WAJA
WA JUSTICE ASSOCIATION

WAAMH
Western Australian Association for Mental Health

JUSTICE DELAYED IS JUSTICE DENIED.

A Report to Strengthen the *Criminal Law (Mentally Impaired Accused) Act*

WAJA

WA JUSTICE ASSOCIATION

"Justice Delayed is Justice Denied"

A report to strengthen the *CLMIA Act*

WA Justice Association

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Strengthening the *CLMIA Act*

To:	Western Australian Association for Mental Health (WAAMH), Magistrate Felicity Zempilas, Nicholas Versteegan
From:	Charlotte Salom, Maria Ambrose, Lachlan Philips, Hugo Brossard, Maxwell Hinch
CC:	Tenille Lazenby, Isabelle Bavcevic, Tom Penglis
Date:	Semester 1 2022
Re:	Justice Delayed is Justice Denied: A report to strengthen the CLMIA Act

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2. Acknowledgements

This report has been prepared by Charlotte Salom, Maria Ambrose, Lachlan Philips, Hugo Brossard and Maxwell Hinch for the Western Australian Association for Mental Health (WAAMH). Special acknowledgement must be made to Nicholas Versteegen of the Mental Health Law Centre (MHLC) and Magistrate Felicity Zempilas for mentoring and supervising the project respectively.

The Western Australian Justice Association acknowledges Aboriginal people as the traditional owners and custodians of Australia and recognises their continuing connection to land, waters and community.

We acknowledge and respect Aboriginal Elders past and present, and support emerging leaders across Western Australia and Australia.

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3. Executive Summary

The Western Australian Justice Association ('**WAJA**') has worked in collaboration with the Western Australia Association for Mental Health ('**WAAMH**') to develop a report to explore ways of improving the operation of the *Criminal Law (Mentally Impaired Accused) Act 1996 (WA) ('**CLMIA Act')*. Currently, *CLMIA Act* fails to provide accused who have mental and/ or cognitive impairment with access to natural justice, procedural fairness and appropriate treatment.[1] Most shockingly, *CLMIA Act* risks imprisoning these accused for indefinite terms of custody, often longer than the period they would have served had they been convicted of a criminal offence. Punishment without conviction undermines the foundational values of our justice system such as equality, the right to a fair trial and the right to know the charges held against you. Our report has explored options to potentially restore these values.

In particular we have:

- Considered the advantages of a centralised process in courts to determine fitness to stand trial;
- Investigated opportunities to improve communication and cooperation between key agencies in the case management of an accused deemed potentially unfit to stand trial; and
- Examined mechanisms to restore fitness in a process which is person-centred, family sensitive and recovery focused.

We identified deficiencies in the current system by undertaking a broad literature review and consultation with key agencies. Through this process we explored mechanisms to improve the accountability and transparency of how *CLMIA Act* operates for an accused deemed potentially unfit to stand trial. This report provides a series of recommendations (listed below) for the key features of a proposed new system, which aims to ensure consistent, fair and properly informed outcomes for an accused deemed potentially unfit to stand trial under *CLMIA Act*.

The current Western Australian ('WA') Government committed to reforming the *CLMIA Act* prior to its election in 2016, with new legislation drafted in 2019.[2] Whilst commitments to reform CLMIA ACT have been made, substantive and meaningful reform has yet to be made. Mentally and/or cognitively impaired accused continue to be harmed by in-place legislation. We are yet to observe substantive and meaningful reform to *CLMIA Act* or relative service delivery agencies to improve outcomes for mentally and/or cognitively impaired accused persons.[3]

We hope that this report is read in tandem with the breadth of existing recommendations on this subject and will bolster the advocacy efforts of WAAMH to urge the WA government to protect the rights of this vulnerable group in our community.

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[1] 'Mark McGowan's promise to stop jailing mentally impaired people indefinitely still unfulfilled', ABC Radio Perth (Web Page, 17 May 2022) <https://www.abc.net.au/news/2022-05-17/mentally-impaired-custody-reforms-go-unfulfilled-by-mark-mcgowan/101061754>.
[2] Ibid.
[3] Ibid.

List of Recommendations

Improving the Process in Courts (Section 6 of this report)

1) Enhancing the information sharing capacity of key parties.
2) Implementing a "list" approach to hearing matters of unfitness to stand trial to improve consistency and streamline an accused's access to support services.
3) Reforming the test for fitness.
4) Increased judicial discretion around making custody orders, the length of time available to facilitate restoring the fitness of an accused and access to a special hearing process.
5) Enshrining limits on detention.
6) Reform to the role and composition of the Mentally Impaired Accused Review Board ('**MIARB**').

Streamlining the Process for Lawyers (Section 7 of this report)

1) Implementing a support person who may bridge the gaps within information channels.
2) Increased support for lawyers and their client enhancing transparency, fairness and support.
3) Supporting the client through just trial processes and enhancing their understanding of court processes through client-specific options.
4) Training and Education opportunities for lawyers which focusses on the legal framework and when fitness may be raised as an issue.
5) Right to representation in court and MIARB proceedings for mentally impaired individuals.

Endorsing a Person-Centred, Family Sensitive and Individualistic Approach to Restoring Fitness (Section 8 of this report)

1) Advocating for increased access to 'places of custody'.
2) Strengthening the use of Support Plans to Achieve Better Outcomes.

4. Key terms

Mental illness

- Confusion has been expressed with the existence of two different definitions of 'mental illness' in the legislation.
- Mental illness under the *Criminal Code 1913* (WA) means an underlying pathological infirmity of the mind, whether of short or long duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary stimuli. [4]
- Mental illness under the *CLMIA Act* has the meaning given in the *Mental Health Act 2014* section 4 which defines mental illness as a condition that (a) is characterised by a disturbance of thought, mood, volition, perception, orientation or memory and (b) significantly impairs (temporarily or permanently) the person's judgment or behaviour. [5]
- However, it is appropriate that the definition in context of the *CLMIA Act* has the same meaning as that in the *Mental Health Act 2014*.

Mental Impairment

- A mentally impaired accused means persons who are mentally unfit to stand trial or acquitted on account of unsoundness of mind. Under section 23 of the *CLMIA Act* the term mentally impaired accused is more narrowly defined to mean an accused in respect of whom a custody order has been made and who has not been discharged from the order.[6]
- Words such as 'brain damage' and 'senility' are outdated and should be removed from the definition of mental impairment. [7]
- Specifically, the current definition does not reflect the contemporary medical classification and uses language that is highly stigmatising.[8]
- It has been recommended that the definition be altered to read as "mental impairment means intellectual disability, mental illness, brain injury or dementia or a combination of these conditions".

Unsoundness of mind

- Although the term 'unsoundness of mind' is outdated and appears only to relate to mental illness, in practice the term in the *CLMIA Act* and the Criminal Code makes it evident that it should encompass both mental illness and intellectual and cognitive disability. It is recommended that the term should be replaced with 'mental impairment' to update the meaning within the Act in context of contemporary definitions. [9]

Fitness to stand trial

- The term refers to the capacity of an individual to participate in their trial. This might be in the sense that they understand the charge against them but can also extend to their ability to make a rational decision.

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[4] *Criminal Code 1913* (WA) s1
[5] *Mental Health Act 2014* (WA) s4.
[6] *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s23.
[7] Department of the Attorney General, *Review of the Criminal Law (Mentally Impaired Accused) Act 1996*: Final Report (Report, 2016) 8.
[8] Ibid.
[9] Ibid.

5. Context of this Report

What is the Problem?

- Mental impairment is often associated with a heightened exposure to health risk factors which include substance abuse as well as social risk factors such as homelessness and education. The combination of these disadvantages increases the likelihood of such a person becoming involved in the criminal justice system.[10]

- The overrepresentation of Indigenous people in the criminal justice system means that mental impairment related custody disproportionately impacts Indigenous accused.

Operation of the *CLMIA Act 1996* (WA)

- The Act relates to criminal proceedings involving mentally impaired persons who are charged with an offence. The purpose of the Act is to prescribe an extrajudicial process for the treatment of people who, as a result of severe mental illness or an intellectual or cognitive disability, are not able to fairly participate in the usual judicial procedures of our criminal justice system.[11]

- The Act specifically deals with accused who have been found by a court to be mentally unfit to stand trial or have been found not guilty on account of unsoundness of mind. Accordingly, persons subject to the Act itself have not been found criminally culpable.[12]

- The Act does not intend to provide punishment for criminal guilt, rather it is intended to balance the duty of the Government to protect the community with rights of persons with a mental or cognitive impairment.

- The key objectives of the Act are:[13]
    - The paramount safety of the community, including victims of alleged crime; and
    - The fair and equitable treatment of mentally impaired accused, consistent with the principle of least restriction.

- The management, supervision and release framework under the Act promotes community protection in two main ways:[14]
    - The public is protected through the removal of a mentally impaired accused from the community through imprisonment, supervision or treatment; and

[10] Ibid.
[11] Ibid 4.
[12] Ibid 6.
[13] Ibid.
[14] Ibid 30.

- In the longer term, the public is protected through the provision of appropriate treatment which supports successful rehabilitation of the mentally impaired individual until they can be safely reintegrated into the community.

- However, the Act significantly lacks procedural fairness and has been plagued with a lack of transparency. It also fails to facilitate a streamlined process for managing criminal proceedings for people deemed potentially unfit to stand trial.

- The Act has failed to strike an appropriate balance between protecting the safety of the community and safeguarding the rights and needs of persons with mental impairment who have been charged with offences.[15] Amendments are required to ensure that the Act balances the right of the mentally impaired individual with the interests of the community. [16]

Opportunity for change: The *CLMIA Amendment Bill 2014*

- New sections that set out contemporary Principles and Objects, consistent with our obligations under the UN Convention on the Rights of Persons with Disabilities (UNCRPD), to achieve the aims of community safety, least restrictive option, and contemporary treatment and support for people accused under the Act.[17] There is also a recommendation for the right to independent advocacy for all people on remand for assessment, or under a community based or custody order, pursuant to the Act. [18]

- There are further recommendations for the right to legal representation in all court and Mentally Impaired Accused Review Board (MIARB) proceedings, the Act itself should aim to set a clearer standard for assessing fitness to stand trial and allow fitness to stand trial with supports. [19]

- Specifically, another recommendation is that custody orders should be no longer than the term the person would likely have received, had they been found guilty of the offence. This was the central to the Amendment Bill in 2014 which did not, however, pass in Western Australia. [20]

- The lack of procedural fairness remains a prominent issue plaguing the Act. New procedural fairness provisions were outlined which provide for rights to appear, appeal, review and rights to information and written reasons for a decision. Future changes should include similar provisions plus amendments to remove the role of the Attorney General and Governor, requiring a court or tribunal to have oversight of custody orders. Changes should be made to MIARB processes to improve procedural fairness and to align the Board's membership with the principles and objects of the Act. [21]

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[15] Ibid 31.
[16] Ibid.
[17] *UN Convention on the Rights of Persons with Disabilities*, Article 14(1)(b).
[18] Criminal Law (Mentally Impaired Accused) Act Amendment Bill 2014 (WA)

[19] Ibid.
[20] Mental Health Law Centre, A Policy and Law Reform Submission, *InterAction with the Western Australian Criminal Justice System by People affected by Mental Illness or Impairment* (10 August 2010) 8.
[21] Ibid 15.

