

# **People with Disabilities (WA) Inc.**

## **Submission for the Review of**

### **Western Australia's Criminal Law (Mentally Impaired Accused) Act 1996**

**December 2014**

People with Disabilities (WA) Inc. (PWdWA) would like to thank the WA Department of the Attorney General for the opportunity to provide comment for the review of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA).

PWdWA is the peak disability consumer organisation representing the rights, needs and equity of all Western Australians with disabilities via individual and systemic advocacy.

PWdWA is run BY and FOR people with disabilities and, as such, strives to be the voice for all people with disabilities in Western Australia.

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**People with Disabilities (WA) has also signed up to the joint submission prepared by the Western Australian Association for Mental Health (WAAMH).**

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## 1. INTRODUCTION

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The purpose of this submission is to provide feedback to the WA Department of the Attorney General for the review of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) (the Act). The Act covers criminal proceedings for people charged with offences who are found by a court to be either mentally unfit to stand trial, or not guilty by reason of unsound mind. Recent media campaigns and targeted reviews have highlighted serious inequalities within the legislation and its procedures, where the fundamental human rights of people who have been found unfit to stand trial are not being met.

The Act is available on the State Law Publisher website

[http://www.slp.wa.gov.au/legislation/statutes.nsf/main\\_mrtitle\\_228\\_homepage.html](http://www.slp.wa.gov.au/legislation/statutes.nsf/main_mrtitle_228_homepage.html)

The Discussion Paper for the review is available from

[http://www.department.dotag.wa.gov.au/R/review\\_of\\_the\\_criminal\\_law\\_mentally\\_impaired\\_accused\\_act\\_1996.aspx](http://www.department.dotag.wa.gov.au/R/review_of_the_criminal_law_mentally_impaired_accused_act_1996.aspx)

This submission is based on a collation of information from PWdWA's individual advocacy database, previous reviews of the Act, human rights policy, and other relevant resources; and takes into account the real life experiences of people with mental illness or disability in their interactions with Western Australia's criminal justice system. The submission will consider several of the discussion points in the Discussion Paper, with a particular focus on the objects and principles of the Act, and the role of supported decision making in determining a person's fitness to stand trial.

## 2. HUMAN RIGHTS PRINCIPLES

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### 2.1 INTERNATIONAL AGREEMENTS

In 2012, the Australian Government released the National Human Rights Action Plan, outlining a commitment by all Australian States and Territories to address key priority areas for human rights development. One of these priority areas is the implementation of the Commonwealth's *Human Rights (Parliamentary Scrutiny) Act 2011* that requires all new Bills to be examined for compliance under the seven core United Nations human rights treaties to which Australia is a party. Of particular relevance to this submission are the International Covenant on Civil and Political Rights (The ICCPR), and the Convention on the Rights of Persons with Disabilities (The CRPD).

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law... Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law... No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed... Everyone shall have the right to recognition everywhere as a person before the law. (Articles 14, 15 & 16 of the ICCPR)

States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life... take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity... ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests... States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings. In order to help to ensure effective access to justice for persons with disabilities shall promote appropriate training for those working in the field of administration of justice, including police and prison staff... State Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation. (Articles 12, 13 and 14 of the CRPD)

**Recommendation 1:** The Act should be reviewed against the seven core United Nations human rights treaties and amended accordingly.

## 2.2 RIGHTS OF PERSONS WITH MENTAL ILLNESS OR DISABILITY

The term “disability” is not defined within the Act, though it is recognised across services that mental illness is a form of disability. Accordingly, any policy that sets out the rights of the person with disability also covers the rights of a person with a mental illness.

### THE DISABILITY SERVICES ACT 1993 (WA)

disability means a disability —

- (a) which is attributable to an intellectual, psychiatric, cognitive, neurological, sensory, or physical impairment or a combination of those impairments; and
- (b) which is permanent or likely to be permanent; and
- (c) which may or may not be of a chronic or episodic nature; and
- (d) which results in —
  - (i) a substantially reduced capacity of the person for communication, social interaction, learning or mobility; and
  - (ii) a need for continuing support services.

**Recommendation 2:** The Act includes the term “disability”, where the term has the same definition as in the *Disability Services Act 1993* (WA).

