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
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
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
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