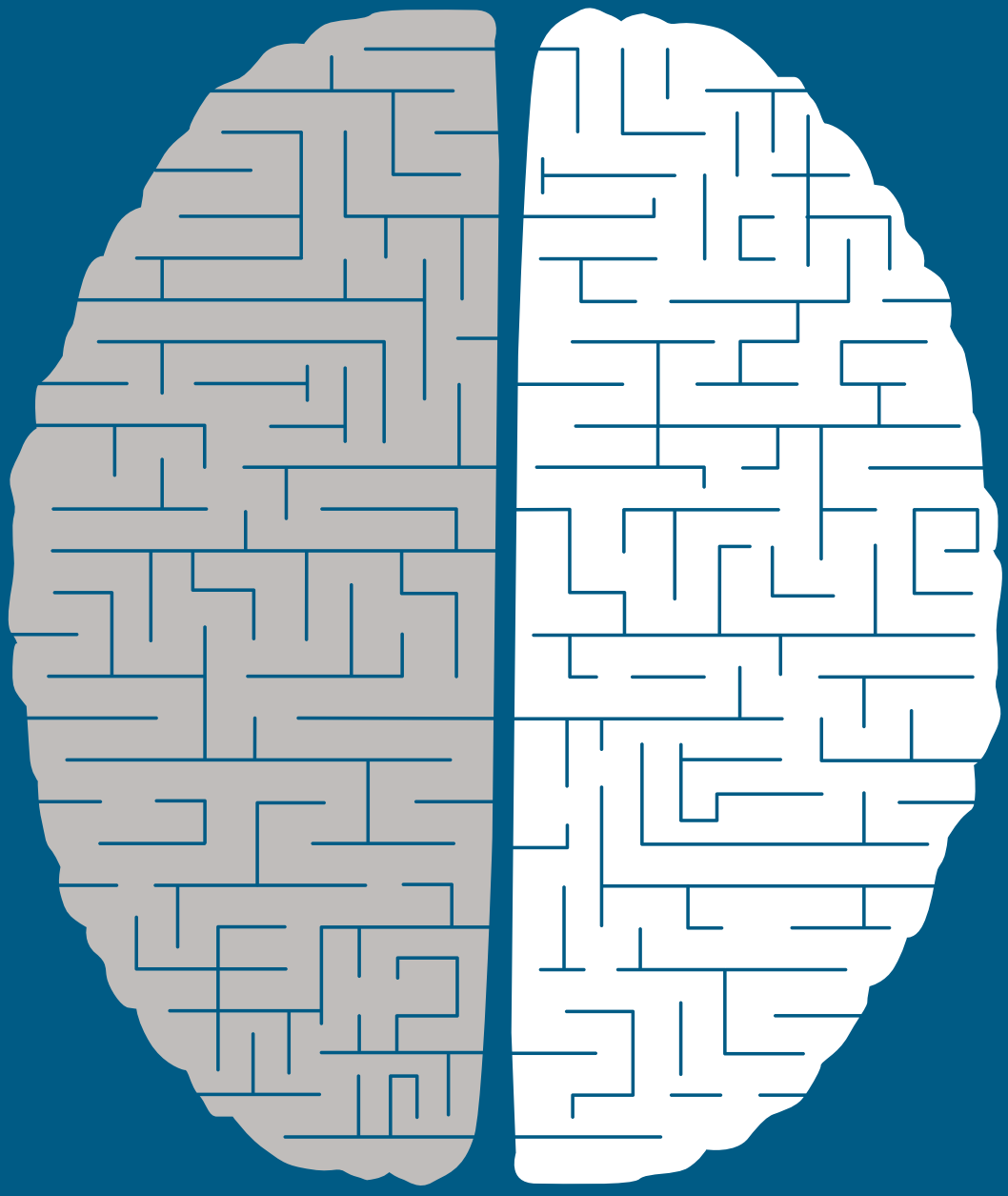
Victorian Law Reform Commission

Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 and the Children's Court of Victoria

SUPPLEMENTARY CONSULTATION PAPER NOVEMBER 2013



Published by the Victorian Law Reform Commission

The Victorian Law Reform Commission was established under the *Victorian Law Reform Commission Act 2000* as a central agency for developing law reform in Victoria.

This report reflects the law as at 30 October 2013.

This publication of the Victorian Law Reform Commission follows the Melbourne University Law Review Association Inc, *Australian Guide to Legal Citation* (3rd ed., 2010).

VLRC consultation paper number 19.

ISBN 978-0-9922737-4-3

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Foreword

The issues raised in this supplementary consultation paper have a real impact upon the lives, rights and welfare of young people. The Commission invites you to make a submission on any or all of the issues by 18 December 2013. Your submissions will inform the recommendations the Commission makes to the Attorney-General.

The Commission will report by 30 June 2014.

The Hon. Philip Cummins, Chair, Victorian Law Reform Commission

Terms of reference

Primary terms of reference

The Victorian Law Reform Commission is asked to review and report on the desirability of changes to the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (CMIA) to improve its operation.

The review should examine the operation of the CMIA and consider whether changes are needed to ensure that the CMIA operates justly, effectively and consistently with the principles that underlie it.

In particular, the Commission should consider whether:

- the CMIA should define 'mental impairment' and, if so, how it should be defined;
- the process of determining fitness to stand trial can be improved;
- the application of the CMIA should be further extended to the Magistrates' Court, for example:
  - whether the process for determining fitness to stand trial should be adapted for use in the Magistrates' Court;
  - whether the CMIA should permit the Magistrates' Court to make supervision orders or other orders appropriate to the jurisdiction, rather than being required to discharge the accused if the accused is found not guilty because of a mental impairment; and
  - if the Magistrates' Court is permitted to make additional orders, whether this should be limited to indictable offences that are heard and determined summarily or extended to also include certain summary offences;
- legislative clarification is required as to how the law should provide for the jury to approach the elements of an offence and, any defences or exceptions, when the defence of mental impairment is in issue; and
- changes should be made to the provisions governing supervision and review, including the frequency, form and conduct of reviews and the arrangements for consideration and representation of the various interests involved, including the interests of the community.

In undertaking this reference, the Commission should have regard to the cost implications of recommendations, including the costs of supervision and of treatment services.

The Commission should also have regard to any recommendations that may be made by the Victorian Parliament Law Reform Committee in its *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers*.

The Commission is to report by 31 March 2014.

Supplementary terms of reference

The Victorian Law Reform Commission is also asked to consider whether the application of the CMIA should be further extended to the Children's Court. In particular, the Commission should consider:

- the Court of Appeal decision in *CL, A Minor (by his Litigation Guardian) v Director of Public Prosecutions (DPP) (obh Lee)* [2011] VSCA 227*;*
- whether the process for determining fitness to stand trial in the *Crimes (Mental Impairment and Unfitness to be Tried Act) 1997* should be adapted for application in the Children's Court;
- in relation to fitness and the defence of mental impairment, whether a different process for determination should apply in the Children's Court than any that may be proposed by the Commission with regards to the Magistrates' Court;
- what orders should be available in the Children's Court following a finding of unfitness or not guilty because of mental impairment;
- whether the current jurisdiction of the Children's Court should apply, so that the Court could hear and determine any matter before it if fitness or mental impairment should arise, apart from those currently required to be committed to the Supreme Court.

The Commission is granted an extension of time to report on this reference to 30 June 2014.

Call for submissions

The Victorian Law Reform Commission invites your comments on this supplementary consultation paper.

What is a submission?

Submissions are your ideas or opinions about the law under review and how to improve it. This consultation paper contains a number of questions on page 46 that seek to guide submissions.

Submissions can be anything from a personal story about how the law has affected you to a research paper complete with footnotes and bibliography. We want to hear from anyone who has experience with the law under review. It does not matter if you only have one or two points to make—we still want to hear from you. Please note, however, that the Commission does not provide legal advice.

What is my submission used for?

Submissions help us understand different views and experiences about the law we are researching. We use the information we receive in submissions, and from consultations, along with other research, to write our reports and develop recommendations.

How do I make a submission?

You can make a submission in writing, or in the case of those requiring assistance, verbally, to one of the Commission staff. There is no required format. However, we encourage you to consider the questions on page 46 of this paper.

Submissions can be made by:

Online form: www.lawreform.vic.gov.au

Email: law.reform@lawreform.vic.gov.au

Mail: GPO Box 4637, Melbourne Vic 3001

Fax: (03) 8608 7888

Phone: (03) 8608 7800, 1300 666 557 (TTY) or 1300 666 555 (cost of a local call)

Assistance

Please contact the Commission:

- if you require an interpreter
- if you need assistance to have your views heard
- if you would like a copy of this paper in an accessible format.

Publication of submissions

The Commission is committed to providing open access to information. We publish submissions on our website to encourage discussion and to keep the community informed about our projects.

We will not place on our website, or make available to the public, submissions that contain offensive or defamatory comments or which are outside the scope of the reference. Before publication, we may remove personally identifying information from submissions that discuss specific cases or the personal circumstances and experiences of people other than the author. Personal addresses and contact details are removed from all submissions before they are published.

The views expressed in the submissions are those of the individuals or organisations who submit them and their publication does not imply any acceptance of, or agreement with, these views by the Commission.

We keep submissions on the website for 12 months following the completion of a reference. A reference is complete on the date the final report is tabled in Parliament or, in the case of a community law reform project, when the report is presented to the Attorney-General. Hard copies of submissions will be archived and sent to the Public Records Office Victoria.

The Commission also accepts submissions made in confidence. These submissions will not be published on the website or elsewhere. Submissions may be confidential because they include personal experiences or other sensitive information. The Commission does not allow external access to confidential submissions. If, however, the Commission receives a request under the *Freedom of Information Act 1982* (Vic), the request will be determined in accordance with the Act. The Act has provisions designed to protect personal information and information given in confidence. Further information can be found at www.foi.vic.gov.au.