To ensure that the Act complies with national and state human rights principles relevant to people with mental illness or disability, it is recommended that the following resources are reviewed:

1. National Disability Strategy 2010-2020
2. National Disability Advocacy Standards
3. National Standards for Disability Services
4. Count Me In – Disability Future Directions (WA)
5. WA Department of the Attorney General – Disability Access and Inclusion Plan 2013-18
6. *Disability Discrimination Act 1992* (Cth)
7. *Disability Service Act 1993* (WA)
8. Mental Health Bill 2013 (WA)
9. Charter of Mental Health Care Principles (WA)

10. Mental Health Statement of Rights and Responsibilities 2012 (Cth)

11. *Carers Recognition Act 2004* (WA)

12. *Equal Opportunities Act 1984* (WA)

**Recommendation 3:** Any amendments to the Act should comply with national and state policy which is aimed to safeguard and uphold the rights of people with mental illness or disability.

### 3. CURRENT LAW REFORM

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In response to campaigns by the public and previous reviews of the Act, two Bills have been introduced into WA Parliament; the Declared Places (Mentally Impaired Accused) Bill 2013 (WA) and the Criminal Law (Mentally Impaired Accused) Amendment Bill 2014 (WA). Under the Act, if a person is found unfit to stand trial the court can either make an order to release the person unconditionally; or can make an order for them to be detained indefinitely “in an authorised hospital, a declared place, a detention centre or a prison, as determined by the Board, until released by an order of the Governor.” (section 24). Since the Act came into operation in 1996, there have been no declared places set up in Western Australia so this order has not been an option. Furthermore, a serious injustice arises where a person is detained indefinitely, regardless of the fixed term for the offence they are charged with, and despite the fact that without a trial they have not been found either guilty or not guilty of the offence.

Two people who have been subject to inequalities in the criminal law system are Rosie Ann Fulton and Marlon Noble.

Rosie Ann’s story can be accessed from

<http://www.abc.net.au/news/2014-07-14/rosie-ann-fulton-arrested-again-in-alice-springs/5594396>

Marlon’s story can be accessed from

<http://www.abc.net.au/rampup/articles/2011/12/09/3387845.htm>

After 10.5 years in prison Marlon was released, subject to conditions.

These injustices cannot continue.

### **Declared Places (Mentally Impaired Accused) Bill 2013 (WA)**

The purpose of this Bill is to enable the Disability Services Commission to operate Western Australia's first declared place that will provide accommodation and support services for people with intellectual or cognitive disability who have been accused but not convicted of a crime. It will provide, for the first time, an appropriate alternative to custody in prison; one which is designed and staffed to provide a therapeutic environment that can provide social support and life skills training, while providing levels of security that are required to ensure community safety. The issue of people with intellectual disability or cognitive disability who are not convicted of offences being detained in the mainstream prison system has been a significant social policy issue within Western Australia and remains so in other jurisdictions. This legislation marks a significant milestone in the provision of social justice in this state. (Declared Places (Mentally Impaired Accused) Bill (WA)2013, Legislative Council, Second Reading Speech)

### **Criminal Law (Mentally Impaired Accused) Amendment Bill 2014 (WA)**

The purpose of this Bill is to amend the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) to provide that a court making a custody order under that Act in respect of an accused must fix a term for that order that is equivalent to the period of imprisonment that would, in the court's opinion, have been appropriate had the accused been found guilty of the offence with which the accused was charged. (Criminal Law (Mentally Impaired Accused) Amendment Bill 2014 (WA), Introduction)

This submission supports the overall objectives of both Bills, while emphasising the need for appropriate safeguards and rehabilitation to assist the person in returning to the community. It is understood that the review by Parliament of the Criminal Law (Mentally Impaired Accused) Amendment Bill 2014 (WA) has been put on hold until the current review of the Act is complete. In accordance with human rights principles, it is important that this area of inequality is addressed as soon as possible and is not subject to any further delays.

**Recommendation 4:** The Declared Places (Mentally Impaired Accused) Bill 2013 (WA) and the Criminal Law (Mentally Impaired Accused) Amendment Bill 2014 (WA) are reviewed by Parliament as a priority before any other amendments to the Act are considered.

## 4. DISCUSSION POINTS

**Discussion Point:** Should the definition of ‘mental illness’ be amended? Are there any other terms and definitions that should be reviewed?

### 4.1 KEY TERMS FOR REVIEW

#### 4.1.1 Review of the term “mental illness”

**mental illness (Part 3 of the Act, as defined in the *Criminal Code Act Compilation Act 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.

