Supreme Court on an annual basis.

Constitution of the MIARB

Section 42 of the CLMIA Act provides for the constitution of MIARB. The members of the MIARB are the chairperson of the Prisoners Review Board, a psychiatrist, a psychologist and the persons who are community members of the Prisoners Review Board. These community members must include at least one community member who is an Aboriginal person with knowledge and understanding of Aboriginal culture local to this state.[83] The chairperson and two other members of the MIARB constitute a quorum.

ALSWA considers that ideally the MIARB should always include an Aboriginal person if the MIARB is dealing with an Aboriginal mentally impaired accused. Likewise, if the mentally impaired accused is a child, the MIARB should include a child or adolescent psychiatrist. Furthermore, the MIARB should be constituted with members who have expertise in forensic mental heath and disability.

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

Answer: ALSWA is of the view that the MIARB should always include an Aboriginal person if it is dealing with an Aboriginal mentally impaired accused. Likewise, if the mentally impaired accused is a child, the MIARB should include a child or adolescent psychologist.

Leave of absence

The MIARB can only make a leave of absence order for a mentally impaired accused if the Governor has first made an order allowing the MIARB to grant leave of absence. Such an order may be made following a recommendation by the MIARB to the Attorney General. Section 28(3) of the CLMIA Act provides that before making a leave of absence order, the MIARB is to have regard to the degree of risk posed by the accused to the personal safety of people in the community (or any individual in the community) and the likelihood that, if given leave of absence on conditions, the accused would comply with the conditions.

The Discussion Paper notes that some stakeholders have argued that the considerations for making a leave of absence order are less extensive than for a general release order under s 33(5). The considerations in s 33(5) include whether the accused's mental impairment may benefit from treatment or training or any other measure. ALSWA is of the view that in addition to the

82 Ibid.
83 *Sentencing Administration Act 2003* (WA) s 42.

abovementioned considerations, the MIARB should be required to consider the extent to which the leave of absence may benefit the accused in terms of treatment, rehabilitation or general wellbeing. For Aboriginal mentally impaired accused this should include consideration of cultural wellbeing and the importance of maintaining connection to country, culture and community.

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

Answer: ALSWA is of the view that in addition to the abovementioned considerations, the MIARB should be required to consider the extent to which the leave of absence may benefit the accused in terms of treatment, rehabilitation or general wellbeing (including for Aboriginal people, cultural wellbeing and the importance of maintaining connection to country, culture and community).

Right to appear

ALSWA understands that the general practice of the MIARB is to accept written submissions from a mentally impaired accused and their advocates. Section 40 of the CLMIA Act provides that the MIARB may require the mentally impaired accused to appear before the MIARB. The Discussion Paper notes that some stakeholders are concerned that the there is no statutory right for mentally impaired accused and/or their advocates to appear before the MIARB.[84] 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.

Question 17: Should there be a formal process where the mentally impaired accused has a right to appear before the Board? Who should be entitled to appear to represent the accused's interests or provide information to the Board?

Answer: ALSWA is of the view that a mentally impaired accused should have a right to appear before the MIARB and be represented by a legal practitioner and/or advocate of their choice.

Release considerations

Section 33(5) sets out the factors to be considered by the MIARB when determining whether to recommend the release of a mentally impaired accused. These are:

> (a) the degree of risk that the release of the accused appears to present to the personal safety of people in the community or of any individual in the community;

84 Government of Western Australia, Criminal Law (Mentally Impaired Accused) Act 1996: Discussion Paper (2014) 23.

(b) the likelihood that, if released on conditions, the accused would comply with the conditions;

(c) the extent to which the accused's mental impairment, if any, might benefit from treatment, training or any other measure;

(d) the likelihood that, if released, the accused would be able to take care of his or her day to day needs, obtain any appropriate treatment and resist serious exploitation.;

(e) the objective of imposing the least restriction of the freedom of choice and movement of the accused that is consistent with the need to protect the health or safety of the accused or any other person;

(f) any statement received from a victim of the alleged offence in respect of which the accused is in custody.

The Discussion Paper notes that it has been suggested that these factors may be too broad and should be limited to 'criteria solely and specifically related to the safety of the community'.[85] On the other hand, others have suggested that it is appropriate to consider the safety and welfare of the mentally impaired accused and, therefore, criteria in relation to whether mentally impaired accused can care for themselves in the community is relevant.

ALSWA acknowledges community safety is the key factor that should be taken into account in deciding whether to release a mentally impaired accused from custody. However, this issue should not be viewed in isolation and without due consideration of the appropriate supports and services available to enable a mentally impaired accused to live in the community. ALSWA is of the view that whether a mentally impaired accused is able take care of his or her daily needs skews the balancing exercise required. The continued detention of a mentally impaired accused because they are unable to independently live in the community is inappropriate. The legislation and supporting structures must be set up to ensure that such persons can receive the necessary support and assistance.

Question 18: Are the current criteria set out in section 33(5) of the CLMIA Act appropriate to determining whether the mentally impaired accused should be released? Is there other information the Board needs to consider?

Answer: ALSWA is of the view that the criteria in section 33(5)(d) should be removed and a greater emphasis placed on inquiring about and ensuring that mentally impaired accused can received appropriate support and assistance to live in the community.

Review of Board decisions

Section 42 of the CLMIA Act requires the Board to give a copy of its report recommending release (or otherwise) to the mentally impaired accused and, if requested, to the mentally impaired accused's lawyer or guardian. There is no right of review under the CLMIA Act and the only option is for the mentally impaired accused to seek judicial review of the Board's decision. The Discussion Paper notes that the judicial review process may be 'confusing and expensive' for a mentally impaired accused and the grounds for review are, in any event, very narrow.[86] As noted above, ALSWA

85 Government of Western Australia, Criminal Law (Mentally Impaired Accused) Act 1996: Discussion Paper (2014) 24.
86 Government of Western Australia, Criminal Law (Mentally Impaired Accused) Act 1996: Discussion Paper (2014) 25.