Please note that submissions that do not have an author or organisation's name attached will not be published on the Commission's website or made publicly available and will be treated as confidential submissions.

Confidentiality

When you make a submission, you must decide how you want your submission to be treated. Submissions are either public or confidential.

- **Public submissions** can be referred to in our reports, uploaded to our website and made available to the public to read in our offices. The names of submitters will be listed in the final report. Private addresses and contact details will be removed from submissions before they are made public.
- **Confidential submissions** are not made available to the public. Confidential submissions are considered by the Commission but they are not referred to in our final reports as a source of information or opinion other than in exceptional circumstances.

Please let us know your preference when you make your submission. If you do not tell us that you want your submission treated as confidential, we will treat it as public.

Anonymous submissions

If you do not put your name or an organisation's name on your submission, it will be difficult for us to make use of the information you have provided. If you have concerns about your identity being made public, please consider making your submission confidential rather than submitting it anonymously.

More information about the submission process and this reference is available on our website: www.lawreform.vic.gov.au.

Submission deadline 18 December 2013

1

Background

1. Background

Introduction

1.1 This paper contains supplementary consultation material prepared by the Victorian Law Reform Commission as part of its review of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (CMIA). It relates to supplementary terms of reference for the CMIA review received by the Commission from the Attorney-General on 24 September 2013.

1.2 The supplementary terms of reference request the Commission to consider whether the application of the CMIA should be further extended to the Children's Court of Victoria (the Children's Court), particularly in the light of the decision of the Victorian Court of Appeal in *CL, A Minor (by his Litigation Guardian) v Director of Public Prosecutions (DPP) (obh Lee)* [2011] VSCA 227.[1] This paper functions as a supplement to the Commission's consultation paper published in June 2013.[2]

Primary terms of reference for the CMIA review

1.3 In August 2012, the Attorney-General, the Hon. Robert Clark, MP asked the Commission, under section 5(1)(a) of the *Victorian Law Reform Commission Act 2000* (Vic), to review and report on the desirability of changes to the CMIA to improve its operation. The terms of reference are set out on page iv of this paper.

Supplementary terms of reference for the CMIA review

1.4 The Commission has been asked to examine and report on these supplementary terms of reference in relation to the application of the CMIA to the Children's Court within its review of the CMIA as a whole. Accordingly, the Attorney-General has revised the reporting date for the reference to be no later than 30 June 2014. The supplementary terms of reference are set out on page v of this paper.

The Commission's approach

Consultation paper and consultations on primary terms of reference

1.5 The Commission's approach is detailed in its consultation paper on the primary terms of reference.[3]

1 [2011] VSCA 227 (5 August 2011).
2 Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, Consultation Paper (2013).
3 Ibid 3–7.

1.6 The Commission published the consultation paper in June 2013, along with a call for public submissions by 23 August 2013. The Commission received 22 submissions in response to the consultation paper. The Commission consulted widely with interested organisations and people to gather information and comments on the operation of the CMIA, identify issues and develop and test options for reform. At the time of publishing this paper, the Commission has conducted 45 consultation activities on the primary terms of reference.

1.7 The Commission has established an advisory committee comprising individuals with expertise in matters relevant to the review. The members of the advisory committee are detailed in the Commission's consultation paper.[4] Following its first meeting in April 2013, the committee met for a second time in September 2013 after the close of submissions on the primary terms of reference.

Consultation paper on supplementary terms of reference

1.8 This supplementary consultation paper relates to the supplementary terms of reference for the review of the CMIA, and builds on the work conducted on the primary terms of reference.

1.9 The purpose of the material is to assist the Commission to understand how the CMIA has been operating in relation to the Children's Court since its introduction, as well as seek views from interested stakeholders on how the CMIA should operate in relation to young people.[5]

1.10 Due to the short time period, the Commission has not sought to conduct a comprehensive literature review or draft a further detailed consultation paper on the supplementary terms of reference.[6]

1.11 Instead, the supplementary consultation paper poses a series of questions, along with primarily descriptive information designed to contextualise those questions. The Commission has been informed by targeted preliminary research and a small number of preliminary meetings with key stakeholders in the sector.

Further formal consultations

1.12 The Commission will be conducting further consultations with key stakeholder groups.

1.13 The Commission wants to hear your views and experiences of the CMIA with regard to the Children's Court and young people. It seeks comments on the questions in this supplementary consultation paper or any other issues you may wish to raise regarding the supplementary terms of reference. Your responses to the questions will assist the Commission to better understand the nature of the issues and to determine the most appropriate response in its recommendations.

1.14 Information about how to make a submission to the Commission is provided at page vi. To allow the Commission time to consider your views before deciding on final recommendations, submissions are due by 18 December 2013.

4 Ibid 5.

5 The term 'young people' is used as a general term in this paper to refer to individuals who qualify to be dealt with in the Children's Court or under special provisions that apply to 'children' (aged under 18 years) and 'young offenders' (aged 19–20 years) in the *Children, Youth and Families Act 2005* (Vic) and the *Sentencing Act 1991* (Vic). When referring to specific provisions or legislation, the particular term will be used to describe individuals as appropriate.

6 For comprehensive information regarding the history and context of the CMIA and an overview of the current legislation, see Victorian Law Reform Commission, above n 2, 10–17; 32–49.

Final report on primary and supplementary terms of reference

1.15 The feedback and information that the Commission receives from submissions and formal consultations on this supplementary consultation paper, as well as the input received on the primary terms of reference, will inform its recommendations to the Attorney-General.

1.16 A report setting out the Commission's recommendations regarding the primary and supplementary terms of references will be provided to the Attorney-General by 30 June 2014. The Attorney-General must table the report in the Victorian Parliament. The Victorian Government then decides whether to implement the Commission's recommendations.

Young people in the criminal justice system

1.17 Much significant work has been done in relation to understanding the complex characteristics and needs of young people in the criminal justice system.[7]

1.18 While a comprehensive analysis of the nature of juvenile offending is beyond the terms of the current CMIA review, there are widely-agreed characteristics that set young offenders apart. These must be taken into account when determining whether changes should be made to the current system, and what the most appropriate changes would be.

1.19 Some basic statistical trends that seem consistent across jurisdictions include:[8]

- Offending rates peak in late adolescence.
- Young people commit only a relatively small proportion of all crimes.
- Young people are less likely than adults to commit serious offences.
- Young people are more likely than adults to come to the attention of police, for a variety of reasons.

1.20 The Commission's preliminary research and discussions have highlighted that young people in the criminal justice system are highly likely to have experienced some form of disadvantage. A large percentage of young people in contact with the criminal justice system have had previous contact with child protection services, disability services, or the court system in relation to family matters. They also have high rates of exposure to abuse and trauma, histories of drug and alcohol use and of suspension and expulsion from school.[9] Notably, many of these young people also have issues relating to mental health or intellectual functioning.

Young people and the CMIA

1.21 In the usual criminal process, if a person charged with an offence has a mental condition[10] that affects their capacity to a particular degree, there can be a legitimate basis for exempting them from the usual criminal process.

7 For example, work by the Sentencing Advisory Council, the Australian Institute of Criminology and the Youth Parole and Youth Residential Boards.
8 See generally Kelly Richards, 'What makes juvenile offenders different from adult offenders?' (Trends and Issues Paper No 409, Australian Institute of Criminology, February 2011) 1–3.
9 See, eg, the statistical snapshot contained in Youth Parole Board and Youth Residential Board, *Annual Report 2012–13* (2013), 13.
10 In this paper, a mental condition means any condition that results in a person's mental processes becoming disordered or impaired.

1.22 These exemptions are founded on long-established principles in the criminal justice system. A person should not be tried for an offence if at the time of trial they are mentally unfit to stand trial. A person should not be held criminally responsible and punished for an offence if at the time the offence occurred they did not have the capacity to commit the offence because of a mental impairment.

1.23 These principles form the basis of different laws and procedures contained in the CMIA. The CMIA governs the law and procedure in relation to people charged with criminal offences ('accused people') who are found to be mentally unfit to stand trial for those offences and/or who are found not guilty of those offences because of mental impairment.[11]

1.24 The supplementary terms of reference require consideration of what happens to young people who are charged with criminal offences ('young accused people') who have a mental condition such that it may give rise to a question of unfitness to stand trial or the defence of mental impairment.

1.25 In contrast to the vast body of knowledge regarding young people generally in the criminal justice system, less is known about this particular cohort of young people. For example, it is unclear whether and how unfitness to stand trial or the defence of mental impairment apply to young people, and the most suitable pathways for supervision and treatment of young people in the forensic disability and mental health systems are not necessarily agreed upon.

1.26 It is clear that young people face significant challenges in dealing with the criminal justice system generally, as their ability to fully understand and meaningfully participate may be impaired by their level of maturity and development. Coupled with the added difficulties posed by mental health problems and intellectual disabilities, young people with mental conditions represent a doubly vulnerable group in the criminal justice system.

1.27 The supplementary terms of reference require the Commission to examine how the criminal justice system and the CMIA should interact with regard to young people, in particular within the specialised jurisdiction for young people in the Children's Court of Victoria.

Children's Court of Victoria

1.28 The Children's Court is a specialist court operating under the authority of the *Children, Youth and Families Act 2005* (Vic) (CYFA). The purpose of the Act is to 'make provision in relation to children who have been charged with, or who have been found guilty of, offences and to continue the Children's Court of Victoria as a specialist court dealing with matters relating to children.'[12]

1.29 The Children's Court has all the powers and authorities of the Magistrates' Court, in relation to all of the matters over which it has jurisdiction.[13]

11 These laws and procedures were formerly contained in a system known as the Governor's pleasure regime. See Victorian Law Reform Commission, above n 2, 12.
12 *Children, Youth and Families Act 2005* (Vic) s 1(c), (d).
13 Ibid s 528(1).

