Commissioner for Children and Young People
Western Australia

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Ms Cheryl Gwilliam
Director General
Department of the Attorney General
c/o Review of the *Criminal Law (Mentally Impaired Accused) Act 1996*
By email: CLMIAAct.Review@justice.wa.gov.au

Dear Ms Gwilliam

Review of the *Criminal Law (Mentally Impaired Accused) Act 1996*

Thank you for the opportunity to provide a submission in response to the Discussion Paper on the *Criminal Law (Mentally Impaired Accused) Act 1996* (the CLMIA Act). I welcome this process to reform the CLMIA Act to improve the way the criminal justice system deals with people with a mental impairment.

My functions under the *Commissioner for Children and Young People Act 2006* include advocating for children and young people, and monitoring and reviewing written laws, draft laws, policies, practices and services affecting the wellbeing of children and young people. I must give priority to, and have special regard to, the interests and needs of Aboriginal children and young people and those who are vulnerable or disadvantaged for any reason. I am also required to have regard to the United Nations Convention on the Rights of the Child. Children and young people are defined in the *Commissioner for Children and Young People Act 2006* as people under 18 years of age.

The CLMIA Act does not currently distinguish between adults or children, or include specific provisions relating to children and young people. Children and young people in the criminal justice system who are affected by a mental impairment are especially vulnerable and it is important to ensure their interests, needs and rights are properly considered during the review of the CLMIA Act.

The submission the former Commissioner, Michelle Scott, provided to you in May 2013 as part of the initial consultation round remains relevant and I attach it again in response to the Discussion Paper. Below I have summarised the recommendations made for improving the way children and young people are dealt with under the CLMIA Act.

Objects and principles

The lack of an objects clause or statement of principles to be applied in administering the CLMIA Act is an oversight that deserves to be remedied. I support the inclusion of an objects clause and principles in the CLMIA Act as part of the current reform process.

A specific principle that should be included is that, in performing a function under the Act in relation to a child, a person or body must have regard to what is in the best interests of the child as a primary consideration. This recognises the special vulnerability of mentally impaired children and the responsibility of the justice system to consider their interests and needs.

This principle was adopted recently in the *Mental Health Act 2014*, which provides a model for the CLMIA Act.

Options when accused is unfit to stand trial

The limited options available to a court when an accused is found unfit to stand trial is a major problem of the current legislation, as recognised in the Discussion Paper. I support amending the CLMIA Act to provide a court with an expanded range of options.

In relation to children and young people found unfit to stand trial, I recommend giving courts the power to impose any of the sentencing dispositions available under the *Young Offenders Act 1994 (WA).* These include community-based orders with varying levels of supervision and conditions.

In addition, the CLMIA Act should be amended to provide that a child or young person found unfit to stand trial cannot be subject to an indefinite custody order or, alternatively, that an upper limit must be set on the duration of a custody order taking into account the circumstances of the case. An indefinite custody order is not an appropriate way to deal with a vulnerable child or young person.

Options when accused is not guilty due to unsoundness of mind

While on the surface it appears that a court has more options available to it in relation to people found not guilty due to unsoundness of mind, as explained in the attached submission, the options available in relation to children and young people in practice are quite limited.

The CLMIA Act should be amended to enable a court that finds a child or young person not guilty on account of unsoundness of mind to impose any of the sentencing dispositions available under the *Young Offenders Act 1994 (WA)*.

The CLMIA Act should also be amended to ensure that the mandatory requirement for a custody order in relation to a Schedule 1 offence does not apply to children and young people. A mandatory requirement to impose a custody order on children and young people is inappropriate given their particular vulnerability.

It follows that the requirement for a mandatory custody order where the accused reoffends or fails to comply with conditions is also inappropriate for a child or young person. The CLMIA Act should be amended to provide for a wider range of orders, including an order under the *Young Offenders Act 1994* (WA).

Similarly to children and young people found unfit to stand trial, the CLMIA Act should be amended to provide that a child or young person found not guilty due to unsoundness of mind cannot be subject to an indefinite custody order or, alternatively,

that an upper limit must be set on the duration of a custody order taking into account the circumstances of the case.

Custody orders

The current provisions of the CLMIA Act regarding the review of custody orders by the Mentally Impaired Accused Review Board make no distinction between children and adults. The time between reviews may be as long as 12 months, which is twice as long as the maximum period provided for in civil legislation (the *Mental Health Act 1996 (WA)*, soon to be superseded by the *Mental Health Act 2014 (WA)*).

There is a strong argument to be made for more frequent reviews for mentally impaired accused children and young people as they are particularly vulnerable. The CLMIA Act should be amended to provide that the Mentally Impaired Accused Review Board is required to review a custody order imposed on a child or young person under the Act as often as is provided for under civil legislation.

Further, in deciding whether to recommend the release of a mentally impaired accused, the Mentally Impaired Accused Review Board currently must have regard to a number of factors, none of which are child-specific. There is no reference to the need to consider the best interests of the child, nor is there any express mention of whether there are family or other carers who are in a position to take care of the daily needs of the accused.

The CLMIA Act should be amended to provide that, in the case of a child or young person and in addition to the other factors specified, the Mentally Impaired Accused Review Board is required to take into account the best interests of the child or young person and whether there is any family or other support available to assist the child or young person in the community.

Mentally Impaired Accused Review Board

When considering the continued detention or release of a mentally impaired accused child or young person, the specialised knowledge of child and adolescent psychologists or psychiatrists should be sought. Currently there is no requirement for such input to be obtained.

The CLMIA Act should be amended to provide that when dealing with a mentally impaired accused child or young person the Mentally Impaired Accused Review Board must include a child or adolescent psychologist or psychiatrist.

The Mental Health Tribunal that will be established under the *Mental Health Act 2014 (WA)* will be required to have a member who is a child or adolescent psychiatrist when dealing with a patient under 18 years. In addition, children who are parties to proceedings in the Mental Health Tribunal will have the right to be heard and represented, and when they are represented they will have the right to express their view on any matter arising in the course of the proceeding that may affect them. This is consistent with children's human rights standards.

The CLMIA Act should be amended to provide that a mentally impaired accused who is under the age of 18 years has the right to be heard by, and the right to be represented at, the Mentally Impaired Accused Review Board during any review under the Act.

Unlike in civil legislation, there is currently no right to appeal or seek a review of a decision of the Mentally Impaired Accused Review Board. The CLMIA Act should be amended to provide for a right of appeal and review to the State Administrative Tribunal modelled on the provisions of the soon to be implemented *Mental Health Act 2014 (WA).*

Non-legislative recommendations

In addition to the reform proposals outlined above, I reiterate the following non-legislative recommendations:

- that the Department of the Attorney General and the Mentally Impaired Accused Review Board keep statistics in relation to the age of mentally impaired accused at the time they were found unfit to stand trial or not guilty on account of unsoundness of mind
- that an appropriate child-specific place in the community be declared as a 'declared place' for children and young people who are subject to a custody order under the CLMIA Act and a dedicated forensic mental health unit be established for children and young people.

Yours sincerely

JENNI PERKINS

A/Commissioner for Children and Young People

8 December 2014