**SUBMISSION TO THE VICTORIAN LAW REFORM COMMISSION**

# Review of the *Crimes* *(Mental Impairment and Unfitness to be Tried) Act* 1997

Submitted by: Australian Community Support Organisation

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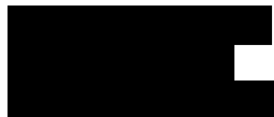
www.acso.org.au

## Australian Community Support Organisation (ACSO)

In the last three decades, ACSO has grown from a small organisation providing a halfway house for ex-prisoners to becoming a leading provider in forensic services in Australia. Our vision is to create a safe and inclusive community freed of crime and prison. Our growth is testament to our ethos, "create another chance", and how we go about doing it portrays our values.

ACSO helps people transition from prison, assists them in the community to prevent re-offending and diverts others from committing crime in the first place. We offer innovative services responding to unemployment, mental illness, disability, homelessness, substance use and offending behaviour. These services are delivered through our *wrap around* service delivery model that integrates our forensic residential, clinical care, disability and mental health case coordination and employment services, to achieve better outcomes for our clients and the communities we serve. ACSO delivers more than 20 programs to approximately 20,000 clients per annum via our four divisions:

1. Clinical Services
2. Complex Care
3. Forensic Residential Services
4. Employment Services

ACSO Forensic Residential Services:

ACSO currently manages nine residential facilities and approximately 45 specialist beds, with a new eight bed facility due to be built in 2014. Many service providers that would normally cater to this clientele, 'vulnerable disability', are not equipped with the resources and specialist training required for the forensic population and therefore refrain from working with this client group.

## Scope of Our Submission

ACSO welcomes the opportunity to make a public submission regarding the review of the *Crimes (Mental Impairment and Unfitness to be Tried) Act* 1997 (CMIA).

This submission focuses on responding to questions posed in the consultation paper that lie within ACSO's areas of expertise and experience. The content has been collected from internal discussions with staff who have suitable expertise and experience with clients on Non-Custodial Supervision Orders (NCSO) and the justice system.

## ACSO Response to Review Questions

### The length of the process

*Q22: In your experience as either a person subject to the CMIA, a family member of a person subject to the CMIA or a victim in a CMIA matter, how has the length of the unfitness process affected you?*

Processes under the CMIA can be protracted, as exemplified by the case in paragraph 7.31 of the Review's consultation paper, and appropriate accommodation for those in the criminal justice system with intellectual disabilities, cognitive impairment, or a mental illness remains scarce. This results in a high probability of those likely to be declared 'unfit to stand trial' to be kept in mainstream facilities, thus exposing them to risks to which they are particularly vulnerable (please refer to ACSO case study # 3).

### Section 47 certificates on availability of facilities and services

*Q60: Are there appropriate and sufficient facilities and services for people subject to the CMIA?*

ACSO does not believe there are an adequate number of facilities with the appropriate combination of specialist support services, resources and forensic experience to cater for this population's specific criminogenic needs. Without such targeted support offending behaviours are less likely to diminish and a cycle of offending and risk to the community and self can ensue.

In our experience, the offending and complex emotional and behavioural issues our clients present with pose a real challenge in servicing and accommodating those subject to the CMIA regime. Particularly challenging is implementing the provision of gradual and safe reductions in restrictions that are responsive to the person's risks and needs (step down approach). Further to this, CMIA clients can present more vulnerable than the general forensic-disability population, by nature of cognitive deficits and adaptive skill functioning, but often reside with other clients that are higher functioning or 'street' smart. This situation increases the risks to CMIA clients being exploited or victimised. Therefore, at times, those who would benefit from our service may need to be rejected due to the foreseeable risks associated with them residing with non-CMIA forensic clients, which poses a significant challenge for the sector.

### Indefinite nature of the order with a 'nominal term'

*Q62: Is the use of a nominal term an effective safeguard in balancing the protection of the community with the rights of the person subject to a supervision order?*

While the indefinite nature of orders under the CMIA might act as a community safeguard in high risk cases, this approach, in practice, appears to foster the perception that revocation or

variation of orders will be the 'exception rather than the norm'. This could act to undermine the right of the person under the order to have a case mounted for revocation or variation in keeping with the Act's key principle of *gradual reintegration*. ACSO's approach is in line with the principle of gradual reintegration, through the incorporation of our *step down* approach which facilitates, where appropriate, a gradual transition back into the community and helps 'create another chance'. It is not within our scope to comment on the merits or otherwise of the use of *limiting terms*, however, if the nominal term approach remains we would advocate for greater prescription under the Act regarding the process that determines if an order should be varied, revoked or continued.

