AT THE GOVERNOR'S PLEASURE – INDEFINITE CUSTODY, NATURAL JUSTICE & DUE PROCESS

PRESENTATION TO CURTIN CORNER

FOR THE JOHN CURTIN INSTITUTE FOR PUBLIC POLICY

FRIDAY 30TH SEPTEMBER 2016

ADVOCACY POLICY COMMUNITY
DEVELOPMENTAL DISABILITY wa

WAAMH
Western Australian Association for Mental Health

OVERVIEW

- Description of Criminal Law (Mentally Impaired Accused) Act 1996
- Summary of major critiques of law – natural justice and procedural fairness
- Advocacy for law reform – a history
- A case study in contemporary 'law and order' debates
- Case studies
- Conclusion & discussion

CRIMINAL LAW (MENTALLY IMPAIRED ACCUSED) ACT 1996

- Unfit to stand trial & unsoundness of mind
- Community protection, treatment & support
- Determining fitness
- Application of Custody orders
  - Unconditional release vs custody order
  - Mandatory custody orders – Schedule One
  - Indefinite nature of custody orders
  - Place of custody

CRIMINAL LAW (MENTALLY IMPAIRED ACCUSED) ACT 1996 CONT.

- Decision making
  - Role of Mental Impaired Accused Board
  - Role of the Governor & Attorney-General
- Places of Custody
  - Prison
  - Authorised hospitals
  - Declared place
- Oversight of Leaves of Absence & Conditional Release Orders

PRIORITIES FOR REFORM

- UN Convention on Rights of People with Disability
- Consistency with other Australian jurisdictions
- Legal capacity & access to justice – supported decision making, adjustments
- Judicial discretion – alternatives to custody orders
- Repealing of mandatory custody orders

PRIORITIES FOR REFORM CONT.

- Limiting terms ('Governor's pleasure' – WA & NT)
- Procedural fairness provisions
- Special hearing to test evidence
- Separation of powers - release from custody & conditions reviewable by Supreme Court

ADVOCACY FOR LAW REFORM

- 1996 – Criminal Law (Mentally Impaired Accused) Act enacted
- 1997 – Victorian law reform – 'Governor's pleasure' & judicial decisions
- 2003 – Holman review recommends major reforms
- 2008 – Hon Jim McGinty MLA conducts internal review, commences drafting of new Act, not introduced to Parliament before election

ADVOCACY FOR LAW REFORM CONT.

- 2011 – public attention to Marlon Noble case leads to his release, Judge Robert Cock investigates treatment
- 2011 – Commissioner for Children & Young People releases CLMIA position paper
- 2011 – Aboriginal Disability Justice Campaign
- 2012 – Stokes Review of mental health facilities cites problems with CLMIA
- 2013 – WAAMH publishes Open Letter to Premier Barnett calling for immediate & transparent review

ADVOCACY FOR LAW REFORM CONT.

- 2013 – Greens & Liberal Party make election commitments to reform CLMIA
- 2014 – Office of Inspector of Custodial Services calls for overhaul of CLMIA
- 2014 (Sept) – DoTAG opens Review, limited Terms of Reference excludes questions of separation of powers
- 2015 – Disability Justice Centre opens, State's first declared places as alternative place of custody

ADVOCACY FOR LAW REFORM CONT.

- 2016 – Senate inquiry into indefinite detention of people with disability launched
- 2016 (Mar) – ALP commit to 4/5 sector priority reforms
- 2016 (Apr) – DoTAG releases report on review of CLMIA, recommendations fall short of key reform priorities, including indefinite custody
- 2016 (Sept) – UNCRPD hands down finding on complaint by Marlon Noble

CASE STUDY IN 'LAW & ORDER' DEBATES

- Criminalisation of vulnerability & disadvantage
  - Mandatory sentencing
  - Preventive access to supports & services
- Punitive criminal law vs rehabilitative criminal justice – competing narratives
  - Understanding and mitigating risk
  - Justice/social reinvestment vs growth in prisons
- Prevalence of mental illness & cognitive/intellectual impairment in offending population
  - Effectiveness of prisons in rehabilitation
- Access to supports & services, interface between Courts and service systems
- Political leadership and community expectations