- Importantly, prison should cease to remain a legal place of detention for mentally impaired accused. More alternative options with sufficient room to accommodate for mentally impaired accused should be made a priority. [22]

- Furthermore, it is recommended that all people on remand for assessment, and all those on custody and community-based order under the Act, have the right to independent advocacy and representation through the new Mental Health Advocacy Service. [23]

An Interstate Comparison of Fitness to Stand Trial

- The procedure under the *CLMIA Act* differs from a number of other jurisdictions in Australia. Relevant legislation in the Australian Capital Territory, New South Wales, Northern Territory and Victoria provides that following a finding that an accused is mentally unfit to stand trial, a special hearing process should be conducted in order to test the case against the accused. [24]

- In South Australia, the *Criminal Law Consolidation Act 1935* (SA) provides that If the Court orders an investigation relating to an accused's mental fitness to stand trial, the question of the accused's mental fitness to stand trial may, at the discretion of the trial judge, be separately tried before or after a trial of the objective elements of the alleged offence. [25]

- The Mental Health Commission noted as a key concern the absence of a process for determining whether a mentally impaired accused did indeed commit the objective elements of the offence of which they are accused. [26]

- There are submissions contesting the benefit of the special trial process. In other jurisdictions special hearings are considered an important mechanism whereby an unfit accused is given an opportunity for acquittal and unconditional release, a fundamental requirement of the criminal justice system. However, current provisions of the Act in WA provide the Court already with the power to unconditionally discharge the accused where appropriate. [27]

- Furthermore, other jurisdictions impose limitations on detention periods which is significantly different to practice in WA. The Amendment Bill in 2014 attempted to restrict detention periods to the time for which the accused would have been detained should they have been found guilty. [28]

- The *CLMIA Act* should be amended to align with the approach taken in other Australian jurisdictions.

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[22] Ibid 45.
[23] Department of the Attorney General, *Review of the Criminal Law (Mentally Impaired Accused) Act 1996*: Final Report (Report, 2016) 89.
[24] Australian Law Reform Commission, *Unfitness To Stand Trial,* (Discussion Paper 81, May 2014)
[25] *Criminal Law Consolidation Act 1935* (SA)
[26] Department of the Attorney General, *Review of the Criminal Law (Mentally Impaired Accused) Act 1996*: Final Report (Report, 2016) 52.
[27] Ibid 53.
[28] Criminal Law (Mentally Impaired Accused) Act Amendment Bill 2014 (WA)

An International Comparison of Fitness to Stand Trial

- The general criteria for non-criminal responsibility are similar across the world with the main concern being the relationship between mental disorder, offence and the impact of the mental disorder on the act itself. [29]

- In many countries, such as Germany, Ireland, the Netherlands and Singapore, there is a legislated time frame for a forensic psychiatric analysis to be conducted. These may be conducted urgently, within 72 hours in some countries such as Canada, England, Pakistan and Wales.[30] This aims to reduce the unnecessarily long detention in prison and upholds the right of the individual to access a fair trial in a reasonable timeframe.[31]

- Although some countries require hospital admission to conduct an analysis, in many countries such as Canada, England, USA and France hospital admissions are not compulsory, and research has shown that out-patient assessments are more cost effective and protect the liberty of accused persons to the right to a fair and speedy trial.[32]

- In Canada, psychiatrists are required to conduct court-ordered assessments with other mental health professionals being occasionally involved in the other aspects of the assessment. Research has stipulated that mental health professionals from various disciplines can achieve higher levels of reliability, validity and quality in these assessments.[33] Therefore, it may be considered to be an option available to countries with limited access to these health professionals to ensure that these assessments are carried out sooner.

- It was also further recommended that the assessments of fitness use a functional model of evaluation, where the assessment describes the functional abilities required for a defendant to stand trial and not simply diagnose and recommend interventions. [34]

How *CLMIA Act 1996 (WA)* Breaches Australia's Human Rights Obligations

- Various submissions have raised concerns regarding the consistency of indefinite detention with Australia's international human rights obligations.[35] The following human rights obligations have been expressed as being potentially breached by the indefinite custody regime established under the *CLMIA Act 1996*:

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[29] Arboleda-Flórez, Julio, 'Forensic Psychiatry: Contemporary Scope, Challenges and Controversies' (2006) 5(2) *World psychiatry* 87
[30] Acklin, Marvin W, Kristen Fuger and William Gowensmith, 'Examiner Agreement and Judicial Consensus in Forensic Mental Health Evaluations' (2015) 15(4) *Journal of forensic psychology practice* 318
[31] Houidi, Ahlem and Saeeda Paruk, 'A Narrative Review of International Legislation Regulating Fitness to Stand Trial and Criminal Responsibility: Is There a Perfect System?' (2021) 74 *International Journal of Law and Psychiatry* 101666
[32] Ibid.
[33] Chan, Lai Gwen and Todd Tomita, 'Forensic Psychiatry in Singapore' (2013) 5(4) *Asia-Pacific psychiatry* 344
[34] Viljoen, J. L., Roesch, R., & Zapf, P. A. (2002). Inter-rater reliability of the fitness interview test across 4 professional groups. Canadian Journal of Psychiatry, 47, 945–952. https://doi.org/10.1177/070674370204701006.
[35] Mental Health Law Centre, A Policy and Law Reform Submission, *Interaction with the Western Australian Criminal Justice System by People affected by Mental Illness or Impairment* (10 August 2010) 41.

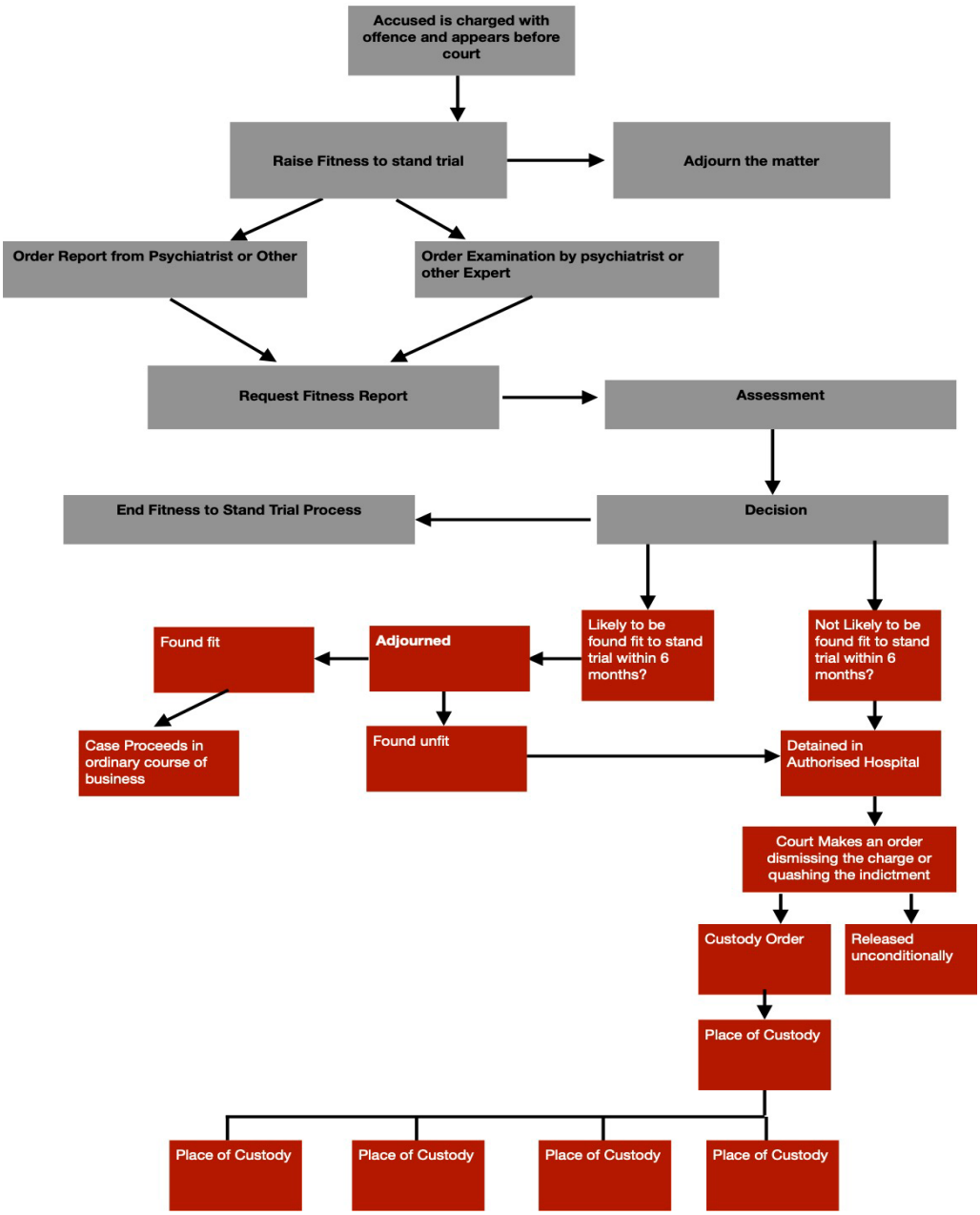
- Article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR), which prohibits arbitrary detention;
- Article 7 of the ICCPR, which provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment;
- Article 10(1) of the ICCPR, which provides that all persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person;
- Article 2(a) of the ICCPR, which provides that accused persons, shall be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons; and
- Article 15 of the United Nations *Conventions on the Rights of Persons with Disabilities,* which provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

- The Western Australian Association for Mental Health expressed the view, that the United Nations *Convention on the Rights of Persons with Disabilities "*is of particular note, and its protections must feature strongly in the principles for a new *Criminal Law (Mentally Impaired Accused)* Act."[36]

[36] Ibid.

5. Recommendation 1: Improving the Court Process

6.1 What is the Current Process?



(a) Key Issues with the Current Process

Several issues arise from the current court process:

i. Time delays within the court;
ii. Lack of information sharing between agencies, such as those providing assessment reports and those providing treatment to an accused;
iii. Duplication of new reports and evaluations which can take months to prepare;
iv. Variability of quality of reports depending on access to relevant information and criteria used; and
v. While these processes occur, often taking a long time, an accused might be incarcerated without receiving treatment or in an environment that is not supportive of their needs.

6.2 Recommendations

6.2.1 Improving the Information Sharing Capacity of Key Parties

Enhancing information sharing between key agencies would provide better outcomes in the case management of accused deemed potentially unfit to stand trial. Currently, there can be as many as six government Departments involved in an accused's case from first interaction with the criminal justice system to receiving treatment in an authorised place of custody. Without proper, transparent information sharing between these key agencies about the status of an accused's case, the costs and time taken to receive justice are exacerbated.

During a consult with a Forensic Psychiatrist, WAJA heard how this lack of information sharing adversely impacts the potential for an accused to have their case progressed to release.[37]

[37] Consult with WA Forensic Psychiatrist (WA Justice Association, 2022) [*Identity redacted for confidentiality*].

A. In Preparation for Fitness Determination

Enhancing the information sharing between key parties will lead to better informed court decisions as well as more timely and cost-effective access to justice for an accused deemed unfit to stand trial.

WAJA recommends,

- Negotiating access to key documents currently held in confidence by the Department of Justice
- Investigating the role that a support person could play in collecting and collating relevant documents for an accused at each stage of their case to prevent delays and unnecessary orders for re-assessment
- Implementing a shared data base for the case management of accused to promote cooperation and transparency between relevant agencies

Without thorough communications between the lawyer, client and expert charged with carrying out the assessment and preparing the court report, an inaccurate determination may be made concerning the accused's fitness to stand trial. This Psychiatrist explained that this is a particular concern when an accused's medication cycle is not communicated to the relevant parties.[38] He recounted an instance where he carried out three psychiatric assessments on an accused on the direction of their lawyer, each time determining that the accused was fit to stand trial, contrary to his lawyer's observations. It was later discovered that this Psychiatrist met the accused the day after his fortnightly medication had been taken, and hence the accused's condition was stable. However, his lawyer was meeting with him at the end of the medication cycle, when he was in a less stable condition.[39] Without adequate information sharing, resources are potentially wasted, and it raises concerns that people may be deemed unfit to stand trial without a complete understanding of their medical history or mental impairment.