ACSO believes that a fresh determination of whether an NCSO should be varied or revoked, based on evidence such as treatment progress and assessed level of risk, should be an integral part of all regular reviews. This would lift the onus and burden of applying for variations from the person under the order, and mitigate preconceived notions of failure. This would not have the effect of increasing the level of unwarranted variations or revocations, but rather, would improve the chances for gradual reintegration and make decisions for continuance of orders more transparent.

## The method for setting a nominal term

*Q63: Should the method for setting the nominal term be changed? If so, how should it be changed?*

It is difficult to see that the nominal term is correlated with either the risk of offending, dangerousness of the offender or severity of the crime. Our experience is that the nominal term is often set at five years, which gives the impression that a default period might be used for convenience. If this perception is borne out, then our suggestion would be that the nominal term should at least be meaningfully associated with the level of risk to self and the community as well as the severity of the crime.

## Principles underpinning appeals

*Q67: Are there any barriers to people subject to supervision orders and other parties pursuing appeals against supervision orders?*

One of the main barriers to mounting appeals for those subject to supervision orders would be a lack of resources. There might also be a perception that if the defendant is unfit to plea then they would be unfit to appeal, which could undermine the likelihood of appeal on behalf of the defendant.

## Review, variation and revocation of orders

*Q70: Are changes required to the provisions for reviewing, varying and revoking supervision orders to make them more just, effective and consistent with the principles underlying the CMIA? If so, what changes are required?*

Our response to Q62 largely answers this question.

In general, however, ACSO's opinion is that the Act's key principle of *gradual reintegration*, which is in keeping with our own *step down* approach, is constrained by the indomitable nature of its indefinite sentence structure and reviews that carry a burden of onus on the person under the order to apply for a variation or revocation.

ACSO, in its submission to the Australian Human Rights Commission's *Access to Justice in the Criminal Justice System for People with Disability*, recommended a division of the court be set aside specifically for a specialist response function for cases involving intellectual disability, akin to the ARC list, sex offenders list etc. We feel that such a specialist response would benefit reviews and assessment of whether variation or revocation of orders were in the best interest of parties under the CMIA.

*Q73: Does the CMIA strike the right balance between allowing for flexibility in the frequency of reviews and ensuring that people subject to supervision orders are reviewed whenever appropriate?*

We are concerned there is a general presumption that a person's impairment at the time of an offence is a permanent one, resulting in a belief that the indefinite nature of NCSOs is warranted. This is not necessarily the case, particularly in circumstances of diminished mental health. After successful treatment, a person could be in an improved state of mind or experience positive behaviour change, thereby being less of a risk regarding community safety.

It is ACSO's opinion that the current Act provides limited scope for variance and revocation of NCSO's in particular, often resulting in individuals' with an intellectual disability and/or mental impairment being exposed to highly restrictive conditions and practices that undermine the Act's key principles of gradual reintegration.

## Responsibility for people subject to supervision orders

*Q79 Is there sufficient clarity in the arrangements for monitoring people subject to non-custodial supervision orders? -and- Q80: If no, what changes should be made to ensure that people on non-custodial supervision orders are adequately monitored?*

*-and-*

*Q81: Is there is a need for guidance on failures to comply with or breaches of supervision orders?*

From our experience, we do not believe adequate procedural clarity exists regarding the monitoring of those on NCSOs. The triggers for alerts to the Department (or Police/courts), of a breach that is serious under a particular order, appear unclear or non-existent. While information on breaches might make its way into annual reviews, we feel it is too important a part of effective risk management not to be reported under the monitoring regime. A 'one-size-fits-all approach' to reporting breaches or non-compliance, however, is undesirable. Optimum monitoring of those on orders requires an individual case-management approach, by suitably qualified staff, who can be guided by clearer information regarding breaches, risk, and alerting procedures.