**mental illness (Part 5 of the Act, as defined in the *Mental Health Act 1996 (WA)*)**

(1) For the purposes of this Act a person has a mental illness if the person suffers from a disturbance of thought, mood, volition, perception, orientation or memory that impairs judgment or behaviour to a significant extent.

(2) However a person does not have a mental illness by reason only of one or more of the following, that is, that the person —

- (a) holds, or refuses to hold, a particular religious, philosophical, or political belief or opinion;
- (b) is sexually promiscuous, or has a particular sexual preference;
- (c) engages in immoral or indecent conduct;
- (d) has an intellectual disability;
- (e) takes drugs or alcohol;
- (f) demonstrates antisocial behaviour.

The inclusion of two definitions of the term mental illness within the Act creates inconsistencies that may lead to misinterpretation. Part 3 of the Act refers to the legal definition of mental illness, in assessing the question of mental fitness. In contrast, Part 5 of the Act, covering treatment and custody orders, refers to the term mental illness as defined in the *Mental Health Act 1996 (WA)*. Confusion arises in assessing a person’s fitness to stand trial, where the judicial officer may order an examination or report from a psychiatrist or other appropriate expert. In such situations it is likely that the psychiatrist and other experts within the mental health and disability sectors will be familiar with the definition of mental illness in the *Mental Health Bill 2013 (WA)*; whereas the judicial officer will approach the question using the legal definition. Consequently, these inconsistencies may lead to



inaccurate assessments of fitness to stand trial. It is therefore recommended that a single definition of mental illness is used, that is consistent across all WA legislation.

A modified definition of mental illness has been developed and included in the Mental Health Bill 2013 (WA), that was passed by the WA Parliament in October 2014 (see below). If this definition of mental illness is still not acceptable for legal purposes, then it may be necessary to add an 'exceptions' section to the Act.

### **MENTAL HEALTH BILL 2013 (WA)**

#### **When a person has a mental illness**

- (1) A person has a mental illness if the person has a condition that —
  - (a) is characterised by a disturbance of thought, mood, volition, perception, orientation or memory; and
  - (b) significantly impairs (temporarily or permanently) the person's judgment or behaviour.
- (2) A person does not have a mental illness merely because one or more of these things apply —
  - (a) the person holds, or refuses or fails to hold, a particular religious, cultural, political or philosophical belief or opinion;
  - (b) the person engages in, or refuses or fails to engage in, a particular religious, cultural or political activity;
  - (c) the person is, or is not, a member of a particular religious, cultural or racial group;
  - (d) the person has, or does not have, a particular political, economic or social status;
  - (e) the person has a particular sexual preference or orientation;
  - (f) the person is sexually promiscuous;
  - (g) the person engages in indecent, immoral or illegal conduct;
  - (h) the person has an intellectual disability;
  - (i) the person uses alcohol or other drugs;
  - (j) the person is involved in, or has been involved in, personal or professional conflict;
  - (k) the person engages in anti-social behaviour;
  - (l) the person has at any time been —
    - (i) provided with treatment; or
    - (ii) admitted by or detained at a hospital for the purpose of providing the

person with treatment.

- (3) Subsection (2)(i) does not prevent the serious or permanent physiological, biochemical or psychological effects of the use of alcohol or other drugs from being regarded as an indication that a person has a mental illness.
- (4) A decision whether or not a person has a mental illness must be made in accordance with internationally accepted standards prescribed by the regulations for this subsection.

**Recommendation 5:** The Act should refer to a single definition of the term “mental illness” that is consistent across all WA legislation, where ‘mental illness has the same definition as in the Mental Health Bill 2013 (WA)’.

#### **4.1.2 Review of the term “mental impairment”**

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

**(Part 3 of the Act, as defined in the *Criminal Code Act Compilation Act 1913 (WA)*)**

There is no nationally recognised definition of mental impairment within either the mental health or disability sectors. Within the Act the term refers either to a person with mental illness or disability who has been found unfit to stand trial, or a person who is found not guilty in cases where their mental illness constitutes a defence of being of 'unsound mind' at the time of the offence. Including objects and principles within the act may help clarify the purpose of defining the term mental impairment. From a human rights perspective, it would be important to identify a person with a mental illness or disability to ensure that the correct treatments, accommodations and supports are available to them throughout their interactions with the justice system. It is also recognised that a person may have a combination of conditions that may affect their fitness to stand trial. In their 2013-14 Annual Report, the Mentally Impaired Accused Review Board reports that ‘Of the 39 accused currently being managed by the Board, 18% have an intellectual impairment which does not require treatment. A further 13% of accused have a dual diagnosis of intellectual impairment and mental illness. A remaining 69% of accused have a mental illness. (p.12-13)’