1.30 The purpose of the Children's Court is to provide a 'modern, professional, accessible and responsive specialist court system focussed on the needs of children, young persons and their families'.[14]

1.31 The Court is presided over by the President—a County Court judge appointed by Governor in Council[15]—and magistrates. When appointing magistrates to the Children's Court, the President must have regard to their experience in child welfare matters.[16]

1.32 The Court is divided into the family, criminal and Koori (criminal) divisions, as well as the neighbourhood justice division.[17]

Civil and family jurisdictions

1.33 The family division of the Court hears applications and makes orders in relation to the protection and care of children.

1.34 Failure to pay infringements and other fines issued against children are dealt with in the Children's Court by the Children and Young Persons Infringement Notice System.[18]

Criminal jurisdiction

1.35 The Criminal Division of the Court has jurisdiction to hear and determine summarily all summary offences and indictable offences charged against children, except seven indictable offences that result in death.[19]

1.36 The CYFA defines a child as a person who, at the time of the alleged commission of the offence in question:[20]

> was under the age of 18 years but of or above the age of 10 years but does not include any person who is of or above the age of 19 years when a proceeding for the offence is commenced in the Court.

1.37 The seven death-related indictable offences specifically excluded from the Children's Court's jurisdiction are:

- murder
- attempted murder
- manslaughter
- child homicide
- defensive homicide
- arson causing death
- culpable driving causing death.

1.38 The Criminal Division also has jurisdiction to conduct committal proceedings, to grant or refuse bail, and to deal with breaches of orders.[21]

14 Peter Power, 'Court Overview' (Research Paper No 2, Children's Court of Victoria, 30 July 2013) 2.1.
15 *Children, Youth and Families Act 2005* (Vic) s 508(2).
16 Ibid s 507(2).
17 Ibid s 504(3).
18 Ibid sch 3.
19 Ibid s 516.
20 Ibid s 3 (definition of 'child').
21 Ibid s 516(1)(c),(d),(e).

Adult courts

1.39 Aside from the seven excluded offences listed above, the Children's Court must generally determine all matters involving summary and other indictable offences relating to people who are children, or were children at the time of the alleged commission of the offence. However, there are particular circumstances in which such matters can be heard in adult courts, either by transfer to the Magistrates' Court or by being uplifted to the Supreme Court or County Court.

Transfer to the Magistrates' Court

Over 19 years—exceptional circumstances

1.40 Even if the accused was a child (under 18) at the time of the offence but over 19 at the time of the hearing, the Children's Court must hear the matter unless it considers that there are exceptional circumstances which warrant the matter's transfer.[22] If the Children's Court considers that exceptional circumstances exist, the matter must be discontinued, and transferred to the Magistrates' Court.

1.41 Factors which must be considered for these purposes include:

- the age of the accused
- the nature and circumstances of the alleged offence
- the stage of the proceeding
- whether the accused is the subject of another proceeding in any other court
- any delay in the hearing of the charge and the reason for the delay
- whether the sentences available to the Court are appropriate
- whether the accused prefers the charge to be heard in the Children's Court or the Magistrates' Court
- any other matter that the Court considers relevant.[23]

Uplifting a matter to the Supreme Court and County Court

Indictable offences—exceptional circumstances

1.42 Where a child is charged with an indictable offence (other than a death-related offence), the matter may be committed from the Children's Court up to a higher court—either the Supreme Court or County Court. This may occur when the child (or their parents, in some situations)[24] objects to a summary hearing,[25] or where the judge decides that 'exceptional circumstances' justify a hearing by judge and jury in the higher courts.[26]

1.43 It is clear from judicial interpretation that in considering whether exceptional circumstances[27] exist, the Children's Court should be reluctant to relinquish its jurisdiction.

22 Ibid s 516(5).
23 Ibid s 516(6).
24 Ibid s 356(4).
25 Ibid s 356(3)(a).
26 Ibid s 356(3)(b).
27 Or 'special reason', as the standard was expressed in the *Children's Court Act 1973* (Vic) s 15(3).

1.44 In *D (a Child) v White*,[28] Justice Nathan stated that as the Court has an 'embracive' jurisdiction relating to children, reasons to transfer a matter must be 'special; … not matters of convenience or to avoid difficulties'.[29] This was approved and furthered by Justice Cummins in *A Child v A Magistrate of the Children's Court & Ors*,[30] in which he added that 'exceptional' in the statutory form means 'very unusual', and that construal of the legislation as whole—noting the comprehensive nature of the Court's scheme— makes it apparent that the Children's Court should give up its jurisdiction 'only with great reluctance'.[31]

1.45 In *DL (A Minor by His Litigation Guardian) v A Magistrate of the Children's Court & Ors,*[32] Justice Vincent described the legislative scheme relating to children in criminal proceedings as having a very different approach to that relating to adults 'for a very good reason'. He was of the view that only 'very special, unusual or exceptional circumstances' can warrant the transfer of a matter to an adult jurisdiction.[33]

1.46 These views were also expressed by Justice Lasry in *CL (A minor) v Tim Lee and Ors and Children's Court of Victoria at Broadmeadows* (CL at trial).[34] Leave to appeal was sought by CL, which was considered by the Victorian Court of Appeal in *CL, A Minor (by his Litigation Guardian) v Director of Public Prosecutions (DPP) (obh Lee)* (CL on appeal).[35] This particular issue was not expressly considered by the Court of Appeal in CL on appeal.

Committal proceedings

1.47 If it considers that exceptional circumstances exist, the Court will conduct a committal proceeding in order to determine whether the evidence has sufficient weight to support a finding of guilt against the child.[36] The Court must then provide reasons for choosing not to determine the matter summarily.[37]

1.48 The Children's Court is provided with two possible outcomes following such a committal hearing:

- discharging the child
- directing the child to be tried in the higher courts,[38] either remanded in custody or bailed until that time.[39]

1.49 The procedure to be followed in a committal proceeding is found in the *Criminal Procedure Act 2009* (Vic).[40]

28 [1988] VR 87. This case considered section 15(3) of the *Children's Court Act 1973* (Vic), equivalent to the current sections 356(3)–(4) of the *Children, Youth and Families Act 2005* (Vic).
29 *D (a Child) v White* [1988] VR 87, 93.
30 [1992] VSC 58 (24 February 1992).
31 Ibid [6].
32 (Unreported, Supreme Court of Victoria, Vincent J, 9 August 1994). This case considered section 134 of the *Children and Young Person's Act 1989* (Vic), equivalent to the current sections 356(3)–(4) of the *Children, Youth and Families Act 2005* (Vic).
33 *DL (A minor by his litigation guardian) v A Magistrate of the Children's Court & Ors* (Unreported, Supreme Court of Victoria, Vincent J, 9 August 1994) [4].
34 [2010] VSC 517 (16 November 2010) [66].
35 [2011] VSCA 227 (5 August 2011).
36 *Criminal Procedure Act 2009* (Vic) ss 141(4)(b),(c), 142(1)(b).
37 *Children, Youth and Families Act 2005* (Vic) s 356(3).
38 It is a matter for the Director of Public Prosecutions to which of the higher courts the person is to be committed for trial. See Part 2.3 of Office of Public Prosecutions, *Director's Policy: The Prosecutorial Discretion* (2013).
39 *Children, Youth and Families Act 2005* (Vic) ss 516(1)(c)(i), (ii).
40 *Criminal Procedure Act 2009* (Vic) ss 129–140.

The decision in CL

1.50 The supplementary terms of reference ask the Commission in particular to consider the Court of Appeal decision in *CL, A Minor (by his Litigation Guardian) v Director of Public Prosecutions (on behalf of Tim Lee & Ors)* (CL on appeal).[41] The essential question in that case was whether the Children's Court of Victoria had jurisdiction to hear and determine the question of fitness to stand trial if it arose.

1.51 CL, a child, had been charged with numerous serious offences. He was before the Criminal Division of the Children's Court sitting in Broadmeadows. A question of CL's fitness to plead arose. The magistrate concluded that he did not have jurisdiction in that circumstance to proceed with the hearing in the Children's Court and that the matters should proceed by way of committal proceeding to the County Court. CL, by his litigation guardian (his mother), sought judicial review in the Supreme Court of Victoria of that decision.[42] The judge, Justice Lasry, held that the Children's Court did not have jurisdiction to hear and determine the question of fitness to plead. Leave to appeal from that decision was sought. The Victorian Court of Appeal refused leave to appeal, holding that the decision of Justice Lasry was not in error.[43]

1.52 Accordingly, while the defence of mental impairment can be raised in the Magistrates' Court and therefore in the Children's Court, by virtue of section 5 of the CMIA, the antecedent question of fitness to plead cannot be heard in the Children's Court. If it genuinely arises in that Court, the Court must direct the child to be tried in the higher courts, resulting in a possible committal to the Supreme or County Court of Victoria, where the question of fitness to plead can be heard and determined. This matter is considered at [2.57] and following.

41 [2011] VSCA 227 (5 August 2011).
42 *CL (A Minor) v Tim Lee and Ors and Children's Court of Victoria at Broadmeadows* [2010] VSC 517 (16 November 2010).
43 *CL, A Minor (by his litigation guardian) v Director of Public Prosecutions (on behalf of Tim Lee & Ors)* [2011] VSCA 227 (5 August 2011).

2

Application of the CMIA to young people in criminal proceedings

2. Application of the CMIA to young people in criminal proceedings

Principles and rights

2.1 The purpose of this section is to identify the principles that apply in relation to young people in criminal proceedings, and to young people with mental conditions in criminal proceedings, in relevant surrounding jurisdictions, as well as the particular principles that apply under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (CMIA), including the protection of the community and the rights and interests of victims.