B. Access to Expert Reports

The Department of Justice is responsible for arranging expert fitness assessments and court reports. A court may request previous reports which are stored at the Department of Justice (DOJ). However, other parties requesting documents from the DOJ is a challenge as they are confidential and, in some instances, may have been destroyed. The confidential nature of psychiatric reports can also lead clinicians to duplicate some of the extensive research which may have already been done previously, leading to an unnecessarily prolonged process. It also undermines the transparency of reports created.

C. Access to Documentation from a Place of Custody

[38] Ibid
[39] Ibid

Poor information sharing procedures impedes an accused's opportunity to progress to release from their place of custody. For example, there have been instances where MIARB has not been advised of any relevant information in respect of an accused's progress from within a place of custody (particularly prisons) in a timely fashion. It is essential that MIARB is provided with detailed documentation of an accused's progress in programs and treatment to provide them the best opportunity to progress to release on annual review. There are several case examples where an accused's documentation contains only insubstantial comments made by custodial officers, which are largely not useful to MIARB. Therefore, the accused's case is not progressed and they remain in custody for disproportionate periods of time.[40]

From our research, WAJA considers a timeline of recommendations that should be implemented to improve the cooperative capacity of key agencies in the case management of an accused deemed unfit to trial.

As a short-term goal, it is important to begin discussions and negotiations with the Department of Health and Department of Justice with the goal to enable easier access by certain key parties to the records they keep confidential. This process would be beneficial in establishing the basis for a shared database and decrease the necessity for them to be re-ordered by the Court. Removing barriers to accessing reports would also improve the quality of reports produced as other clinicians would have access to relevant portions of an accused's history.

In the medium-term we see value in the role a support person could play in the court to facilitate the collection of key documents at each stage of the case process. It could additionally help making sure the correct documentation is given at the beginning of the processes (i.e. medical history, medication schedules, previous psychiatric reports, etc.). Additionally, they would ensure that an accused has access to their assessment report and treatment plans in their place of custody as well as monitoring all the progress reports before their six-month review of fitness by the Court. A support person would also without a doubt give continued support to ensure that the parties' documents are up to date before review by MIARB to progress towards release from their place of custody.

Finally, **the long-term goal** is to create a shared database across agencies. This recommendation targets the DOH and DOJ's handling of documents and would ensure that these important, informative documents are appropriately shared to the courts. This database would prove to be extremely valuable as the whole process would be considerably shorter and would also avoid any conflict between agencies in obtaining the documents. Additionally, the clinicians would not have to duplicate extensive research on the past history of an accused which can significantly prolong the process.

However, it is important to note that none of these recommendations could be enforced unless courts are given more power to obtain the relevant information. The issue of increased judicial flexibility is discussed below at s 1.4.

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[40] Department of the Attorney General, *Review of the Criminal Law (Mentally Impaired Accused) Act 1996* (Final Report, April 2016).

6.2.2 Reform the Test for Fitness

- What the definition is:
  - The term refers to the capacity of an individual to participate in their trial. This might be in the sense that they understand the charge against them but can also extend to their ability to make a rational decision. It is presumed that a person is fit to stand trial.[41]

- How it is used to determine fitness:
  - The current standard for determining fitness to stand trial in Western Australia is principally governed by the common law precedent established in *R v Presser;* whether an accused has sufficient mental or intellectual capacity to understand the proceedings and to make an adequate defence.[42] It was then incorporated under the section 9 of the *CLMIA Act.*

- The elements of the test include,
  a) An understanding of the nature of the charge;
  b) An understanding of the requirement to plead to the charge or the effect of a plea;
  c) An understanding of the purpose of the trial;
  d) An understanding or an exercise of the right to challenge the jurors;
  e) To follow the course of the trial;
  f) An understanding of the substantial effect of the evidence presented by the prosecution in the trial; and additionally
  g) To properly defend the charge.

The Problem with the *Presser Test*

- The Presser test ('the test') has been criticised as placing undue emphasis on a person's intellectual capacity to understand the legal system and charges posed against them, as opposed to their ability to engage in rational decision making.[43] Despite the rules being described as 'protective', their severe nature causes adverse outcomes for accused deemed unfit to stand trial under *CLMIA Act* as they may become subject to an indefinite custodial order.[44]

- As a result, a significant number of key parties have called for improvements and clarification to the current criteria of the test, to better address the accused's ability to make crucial decisions in their legal proceedings. Several reports show that there is a need to incorporate the approach of the Law

[41] Australian Law Reform Commission, *Unfitness to stand trial* (Discussion Paper No 81, 20 May 2014) https://www.alrc.gov.au/publication/equality-capacity-and-disability-in-commonwealth-laws-dp-81/7-access-to-justice/unfitness-to-stand-trial/#:~:text=7.13%20At%20common%20law%2C%20the,to%20make%20an%20adequate%20defence
[42] https://www.alrc.gov.au/publication/equality-capacity-and-disability-in-commonwealth-laws-dp-81/7-access-to-justice/unfitness-to-stand-trial/#:~:text=7.13%20At%20common%20law%2C%20the,to%20make%20an%20adequate%20defence
[43] https://www.alrc.gov.au/publication/equality-capacity-and-disability-in-commonwealth-laws-dp-81/7-access-to-justice/unfitness-to-stand-trial/#:~:text=7.13%20At%20common%20law%2C%20the,to%20make%20an%20adequate%20defence
[44] https://www.alrc.gov.au/publication/equality-capacity-and-disability-in-commonwealth-laws-dp-81/7-access-to-justice/unfitness-to-stand-trial/#:~:text=7.13%20At%20common%20law%2C%20the,to%20make%20an%20adequate%20defence

Commission of England and Wales, most notably the 2010 consultation paper titled '*Unfitness to Plead'* which argued that a person should only be found unfit if they are unable:

- To understand the information relevant to the decision that they will have to make in the course of their trial,
- To retain that information,
- To use or weigh that information as part of decision-making process,
- To communicate their decision,[45]
- To provide instructions to his or her legal practitioner.[46]

Therefore, there is a definite need to reform the test for fitness, to steer away from the high threshold of intellectual capacity, as in reality the threshold for standing trial should be considered in light of the ability of lawyers to regularly take instructions from clients with mild mental and cognitive impairment.[47]

6.2.3 Centralising Matters of Fitness to be Heard on the Same List

Cases where fitness has been raised should be centralised on a list in the Magistrate's Court to improve consistency of outcomes, flow of information and promote and provide early engagement with treatment and support services for an accused.

Fitness to stand trial cases are inherently complex and involve many agencies. For example, multiple government departments and treatment providers are involved in the case management of an accused with cognitive or mental impairment. When these cases are heard as they appear, the system does not have access to sufficient resources to provide procedural justice to an accused. Therefore, WAJA recommends that persons prosecuted under *CLMIA Act* are heard on the same court list.

The advantage of hearing these cases on the same list reflects the recommendations made in s 1.1. On the list day, the relevant sources of information would be available at one key point. Provided that this key point was resourced and adequately supported by relevant expertise, it would provide for more consistent, fair, and properly informed outcomes for an accused deemed unfit to stand trial under *CLMIA Act*.

[45] https://www.alrc.gov.au/publication/equality-capacity-and-disability-in-commonwealth-laws-dp-81/7-access-to-justice/unfitness-to-stand-trial/#:~:text=7.13%20At%20common%20law%2C%20the,to%20make%20an%20adequate%20defence
[46] https://www.alrc.gov.au/publication/equality-capacity-and-disability-in-commonwealth-laws-dp-81/7-access-to-justice/unfitness-to-stand-trial/#:~:text=7.13%20At%20common%20law%2C%20the,to%20make%20an%20adequate%20defence
[47] https://www.alrc.gov.au/publication/equality-capacity-and-disability-in-commonwealth-laws-dp-81/7-access-to-justice/unfitness-to-stand-trial/#:~:text=7.13%20At%20common%20law%2C%20the,to%20make%20an%20adequate%20defence

If matters were heard on a designated list, it would help to streamline case management. Relevant agencies and support contacts would be available and involved in an accused's case management from the earliest convenience. And it would provide an accused with early connection to person-centred, family sensitive and recovery focussed support.

For example, in a number of Magistrate's Courts in WA there are dedicated lists for criminal matters which are family violence related.[48] The purpose of the list is to provide support to family violence victims by connecting them with the Family Violence Service and Department of Corrective Service and '... break the cycle of family violence by providing the option of programs to address violent behaviour'.[49]

Some examples of relevant agencies and service providers may include:

- Outcare, or another provider of community supports[50]
- Mental Health Law Centre,[51]
- Department of Corrective Services,
- Department of Communities (Disability Services),
- MIARB,
- Mental Health practitioners,
- Information regarding availability of approved and declared places.

Centralising matters concerning fitness to stand trial would improve the efficiency of the court process and reduce costs. It would enhance the consistency, quality and timely delivery of justice to an accused deemed potentially unfit to stand trial under *CLMIA Act*.

6.2.4 Increased Judicial Discretion

Judges and Magistrates should be granted greater flexibility under *CLMIA Act,*

- To determine the most appropriate and least restrictive disposition of the accused's matters, having regard to both community safety and the unique needs of an accused
- To determine a reasonable period for the accused to engage with support services to restore their fitness to stand trial (based on evidence)
- To conduct a Special Hearing (where necessary) to test the evidence against an accused deemed unfit to stand trial

[48] 'Family Violence List', Magistrates Court of Western Australia, (20 May 2022) <https://www.magistratescourt.wa.gov.au/F/family_violence_list.aspx>.
[49] Ibid.

[50] 'Outcare', (Web Page, 16 May 2022) <https://www.outcare.com.au/>.
[51] 'Mental Health Law Centre', (Web Page, 10 May 2022) <https://mhlcwa.org.au/>.

A. Orders

Providing Judges and Magistrates with greater judicial discretion to determine the appropriate disposition of an accused's matters when deemed unfit to stand trial will reduce the pressure on current places of custody as well as provide more rehabilitative and suitable dispositions for an accused who does not pose such a severe risk to the community.

Currently, the court only has two options when deciding the disposition of a person deemed unfit to stand trial:

1. To make an unconditional release order, or
2. To impose a custody order.

Unconditional release refers the discharge of a person deemed unfit to stand trial in circumstances where they cannot reappear before the Court.[52] It can be offered in the first instance, or on final review once a person has spent six months in a place of custody engaging with treatment. Where the court determines that an accused is unfit to stand trial but does not pose such a grave threat to community safety to impose a custody order, they are released unconditionally. Unconditional release fails to support an accused with mental or cognitive impairment develop strategies to treat and manage their impairment and fails to address recidivism on the part of the accused.[53]

In contrast, the disposition of a custody order refers the person to prison, a declared place, authorised hospital, or detention centre, where they will participate in treatment programs and have their fitness reviewed by the court in six months.[54] A custody order will only be imposed if the statutory penalty of the alleged offence includes imprisonment, or a custodial order is obligatory under Schedule 1 of *CLMIA Act*.[55] However, in circumstances where the accused may pose a threat to community safety, the courts trend to Act cautiously and more frequently impose a custody order than a grant of unconditional release.

The Court is permitted broad discretion to impose such orders, considering.

- The strength of the evidence against the accused
- The nature of the alleged offence and the alleged circumstances of its commission
- The accused's character, antecedents, age, health and mental condition
- The public interest.[56]

[52] *Criminal Law (Mentally Impaired Accused) Act 1996 (WA)* s 35 ('*CLMIA Act*).
[53] Department of the Attorney General, *Review of the Criminal Law (Mentally Impaired Accused) Act 1996 Final Report* (April 2016) 56 ('Attorney General').
[54] *CLMIA Act* (n 53) s 24.
[55] Ibid, Schedule 1.
[56] *CLMIA Act* (s 53) s 22.