It may also be debated whether terms such as “senility” and “intellectual disability” are appropriate terms. The Alzheimer’s Association stress that ‘Dementia is often incorrectly referred to as “senility” or “senile dementia”, which reflects the formerly widespread but incorrect belief that serious mental decline is a normal part of aging’. Furthermore, the term “intellectual disability” may be seen as a degrading term where a person may have been

assessed as having an IQ below 70 but have skills and abilities in many other areas of life. Importantly, people who have been diagnosed with an intellectual disability may not identify themselves as a person with an intellectual disability and may instead use terms related to their capacity to learn (Spork 1994).

**Recommendation 6:** The definition of the term “mental impairment” should be modified in accordance with the objects of the Act, human rights principles and present day terminology.

#### **4.1.3 Review of the term “mentally impaired accused”**

In Part 5 of the Act the term mentally impaired accused is defined as ‘an accused in respect of whom a custody order has been made and who has not been discharged from the order’. At points in the Act, it is unclear whether mentally impaired accused refers to a person who has been charged with an offence and has a mental impairment, or a person who has been charged with an offence and found unfit to stand trial.

**Recommendation 7:** The term “mentally impaired accused” should be replaced with a more appropriate term (or terms) and used consistently throughout the Act.

#### **4.1.4 Review of the term “appropriate expert”**

Part 3, Section 12 of the Act states that in deciding whether a person is fit to stand trial the judicial officer may —

- (a) order the accused to be examined by a psychiatrist or other appropriate expert;
- (b) order a report by a psychiatrist or other appropriate expert about the accused to be submitted to the court;
- (c) adjourn the proceedings and, if there is a jury, discharge it;
- (d) make any other order the judicial officer thinks fit.

There is no definition of the term appropriate expert in the Act and it is unclear what type of professionals are considered to be appropriate experts. For instance, will a report be sought from medical professionals purely for the purpose of assessing the person’s fitness to stand trial; or would an appropriate expert include a disability sector professional who could comment on the therapies, accommodations, supports and training that may be necessary to improve the person’s capacity to stand trial. The responsibility of the judicial officer in deciding whether a person is fit to stand trial is also questionable, and it is recommended

that the judicial officer seeks advice from an appropriate expert in 'all' cases where he/she believes that the person has a mental illness or disability.

**Recommendation 8:** The term "appropriate expert" should be defined at the beginning of the Act, where an 'appropriate expert is qualified to provide advice regarding the assessment, treatment and capacity of the person accused of the criminal offence'

**Recommendation 9:** The judicial officer should only make a decision about a person's fitness to stand trial after seeking advice from an appropriate expert.

## 4.2 STATEMENT OF OBJECTS AND PRINCIPLES

### **Discussion Point:**

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

It is strongly recommended that a statement of objects and principles is included at the beginning of the Act. This provision could not only help clarify the purpose of the Act and promote consistency both within and across legislation, but also has an educative role in ensuring that the rights of the victims and person accused of the offence are safeguarded and upheld. In compliance with related legislation, including the ICCPR, CRPD, *Disability Services Act 1993* (WA), *Mental Health Bill 2013* (WA), *Declared Places (Mentally Impaired Accused) Bill 2013* (WA) and *Carers Recognition Act 2004* (WA), it is recommended that the Act includes objects and principles:

To promote:

- best practice that is sensitive and responsive to the individual and diverse needs of all people with mental illness or disability taking into account their age, gender, religion, indigenous status, cultural or linguistically diverse backgrounds or geographic location.

To ensure:

- equal recognition before the law;
- compliance with all human rights obligations;
- compliance with Commonwealth and WA State legislation;

- the protection and safety of victims and the community;
- the use of least restrictive practices;
- equitable access to facilities, services and information;
- access to accommodations, supports, habitation and rehabilitation - in a timely manner;
- access to legal representation.

To recognise:

- the decision making capacity of the person accused of the offence and their right to self-determination;
- the role of nominated persons, legal guardians, carers and families - in supporting the person accused of the offence, and in considering options that may be available to them;
- the role of independent individual advocates;
- the role of multidisciplinary services including disability services, allied health services and accommodation services.