2.2 The Commission is seeking to determine which principles should be applied to young people with mental conditions who raise unfitness to stand trial or the defence of mental impairment in the Children's Court or adult courts in Victoria.

Principles of the Children, Youth and Families Act

General principles

2.3 When making decisions or taking actions under the *Children, Youth and Families Act 2005* (Vic) (CYFA), decision makers (including courts, community services and the Secretary to the Department of Human Services) must have regard to the principles laid out in Part 1.2 of the Act,[44] which are designed to provide guidance in the Act's administration.[45] The principles set out are:

- the best interests principles
- decision-making principles
- additional decision-making principles for Aboriginal children.

2.4 These principles do not apply to decisions made under the chapters which govern the Children's Court or the criminal responsibility of children.[46]

Best interests principles

2.5 The best interests principles state that the best interests of the child must always be paramount, and in determining if a decision or action is in their best interests, considerations must include the need to protect the child from harm, to protect their rights and promote their development.[47]

44 *Children, Youth and Families Act 2005* (Vic) s 8(1), (4).
45 Ibid s 9(1).
46 Ibid s 9(2).
47 Ibid s 10(1), (2).

2.6 Eighteen further factors are set out for consideration where relevant to a specific decision or action taken in relation to a child, including:[48]

- the desirability of continuity and stability in the child's care
- the views and wishes of the child, if they can be reasonably ascertained
- the desirability of the child being supported to gain access to educational, health and accommodation services
- the possible harmful effect of delay in making the decision or taking the action.

Decision-making principles

2.7 The principles that apply to any decision that is made or action that is taken include:

- the process should be fair and transparent
- the views of those involved should be taken into account
- the persons involved should be able to participate in and understand the process.

Additional decision-making principles for Aboriginal children

2.8 Additional principles are laid out that apply to any decision made or action taken in relation to an Aboriginal child, in recognition of 'the principle of Aboriginal self-management and self-determination'.[49] For example, where relevant, members of the Aboriginal community to which the child belongs and other respected Aboriginal people are to be given an opportunity to contribute their views.[50] There are also a number of requirements in relation to the placement of an Aboriginal child or other significant decision, including the convening of a meeting attended by particular people, consulting with an Aboriginal agency and applying the 'Aboriginal Child Placement Principle'.[51]

Criminal principles

Procedural

2.9 The CYFA contains generally-applicable principles relating to criminal procedure in the Children's Court, including requirements under section 522 of the Act that the Court should, as far as practicable:

- ensure the proceeding is comprehensible to the child and other parties
- ensure that the child understands the implication of the proceedings and any order made
- allow the child to participate fully
- consider the child's wishes
- respect the child's cultural identity
- minimise the stigma to the child and their family.[52]

48 Ibid s 10(3)(d), (f), (n), (p).
49 Ibid s 12(1).
50 Ibid s 12(1)(a).
51 Ibid s 12(1(b). See also section 13 for the Aboriginal Child Placement Principle and section 14 for further principles for placement of Aboriginal children.
52 Ibid s 522(1)(a)–(f).

2.10 Where a child is involved in concurrent Family and Criminal Division proceedings, the Court must determine the family proceedings first.[53]

2.11 Chapter 5 of the CYFA contains procedures governing custody, bail, referral for investigation, the applicable standard of proof, reports and the procedure for trying indictable offences summarily.[54]

Sentencing

2.12 Part 5.3 of the CYFA applies to the sentencing of children who have been found guilty of a criminal offence in the Children's Court.

2.13 The CYFA sentencing hierarchy operates to promote the most appropriate sentence in the circumstances. The orders available on a finding of guilty of an indictable or summary offence in the criminal jurisdiction of the Children's Court are listed in the CYFA in order of severity.[55]

2.14 The Children's Court must not impose a sentence unless it is satisfied that it is not appropriate to impose a less severe sentence.[56] The severity of a potential sentence must be reduced where a child has participated in a Court-ordered group conference.[57]

2.15 In determining which sentence to impose, the Court must have regard to the following factors:

(a) the need to strengthen and preserve the relationship between the child and the child's family; and

(b) the desirability of allowing the child to live at home; and

(c) the desirability of allowing the education, training or employment of the child to continue without interruption or disturbance; and

(d) the need to minimise the stigma to the child resulting from a court determination; and

(e) the suitability of the sentence to the child; and

(f) if appropriate, the need to ensure that the child is aware that he or she must bear a responsibility for any action by him or her against the law; and

(g) if appropriate, the need to protect the community, or any person, from the violent or other wrongful acts of the child.[58]

2.16 The CYFA also sets out specific rules governing the imposition of each sentence type.[59]

53 Ibid s 360(2).
54 Ibid ss 345–359. The procedure for trying indictable offences summarily is also noted above at [1.47]–[1.49].
55 Ibid s 360.
56 Ibid s 361.
57 Ibid s 362(3).
58 Ibid s 362(1).
59 Ibid s 363–418.

Legal representation

2.17 The CYFA provides that a child must be represented by a legal practitioner in the following specific types of criminal matter:

(a) a proceeding with respect to bail if the informant or prosecutor or any person appearing on behalf of the Crown intends to oppose the grant of bail;

(b) a proceeding under section 24 of the Bail Act 1977;

(c) a hearing of a charge for an offence punishable, in the case of an adult, by imprisonment;

(d) a review of a monetary penalty imposed by the Court in respect of an offence punishable, in the case of an adult, by imprisonment;

(e) an application in respect of a breach of an accountable undertaking, bond, probation order, youth supervision order or youth attendance order imposed by the Court in respect of an offence punishable, in the case of an adult, by imprisonment.[60]

2.18 If a child is not represented, the Court must adjourn proceedings to allow the child to obtain representation. The Court may not resume unless the child has had sufficient opportunity to obtain legal representation.[61]

2.19 In matters other than those listed in section 525(2), the Court may adjourn to allow the child to seek representation.[62]

2.20 In the majority of criminal cases, Victoria Legal Aid funds representation for young people.[63]

Parens Patriae

2.21 The *parens patriae* (the state as parent) doctrine is based in the common law, and provides courts with a 'best interests' jurisdiction relating to the welfare of a child.

2.22 The jurisdiction is most commonly exercised in the Family Court and Family Division of the Children's Court, as it is 'directed to the protection of children who are not legally competent to look after themselves',[64] and 'to supplement the care and protection of vulnerable members of the community where amongst other things relevant statutory provisions would not adequately do so'.[65]

2.23 In the recent Victorian case of *Re Beth*, while Justice Osborn reiterated that the extent of the Court's *parens patriae* power was not subject to limitation, he summarised that the jurisdiction:

- is very broad
- is essentially a protective one
- is governed in its exercise by the consideration of the best interests of the child
- must be exercised with caution
- is not excluded by the provisions of the CYFA or the *Disability Act 2006* (Vic).[66]

60 Ibid s 525(2).
61 Ibid s 524(2), (3).
62 Ibid s 524(1).
63 Victoria Legal Aid, Submission to the Department of Justice on 'Improving Diversion for Young People in Victoria', September 2012.
64 *Re Beth* [2013] VSC 189 (23 April 2013) 115.
65 Ibid 84.
66 Ibid 127.

Principles of the CMIA

2.24 Broadly speaking, the principles underlying the CMIA seek to strike a balance between the protection of the community and the rights and clinical needs of accused people judged unfit to stand trial or found not guilty because of mental impairment. These principles are either explicitly stated or reflected in the provisions of the CMIA.

2.25 The overarching principle to which courts must have regard when deciding whether to make, vary or revoke a supervision order or remand someone under the CMIA is that 'restrictions on a person's freedom and personal autonomy should be kept to the minimum consistent with the safety of the community'.[67]

2.26 The court is also required to consider the nature of the person's impairment, how it relates to the offence, whether it poses danger to themselves or others, the need to protect people from such danger, and the availability of adequate resources for treatment in the community.[68]

2.27 The Commission identified eight principles as underpinning the CMIA as part of research conducted on the primary terms of reference. The identified principles are described in detail in the Commission's consultation paper[69] and can be summarised as follows:

- *fairness to an accused person and the right to a fair trial*—a person should not enter a plea to an offence or be tried for an offence unless they are mentally fit to stand trial
- *legitimate punishment*—a person should not be held criminally responsible and punished for an offence if they are not morally blameworthy for the behaviour
- *least restrictive alternative*—when a person is subject to the CMIA, restrictions on the person's freedom and personal autonomy should be kept to the minimum consistent with the safety of the community
- *community protection*—when a person is subject to the CMIA, the need to protect the community or the person from any likely danger because of their mental condition
- *rights of victims and family members*—victims and family members of people subject to the CMIA have a right to be heard and to be informed
- *gradual reintegration*—the treatment and reintegration of a person subject to the CMIA is considered on a gradual basis via a staggered system of management and supervision
- *therapeutic focus*—the CMIA aims to promote an increased understanding of mental conditions among the community and processes to assist in the recovery of all people affected by an offence (including victims, the person subject to the CMIA and their family members)
- *transparency and accountability*—the CMIA encourages procedural fairness, open and transparent decision making and rights of appeal.

67 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 39.
68 Ibid s 40(1)(a)–(e).
69 Victorian Law Reform Commission, above n 2, 18–26.

Human rights principles

2.28 The CYFA and the CMIA exist within a broader Victorian human rights framework as encapsulated in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter). Also relevant are the principles contained in international human rights law.