## Application of the principles and matters the court is to consider

*Q88: Should the court continue to consider the 'dangerousness' of the person subject to the supervision order?*

*-and-*

*Q89: Should the court continue to consider the likelihood of the person endangering themselves?*

Yes, ACSO suggest that harm to self & others should be considered as part of the risk management approach through formal and ongoing assessment (also see answer to Q91 below).

*Q90: What role should the seriousness of the offence play in the making, varying and revocation of orders and applications of leave?*

We believe an offender's pattern of behaviour and assessed level of risk, including seriousness of the offence, should be considered in the varying of orders or leave applications, to ensure both community safety and that offenders can progress down the path of gradual reintegration.

*91 Should the CMIA provide more guidance to the courts on the factors relevant to making, varying and revoking orders and applications of leave? If so, what guidance should be provided?*

Yes. We suggest that factors requiring consideration for varying and revoking orders include: behaviour and attitude change, treatment progression, personal improvement and achievement of treatment outcomes, rehabilitation, mental health, medications and their effects, and risk assessment. Consideration of these factors in the varying or revoking of orders would likely facilitate progress on the CMIA's key principle of *gradual reintegration*.

## Principles and matters the Forensic Leave Panel considers

*Q92: Is there a need for additional legislative guidance for the Forensic Leave Panel in making leave decisions? If so, what guidance should be provided?*

We perceive a need for increased input from forensic disability service providers about treatments and available provisions for this specialist offender group. This input could assist in the guidance of the Leave Panel to ensure both community and offender safety and would increase accountability from service providers.

*Q93: Are changes required to improve the way in which expert reports are provided to the courts? If so, what changes are required?*

ACSO's concern is that objectivity could be threatened through the employment of a relatively small pool of experts continually providing expert reports. We see merit in the practice, in some US jurisdictions, that requires the provision of two separate expert reports.

## Representation of people subject to supervision orders

*Q97: Is there a need for more advocacy or support, in addition to legal representation, for people subject to supervision orders when they are in detention or in hearings?*

In our submission to the Australian Human Rights Commission's *Access to Justice in the Criminal Justice System for People with Disability*, we acknowledged the initiative by Magistrates' Court in employing mental health court liaison officers, and suggest that, similarly, court officers trained in intellectual disability, cognitive impairment and mental health issues would also serve the needs of the Supreme and County Courts well. These officers combine knowledge of court and legal processes with an understanding of the issues confronting those with mental impairment and the challenges this can pose for an adequate hearing.

## Representation of community interests

*Q99: Should community interests be represented in the CMIA system of supervision?*

The interests of the community should be considered in terms of where and how the person on the order is accommodated in the community, which should be part of an overall risk management plan. ACSO would support the notion of community involvement, by way of representation, if it is limited to community members who have relevant expertise or knowledge of mental impairment and who are not actively involved or engaged with forensic disability or mental health proceedings. It is ACSO's view that community members with some background, knowledge and experience in working with this offending population would be best suited for representation in the supervision system.

## Suitability of the system for people with an intellectual disability or cognitive impairment

*Q102: Is the current CMIA model of supervision appropriate for people with an intellectual disability or cognitive impairment?*

*Q103: Are changes needed to the CMIA model of supervision to better meet the needs of people with an intellectual disability or cognitive impairment?*

*-and-*

*Q104: Are changes needed to the processes and services that support the CMIA model of supervision to ensure that it meets the needs of people with an intellectual disability or cognitive impairment?*

Overall, ACSO advocates greater accountability regarding supervision of those subject to the CMIA, through some form of accreditation of service providers to provide specialist accommodation, support and treatment to this forensic population. Accredited forensic disability services combined with improved provisions for monitoring those on orders (as outlined earlier) could help ensure community and client safety, and assist in achieving the CMIA's desired outcome of successfully reintegrating offenders into the community.

A more tightly structured supervision regime incorporating risk assessment, treatment plans and regular reporting of progress, exists under Supervised Treatment Orders and some Civil orders, which could lend guidance for the same under NCSOs.