The most problematic criterion under consideration is 'public interest'. The phrase is not defined in *CLMIA Act* and, as a result, is inconsistently applied across cases in the interest of preserving community safety.[57] A more exacting criterion that invokes expert evidence as to the accused risk of re-offending or genuine threat to the community would provide a more transparent process to the accused and their family as well as better reflect the seriousness of orders made under *CLMIA Act*. [58]

This binary operation of the *CLMIA Act* fails to accommodate for the unique experiences of persons with cognitive and mental impairment. Without providing greater flexibility to the court, the *CLMIA Act* fails to guarantee procedural fairness or support an accused to access treatment services to reduce their likelihood of re-offending.

Further, due to limited available declared places and authorised hospitals (discussed below at 3.2) it is most likely that an accused person will be placed in prison, either for six months prior to review or after the making of a custody order, which often fails to offer consistent and adequate rehabilitative services.[59] Treating cognitive and mental impairment in prison is challenging and often leads to deterioration in a person's condition.

Risks associated with prison led treatment may include:

- Appointments with service providers may be disrupted as the accused can be relocated
- Accused persons can be exploited by other inmates
- Managing treatment schedules of persons with cognitive and mental impairment creates additional stress and tension in staff who lack resources and training to manage the resulting behaviours of some impairments

WAJA endorses recommendations that the court should be granted the flexibility to determine the most appropriate disposition to balance community safety and the rights of the accused.[60] A middle ground between unconditional release and a custody order would be to enforce a community-based order ('**CBO**').

A CBO would permit an accused to continue their normal life at home with the support of family and friends whilst adhering to the rules of their specific order.[61] This would be particularly beneficial where an accused is unfit to stand trial but does not pose such a significant risk to the community to justify placing them under a custody order. The imposition of CBOs would also promote access to restorative treatment for the accused suffering mental or cognitive impairment. The option of a CBO for those suffering cognitive impairment, who may not ever be fit to stand trial, would provide better, more definitive, and rehabilitative outcomes as opposed to spending a disproportionate amount of time for their offence under a custody order.

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[57] Mental Health Law Centre (WA) Inc, *Interaction with the Western Australian Criminal Justice System by People Affected by Mental Illness, or Impairment,* (Law Reform Submission) 40, < https://www.aasw.asn.au/document/item/4346> ('MHLC').
[58] Ibid, 40.
[59] Chelsea McKinney, *Submission to the Review of the Criminal Law (Mentally Impaired Accused) Act 1996* (December 2014) 11, < https://www.pwdwa.org/documents/submissions/Joint_CLMIA_Submission_Final_121214.pdf>.
[60] Attorney General (n 54) 57.
[61] 'Community Based Orders – Fact Sheet', *Department of Justice* (Web Page, May 2022) < https://www.wa.gov.au/system/files/2021-12/cbo-fAct-sheet.pdf> ('CBO').

As the judicial power to execute CBOs already exist under *CLMIA Act* for those acquitted on unsoundness of mind under s 22, it does not seem unfeasible to extend a judge's discretion to impose a CBO on an accused deemed unfit to stand trial.

What is a Community Based Service Order?

- Provided for under the *Sentencing Act 1995* to give offenders the opportunity to address their criminal behaviour by partaking in supervision, a program or community work for a period of at least six but no longer than 24 months.[62]
- It allows an accused life to continue as normally as possible and in some instances the court will impose a 'spent conviction' in conjunction with the CBO.[63]
- It requires an accused to report to the nominated community corrections officer (CCO) within 72 hours of the disposition being handed down as well as notifying the CCO of any change of address or employment.
- An accused must not leave the State without prior permission from the Community Corrections Centre and generally comply with the terms of their order.[64]
- If the accused breaches the terms of the order, they will come before the court for re-assessment and a CBO will not be afforded again.[65]

B. Six-Month Limit

Where possible, endowing the Judge or Magistrate with greater discretion to determine an appropriate period before an accused fitness is reviewed would lead to better outcomes and reflect the **realities** of restoring fitness in people with unique needs and overburdened and resource poor places of custody.

The rigid six-month time frame enshrined in *CLMIA Act* before an accused comes back before the court to have their fitness determined does not reflect the practical reality of restoring fitness in individuals deemed potentially unfit to stand trial. Whilst it is acknowledged that this period should not be open-ended as this creates the capacity for someone to spend a disproportionate amount of time in custody awaiting re-assessment, the Judge or Magistrate should be endowed with some discretion to extend the review period dependent on the circumstances of an accused.

Due to the inherent pressure on institutions such as prison, some accused deemed unfit to stand trial may not have access to treatment from day one of arriving in custody. Picture a situation in which an accused resides in custody for five months before engaging with treatment. This does not provide the accused with adequate opportunity to restore and manage their fitness to stand trial before re-appearing in court. Such an instance

[62] *CLMIA Act* s19(5).
[63] CBO (n 62) with 'spent order' meaning that once the period of the order is successfully completed, the offender is not required to reveal the details of their conviction. In the context of fitness to stand trial it could be that a person's conviction is quashed.
[64] Ibid.
[65] Ibid.

was observed in the WA Magistrates Court in which the report indicated that the accused would have become fit if they had the opportunity to undertake one to two more months of treatment. In this instance, the court took this into consideration and released the accused unconditionally, but this may not always be the case.

We propose a system which contemplates a two-stage review of the accused fitness,

1. A review of the accused fitness up to six-months after the initial hearing,
2. Then, where justified, the potential for a second review one to three months before a final decision on disposition is made.

This would permit greater flexibility for judicial officers to make a properly informed decision without creating a mechanism for the accused to be involved with the system for a disproportionate period of time.

C. A Place for Special Hearings

Empowering Judges and Magistrates with discretion to consider when a Special Hearing would be appropriate to improve the case management of an accused deemed unfit to stand trial.

A Special Hearing provides a process to test the strength of the evidence against an accused, as if the accused had entered a plea of not guilty, to determine whether they are:

- Not guilty of the offence charged
- Not guilty of the offence charged by reason of mental impairment
- Likely to have committed the offence charged or a viable alternative offence.[66]

They intend, as nearly as practicable, to replicate a normal trial process, including the application of the rules of evidence and the requirement of a jury.[67] The relevant standard of proof is beyond a reasonable doubt.[68] A Special Hearing provides the Judicial officer an opportunity to test the strength of the evidence before them to inform their decision making with regards to a disposition. For example, in Victoria if an accused deemed unfit to stand trial is not convicted of the offence under a Special Hearing the judge must either make the accused subject to a Supervision Order (akin to a CBO) or release the accused unconditionally.[69] This is evidently a better outcome then an accused being placed on a custody order.

However, limitations of Special Hearings are that they are resource heavy and may not always be necessary. Therefore, it is recommended that Judicial officers are given discretion as to when it would be a worthwhile endeavour to conduct a Special Hearing and that they need not necessarily involve a jury.

6.2.5 Abolishing Indefinite Detention

[66] 'Unfitness for Trial', Deike Kemper (Web Page, May 2022) < https://www.gotocourt.com.au/criminal-law/unfitness-for-trial/#:~:text=Special%20Hearings%20must%20be%20conducted,a%20plea%20of%20not%20guilty>.
[67] Ibid.
[68] Ibid.
[69] Ibid.

The current operation of *CLMIA Act* does not afford procedural justice to an accused deemed unfit to stand trial and subject to a custody order.

Following the imposition of a custody order, a person has 28 days to instigate an appeal.[70] After this period, an accused person deemed unfit to stand trial has no right to review or appeal a decision of the Mentally Impaired Accused Review Board ('MIARB') and will be held indefinitely at the Governor's leisure until it is determined that they no longer pose a risk to the community.

The capacity of an accused to stand trial is reviewed annually by MIARB, with an accused able to make submissions regarding any treatment programs that they have undertaken and would like to be considered by MIARB. However, MIARB has limited decision making power, confined to providing recommendations to the Attorney-General. These recommendations are followed, once signed off by the Governor.[71] With limited resources and access to treatment services in prison (the most common place of custody) it is unlikely that an accused will be able to generate a strong case and therefore, likely to remain in custody for disproportionate periods of time.

It is a severe infringement on a person's right to liberty to be indefinitely detained without being convicted of an offence.[72] The *CLMIA Act* should provide for a limit on the period of detention that an accused is subject to, for example, the maximum period of imprisonment that could have been imposed if the person had been convicted.

WAJA reinforces the vast literature and position of key agencies to recommend that the potential for indefinite detention under the *CLMIA Act* must be removed. WA should adopt a model which places a definite limit on the period of detention. For example, in the Australian Capital Territory, the Court must not order an accused be detained for a period greater than the nominated term. In South Australia, the Court limits detention by the term of imprisonment which would have been imposed if the accused was found guilty. Enshrining a limit on detention provides accused with hope and the same procedural fairness that is afforded to others who come into contact with the criminal justice system.

6.2.6 Reforming the Role of the Mentally Impaired Accused Review Board

WAJA recommends a threefold reform to the role of MIARB to improve its function as a review board and centralise the process of case management for an accused deemed unfit to stand trial under *CLMIA Act*,

- Absorbing the role of the Attorney General to make determinations about the release of an accused

[70] 'Fitness to Stand Trial', Mental Health Law Centre (Brochure, February 2022) < https://mhlcwa.org.au/wp-content/uploads/2019/06/2017-Fitness-to-stand-trial.pdf>.
[71] Ibid.
[72] MHLC (n 58) 39.

- Reforming its composition to reflect experts in the field of mental and cognitive impairment, as well as being independent from the Prisoner Review Board
- Extending its responsibility to Act as a central point of contact to foster cooperation between key agencies in the case management of accused deemed unfit to stand trial

Currently, the *CLMIA Act* operates under a model of executive discretion, in which the Attorney General has final decision-making power over the release of an accused deemed unfit to stand trial. Therefore, despite the MIARB's broad discretion as to the management, supervision and release of an accused deemed unfit to stand trial under a custody order its power is limited to making annual recommendations.

This broad discretion extends to factors such as:

- The degree of risk an accused poses to community safety,
- Likelihood that an accused would comply with a conditional release order,
- The extent to which an accused mental impairment would benefit from treatment, training or any other measure,
- Likelihood that an accused could take care of themselves, obtain appropriate treatment and 'resist serious exploitation,'
- Complying with the objective of imposing the least restriction of the freedom of choice and movement of the accused in balance with protecting the health and safety of the accused and others, and
- Any statement received from the victim of the alleged offence.[73]

While executive discretion is arguably consistent with the principle of community safety underlying the *CLMIA Act,*[74] it is our view that the executive discretion decision making model should be reformed to be placed within MIARB or in the court. The following criticisms of executive decision making are highlighted in *The Review of the Criminal Law (Mentally Impaired Accused) Act 1996 Final Report:*

- Exacerbated periods of detention 'in the public interest',
- Lack of transparency and procedural fairness, particularly as there is no requirement that reasons are released following a decision,
- The absence of timeframes on decision unfairly impeding an accused progress towards unconditional discharge,
- No availability for an accused to have a further hearing to test the evidence against them pertaining to their alleged offence, and
- Inability to appeal placing the model in breach of Australia's human rights obligations, such as the right to a fair trial and natural justice.[75]

The executive discretion model fails to provide adequate transparency to an accused and is an unnecessary layer of oversight in the case management of an accused deemed unfit to stand trial. As discussed at s 1.3, centralising the court process concerning fitness to stand trial will provide for more consistent, just and fair outcomes for an accused.

[73] Ibid (n 53) s 33(5).
[74] *Attorney General* (n 54) 83.
[75] Ibid.