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 on the merits.

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

Answer: ALSWA submits that the CLMIA Act should include that a mentally impaired accused who is subject to a custody order can apply on an annual basis to the Supreme Court of Western Australia for a review which is conducted as a review on the merits.

JUVENILES

The Discussion Paper states that:

> The CLMIA Act applies to juveniles in the same way as it applies to adults. It has been suggested that it would be more appropriate to treat juveniles differently from adults since juvenile mentally impaired accused may have special needs due to their youth and immaturity. In particular, it has been suggested the CLMIA Act should be amended to provide more flexibility for the courts and the Board to take into account the special needs and circumstances of children. [87]

As discussed earlier, the court may make a CRO, CBO or ISO in relation to a mentally impaired accused who has been acquitted on account of unsoundness of mind (unless the offence is in Schedule 1). ALSWA has recommended that these options be legislatively provided for mentally impaired accused who are found unfit to stand trial. However, there is a difficulty in relation to persons who are under the age of 17 years at the relevant time. Under s 22(2) of the CLMIA Act a court cannot make a CRO, CBO or an ISO unless such an order could have been made if the accused had been found guilty of the offence. Such orders cannot be imposed in relation to a young person who is under the age of 17 years and, therefore, in such cases the options are again very limited: unconditional release or a custody order.[88] 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.

It is also highlighted that the injustice arising from indefinite detention is even more pronounced for juveniles. Invariably, because of the overriding goal of rehabilitation, juvenile offenders will be sentenced to much shorter terms of detention than adult offenders and often juvenile offenders will be sentenced to a community-based order where an adult offender would receive imprisonment. Therefore, for a juvenile mentally impaired accused who remains in detention for many years, the difference between the time spent in custody in contrast to a comparable offender will be greater. It is imperative, therefore, that courts are equipped to impose non-custodial options for juvenile mentally impaired accused.

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87 Ibid, 26.
88 See *Sentencing Act 1995* (WA) ss 46A, 50, 50A and 50B.

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

Answer: ALSWA recommends that the CLMIA Act be amended to provide that all of the sentencing dispositions under the *Young Offenders Act 1994* (WA) be available for mentally impaired accused who are under the age of 18 years. In the longer term, as for adults, consideration to specialist supervision orders for juvenile mentally impaired accused should be considered.

OTHER ISSUES

Failure to comply with community-based disposition under the CLMIA Act

For those mentally impaired accused who are placed on a CRO, CBO or ISO the consequences of failure to comply with the conditions of the order are extreme. Pursuant to s 22(3) of the CLMIA Act if the court cancels the CRO, CBO or ISO the court must make a custody order. In contrast, if the court was dealing with an *offender* for a breach of the order it could resentence the offender to another disposition – there is no requirement to impose imprisonment. ALSWA submits that the CLMIA Act should be amended to enable the court to consider the circumstances of the breach and whether a further community-based disposition should be imposed.

ALSWA recommends that s 22(3) of the CLMIA Act be amended to provide that if a court makes a Conditional Release Order, Community Based Order or Intensive Supervision Order in respect of a mentally impaired accused and the order is subsequently cancelled, the court may impose a custody order or may impose a further Conditional Release Order, Community Based Order or Intensive Supervision Order or take no further action. The same provisions should apply for sentencing dispositions under the *Young Offenders Act 1994* (WA) as discussed above.

Frequency of reviews before the MIARB

As discussed above, ALSWA recommends that mentally impaired accused have a right of review to the Supreme Court once a year. However, there is also a strong argument for enabling more frequent reviews before the MIARB. Currently, the MIARB is required to provide a report (recommending whether or not the Governor should be advised to release the mentally impaired accused) to the Minister within eight weeks after the custody order was made; whenever it receives a written request to provide a report from the Minister; whenever it considers that there are special circumstances justify a report to be provided to the Minister; and, in any event, at least once a year.

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.

Prison disciplinary offences for mentally impaired accused in prisons

The OICS has suggested that alternative processes should be adopted for mentally impaired accused in respect of prison disciplinary offences. Although the 2011 Assistant Commissioner Custodial

Operations Notice provides that the person should be provided with appropriate representation for prison charge proceedings it is observed that the laying of charges against this cohort is 'confounding' given their mental unfitness to stand trial.[89] ALSWA agrees and suggests that a review of how mentally impaired accused who are detained in a prison should be dealt with in relation to ordinary prison management issues and discipline should be conducted.

Appeal rights in respect to disposition upon a finding of unfitness to stand trial or acquittal on account of unsoundness of mind

Although the CLMIA Act provides a right of appeal in relation to a determination of whether an accused is mentally unfit to stand trial, it does not contain a right to appeal the decision about whether a custody order (or any other disposition) is imposed. In contrast, pursuant to ss 6 and 7 the *Criminal Appeals Act 2004* (WA) there is a right to appeal to the Supreme Court in respect to an order made by a court of summary jurisdiction as a result of an acquittal on account of unsoundness of mind. Further s 25 of that Act provides for a specific right to appeal any order made under the CLMIA Act as a result of an acquittal on account of unsoundness of mind for matter that were heard before a superior court.

ALSWA is of the view that legislative reform is required (either to the *Criminal Appeals Act 2004* (WA) or the CLMIA Act) to ensure that the accused and prosecution have a right to appeal the making of any order imposed following a determination that an accused is mentally unfit to stand trial.

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[89] Office of the Inspector of Custodial Services, *Mentally Impaired Accused on 'Custody Orders': Not guilty, but incarcerated indefinitely* (2014) 35.