Charter of Human Rights and Responsibilities Act

2.29 The Charter creates an obligation for public authorities to act in accordance with human rights. It stipulates that legislation should be interpreted, insofar as is possible, in a manner consistent with the promotion of human rights.[70]

2.30 The Charter provides that a human right may only be limited where it is 'reasonable, necessary, justified and proportionate'.[71]

2.31 Courts do not generally fall within the definition of public authorities for the purposes of the Charter, unless acting in an 'administrative capacity'.[72] An example of a court acting in an administrative capacity for these purposes is when it is conducting committal proceedings and when it is adopting 'practices and procedures'.[73]

2.32 Section 23 of the Charter, 'Children in the criminal process', provides that accused children must be brought to trial as quickly as possible,[74] and that children convicted of offences must be treated in a way that is appropriate for their age.[75]

2.33 General rights of accused persons in criminal proceedings are set out in section 25, and include the right to be tried without unreasonable delay. Children charged with criminal offences are given the right to a procedure that 'takes account of [their] age and the desirability of promoting the child's rehabilitation'.

2.34 Other rights expressly set out in the Charter which would likely have an impact on young people with mental conditions in the criminal justice system include the protections of:

- families and children
- privacy and reputation
- taking part in public life
- liberty and security of person
- fair hearing.[76]

International law

United Nations rules and guidelines

2.35 In 1985, the United Nations General Assembly adopted the *Standard Minimum Rules for the Administration of Juvenile Justice*,[77] a resolution on the treatment of juvenile offenders.

70 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1).
71 Ibid s 7(2)(e).
72 Ibid s 4(1)(j).
73 Ibid s 4(1)(i)
74 Ibid s 23(2).
75 Ibid s 23(3).
76 Ibid ss 13, 17, 18, 21, 24.
77 United Nations General Assembly, United Nations Standard Minimum Rules for the Administration of Juvenile Justice, GA Res 40/33, UN GAOR, 96th plen mtg (29 November 1985) ('*Beijing Rules*').

2.36 These rules sit within a framework including two other sets of rules governing juvenile justice, both adopted in 1990: The United Nations Guidelines for the Prevention of Juvenile Delinquency ('the Riyadh Guidelines')[78] and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty ('the JDL Rules').[79]

2.37 The Beijing Rules lay out a range of principles for establishing a progressive justice system for young persons in conflict with the law. The rules stress the importance of establishing laws and processes that are specifically applicable to juvenile offenders, and designed to meet their varying needs.

2.38 Other notable principles include:

- the importance of diversion[80]
- the need for a broad range of dispositions available when sentencing young people[81]
- avoidance of unnecessary delay.[82]

2.39 These three sets of rules have been adopted by the United Nations Committee on the Rights of the Child as determinative of what is required to comply with the terms of the United Nations Convention on the Rights of the Child.

United Nations Convention on the Rights of the Child

2.40 Australia is a signatory to the United Nations Convention on the Rights of the Child.[83] While the Convention has not been directly incorporated into Australian law in its entirety, some of its provisions are reflected in domestic legislation, including state and territory legislation. The Convention is annexed to the Commonwealth Human Rights Commission Act,[84] giving the Commission the power to investigate violations of Convention rights by Commonwealth agencies.

2.41 The overarching principles behind the Convention are framed in terms of the child's best interests:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.[85]

2.42 Article 40 of the Convention contains general principles relating to the treatment of children accused of crimes, and provides that party states recognise the right of accused children to be treated in a manner 'consistent with the promotion of the child's sense of dignity and worth … and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.'[86]

78 United Nations General Assembly, United Nations Guidelines for the Prevention of Juvenile Delinquency, GA Res 45/112, UN GAOR, 68th plen mtg, (14 December 1990).
79 United Nations General Assembly, United Nations Rules for the Protection of Juveniles Deprived of their Liberty, GA Res 45/113, UN GAOR, 68th plen mtg, (14 December 1990).
80 *Beijing Rules* r 11.
81 Ibid r 18.
82 Ibid r 20.
83 Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 40.
84 *Australian Human Rights Commission Act 1986* (Cth).
85 Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3(1).
86 Ibid art 40(1).

2.43 Other relevant principles that run throughout the Article include:

- the importance of determining criminal matters relating to children without delay[87]
- the desirability of specialised laws, procedures, authorities and institutions specifically applicable to children accused of crimes[88]
- the desirability of dealing with such children in less-formal or non-judicial proceedings[89]
- the importance of a range of dispositions, orders, programmes and alternatives to institutional care to ensure children are 'dealt with in a manner appropriate to their well-being and proportionate to their offence'.[90]

Other principles governing the treatment of people with mental conditions

2.44 Also relevant are the principles in relevant legislation that govern the treatment of people with mental conditions. In Victoria, the two key pieces of legislation are the *Mental Health Act 1986* (Vic) and the *Disability Act 2006* (Vic), which apply to young people as well as adults.

2.45 The relevant national principles relating to the treatment of people with mental conditions are detailed in the Commission's consultation paper on the primary terms of reference.[91]

The Mental Health Act

2.46 The Mental Health Act outlines principles for the treatment and care of people with a mental disorder in Victoria. A therapeutic focus is evident in the principles of the legislation. It states that people with a mental disorder are to be involved in the development of their own treatment plan wherever possible and should be provided with comprehensive information about their mental disorder and proposed and alternative treatments.[92] It also states that treatment and care should promote and assist self-reliance.[93]

2.47 The Mental Health Act also provides for the principle of least restriction. Care and treatment are to be provided in 'the least possible restrictive environment and least possible intrusive manner consistent with the effective giving of that care and treatment'.[94] Further it requires that 'any restriction upon the liberty of patients and other people with a mental disorder and any interference with their rights, privacy, dignity and self-respect are kept to the minimum necessary in the circumstances'.[95]

2.48 Consistent with the principle of least restriction, other principles in the legislation state that wherever possible treatment should be provided in the community or near the home of the person with a mental disorder or the home of their friends or relatives.[96]

2.49 The Mental Health Act is currently under review. The new proposed legislative framework will seek to promote recovery-oriented practice. Central to the reforms is a supported decision-making model of treatment and care. The framework aims to 'enable and support compulsory patients to make decisions about their treatment and determine their individual path to recovery'.[97]

87 Ibid art 40(2)(b)(iii).
88 Ibid art 40(3).
89 Ibid art 40(3)(b).
90 Ibid art 40(4).
91 Victorian Law Reform Commission, above n 2, 28.
92 *Mental Health Act 1986* (Vic) s 6A(e), (j).
93 Ibid s 6A(d).
94 Ibid s 4(2)(a).
95 Ibid s 4(2)(b).
96 Ibid ss 6A(b), 6A(f).
97 Department of Health, *A new Mental Health Act for Victoria—Summary of proposed reforms* (2012).

The Disability Act

2.50 The Disability Act outlines a number of principles to promote and protect the rights of people accessing disability services.

2.51 One of the principles provides that 'persons with a disability have the same rights and responsibilities as other members of the community and should be empowered to exercise those rights and responsibilities'.[98] They include:

- the right to respect for their human worth and dignity as individuals
- the right to live free from abuse, neglect or exploitation
- the right to exercise control over their lives
- the right to participate in decisions and access information and obtain services that support their quality of life.[99]

2.52 The Disability Act also outlines principles that disability services should adhere to in order to ensure the rights of people accessing services are protected. For example, that services should be flexible and responsive to the individual needs of a person with a disability.[100]

2.53 Consistent with the principles in the CMIA, the Disability Act provides for the principle of least restriction. The Disability Act states that '[i]f a restriction on the rights or opportunities of a person with a disability is necessary, the option chosen should be the option which is the least restrictive of the person as is possible in the circumstances'.[101]

What principles should apply to young people under the CMIA?

2.54 The Commission is seeking to understand how the CMIA principles are currently applied to young people who are subject to the legislation.

2.55 In considering whether and how the CMIA should be further extended in the Children's Court, the Commission is also seeking views on what principles should apply to young people in the criminal justice system who have mental conditions and who may raise unfitness to stand trial or the defence of mental impairment.

2.56 Once the Commission has discerned which principles should be applied to young people with regard to the CMIA, creation of any new scheme or modification of current processes should be done with these in mind.

Questions

1 How are the principles of the CMIA currently applied in the higher courts to young people who are subject to the CMIA?

2 Are the current CMIA principles appropriate for young people?

3 Are there areas of the current process that conflict with human rights principles? If so, which areas?

4 What principles should govern the application of the CMIA to young people in the Children's Court and adult courts?

98 *Disability Act 2006* (Vic) s 5(1).
99 Ibid s 5(2).
100 Ibid s 5(3).
101 Ibid s 5(4).

Unfitness to be tried and mental impairment in relation to young people—Children's Court

Current limited jurisdiction of the CMIA in the Children's Court

2.57 The Children's Court shares 'all the powers and authorities' of the Magistrates' Court in the areas over which it has jurisdiction.[102] The defence of mental impairment applies in the Magistrates' Court by virtue of section 5(1) of the CMIA and is therefore available in the Children's Court. As in the Magistrates' Court, the only option on a finding of not guilty because of mental impairment in the Children's Court is to discharge the young person.