**Recommendation 10:** The Act should include a statement of objects and principles taking into account human rights principles and compliance with other legislative instruments.

### 4.3. DETERMINING UNFITNESS TO STAND TRIAL

**Discussion Point:**

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

#### 4.3.1 Supported Decision Making

In accordance with human rights principles and the opinions of stakeholders, it is recommended that a section on supported decision making is included in the Act.

In the Mental Health Bill (WA) 2013: An adult is presumed to have the capacity to make a decision about a matter relating to himself or herself unless the adult is shown not to have that capacity.

A person does not have the capacity unless the person can —

- (a) understand the things that are required;
- (b) understand the matters involved in making the decision;

- (c) understand the effect of the decision; and
- (d) communicate the decision in some way.

Importantly, the assessment of 'decision making capacity' is distinct from any criteria to establish 'fitness to stand trial' and could help flag the need for necessary accommodations or supports to be implemented to help build the person's ability to exercise their legal rights.

In May 2014, the Australian Law Reform Commission put forward a proposal for National Decision Making Principles and a Commonwealth Supported Decision Making Model in their Discussion Paper on 'Equality, Capacity and Disability in Commonwealth Laws'. In response to this discussion paper, People with Disability Australia (PWDA), the Australian Centre for Disability Law (ACDL) and the Australian Human Rights Centre (AHRCentre) highlighted the need to recognise a person's legal agency and equal rights before the law; where "the answer is to create a mechanism of support provision which fulfils the requirements of any person who needs it in order to exercise their legal agency" (p.3).

In accordance with the CRPD, their submission proposes a 'National Framework for Equality before the Law' (see below), combining the National Decision Making Principles and a Commonwealth Supported Decision Making Model. This Framework aims to replace "substituted decision making models" where a person makes decisions in another's 'best interest', with a "supported decision making model" that reflects the rights, will and preferences of the person with mental illness or disability.

### National Framework for Equality before the Law

#### Principle 1 – The Right to Make Decisions

Every adult has the right to exercise their legal capacity. This includes the right to make decisions that affect their life and to have those decisions respected.

#### Principle 2 – The Right to Support

Every person who may require support to exercise their legal capacity must be provided with the support required to express their will and preferences. This includes support necessary for them to make, communicate, and participate in decisions that affect their lives.

- (a) A person who requires support should be able to appoint a supporter or supporters at any time:

- where a supporter is appointed, ultimate decision making authority remains with the supported person;
- any decision made with the assistance of a supporter should be recognised as the decision of the supported person; and
- a person should be able to revoke the appointment of a supporter at any time, for any reason.

(b) Support may include:

- support to obtain, receive or understand information relevant to a decision and the effect of a decision;
- support to retain information necessary to make a decision;
- support to use or weigh information as part of the process of making a decision;
- support to communicate a decision to third parties;

(c) Support persons may also:

- provide advice;
- handle the relevant personal information of the person;
- endeavour to ensure the decisions of the person are given effect; and
- assist the person to develop their use of decision making supports.

(d) In addition to formal support providers, the role of families, carers, and other significant persons in supporting persons to exercise their legal capacity should be acknowledged and respected.

### Principle 3 – Implementing Will and Preference

The will, preferences and rights of persons who may require support to exercise their legal capacity must direct decisions that affect their lives. This includes people who use decision making supports.

(a) Safeguards to ensure respect for will, preferences and rights include:

- that support persons are free from conflict of interest and undue influence;
- that the National Legal Capacity Support Agency acts as regulator, arbitrator, investigator and complaints body regarding the integrity of decision making support arrangements.

(b) A person may appoint an independent Agent to implement their will and preferences on their behalf. This may include:

- the implementation of advance directives; and
- the power of attorney to carry out specific acts according to pre agreed instructions.

#### Principle 4 – Representation of Rights, Will and Preferences

Where the will and preferences of a person cannot be determined through the provision of support, an independent representative may be appointed:

- the representative must give effect to what the person would likely want, based on all the information available, including consulting with supporters.
- if it is not possible to determine what the person would likely want, the representative must act to promote and safeguard the person’s human rights and act in the way least restrictive of those rights.

(a) The opportunity to determine the will and preferences of a person may evolve or fluctuate over time.

(b) The appointment of a representative decision maker must be limited in scope, be proportional and tailored to the person’s circumstances, and apply for the minimum time possible.