Secondly, the composition of MIARB should be reformed to reflect its role in the case management of accused deemed unfit to stand trial under *CLMIA Act*. Currently, MIARB is constituted by members of the Prisoner Review Board (**PRB**) which undermines the independence and effectiveness of the Board.[76] This overlap creates confusion, particularly amongst administrative staff, regarding the jurisdiction of the *CLMIA Act*.[77] For example, the PRB considers the release of persons charged of an offence who are serving a finite sentence. In contrast to persons held on an indefinite custody order under *CLMIA Act* who have not been convicted of an offence, been to trial or are likely not culpable for the offence they allegedly committed.[78] MIARB should be constituted by an independent body of staff and include experts in the field of mental and cognitive impairment such as psychologists, psychiatrists and support workers. This would allow MIARB to make better informed decisions on the status of an accused and the treatment standard necessary to establish their release.

Thirdly, the role of MIARB could be extended to act as a Board to facilitate and foster cooperation between the key parties involved in the case management of an accused deemed unfit to stand trial. As discussed, throughout the report a major weakness of the operation of *CLMIA Act* is a lack of communication between key agencies and service providers. For example, by empowering MIARB to enter into a Memoranda of Understanding or host bi-annual conferences with respect to the operation of the *CLMIA Act* between key agencies would provide for greater transparency, cooperation and consistency in the exercise of *CLMIA Act*.[79]

Case Study: The Benefits of Cooperation in the Start Court

The benefits of cooperation and information sharing have been demonstrated in the Start Court. This is a specialist court for accused people with mental health issues. It focuses on providing treatment and support, in order to give participants the opportunity to stabilise their situation, leading to a more positive legal outcome. All the relevant agencies are represented, and share knowledge and access to information about participants. In this way, the court is provided with accurate and timely feedback about a participant's individual needs and progress by people with expertise in understanding mental impairments and their impacts. This problem-solving court is based on the premise that addressing offenders' underlying needs in a range of areas is the most effective way to prevent further involvement with the criminal justice system. Problem-solving courts are only one type of community-based diversion program, and they target offenders who have already penetrated the criminal justice system.[80]

Start Court, although a specialised court, is first and foremost a sentencing court. To participate, an accused must accept responsibility for their offending and is only sentenced post-program. Therefore, it would be

[76] MHLC (n 58) 22; *CLMIA Act* (n 53) s 42.
[77] MHLC (n 58) 22.
[78] Ibid 23.
[79] *Attorney General* (n 54) 103.
[80] David DeMatteo, Casey LaDuke, Benjamin R. Locklair & Kirk Heilbrun, 'Community-based alternatives for justice-involved individuals with severe mental illness: Diversion, problem-solving courts, and reentry' (2012) 42(2) *Journal of Criminal Justice* 64. https://drexel.edu/~/media/Files/psychology/labs/heilbrun/papers/DeMatteo%20et%20al%202013%20Community%20based%20alternatives%20for%20justiceinvolved%20individuals%20with%20severe%20mental%20illness%20%20Diversion%20problemsolving%20courts%20and%20reentry.ashx?la=en

inappropriate for those accused who are potentially deemed unfit to stand trial as they have not been convicted of an offence.[81]However, there are lessons to be drawn from the Start Court model which may improve the court process in respect of accused deemed potentially unfit to stand trial.

[81]https://drexel.edu/~/media/Files/psychology/labs/heilbrun/papers/DeMatteo%20et%20al%202013%20Community%20based%20alternatives%20for%20justiceinvolved%20individuals%20with%20severe%20mental%20illness%20%20Diversion%20problemsolving%20courts%20and%20reentry.ashx?la=en

6. Recommendation 2: Streamlining the Process for Lawyers

7.1 Streamlining the Process for Lawyers.

7.1.1 Implementing a support person who may bridge the gaps within information channels

7.1.2 Increased support for lawyers and their client enhancing transparency, fairness and support

7.1.3 Supporting the client through just trial processes and enhancing their understanding of court processes through client specific option

7.1.4 Training and Education opportunities for lawyers which focusses on the legal framework and when fitness may be raised as an issue

7.1.5 Right to representation in court and MIARB proceedings for mentally impaired individuals.

Due to the inequalities arising under the current process and *CLMIAA*, lawyers in Western Australia avoid raising the question of fitness to stand trial.

Lawyers and accused are unduly deterred from raising mental health issues at trial for fear of their client receiving a custody order if they are found unfit to stand trial or acquitted by reason of unsound mind. The prospect of indefinite detention was seen to create an "incentive… for innocent people to plead (or be advised to plead) guilty, in order to avoid the consequences of unfitness". As a result, people who may in fact be mentally unfit to stand trial may "find themselves subject to and convicted by a judicial process made unfair by their inability to participate meaningfully".[82]

EXAMPLE

A joint submission by the Western Australian Association for Mental Health on behalf of a number of organisations and individuals stated that community health sector agencies were aware of "individuals who were advised by their lawyer to plead guilty, despite a Section 27 defence being available, or the likelihood they would be found unfit to stand trial."[35]

This view was supported by the First People's Disability Network, which argued that "[t]he inability of the justice system to adequately process cases of people with mental impairment efficiently and fairly has created a perverse incentive. If a person with mental impairment pleads guilty to charges, regardless of culpability, they are given a definitive legal outcome. However, should they submit they are unfit to plea, they face an uncertain outcome, and risk being detained under the Act for a period of time which could be substantially longer than if found guilty."[83]

Another difficult reality for lawyers in Western Australia is that the *CLMIA Act* does not provide a right for the mentally impaired accused person to appear before, or be heard by, the MIARB. This leads to

[82] Mental Health Law Centre, A Policy and Law Reform Submission, *Interaction with the Western Australian Criminal Justice System by People affected by Mental Illness or Impairment* (10 August 2010) 65.
[83] Department of the Attorney General, *Review of the Criminal Law (Mentally Impaired Accused) Act 1996*: Final Report (Report, 2016) 74.

circumstances where an accused is unable to be heard during these hearings. For example, program completion reports provide an opportunity for mentally impaired accused prisoners to demonstrate their improvement and perhaps lead to their release. However, the report comments themselves lack the relevant detail to support the claim that the accused is no longer a threat to the community.

Key issues of the MIARB review process:

- These reviews may be vague and fail to capture the extent of the accused rejuvenation,
- These reviews can result in the continued indefinite detention as lawyers are often denied access to all relevant documents, which are in front of the MIARB, and
- Unlike the *Mental Health Act* (WA), detention under the *CLMIA Act* is subject only to a required review once a year. Treating people affected by mental illness and/or impairment differently and in circumstances where they have not been convicted of an offence, amounts to an arbitrary and unjustifiable discrimination. [84]

Fitness can be raised by the defence, prosecution or the judicial officer at any time during the process, even before the plea is entered. It is encouraged that fitness should be raised as soon as there is a concern relating to the client.[85] Fitness can also be used by lawyers as a strategic tool to negotiate with the prosecution to discontinue the charges rather than hold their client in custody. The six-month period itself offers the accused time to become fit and well, especially in cases where being unmedicated contributed to the offence in question. However, lawyers generally tend to avoid raising these options as the inadequacies of the current system do not provide the best outcomes for their client. Fitness is generally raised as a last resort due to these detrimental impacts and the limited capacity of lawyers to assist their clients during these assessment periods. [86]

7.1 Recommendations

7.1.1 Role of a support person

The presence of an assisting support person may allow a more effective and streamlined approach to raising and treating fitness.

The role of a support person may well bridge the gaps within information channels. A support person may assist at different levels of the process, providing more fair treatment of a mentally or cognitively impaired accused.[87]

Statutory mechanisms for support people

[84] *Interaction with Western Australian Criminal Justice System* (n 67) 24.
[85] Ibid.
[86] Ibid 18.
[87] Ibid.

The current legislative framework under the *Evidence Act 1906* provides for alterations to be made to the trial process to incorporate the need for a support person. Specifically, s 106R states:

- the person have near to him or her a person, approved by the court, who may provide him or her with support; or
- the person have a communicator while he or she is giving evidence.[88]

Demand for a support person is not a recent shift in thinking, with the 2016 review of the *CLMIA Act* citing growing concern over a lack of support provided to individuals who may be deemed unfit to stand trial and require facilitated support.[89]

Calls for the amendment of s 12 of the *CLMIA Act* have risen to allow a judicial officer to allow an accused to participate in the trial process with a support person. While this has not been legislatively strengthened, support people may provide valuable benefits to the attainment of justice and fair treatment.[90]

7.1.2 Supporting Lawyer with their Client

A support person assisting lawyers may ease client relationships, taking the pressure off practitioners and make the process easier for an accused.

A support person may provide assistance within the lawyer-client relationship where fitness to stand trial may be an issue. Given the nature of the legal work, a mentally or cognitively impaired accused may be limited in providing sound and informed instructions to their lawyer. This recommendation is underpinned and guided by:

A. Transparency;
   - To support the exchange of clear information between lawyer and client, to service the client's best interests and ensure ethical practice.

B. Fairness;
   - To ensure the equitable treatment of mentally impaired accused in the justice system, which starts from lawyer-client interactions.

C. Support.
   - Ruah and Mental Health Law Centre have implemented a vertically integrated approach whereby an inhouse social worker works with clients, helping the lawyer to provide the fairest and best representation of a client where fitness may be raised.[91]

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[88] *Evidence Act 1906* (WA) s 106R.
[89] Department of the Attorney General, *Review of the Criminal Law (Mentally Impaired Accused) Act 1996*: Final Report (Report, 2016) 9.
[90] Ibid.
[91] Consult with Magistrate Felicity Zempilas (WA Justice Association, University of Western Australia, 2022)

- A similar mechanism may also allow the client to potentially be restored to fitness through treatment, removing the burden to restore clients to fitness felt by some practitioners. This will also allow the client to give better and more informed advice to their legal representative. See Section 3.1.
- A support person may also assist more effective communication between the client and experts assessing fitness. The Forensic Psychiatrist consulted by WAJA gave an example where he travelled to Kalgoorlie to assess a mentally impaired accused, only for the accused to refuse to talk with him.[92] Not only is this a burden on taxpayer money, it is also is not a potentially fair or effective mechanism to extract information from an accused. A support person may bridge the gap between the accused and clinicians assessing them, aiding them through procedures.

7.1.3 Supporting the client with the process

Allowing for a support person through the justice process, where necessary, may be hugely beneficial to an accused and the attainment of justice.

Aiding and supporting the accused through the justice system will enhance their equitable treatment. Understanding the individual needs of each accused is integral to providing procedural fairness. The process itself may be overwhelming for some accused, posing the risk that the accused may not be able to understand the nature of proceedings or give sound instructions. A support person may be able to advise the Court on the need for mechanisms such as extra break times or the careful explanation of processes, for the clear understanding of the nature of proceedings is of upmost importance in these cases. A support person providing an alternative language format for an accused may also bridge cultural gaps that may overwhelm the accused.

7.1.4 Training and Education Opportunities for Lawyers

By increasing training and professional development to lawyers, clinicians and social workers, the process of raising and restoring fitness may become more effectively utilised in the criminal justice system.

Throughout consults with practitioners and professionals involved in process of raising and assessing fitness, a common trend has been a lack of awareness and understanding of the procedure. While the ambiguity within the *CLMIA Act* may be the reason for this, it is important that legal practitioners are aware of the requirements of raising fitness so to best serve their client's needs.

Why is this important?