## Suppression orders and the principle of open justice

*105 What matters should the court consider when making suppression orders?*

ACSO believes that the names of those facing court with an ID, cognitive impairment or mental illness should be suppressed when there is potential that the address or location of the residential facility the person may be moving into will be made known to the public. This is especially relevant when the client is moving into accommodation where other clients are residing and a negative community response occurs. Disruption at such a residence could impact on any of the residents' capacity to effectively reintegrate into the community and pose risks outside the usual liability of accommodation provision. The suppression of names and addresses of residential facilities is sought in these special cases to ensure the safety and wellbeing of all.

## ACSO Client Case Studies

**#1**: Mr V is a 19 year old male with an intellectual disability and a range of concerning behaviours, including aggression. He has lived as a ward of the State in out-of-home care programs and in the community. His challenging behaviours have meant his care and support is provided in a house with just one other resident and 24/7 staffing. His most recent charge, to attack and "bite off the cheek" of one of the staff, has seen him remanded in custody and he is already subject to a Non-Custodial Supervision Order. In order to manage this young man in the prison environment he has been shackled and in 'lock down' for 22 hours a day. His release from remand is contingent on finding suitable accommodation, and to date there is no clear pathway yet established into accommodation. Mr V was referred to ACSO services, however, with all our beds full, he remains remanded in custody. As a result, he will most likely transition into an accommodation setting that may maintain his behaviours of concern and not be responsive to his needs. Worse still, he will stay imprisoned with the current management system in place. Clearly this response limits opportunities for Mr V to stabilise and build the internal and external mechanisms to manage the behaviour within a safe and supported residence.

**#2**: Mr M, a male in his early 50s, experiences intellectual and psychiatric disabilities. At the time of his offences, which occurred almost 30 years ago, he was advised by his legal counsel to plead 'unfit to plea' under Victorian legislation for a sex offence crime against a child in his family. Following this advice Mr M was detained 'at His Governor's pleasure' for a period of 25 years in prison and a secure facility in the community. With ACSO support Mr M applied to the County Court and successfully challenged his order with the Mental Health Review Board. His order was varied from a custodial supervision order to a non-custodial supervision order, and today he lives in one of ACSO's forensic residential services. It was a lengthy and complex process, but Mr M is now fully participating in the community (with environmental management in place) and has not reoffended. Ironically, had Mr M pleaded guilty his sentence would have been significantly shorter.

**#3**: Mr T has an intellectual disability, an acquired brain injury, suffers from schizophrenia and is a chronic 'chromer'[1]. Mr T was charged with armed robbery and false imprisonment, though his involvement was not of his own volition and he was chroming at the time. A jury found Mr T unfit to stand trial, though a second jury was convened and found him guilty of the offence based on expert psychiatric advice that 'he knew what he did at the time was wrong'. Mr T was sentenced to time served, having served 18 months on remand, approximately 12 months of which were spent in the Melbourne Remand Centre (MRC) which is not designed for long-term imprisonment, and thus is not equipped to respond to his poly-morbidities.

[1] Uses inhalants such as spray paint

## KEY POINTS

- ACSO believes there is not enough specification of risk factors in NCSOs or the monitoring regime under the CMIA, which could assist in effectively safeguarding the community and better inform reviews regarding positive progress of offenders. One possibility to improve monitoring the progress of, and risk associated with, persons on NCSOs under the Act is to place supervision within the jurisdiction of an office such as that of the Senior Practitioner.

- ACSO, while appreciating the need for and place of NCSOs, suggests that guidance for improved processes under the CMIA might be gleaned from other successful order types. For example, Supervised Treatment Orders (STOs) often work well regarding positive behaviour change due to their mandating of treatment, having fairly strict structures, and regular reporting of progress, which enable effective monitoring and increased accountability. Another example are some civil orders, which include annual review incorporating a risk assessment, treatment plan etc., which increases the accountability of all the parties.

- ACSO is of the opinion that the presiding culture of maintaining the status quo, through a reticence to apply for variations or revocation of orders, is not conducive to progress against the Act's key principle of *graduated reintegration*. While it is understood that in some cases indefinite periods under the order are required to safeguard the community, prescription could be incorporated into the Act to have the parties explicitly address the question of whether or not a person's order should be varied or revoked upon regular review, based on evidence such as progress in treatment, behaviour change and assessed level of risk.