2.58 The current legal position in Victoria is that the Children's Court does not have jurisdiction to determine whether a child is unfit to stand trial. While the Children's Court has the power to determine the defence of mental impairment, the only outcome available on a finding of not guilty because of mental impairment is a discharge. This was stated in the case of *CL, A Minor (by his Litigation Guardian) v Director of Public Prosecutions (on behalf of Tim Lee & Ors)*[103] (CL on appeal) in the judgment of Acting Justice of Appeal Sifris, with whom the Chief Justice agreed:

> In my opinion, there is no error in his Honour's decision to the effect that the CMI Act does not confer any jurisdiction on the Children's Court, whether expressly or by necessary implication…[w]hen looked at as a whole, the CYFA Act, despite dealing with a number of related and important procedural matters, does not vest the Children's Court with jurisdiction to determine fitness to plead.[104]

2.59 The 2010 decision of the trial judge Justice Lasry in CL (at trial) sets out the reasoning behind his decision, affirmed by the Victorian Court of Appeal,[105] that the Children's Court does not have jurisdiction to determine matters of unfitness.[106] These included:

- Section 528 of the CYFA grants the Children's Court the same jurisdiction as the Magistrates' Court and the second reading speech for the CMIA noted that '…the new procedures for investigation into fitness and a special hearing will not apply in the Magistrates' Court jurisdiction.'[107] The Children Court therefore also lacks jurisdiction to determine matters relating to fitness.[108]
- The defence of mental impairment and the matter of whether an accused is unfit to stand trial are two separate questions. Therefore, while the CMIA expressly grants power to the Magistrates' Court regarding the defence of mental impairment, its silence in relation to unfitness has been taken as being intentional.[109]
- Provisions in the CYFA regarding similar matters to those considered as part of the unfitness test do not impliedly incorporate a jurisdiction to consider fitness to be tried in the Children's Court.[110]
- The CMIA requires that a jury be empanelled to determine the question of whether an accused is unfit to stand trial. Therefore the CMIA could not be applied in the Children's Court, as there are no juries used in the Court.
- A child who is found to be unfit to be tried may be unable to comply with some of the requirements of the CYFA, such as the opportunity to exercise their right to be tried by a jury and to be able to object to a matter continuing to be tried summarily.[111] The Children's Court therefore could not have jurisdiction to determine matters of fitness.

102 *Children, Youth and Families Act 2005* (Vic) s 528(1).
103 [2011] VSCA 227 (5 August 2011).
104 Ibid [34], [41].
105 Ibid.
106 *CL (A Minor) v Tim Lee and Ors and Children's Court of Victoria at Broadmeadows* [2010] VSC 517 (16 November 2010).
107 Victoria, Parliamentary Debates, Legislative Assembly, 18 September 1997, 185 (Jan Wade, Attorney-General).
108 *CL (A Minor) v Tim Lee and Ors and Children's Court of Victoria at Broadmeadows* [2010] VSC 517 (16 November 2010) at [30].
109 Ibid [29].
110 Ibid [40]–[46]. Section 522 of the *Children, Youth and Families Act 2005* (Vic) provides that Children's Court must take steps to ensure a number of matters are satisfied including that the proceedings are understandable to a child, that the child understands the nature and implications of the proceedings and of any order made in the proceeding and must allow the child to participate fully in the proceedings.
111 *CL (A Minor) v Tim Lee and Ors and Children's Court of Victoria at Broadmeadows* [2010] VSC 517 (16 November 2010) at [17] and [46].

Issues identified with the limited jurisdiction of the CMIA in the Magistrates' Court

2.60 A number of issues have been raised throughout the Commission's consultations on the primary terms of reference regarding the lack of jurisdiction in the Magistrates' Court to determine matters of unfitness or to make orders upon a finding of not guilty because of mental impairment. These include:

- lack of outcome for the accused and victim
- lack of outcome for the community
- artificial decision making
- lack of consistency in decision making
- length of proceedings.

Lack of outcome for the accused and victim

2.61 If a person has been found not guilty because of mental impairment in the Magistrates' Court, the magistrate must discharge the person. In these circumstances, the Magistrates' Court has no power to make an order to address the offending behaviour or mental illness, intellectual disability or cognitive impairment.

Lack of outcome for the community

2.62 As discussed above, even if the accused poses a risk of re-offending, the Magistrates' Court lacks the power to make an order to address the offending or protect the community. The absence of a finding in the Magistrates' Court also leads to a lack of ancillary consequences directed towards the protection of the community (for example, licence disqualification, sex offender registration etc).

Artificial decision making

2.63 The current system places pressure on magistrates, prosecutors, defence lawyers and the police to make decisions that circumvent the CMIA to reach a satisfactory outcome. For example, a magistrate may commit an accused person to trial only because the County Court has the power to empanel a jury to determine the issue of unfitness to stand trial, even though the type of offence would allow it to be heard and determined in the Magistrates' Court. Lawyers may deliberately avoid raising the question of unfitness to stand trial to avoid putting their client through the longer and more stressful County Court process. Police prosecutors may request that a matter be dealt with in the committal stream so that there can be an investigation into unfitness to stand trial in the County Court, when usually the same matter would be dealt with in the summary stream.

Lack of consistency in decision making

2.64 The process that currently operates in the Magistrates' Court is dependent on the individual decision making of police prosecutors and lawyers. There is a lack of guidance in relation to decision making in this area (for example, when exercising prosecutorial discretion). The lack of consistency in decision making leads to disparities in terms of when the prosecution pursues a matter in the committal stream, when the prosecution decides to discontinue a matter and when defence lawyers decide to raise the question of unfitness to stand trial.

Length of proceedings

2.65 The current process in relation to unfitness to stand trial requires the empanelling of two juries: one to determine whether the accused person is unfit to stand trial, and a second to determine whether the accused person committed the offence if they are found unfit to stand trial. The length of the process could be difficult for both victims and accused people. The current process also utilises resources in the higher courts even though the offence is one that comes within the jurisdiction of the Magistrates' Court.

Application of the issues regarding limited jurisdiction to the Children's Court

2.66 Preliminary research and discussions by the Commission on the supplementary terms of reference has indicated that several of the issues raised about the lack of jurisdiction to determine unfitness and make orders on a finding of not guilty because of mental impairment in the Magistrates' Court also apply in the Children's Court.

Questions

5 Do the issues raised in the Magistrates' Court also have a particular impact in the Children's Court? If so:

(a) What issues arise from the lack of jurisdiction to determine unfitness and the requirement to discharge a young person found not guilty because of mental impairment in the Children's Court?

(b) What practices, if any, take place in the Children's Court to address issues arising under the CMIA and reach a satisfactory outcome for the young person? In what situations?

6 What other issues arise in the Children's Court due to the limited jurisdiction regarding issues arising under the CMIA?

7 If the CMIA is further extended in the Children's Court, should there be any differences in approach to any further extension in the Magistrates' Court?

Delays in CMIA matters involving young people

2.67 One of the more significant issues in considering the application of the CMIA in the Children's Court is the delay that can be caused by the need to uplift matters to the higher courts to determine unfitness. This can result in delays in therapeutic treatment, which has a particular impact on young people for whom it is crucial to provide intervention and treatment as soon as possible.

2.68 Given that young people are continually developing, significant changes can occur in much shorter periods of time and therefore a report obtained a few months prior may no longer be current. Delays in matters being uplifted to the higher courts can therefore result in the generation of multiple expert reports.

Question

8 How do delays affect young people and victims involved in CMIA matters?

Determination of unfitness in the Children's Court

Power to determine unfitness

2.69 The criteria for determining if a person is unfit to stand trial are outlined in section 6 of the CMIA. As discussed above, the Children's Court does not currently have jurisdiction to determine unfitness. Therefore in cases involving indictable offences, where the question of unfitness is raised, it is regarded as satisfying the exceptional circumstances test. In order to be dealt with, the case must be transferred to a committal hearing which may result in an order by the Children's Court that the person be tried in a higher court. Where the young person is charged with a summary offence and unfitness is raised, the only option is for the prosecution to withdraw the charges or for the court to discharge the accused.

2.70 It is the clear intention of the CYFA that wherever possible, young people should be dealt with in the specialist jurisdiction of the Children's Court. However, the current practice in the Children's Court is to use the 'exceptional circumstances' in section 356(3) of the CYFA to order that a young person be tried in the higher courts in cases involving indictable matters. Under this provision, a committal proceeding must be conducted and reasons must be provided as to why the court considers that the charge is unsuitable to be determined summarily by reason of exceptional circumstances.

2.71 The trial judge in CL (at trial) noted that the lack of jurisdiction to determine unfitness was unsatisfactory and recommended that:

> the *Crimes (Mental Impairment and Unfitness to be Tried) Act* and the *Children, Youth and Families Act* be appropriately amended to provide the Children's Court with the specific jurisdiction to deal with issues of fitness to plead without the need for the defendant to be directed to stand trial and the matter investigated by a jury empanelled for that purpose.[112]

112 Ibid [81].

2.72 The recommendations made by the trial judge in the case of CL (at trial) were endorsed by the Court of Appeal.[113] Acting Justice Sifris in CL (on appeal) stated:

> Before I deal with the proposed disposition of the case, I should say that for my part, I would endorse the recommendations by made by the trial judge.[114]

2.73 A number of other Australian jurisdictions afford magistrates the power to determine the question of fitness to plead. As outlined in CL (at trial):

> … other States have given Magistrates' Courts the power to determine the issue of fitness to plead, or more generally, provided for the summary disposition of persons suffering from mental illness and intellectual disability.[115]

2.74 The Children's Courts of the Australian Capital Territory, Western Australia, South Australia and Tasmania have the power to determine unfitness.[116] In Queensland, the Court may determine unfitness in relation to indictable offences only. In the Northern Territory, there is no power to determine unfitness so the charges must be dismissed or the young person diverted into treatment.[117]

2.75 The Commission invites views on whether the Children's Court should be given the jurisdiction to deal with unfitness to stand trial. Secondary issues on which the Commission seeks input are the process by which this should occur and the evidence that may be required for the Children's Court to make any findings as to unfitness, for example by way of expert reports.

Questions

9 Should the Children's Court be given the jurisdiction to deal with unfitness when it is raised in matters in the Children's Court? If so:

(a) How should this jurisdiction be provided (ie by an express power to investigate, determine and make a finding of unfitness or by an existing power in the Children's Court)?

(b) On what evidence should any unfitness determination be made?