(c) Decisions and interventions made by representatives must be:

- the least restrictive of the person’s human rights;
- subject to appeal; and
- subject to automatic regular, independent and impartial monitoring and review.

(d) Representatives are accountable to the National Legal Capacity Support Agency for their conduct.

<p><b>Recommendation 11</b> : Part 3 of the Act in determining “unfitness to stand trial” is replaced with a section on “supported decision making”, based on a recognised set of principles.</p>
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#### **4.3.2 Communication**

In addition to the inclusion of a section on ‘supported decision making’, it is recommended that the Act includes a section on ‘communication’. Section 9 of the Declared Places (Mentally Impaired Accused) Bill 2013 (WA) states that -

(1) Communication with a person includes the provision to a person of any advice, explanation, information, notification or reasons.

(2) Any communication with a person under this Act must be in a language, form of communication and terms that the person is likely to understand using any means of communication that is practicable and using an interpreter if necessary and practicable.



**Recommendation 12** : The Act includes a section on “communication”.

### **4.3.3 Capacity Building**

Where the person accused of the offence is found by an appropriate expert not to have “decision making capacity”, an alternative order should be available to them; to attend an individually designed 'capacity building program'.

The capacity building program should include structured training in:

- (a) understanding the nature of the charge;
- (b) understanding the requirement to plead to the charge or the effect of a plea;
- (c) understanding the purpose of a trial;
- (d) understanding or exercising the right to challenge jurors;
- (e) following the course of the trial;
- (f) understanding the substantial effect of evidence presented by the prosecution in the trial;
- (g) properly defending the charge; and
- (h) instructing a lawyer

The capacity building program should also educate the person accused of the offence in understanding the consequences a criminal act may have for themselves, the victims and their families.

In developing an individually designed capacity building program there should be consideration of appropriate accommodations and supports; such as reasonable adjustments to the physical environment, assistive communication technology and equipment, and the provision of information in alternative formats (e.g., audio or EasyRead formats), and access to an interpreter, where necessary. A multidisciplinary approach would be desired where consideration should be given to the supports already available to the person, such as supports arranged through local area coordinators or provided through the National Disability Insurance Scheme, or existing services provided through advocacy agencies. Notably, capacity building is not one way, and disability awareness training for court staff, and other relevant persons, could help them to further their understanding of a person's support needs and barriers to accessing the justice system.

If the person, after the program, is then assessed as 'being fit to plead', they should have the same options as any other person charged with a criminal offence, including options:

- a) to plead not guilty to the charge,
- b) to plead guilty to the charge, or
- c) to provide a plea in mitigation; where consideration should be made to whether the person understood they were committing a criminal offence at the time of the offence.

In consideration of timelines, in the joint draft submission prepared by WAAHM, it is recommended that the Act includes “provisions for the Court to approve an additional six months for determination of fitness to enable fitness to be developed or regained and for appropriate supports to potentially assist someone through a trial if they become fit” (p.18-19).

**Recommendation 13** : Where the person accused of the offence is found by an appropriate expert not to have decision making capacity due to a cognitive or learning disability, an alternative order should be available to them; to attend an individually designed 'capacity building program'.

**Recommendation 14** : Where the person is found by an appropriate expert to have acquired decision making capacity after the capacity building program, there should be mechanisms in place to ensure they have access to continued support to exercise their legal rights on an equal basis.

**Recommendation 15** : Where the person is found by an appropriate expert not to have decision making capacity, despite the provision of reasonable accommodations and supports, an “independent representative” should be consulted in accordance with Principle 4 of the proposed ‘National Framework for Equality before the Law’. Mechanisms should also be put in place to allow for ‘periodic reviews’ of the person’s capacity to make decisions and exercise their legal rights.

#### **4.3.4 Legal Representation**

In their submission to the ALRC on the ‘Review of Equal Recognition Before the Law and Legal Capacity for People with Disability’, PWDA, ACDL and the AHRCentre emphasised the need for legislation to recognise the differences between legal capacity and mental capacity. Their paper explains that often legislation will recognise that a person with disability has

legal standing as a person before the law, but then limit their opportunity to exercise their legal rights due to their mental capacity.

All persons should have the right to access legal representation, including people with mental illness or disability. People who have difficulties in instructing a lawyer experience considerable disadvantage. Accordingly, it is recommended that, in conjunction with necessary supports, there are mechanisms in place to ensure that appropriately trained legal advocates are available.