[92] Consult with WA Forensic Psychiatrist (WA Justice Association, 2022) [*Identity redacted for confidentiality*].

a. More widespread confidence and competency in working with fitness

More training around understanding and raising fitness may remove hesitancy felt by some practitioners who may not be as experienced with mentally or cognitively impaired accused. This may better equip lawyers to confront some of the inherent risks associated with the *CLMIA Act* and the notion of fitness. It will also help provide key information to support persons or social workers who may be working with lawyers, clients, or clinicians to better the experience of mentally or cognitively impaired accused. Underpinning this, however, is consistency within legal practice that will provide enhanced access to representation that understands the needs and risks of raising fitness for a vulnerable accused.

b. Understand the legislation to better serve clients needs

Navigating the *CLMIA Act* may be difficult for accused and lawyers, especially in light of the potential consequences that arise. Training will better equip parties to accommodate the client's needs and ensure they are not on the wrong side of the *CLMIA Act*. For example, Hospital Orders governed under s 5 of the *CLMIA Act* provide for an accused to have bail revoked and placed in hospital if they appear unwell, hence removing their ability to rehabilitate in the community.[93] By better training, for more practitioners, more accused will avoid being lost in the correctional system.

c. Better consistency within experts

Greater training tailored at clinicians assessing mentally and cognitively impaired accused within the Department of Justice may also provide greater consistency. Specifically, the process by which subjects are assessed along with the procedure of treatment of individuals deemed potentially unfit to stand trial.

What might this look like?

To encourage further training in this space, offering Continuing Professional Development (CPD) points for relevant courses may be effective. A similar model has been run in New Zealand by the Auckland District Law Society, whereby a course worth 3 CPD hours educates lawyers, clinicians and other relevant practitioners on the legal framework, when fitness may be an issue and the types of assessment.[94] Additionally, it examines the workings of the specialist NZ courts. The course was run by several presenters including a barrister, a forensic psychiatrist, a clinical psychologist, and Her Honour Judge Claire Ryan and provides great breadth of opinions and focal points.[95]

a. Benefits to lawyers

[93] *CLMIA Act 1996* (WA) s 5.
[94] 'Fitness to Stand Trial: A Practical Guide (Live Stream)', *Auckland District Law Society* (Web Page, 11 November 2021) < https://adls.org.nz/Event?Action=View&Event_id=1483>.
[95] Ibid.

Providing a similar course, relevant to the Western Australian jurisdiction and the *CLMIA Act,* will reinforce the relevant principles and procedures that underpin raising fitness. A widespread panel will also gain insight from different aspects of the process by which fitness is raised, determined, and treated. Professionals will be able to gain a greater understanding and appreciation for the process of raising fitness that they can take into practice. Likewise, this exposes professionals to how an accused may be treated along the journey, benefitting lawyers in the advice and guidance they can provide their clients.

b. Benefits to clinicians

Professional Development seminars will allow clinicians to recognise the framework by which an accused may not be deemed fit to stand trial. This will reinforce existing knowledge to better serve the examination, assessment and treatment of mentally and cognitively impaired accused. It will also offer clinicians an opportunity to better understand how assessments are utilised by the court and how an accused may be treated in line with their assessment and Correctional standards. This would be of invaluable benefit, providing for greater transparency into the way clinician work is employed and greater efficiency in the assessment and treatment of mentally and cognitively impaired accused.

c. Benefits to support workers

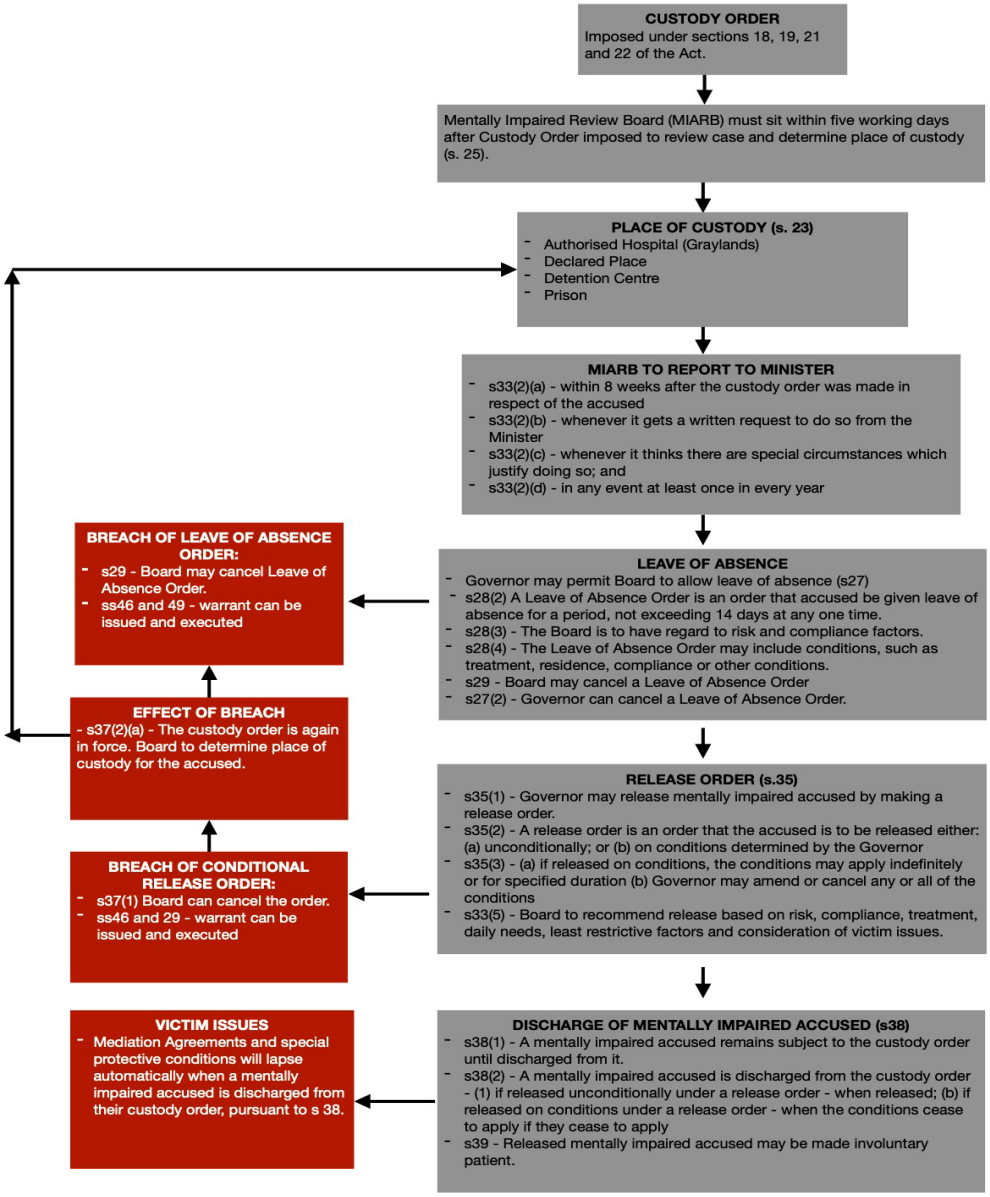
Support workers may also benefit from such a course to better understand the notion of fitness in the trial process and the risks of raising it. By understanding this, support workers will be able to better support those who may be deemed unfit to stand trial or are being returned to fitness. Support workers will also be better equipped to assist lawyers with treating and preparing a client who potentially is unfit to stand trial.

7.1.5 Advocating a Right to Representation in all court and MIARB proceedings

Providing better access to representation will improve outcomes under *CLMIA Act:*

- Allowing an accused to appear before MIARB, specifically with legal representation, will improve the progress to release
- Promoting direct lines to lawyers specialised in matters of fitness will improve the case management and outcome for an accused deemed unfit to stand trial

Flowchart demonstrating the management of an accused on a custody order



Currently, MIARB's role is to provide recommendations to the Minister. However, in practice, MIARB accepts written submissions from the mentally impaired accused as a matter of course and the accused's advocate may choose to make submissions to the Board in writing or appearing in person. This is highlighted as a

discretionary process that may be subject to change as there is no express right in the *CLMIA Act* for mentally impaired accused or their advocates to appear before the Board while the case is heard. [96]

It has been recommended that the *CLMIA Act* be amended to include a subsection which states that the mentally impaired individual has the right to appear, be represented, hear evidence and view reports placed before the board. Specifically, where the mentally impaired accused is financially disadvantaged to pay for legal representation, it should be provided free of charge. [97] Legal Aid Western Australia as well as the Council of Official Visitors both expressed supports to provide legal representation at Mentally Impaired Accused Review Board reviews. [98] This emphasizes the right to representation.

Further, any amendments made to the *CLMIA Act* should expand the allocation of legal resources to provide a specialist option for accused's whose fitness may be raised as an issue. A direct line to a service within Legal Aid or the Mental Health Law Centre may quickly connect to lawyers who are familiar with the area and provide the accused with quality representation from those who better appreciate the intricacies of the process.

This may provide issues for lawyers as the accused may not have the ability to understand their legal representative. Additionally, forcing representation may reflect a lack of choice. However, as there is significant importance in legal advice and representation to individuals engaged in the criminal justice system, there may be consideration to amend fitness criteria to reference the capacity of the person to provide instructions to their legal counsel.[99]

A recent case study published by the Australian Broadcasting Corporation highlighted the difficulties that parents, Susan and John, faced when attempting to advocate for their son who had been in custody since 2017 after being deemed unfit to stand trial.[100] The case study specifically highlighted the deficiencies in the MIARB process itself. The Western Australian Association for Mental Health Chief Executive Officer Taryn Harvey emphasised that proposed changes were aimed at ensuring people with mental impairments had the same rights and avenues to appeal as those who did not. Ms Harvey further stressed that *"there really is no accountability or transparency around these decisions and that information is hidden from people".* [101]

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[96] Review of Criminal Law (Mentally Impaired Accused) Act 1996 – Submission of the Supreme, District & Children Courts of WA
[97] Review of Criminal Law (Mentally Impaired Accused) Act 1996 – Submission of the Supreme, District & Children Courts of WA
[98] Department of the Attorney General, *Review of the Criminal Law (Mentally Impaired Accused) Act 1996*: Final Report (Report, 2016) 89.
[99] Ibid 47.
[100] Alicia Bridges, 'Mark McGowan's promise to stop jailing mentally impaired people indefinitely still unfulfilled', *Australian Broadcasting Corporation News* (online, 17 May 2022) < https://www.abc.net.au/news/2022-05-17/mentally-impaired-custody-reforms-go-unfulfilled-by-mark-mcgowan/101061754>.

[101] Ibid.

7. Recommendation 3: Restoring Fitness

This section focusses on the idea of restoring fitness within an individual as they await their trial by:

- Outlining the current efforts made in WA to restore the fitness of an accused
- Examining the deficiencies of the current system, with emphasis on the inappropriateness of prison as a place of custody to restore fitness, and
- Strengthening the use of support plans to achieve better outcomes for accused

Scope of Recommendation 3

- While it is recognised that the cost effectiveness may be a potential positive outcome of improving the processes for restoring fitness, this report will not explore this due to time and feasibility restrictions. This report recommends that such a cost benefit analysis could inform further research in this area.
- Instead, recommendation 3 argues that the existing process of restoring fitness is inadequate and inherently unjust and must be reformed to a person centred and family sensitive method. This section will focus on a broad approach to restoring fitness, assuming that all treatment is voluntary, and participants fully and wholly consent to each aspect of treatment. For the purposes of this report, this section presupposes that an individual found unfit, is found unfit by the court as per the troubling *Presser* test (see s 1.2).

8.1 The current process

Presently the system for restoring fitness within an individual is:

1. Rarely discussed;
2. Ineffective, due to a lack of consistency, transparency, and accountability of processes to an accused deemed unfit to stand trial; and
3. Potentially inappropriate, due to a lack of resources to adequately treat an accused with a mental or cognitive impairment under a custody order.