10 Do issues currently exist in the Children's Court regarding the provision of expert reports? If so, what are they?

113 *CL, A Minor (by his litigation guardian) v Director of Public Prosecutions (on behalf of Tim Lee & Ors)* [2011] VSCA 227 (5 August 2011) at [51].
114 Ibid [51].
115 *CL (A Minor) v Tim Lee and Ors and Children's Court of Victoria at Broadmeadows* [2010] VSC 517 (16 November 2010) at [82].
116 *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 4, pt 3, div 1; *Criminal Law Consolidation Act 1935* (SA) pt 8A div 2–3; *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 4 pt 2; *Crimes Act 1900* (ACT) s 310.
117 *Mental Health and Related Services Act* (NT) ss 73A(1)–(2).

Test for unfitness

2.76 Under the CMIA, an accused person is presumed to be fit to stand trial.[118] This is the case even where an accused person has previously been found unfit to stand trial. The presumption is rebutted if it is established, following an investigation by a jury, that the accused person is unfit to stand trial.[119]

2.77 The test for unfitness to stand trial in section 6 of the CMIA derives from the case of *R v Presser* (Presser).[120] Under the CMIA, an accused person is unfit to stand trial for an offence if, because their mental processes are disordered or impaired, they are, or at some time during the trial will be:

- unable to understand the nature of the charge
- unable to enter a plea to the charge and to exercise the right to challenge jurors or the jury
- unable to understand the nature of the trial
- unable to follow the course of the trial
- unable to understand the substantial effect of any evidence given against them
- unable to give instructions to their legal practitioner.[121]

2.78 Each of these criteria stands alone. An accused person need only satisfy one of the above criteria to be found unfit to stand trial.

The appropriateness of the unfitness test for young people

2.79 Young people, however, may fail to meet the criteria for unfitness simply by virtue of their stage of development or immaturity. The Australian Institute of Criminology (AIC) has concluded that 'immaturity is a significant factor in shaping juveniles' competence in court, irrespective of other influences'.[122]

2.80 The AIC cites a study that found one third of 11 to 13 year olds and one fifth of 14 to 15 year olds have impaired capacities comparable to that of adults with a serious mental illness who would most likely be found unfit to stand trial.[123] The impaired capacity for young people may therefore be part of the reality of the system. A different approach to unfitness may be required as is recognised by the current approach of the Children's Court through its protective processes and therapeutic priorities.

2.81 The New South Wales Law Reform Commission in its recent inquiry raised the question of whether the Presser criteria are suitable for young people:

> Young people's brains are still developing, with consequent differences in cognitive functioning compared with adults. As discussed … these developmental differences may be further complicated by the existence of a cognitive or mental health impairment, or an emerging impairment.[124]

118 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 7(1).
119 Ibid ss 7(2), (3).
120 *R v Presser* [1958] VR 45.
121 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 6.
122 Richards, above n 8, 6.
123 Ibid, citing Grisso T et al. (2003) 'Juveniles' competence to stand trial: A comparison of adolescents' and adults' capacities as trial defendants' *Law and Human Behaviour* 27(4): 333–363 at 356.
124 New South Wales Law Reform Commission, *Young People with Cognitive and Mental Health Impairments in the Criminal Justice System*, Consultation Paper 11 (2010) 82.

2.82 The Children's Court in New South Wales submitted to the New South Wales Law Reform Commission that the Presser criteria remain 'adequate' for determining fitness when 'applied in a "common sense" fashion'.[125] This view was supported by the Office of the Director of Public Prosecutions which argued that in considering the Presser criteria:[126]

> The fact that someone is younger will obviously be factored in, for instance, on his or her capacity to understand the offence with which s/he is charged or the ability to properly instruct his or her legal representatives.

The requirements under section 522 of the Children, Youth and Families Act 2005

2.83 As discussed at [2.9] above, section 522 of the CYFA requires that the court must take steps to ensure, among other things, that the young person:

- understands the nature and implications of the proceedings
- is allowed to participate fully in proceedings.

2.84 In determining what measures the court must take to ensure the requirements in section 522 are met, the judge or magistrate must necessarily consider and form a view about the young person's capacity to understand and participate in proceedings.

2.85 The judge or magistrate must undertake such an assessment for all children coming before the Children's Court, not just those with a mental condition. This is in recognition of the fact that any young person may have difficulties in understanding and participating in proceedings because of their stage of development. This process may enable the Children's Court to effectively manage young people where unfitness is raised. The Commission invites views about whether section 522 may be used as a means of managing unfitness in the Children's Court and whether this may obviate the need for a test of unfitness for young people in all or particular circumstances.

Questions

11 Can the current unfitness test be appropriately applied to young people?

12 Should any changes be made to the current test for determining unfitness to make the criteria more appropriate for young people?

13 If changes were made to the Presser criteria to include consideration of decision-making capacity or effective participation, what implications could this have for the application of the test for young people?

125 Children's Court of New South Wales, Submission MH43 to the New South Wales Law Reform Commission *Inquiry into People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences,* 10.

126 New South Wales Office of the Director of Public Prosecutions, Submission MH37 to the New South Wales Law Reform Commission *Inquiry into People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences,* 2.

Determination of criminal responsibility

Doli incapax

2.86 At common law, those under a certain age are '*doli incapax*', meaning they are incapable of wrongdoing. The definition of 'child' in the CYFA includes:

> in the case of a person who is alleged to have committed an offence, a person who at the time of the alleged commission of the offence was under the age of 18 years but of or above the age of 10 years.

As children are presumed not to understand their actions, they are unable, at law, to form the *mens rea* for an offence.

2.87 In Victoria, a person under the age of 10 years is 'conclusively presumed' to be *doli incapax* and therefore incapable of committing an offence.[127] Young people between 10 and 14 years of age are also presumed to be *doli incapax*, but the presumption is subject to rebuttal.[128] Although abolished in England,[129] the presumption has been strongly affirmed in Victoria, notably by the Court of Appeal in *R v ALH*.[130]

2.88 The onus lies on the prosecution to prove not only the elements of the offence charged, but also that the child was *doli capax*—capable of wrongdoing.[131]

2.89 While *doli incapax* is a separate inquiry to that of the defence of mental impairment, similar questions are posed in considering the operational elements of the defence regarding the knowledge and wrongness of the conduct. The potential overlap between *doli incapax* and the defence of mental impairment is discussed in the case of *R v ALH*, where the presumption was reframed as an extension of *mens rea:*[132]

> Further, I consider that the traditional notion of presumption is inappropriate. I consider that the better view is that the prosecution should prove beyond reasonable doubt, as part of the mental element of the offence, that the child knew the act or acts were seriously wrong. Such a requirement is consonant with humane and fair treatment of children. It is part of a civilised society.

2.90 The Commission invites people's views on the applicability of the defence of mental impairment to young people and, in particular, how *doli incapax* and the defence of mental impairment should interact in practice in establishing the *mens rea* for young people.

Question

14 In considering criminal responsibility of a young person, how are issues relating to the inquiry of *doli incapax* separated from inquiries about establishing the defence of mental impairment?

127 *Children, Youth and Families Act 2005* (Vic) s 344.
128 See *R v M* (1977) 16 SASR 589.
129 *Crime and Disorder Act 1998* (UK) s 34.
130 [2003] VSCA 129 (4 September 2003).
131 *R v JA* (2007) 174 A Crim R 151 (Higgins CJ) at [82].
132 *R v ALH* [2003] VSCA 129 (4 September 2003) at [74].

Definition of mental impairment

2.91 The common law is relied upon in determining what constitutes a mental impairment. At common law, a person must be 'labouring under such a defect of reason, from *disease of the mind*'[133] in order for the defence of mental impairment to be established. A 'disease of the mind' has been held to be synonymous with a 'mental impairment'.[134]

2.92 While mental illness clearly falls within the scope of the defence of mental impairment, it remains unclear whether other conditions such as cognitive impairment, intellectual disability, drug-induced psychosis or severe personality disorder constitute a 'mental impairment'.

2.93 There are issues specific to young people in identifying and assessing those who may have a mental illness.[135] Detection of emerging mental illness can be complicated by a lack of prior symptoms or treatment history and developmental issues. Most young people in custody will have had limited contact with assessment procedures and therefore no history of previous assessments and treatment is generally available.

2.94 In addition, young people are still developing, accurate assessments of mental illness are difficult, and diagnosis is never as precise as is possible in the adult population. In some cases symptoms are sub-clinical and do not meet formal diagnostic criteria.[136]

2.95 In considering whether mental impairment should be defined as it relates to young people, the Commission is seeking views on how particular mental conditions affect young people and how this should be factored into the question of a possible statutory definition of mental impairment under the CMIA (as raised in the primary terms of reference).

Questions

15 Should mental impairment be defined as it relates to young people? If so, how should it be defined?

16 What specific mental conditions affecting young people should the Commission have regard to in considering the application of the CMIA?

17 Are there specific mental conditions that more commonly affect young people in contact with the criminal justice system?

133 *Daniel M'Naghten's Case* (1843) 8 ER 718, 722 [210].
134 *R v Falconer* (1990) 171 CLR 30, 53; *R v Radford* (1985) 42 SASR 266.
135 New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Diversion*, Report 135 (2012) 379.
136 Justice Health, Victorian Government Department of Justice and the National Justice Chief Executive Officers' Group *Diversion and Support of Offenders with a Mental Illness: Guidelines for Best Practice* (2010) 80.

Defence of mental impairment

2.96 Section 20(1) of the CMIA outlines the defence of mental impairment. The defence is established if at the time of engaging in conduct constituting the offence, the person was suffering from a mental impairment that had the effect that:

- the person did not know the nature and quality of the conduct, or
- the person did not know that the conduct was wrong.

2.97 The CMIA provides that a person will not know their conduct was wrong where they 'could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong'.[137] It could be argued that many young people without a mental impairment would not meet this requirement due to their age and stage of development.