The National Disability Advocacy Standards state that –

Legal advocates may:

- Provide legal representation for people with disability as they come into contact with the justice system;
- Pursue positive changes to legislation for people with disability; and
- Assist people with disability to understand their legal rights.

**Recommendation 16** : There are mechanisms in place to ensure that the person accused of the offence has access to a lawyer.

#### **4.3.5 Independent Individual Advocacy**

When a person is charged with an offence and it is found that they do not have ‘decision making capacity’ it is important that not only do they have access to a legal advocate but also an independent individual advocate. Appropriate referral processes should be in place, with mechanisms to identify whether the person is already with an advocacy service.

Individual advocacy is the process of standing alongside individuals to ensure that people are able to speak out, to express their views and uphold their rights.

Advocacy is -

- listening and consulting;
- providing current information on services and resources;
- pointing towards appropriate agencies and services;
- encouraging and supporting self-advocacy;
- promoting the contribution and potential of people with disabilities;
- lobbying for positive change.

Advocacy is not -

- taking over a client’s life or their issue;
- making decisions for people;
- reinforcing feelings of helplessness or dependence;
- providing mediation or counselling.

It is important that any advocacy service is ‘independent’; where the service sits outside of the court system, and the advocate representing the person accused of the offence is not representing any other person associated with the offence, such as the victims or their families.

Independent advocacy agencies:

- provide non-legal advocacy to people with disabilities who have serious or urgent problems;
- focus on people who are most vulnerable who cannot access other services;
- use action plans to ensure that the client’s issue is understood by everyone and the actions agreed to by everyone.

Schedule 2 of the *Disability Services Act 1993* (WA) reinforces the need for independent individual advocates outlining the objectives for services and programmes, where -

“Programmes and services are to be designed and administered so as to ensure that people with disability have access to advocacy support, to enable them to make choices and participate in decisions about the services they receive or are seeking.”

**Recommendation 17** : There are mechanisms in place to ensure that the person accused of the offence has access to “independent individual advocacy”.

#### 4.4. MENTALLY IMPAIRED ACCUSED REVIEW BOARD

**Discussion Point:**

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

Section 42 of the Act sets out the eligibility criteria for membership of the Mentally Impaired Accused Review Board (the MIARB), where members include the Chairperson and community members of the Prisoners Review Board, and a psychiatrist and psychologist appointed by the Governor.

Section 103 of the *Sentence Administrative Act 2003* (WA) states that:

The members of the Prisoners Review Board are —

- (a) a chairperson, to be nominated by the Minister and appointed by the Governor; and
- (b) at least 2 deputy chairpersons, to be nominated by the Minister and appointed by the Governor; and
- (c) as many community members as are necessary to deal with the workload of the Board, to be nominated by the Minister and appointed by the Governor; and
- (d) as many officers of the Public Sector agency of which the CEO is the chief executive officer as are necessary to deal with the workload of the Board, to be appointed by the CEO; and
- (e) as many police officers as are necessary to deal with the workload of the Board, to be appointed by the Commissioner of Police.

Under the *Sentence Administrative Act 2003* (WA) a community member has one or more of the following attributes —

- (i) the person has a knowledge and understanding of the impact of offences on victims;
- (ii) the person has a knowledge and understanding of Aboriginal culture local to this State;
- (iii) the person has a knowledge and understanding of a range of cultures among Australians;
- (iv) the person has a knowledge and understanding of the criminal justice system;
- (v) the person has a broad experience in a range of community issues such as issues relating to employment, substance abuse, physical or mental illness or disability, or lack of housing, education or training.

This submission supports other stakeholders in recommending that the MIARB and Prisoners Review Board are separated as they relate to different legislation, and have different objectives and functions. Furthermore, based on the eligibility criteria for the

Prisoners Review Board, there would be no guarantee that the MIARB would be representative of people with mental illness or disability. The current MIARB includes a psychiatrist and psychologist who may have worked with clients with mental illness but may not have a professional understanding of the access and communication difficulties experienced by a person with a cognitive or learning disability. It is, therefore, recommended that the membership of the new Board includes adequate representation of community members with a lived experience of mental illness or disability, and includes officers from relevant mental health and disability services, from public or non-Government sectors.

**Recommendation 18** : The Mentally Impaired Accused Review Board’s membership criteria is distinct from that of the Prisoners Review Board and amended to be more representative of people with mental illness and disability.

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