Limited literature on Restoring fitness in WA

Presently there is very little conversation within Western Australia on the most appropriate manner to restore fitness within an accused individual. This is indicative of a general lack of academic literature produced on the topic. Currently, where an individual is found to be unfit to stand trial, the practice to restore fitness is fundamentally flawed and requires adjustment. The disjointed and inefficient nature of the restoration framework within Western Australia is highlighted most notably through the processes of information sharing between agencies and agencies around an individual's determination of fitness as discussed above at *Recommendation 1*.

Currently, s 16 (2) of the *CLMIA Act*, instructs the court on how to manage instances where an individual has been found unfit to stand trial.[105] If the court is satisfied that an accused person may have fitness restored within a six-month period, the court will be adjourned before final determinations are made.[106] As per s 16(3), the court may not adjourn for a period greater than six months.[107]

Deficiencies of six-month adjournment

WAJA consultations have found that it is not uncommon for processes and treatment within this required six-month period to be insufficient to restore fitness within an accused person. Our consultations revealed that this stems from a broad array of failures, inefficiencies and miscommunications, such as:

- Authors of reports on assessments of fitness have minimal or no input into the treatment prescribed to an accused. Therefore, treatment often fails to address the fitness of accused persons. In other words, during the six-month period when the matter is adjourned very little is done.
- Community Corrections officers are not responsible for restoring fitness of an accused. They might be responsible for monitoring an accused on conditional bail, however they would not necessarily have access to any information about an accused's mental health treatment or progress. This can be contrasted with Start Court where the clinicians and Community Corrections officers jointly case manage participants.
- Reports on assessments of fitness do not accompany an accused to their place of custody making it very difficult for the respective staff to account for the individual needs of an accused.

Unreasonable conditions for release

Section 33(5) of the *CLMIA Act* creates unreasonable standards for release on an accused held in custody. Such that, without support from disability and health services they are at risk of being indefinitely detained. For example, an accused will not be released if they do not have capacity to look after themselves. The Law Society of Western Australia expressed that an accused should not be denied release on these grounds. If this is the case, the person should be connected to health and disability support services in the community as part of their release conditions. Although the MIARB have an obligation to balance the safety and welfare of the community with the risk of reoffending of an accused pending their release into the community, an accused should have greater access to support persons to plan their release.

Prisons as an inappropriate place of custody to restore fitness

Prisons, particularly Western Australian prisons, are inappropriate places to provide treatment to restore fitness in accused individuals within the state. We hold that appropriate facilities should be provided and maintained for individuals which offer person-centred, and family and culturally sensitive treatment.

As explored in Recommendation 3.2, authorised hospitals and declared places have limited capacity to accept accused people. Therefore, prisons are commonly used as a place of custody, holding mentally and/or cognitively impaired accused persons through the fitness process, which can be for six to twelve months, or longer. Prisons are an inappropriate place to restore fitness as:

1. It is inherently difficult to plan for life after your custodial order in prison with limited access to external services;
2. It is challenging to access the relevant Departments and services responsible for providing therapy and support for forensic patients; and
3. There is a lack of culturally appropriate care.

a) Inherent difficulty to plan for life after prison

An inability and failure to plan within a prison prevents these facilities from being appropriate places for people to be held to restore fitness.[114] There is a lack of capacity in prisons to provide access to individual support plans, supported accommodation and the support of the National Disability Insurance Scheme to assist with individuals who are determined by a court to be unfit. This failure to plan leads inevitably to an individual being held indefinitely in custody by default. They are unable to show that they have capacity to and are prepared to live amongst the community as required by MIARB.

b) Failure to Fully Utilise Individual Support Plans.

For restorative treatment to be effective, support plans should be person-centred and family sensitive to the needs of each individual accused.[120] Section 3.2 details our suggestion of what an individual support plans could look like with more information provided in the appendix. Prisons are fundamentally not an appropriate location for individual support plans to be executed due to a lack of resources, operational guidelines, IT and data management systems. When an accused is undergoing treatment to restore fitness in prison, there is an overlap of several governmental agencies and departments in the process, each with their own cultures, philosophies and agendas.[121] This is problematic and causes confusion over who should be responsible for delivering each aspect of an accused's support plan and how it can be delivered in a cohesive manner.[122] Therefore, without transparent objectives and responsibilities enshrined in support plans, an accused held in custody in prison does not receive fair access to restorative treatment and are at risk of prolonged detention and further deterioration of their mental and/ or cognitive condition.

c) The Need for Culturally Appropriate Care.

Aboriginal and Torres Strait Islander peoples are disproportionately represented in the criminal justice system. This is also true of those held in custody in prison with mental and/ or cognitive impairment. Without culturally appropriate services available to Aboriginal people, they are at risk of being indefinitely detained, stigmatised as 'uncooperative' and harmed within the prison system. These harms are demonstrated in the tragic case of Rose Anne Fulton and discussed in the academia.

The harm that can be caused by prison and similar facilities to all peoples, particularly individuals with mental and/or cognitive impairment, is well documented in academic literature and governmental reports. Jones highlights the epidemic of violence perpetrated against an accused whilst imprisoned, she details the risk of physical, emotional and relational abuse. Jones views prison as a place of the perpetration of harm, where an accused with mental and/ or cognitive impairment is stigmatised as being unwell and requiring rehabilitation. These harms, Jones presents, are illustrative of the ways prison and the penal system disables an individual and fails to restore their fitness as an individual worthy of a fair opportunity.

This perspective is furthered by Catherine Heard, who presents a detailed report on the mental health, traumatisation, and physical health implications that are exacerbated through imprisonment. As such, it should be concluded, that systemic and ongoing structural issues inherent within the prison system, result in prison not being a safe place and more accurately an inadequate place for rehabilitation of an individual with a mental and/or cognitive impairment.

The case of Rose Fulton is emblematic of the failures of prison for individuals found unfit to stand trial and highlights the harms of prisons for particular groups in our community.[125] Rosie Fulton, a 24-year-old

Aboriginal woman, spent two years in prison without a conviction resulting from her unfitness to stand trial. This particular case highlighted the impracticability and unsuitability of prisons as places to restore fitness within an accused. She was diagnosed with Foetal Alcohol Spectrum Disorder (FASD), with the psychiatric report concluding that she had the mental age of a young child.[126] The prison facilities neither had the capacity or support to restore fitness within Rosie and with no available, culturally appropriate, accommodation within Western Australia, her fate was doomed to such custody.[127]This case and many similar cases, provide opportunities to scrutinise the Western Australian prison system and question the appropriateness of these facilities to support Aboriginal and Torres Strait Islander. This advances the case against present legislation and its limitations in providing culturally appropriate options as places of custody.

"On the boy that I acted for between the ages of 10 and 18 from the East Kimberley, the reports would routinely come back in terms of him being defiant, uncooperative, unwilling to listen—all of those things. Well, he had [Foetal Alcohol Spectrum Disorders] FASD. But, in terms of the compilation of those sorts of reports, the issue is there is no rapport established, there are often language difficulties, and Aboriginal interpreters are never used to assist in the compilation of these reports, so these people are at cross-purposes absolutely with the clients, and then it dovetails further down the track. So, I am very strongly of the view and very passionate about the need for the involvement of Aboriginal people in assisting, assessing and so on with these people—in a culturally appropriate way, obviously." - Peter Collins of ALSWA

8.2 Recommendations

8.2 Endorsing a person-centred, family-sensitive and individualistic approach to restoring fitness

8.2.1 Advocating for increased access to 'places of custody'

8.2.2 Strengthening the use of support plans to achieve better outcomes

8.2.1 Advocating for increased access to 'places of custody'

Western Australia has just one 'authorised hospital' - being the Frankland Centre, and one declared place, in the Bennet Brooke Disability Justice Centre. WAJA recommends that Western Australia should invest in greater access to authorised hospitals and declared places to provide accused's with opportunities to have their fitness restored in facilities dedicated to providing treatment support services.

This report has shown that not only are prisons not suitable facilities to support an accused to restore fitness, they are also facilities with the capacity to inflict great harm on some individuals. It is therefore imperative that accused persons have access to places, either under court order and supervision or otherwise voluntarily, which:

1. Are culturally appropriate, and
2. Are appropriate and have the capacity to support an individual to restore fitness.

Authorised Hospitals

An authorised hospital is a facility where an accused person may be involuntarily detained, through a Hospital Order given by the court under *CLMIA Act*, or for psychiatric assessment and treatment.[102] Western Australia is home to just one authorised hospital, the Frankland Centre. The physical limitations of this one facility and the lack of any others within the State, has forced many accused to remain in prisons, where, due to reasons discussed earlier, there are reduced opportunities to restore fitness. Prison represents an inappropriate place for many accused found to be potentially unfit to stand trial to be detained throughout the often-lengthy adjournments of their matter. Furthermore, extraneous factors and disadvantages found within the prison system mean it has the potential to be, and in many cases is, a harmful place for many vulnerable accused to remain detained.

Declared Places

The *Declared Places (Mentally Impaired Accused) Act 2015* ('**DPMIAA**') brought the idea of declared places into the criminal justice system vernacular within Western Australia.[103] The DPMIAA brings these services within the ministerial portfolio of the Minister for Disability Services and details the express purpose of such facilities as being one to accommodate, habilitate, and rehabilitate those who are mentally impaired accused.[104]

The Alice Springs Care Facility and the Bennet Brook Disability Justice Centre are declared places of custody that have capacity to provide restorative treatment to an accused. [117] At these places of custody an accused receives intervention care and treatment, residential support, opportunities for greater community integration, and a space in which they can work on their mental health and reduce risk behaviours.[118] They incorporate a 'step down' method which provides an accused with milestones in their journey to release as they participate in programs to restore their fitness. However, these facilities have limited capacity to take accused persons. For example, Bennet Brooke has capacity to take ten people but only has three authorised residents in the facility.[105] The gradually increasing number of declared places around the state provides hope of greater access to fair, person-centred and family sensitive methods to restoring fitness in an accused deemed unfit to stand trial in the future.

8.2.2 Strengthening the use of Support Plans to Achieve Better Outcomes

A support plan is the means for which treatment and guidance is provided to, proscribed and delivered to an accused person with the purpose of restoring fitness. All support plans should be seen as facilitative rather than being enforced. Furthermore, the below process is offered as a model of best practice. All individualised care should be delivered in a kind, respectful and consensual manner.

This recommendation is built on the understanding that although support plans exist, inherent difficulties and structural issues result in less efficient and less effective processes of restoring fitness in an accused. As such, WAJA has considered existing support plans and outlines how fitness might best restored in an 'ideal scenario'.

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[102] *Mental Health Act 2014 s 541.*
[103] *Declared Places (Mentally Impaired Accused) Act 2015.*
[104] *Declared Places (Mentally Impaired Accused) Act 2015.*
[105] Alicia Bridges, 'Mark McGowan's Promise to Stop Jailing Mentally Impaired People Indefinitely Still Unfulfilled', *ABCNews* (Online, Retrieved 29 May 2022, 17 May 2022).

This recommendation reinforces the need for person-centred, culturally appropriate and family sensitive support plans.

1. Early identification and determination of fitness

Greater emphasis on diagnosis at first contact with the criminal justice system. This would reduce the risk of imprisonment of accused with mental and/or cognitive impairments as the court would have access to their whole history. Further to this, not only should an accused person's mental and/or cognitive impairment be identified at the earliest opportunity, but so should their treatment plan be set. Establishing a treatment plan early on would permit the relevant agency to track the progress of an accused in their journey to release. Any individual or agency involved in treatment delivery - from social workers assisting the accused to obtain treatment, to agencies facilitating it - should be made aware of any professionally assessed and prescribed individualised treatment for the accused. Some academics have presented the case for all young people to be tested for some mental and/or cognitive impairments, like FASD and p-FAS, at the earliest point of contact with the criminal justice process. This report will not make such a recommendation, but does emphasise and reiterate the benefits to and advantages of early intervention, determination of fitness and diagnosis of a mental and/or cognitive impairment within the criminal justice system.

2. Allocation of a social worker

The idea of having access to a support person and social worker available to the accused person is discussed at s 2.2.

3. Appropriate individualised treatment determined

Our consultations have revealed that in many circumstances, consistently very little had been done to address and treat individuals found to be cognitively and mentally impaired. Even in circumstances where the state forensic officer found that psycho-medicinal treatment would be appropriate, such recommendations often would not be translated to treatment provided to the accused. As such, these lines of communication should be adjusted and ongoing treatment should be provided. The capacity to do this is increased in places with centralised treatment processes, like the start court, declared places and authorised hospitals. The appendix to this report highlights that although treatment of the underlying cognitive impairment with psycho-medicinal therapy may not be sufficient at restoring fitness, it is a useful tool for building the capacity in an accused to restore fitness.

4. Continued assessment and treatment of the accused

Our consultations have revealed deficiencies in the lines of communication between those who diagnose an accused person and those who treat and care for accused persons. As such, to produce the best results in a system where the accused is not under constant supervision, it is imperative that assessments of the cognitive and mental impairment and the treatment provided be re-evaluated and assessed as often as possible. This will not only benefit the case management and outcomes available to an accused but will increase communication and information sharing between key agencies.

5. Continued reporting and adjustment of court report

To ensure that all treatment is both culturally appropriate and individualised, all treatment and reporting on the mental and cognitive impairment of the accused, including potential progression or regression should be reported on a frequent basis in the six-month period whilst the accused trial has been adjourned.

6. The adoption of individualised legal and court education

As discussed in both Recommendation 2 and the appendix of this report is how legal and court education, especially education that is tailored to the particular case of the accused, is a highly effective means of restoring fitness within an accused person.

7. Final assessment and progress to be provided to the court by state forensic officer and anyone else required to provide treatment to the accused

Before making a final custody decision or trial recommencement at the six-month mark, the court should be fully informed of the accused mental and cognitive impairment. This should include their involvement in restorative treatments programs as well as their mental and/ or cognitive status as determined by a psychiatric report. Greater emphasis on ensuring that the Court has access to proper information and reporting done in the best interest of the accused will improve current inefficiencies in court assessment at the six-month adjournment. Not only will this inform the court on whether or not the accused has had its mental and cognitive impairment appropriately restored, it may also assist the court in its determination on whether or not a custody order should be made, if in the event the accused has not been able to have their fitness appropriately restored.

Current System	Proposed System
An individual is placed in detention after being arrested and is not tested.	Individual is assessed for fitness at the earliest possible stage of the criminal justice process. Furthermore, an individual with the capability to prescribe treatment has assessed and diagnosed the accused.
Question of fitness might be raised, in some circumstances, but the onus is placed on the defendant's lawyer for this.	A social worker is assigned to the accused.
Some, not all, accused get diagnosed by an individual for a mental and/or cognitive impairment.	A multi-faceted treatment approach is undertaken which can include education of the Australian legal

	and criminal system, or prescribed medicinal treatment, or both.
Information is not shared appropriately if at all to those with frequent contact and/or the capacity to provide treatment to the accused.	Information is shared in an ethical, individual focused manner, allowing all relevant parties to be privy to any matter which may be appropriate.
Minimal treatment is completed within the limited timeframe to restore fitness within the accused person.	Continual assessment of the accused for fitness and treatment effectiveness takes place. Support worker continually engages with the accused to assist in all matters described earlier in the report.
The accused returns to court 6 months later with little or no prescribed treatment undertaken, with what treatment that has been completed not communicated effectively to individual in charge or determining fitness or the judicial officer overseeing the case.	The accused returns to court having had the opportunity to partake in individualised treatment, targeted at restoring fitness within the person and preventing ongoing detention without trial.

8. Conclusion

This report explored deficiencies in the current response by courts, prisons, and support services to accused persons who may be deemed unfit to stand trial. Through targeted research, consultations, and guidance from Magistrate Zempilas, WAAMH and MHLC we have identified several common themes which have led to unreasonable and unfair periods of indefinite detention for accused who have yet to be charged with an offence, including:

- A lack of transparency and information sharing across key agencies;
- Decentralised processes resulting in a lack of ownership in the case management of an accused;
- Rigidity in the *CLMIA Act* restricting the ability of judges and magistrates to interpret the law and act justly, in the best interest of an accused;
- A lack of knowledge and resources amongst legal professionals about how to best use the *CLMIA Act* to support their clients; and
- A lack of research and investment into methods of restoring fitness in accused with mental and/ or cognitive impairment in WA.

WAJA acknowledges that whilst there are some good systems in place for supporting an accused who is potentially unfit to stand trial, such as social health law centres at RUAH and MHLC and facilities such as Bennet Brooke, they are not broadly applied nor widely accessible.

This report has sought to make recommendations which would centralise the process of determining fitness to stand trial to enhance information sharing and collaboration across agencies as well as emphasise the essentiality of having a process which is person-centred, family sensitive and recovery focussed. Historic

cases such Rosie Anne Fulton's and Marlin Noble, who served excruciating periods of detention without being found guilty of a crime, and more recently the ongoing case of Mr Thomas, demonstrate the failure of the *CLMIA Act* to operate as intended. Rather, *the Act* creates devastating stress for families and unjust outcomes for vulnerable members of our community. We hope that this report goes towards driving legislative change and creating hope for those indefinitely detained under the *CLMIA Act*.

9. Appendix

Appendix I – Restoration of fitness

This section will be dedicated to providing clarity into and an in-depth discussion of how fitness might be restored in an individual, while breaking down the literature on the appropriate treatment to do so. When attempting to restore fitness within an individual, an accused may undergo specific and targeted treatment which takes many forms and different programs. These programs largely revolve around education about the legal system to individuals so as to produce an understanding within the person and therefore restore competence.

Siegal and Etwork describe the need for and necessity of targeted programs addressing competency within accused persons prior to trial.[106] In a small sample group in 1990, Siegal and Etwork found that individuals who went through specific treatment addressing competency had better outcomes compared to individuals who went through psychiatric and mental health treatment for underlying causes of the unfitness.[107]

Scott 2003, describes a program run out of Atascadero State Hospital for which patients go through 'competency classes' to educate the individual through and about the legal processes.[108] The education is inclusive of using real judges and attorneys to run a mock trial to assist in the facilitation of the patients understanding. He continues by describing another program run out of the Forensic Unit Central Ohio Psychiatric Unit for which individuals are assigned to groups in which they attempt to address 'specific deficits.'[109] This program also runs mock trials to assist in patient understanding of the legal system. Alton Mental Health and Development Centre, incorporates a seven-stage program as an attempt to build an immersive educational experience, inclusive of mock trial and videotaped trial training.[110] North Coast Behavioural System has modules, run by staff members, educating patients on various legal issues. This program involves roleplaying courtroom scenarios and anxiety management training.[111]

Bertman et al., 2003, ran a study where defendants who were provided instruction from the legal rights study guide, accused individuals who went through individual session therapy focussing on specific deficits they had and their individual legal circumstance and defendants who were going through standard incompetency hospitalised treatment.[112] Bertman et al, found that both groups that were experiencing treatment focussed around legal education and their own legal circumstance regained and restored their competence at a faster rate than those receiving standard treatment.[113]

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[106] A. Siegal & A. Etwork (1990) 'Treating Incompetence to Stand Trial'. *Law and Human Behaviour* 14(1) 57.

[107] Ibid.
[108] C. Scott (2003) 'Commentary: A Road Map for Research in Competency to Stand Trial'. *Journal of the American Psychiatry and the Law,* 31(1) 36.
[109] Ibid.
[110] Ibid.
[111] Ibid.
[112] L. Bertman et al. (2003). Effect of an individualized treatment protocol on restoration of competency in pretrial forensic inpatients. *Journal of the American Psychiatry and the Law,* 31(1), 27.
[113] Ibid.

Both of the aforementioned studies are limited in their detailing of the improvements made and very few use standard competency testing or control groups thus making comparisons to standard or other forms of treatment limited. In a literature review by Amadeo, it was found that individuals assessed to be unfit to stand trial spent less time hospitalised and returned to court at an earlier date when they received treatment that was targeted towards restoring competence within the accused rather than general treatment commonly received when hospitalised.[114]

A dissertation produced by Helen Richardson presented a program aimed at and designed to restore competency and fitness within an accused person prior to trial.[115] This program entailed; a nine-session group therapy, individual therapy, intensive case management with case managers trained in forensic issues, and psychopharmacological treatment. This treatment was designed to work in conjunction and is made with a specific emphasis and centred around restoring fitness and competency within an accused person deemed mentally unfit. Each participant was also be required to concurrently attend day treatment programs.[116] These programs were purposively built to build a connection between the accused and community mental health programs and facilities, services necessary to help prevent recidivism by the individual. Along with the production of an evidence-based program for how fitness may be restored within an individual, targeting the individuals' deficits in capacity, Richardson outlines staffing, testing, admission and budgeting requirements in facilitating such programs.[117] The necessity of the development of similarly designed programs is emphasised by how typical hospitalisation treatments, not tailored to building capacity and fitness within the individual, are overly expensive and are not always necessary.[118]

In a comparison across two jurisdictions, the Netherlands and Canada, Van Der Wolf et al describe the best treatment to restoring fitness to an individual, in a jurisdiction where it has been determined that restoration is possible (i.e., Canada).[119] Their description follows that treatment should be an all-inclusive treatment. Van Der Wolf et al, state the best form of treatment to restore fitness in an individual determined to be mentally unfit to stand trial includes; pharmaceutical therapy and training provided to the accused to address individual and specific deficits.[120] Van Der Wolf et al, also note that this training may include, as detailed above, specific education on the legal system and the case of the accused.[121]

These studies, however, are contrasted against Mueller and Wylie who researched the effectiveness of one specific treatment focussed on restoring capacity and compared this against generalist treatment received

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[114] Angela Armadeo, The Development of a “Restoration to Competence” Program for Patients Found Incompetent to Stand Trial (Dissertation, 3170156, Massachusetts School of Professional Psychology, 2005).

[115] Ibid.
[116] Ibid.
[117] Ibid.
[118] Ibid.
[119] Michael Van Der Wolf (2010) Understanding and Evaluating Contrasting Unfitness to Stand Trial Practices: A Comparison between Canada and the Netherlands, *International Journal of Forensic Mental Health*, 9(3) 245.

[120] Ibid.
[121] Ibid.

when hospitalised. This study focussed on treatment called fitness game.[122] This treatment focusses on building capacity within the individual and provides legal education to the individual through the use of a board game. Mueller and Wylie found, however, that this treatment was not more effective than the treatment in the control group.[123]

Whilst utilisation of psychopharmaceutical therapy and drug therapy is considered an important aspect in the treatment of mental health and cognitive impairments and the potential restoration of fitness, there are questions that have been raised when such treatment is prescribed and administered involuntarily.[124] That is, where the accused has refused or failed to give consent to the administration of the drug prior. As the United States Supreme Court highlights, there may be grave side effects within the individual when drug therapy is given involuntarily.[125] Such side effects may even include the restoration of unfitness when medication is extinguished. However, the US Supreme Court asserts that the benefits and positive outcomes of psychopharmaceutical therapy is compelling and concluded that administrating such treatments involuntary may be a necessary practice to restore fitness within an accused.[126]

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[122] Crystal Mueller & Michael Wylie (2007) Examining the effectiveness of an intervention designed for the restoration of competency to stand trial, *Behavioural Science and the Law,* 25(6), 891.

[123] Ibid.
[124] *Washington v Harper 494 U.S. 210 (1990); Riggins v Nevada 504 U.S. 127 (1992).*
[125] Ibid.
[126] Ibid.

WAJA

WA JUSTICE ASSOCIATION

WAAMH

Western Australian Association for Mental Health