2.98 The circumstances in which an accused person does not know the nature and quality of their conduct are rare. The defence of mental impairment is most successful where the second limb of the M'Naghten test is established. This limb relates to the way in which the person processes knowledge about the nature and quality of their conduct and whether they know that it was wrong.[138]

2.99 Given the issues discussed above in relation to the interaction of the defence of mental impairment and *doli incapax* and the differences in identifying and assessing mental impairment in young people, the Commission is investigating whether the defence of mental impairment can be appropriately applied to young people and how it interacts with *doli incapax*.

Questions

18 Can the defence of mental impairment be appropriately applied to young people?

19 Do the operational elements of the defence of mental impairment require modification for application to young people?

20 Does the requirement that a person be able to 'reason with a moderate degree of sense and composure' need reformulating if applied to young people?

137 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 20(1)(b).
138 Ibid s 16.

Special hearings and the determination of criminal responsibility of young people found to be unfit

2.100 A special hearing is a means of determining the criminal responsibility of a person who has been found unfit to stand trial. Its purpose is to determine whether, on the evidence available, the person who has been found unfit to stand trial either:

- is not guilty
- is not guilty because of mental impairment
- committed the offence.[139]

2.101 A special hearing is conducted as closely as possible to a criminal trial.[140] The accused person found unfit to stand trial is taken to have pleaded not guilty to the offence.[141] Unlike a criminal trial, the accused person is not expected to participate in the hearing.[142] Instead their interests are represented by their legal representative as far as this is possible.[143]

2.102 If the Children's Court is given the power to determine unfitness, it will be necessary to decide what process should be followed following a finding of unfitness to determine whether the accused person committed the offence.

2.103 As discussed above, section 522 of the CYFA may provide a process for managing matters where unfitness is raised in the Children's Court.

Question

21 If special hearings were to apply in the Children's Court, would procedural modifications be required to make it appropriate for young people?

139 Ibid s 15.
140 Ibid s 16(1).
141 Ibid s 16(2)(a).
142 Law Commission, *Unfitness to Plead*, Consultation Paper No 197 (2012) 27–32, 23.
143 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 20(1)(b).

Outcomes

Diversion

2.104 Young people with mental illness and cognitive impairments require a special response from the criminal justice system. Unlike adults, the brains of young people are continually developing. This impacts on their impulse control and social behaviour on the one hand, while potentially providing a higher capacity for rehabilitation on the other.[144] It has also been found that young people 'grow out' of crime with offending rates peaking in late adolescence and declining in early adulthood.[145] Given these factors, it has been argued that '[a]s juveniles are neither fully developed nor entrenched within the criminal justice system, juvenile justice interventions can impact upon them and help to foster juveniles' desistance from crime.'[146]

2.105 As stated by the former President of the Children's Court, Judge Paul Grant:

> It is a well established principle in youth justice systems that, whenever appropriate, young people should be diverted from formal court processes whilst at the same time ensuring human rights and legal safeguards are fully protected.[147]

2.106 Mental health diversion and support programs that engage with young people should consider the following key issues:

- Offending behaviour often signals an emerging mental illness.
- Family involvement is often essential.
- Services should be inclusive, youth friendly and age appropriate.
- Continuity between adolescent services and adult services is critical.[148]

2.107 There is currently no formal diversion program that exists for young people appearing in the Children's Court in Victoria.

2.108 There is support for the introduction of diversion options for young people in Victoria. Victoria Legal Aid's recent submission to the Department of Justice on 'Improving Diversion for Young People in Victoria' expressed strong support for reforms to introduce 'pre-plea based diversion' and identified a number of benefits for diversion and young people.[149] The Victorian Sentencing Advisory Council has stated that 'the absence of a comprehensive statewide diversion program for young people can lead to inequitable outcomes and possibly also to net-widening in certain areas.'[150]

2.109 Elsewhere, the New South Wales Law Reform Commission has recently published an extensive report on diversion in the criminal justice system in which it was argued that:

> [t]he evidence of high rates of cognitive and mental health impairment in young people in custody at least suggest that paying attention to effective diversion of young people with cognitive and mental health impairments may have long term benefits for the individual and society.[151]

144 New South Wales Law Reform Commission, above n 135, 367-368.
145 D Farrington, 'Age and crime' in M Tonry & N Morris (eds), *Crime and justice: An annual review of research* (University of Chicago Press, 1986), 189–250.
146 Richards, above n 8, 5.
147 Paul Grant, 'Interventions that Work: Dealing with Young People in Conflict with the Law' (Paper presented at the Australian Institute of Criminology International Conference, Young People, Crime and Community Safety: Engagement and Early Intervention, Melbourne, 25–26 February 2008) 1.
148 Justice Health, above n 136, 80.
149 Victoria Legal Aid, above n 63, 3–4.
150 Sentencing Advisory Council, *Sentencing Children and Young People in Victoria* (2012) [28].
151 See New South Wales Law Reform Commission, above n 135, 368.

Question

22 Should a program be introduced in the Children's Court to divert young people who raise unfitness to stand trial or the defence of mental impairment? If so:

(a) What eligibility factors or criteria should be considered?

(b) How should such a program interact with any other powers that may be recommended in the Children's Court for dealing with unfitness or the mental impairment defence?

Current requirement to discharge after a finding of not guilty because of mental impairment

2.110 A number of problems were raised during consultations about the requirement in the Magistrates' Court to discharge on a finding of not guilty because of mental impairment. As outlined above, where there is no 'outcome', the offending behaviour or mental illness, intellectual disability or cognitive impairment is not addressed. The discharge of a person found not guilty because of mental impairment may also compromise community safety.

2.111 These problems may also apply to the requirement in the Children's Court to discharge following a finding of not guilty because of mental impairment. With the exceptions of Queensland and the Northern Territory, all other Australian states and territories are able to make orders on a finding of not guilty because of mental impairment in the summary jurisdiction.[152]

2.112 If the Children's Court is given the power to determine and make findings of unfitness, the Commission must consider what orders should follow a finding of unfitness in the Children's Court. The Commission is also considering this question in relation to the orders that should be available if the Magistrates' Court had the power to deal with unfitness.

2.113 Currently, in the higher courts (where unfitness may be determined), if a person is found unfit to stand trial, there is a 'special hearing' of the evidence relating to the offence charged. Following a special hearing, the jury can find that the accused person 'committed the offence charged or an offence available as an alternative', which is characterised as a 'qualified finding of guilt'.[153] Where a qualified finding of guilt is made in a special hearing, the magistrate may make the person subject to supervision, or order that the person be unconditionally released.[154]

Question

23 Should the Children's Court be given the power to make orders following findings in relation to unfitness and the defence of mental impairment, other than a discharge?

152 Ibid 359.
153 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 17(1)(c), 18(3).
154 Ibid s 18(4).

Options for orders in relation to unfitness and the defence of mental impairment

2.114 The Commission has been asked to consider what orders should be available following a finding of unfitness or not guilty because of mental impairment. In this section, the options for providing a power in the Children's Court to make orders in relation to unfitness and the defence of mental impairment are briefly described, followed by a series of questions.

Limited supervision orders under the CMIA

2.115 When a person is declared liable to supervision under the CMIA, they may be placed under an indefinite custodial or non-custodial supervision order. Given the different principles that apply in the Children's Court in dealing with young people, it is important to avoid drawing a rigorous supervision regime. A supervision regime such as the one that currently exists under the CMIA, which is indefinite, would be inappropriate for offences in the Children's Court.

2.116 The orders available under the CMIA in the Children's Court could be subject to a time limit. Alternatively, only non-custodial supervision orders and unconditional discharges could be available to the Children's Court. With the seven death-related offences and the 'exceptional circumstances' provision, the Children's Court would still retain a discretion to commit the young person to trial in the higher courts, which could act as a safety net for matters that might warrant a more restrictive order.

Orders available in the criminal jurisdiction of the Children's Court

2.117 Orders that are currently available without a conviction under the CYFA include dismissing the charges, undertakings, good behaviour bonds, fines, probation or youth supervision orders and range from 6–18 months in duration.[155]

2.118 Custodial orders require a conviction and are imposed for a maximum period of three years. They include:

- youth residential orders (10–14 year olds)[156]
- youth justice centre orders (15–20 year olds).[157]

2.119 A youth attendance order can also be made with a conviction and requires the young person to attend a youth justice centre for a period of up to 10 hours per week while residing in the community.[158]

Orders available in the civil mental health and disability systems for young people

2.120 Orders under the Mental Health Act and the Disability Act could be used to address the needs of young accused people with a mental illness, intellectual disability or cognitive impairment in the Children's Court. The Mental Health Act contains the following orders for people with a mental illness:

- *involuntary treatment order*—this order allows for the involuntary detention of a person for treatment at an approved mental health service.[159]
- *community treatment order*—this order is for people subject to an involuntary treatment order for treatment in an approved mental health service without detention.[160]

155 *Children, Youth and Families Act 2005* (Vic) ss 380(e)–(g). Good behaviour bonds, fines and youth supervision orders may also be made with a conviction.
156 Ibid s 360(1)(i).
157 Ibid s 360(1)(j).
158 Ibid s 360(1)(h).
159 *Mental Health Act 1986* (Vic) ss 12, 12AA.
160 Ibid s 14.

2.121 The Disability Act contains provisions for a supervised treatment order to detain people with an intellectual disability who pose 'a significant risk of serious harm to others'.[161]

Protection orders

2.122 Section 349(1) of the CYFA provides that where a child appears as an accused in criminal proceedings, and the Children's Court considers there is *prima facie* evidence for the making of a protection order, the Court may refer a matter to the Secretary to investigate whether grounds exist to make a protection order for the young person.

2.123 As stated by Magistrate Power, matters are only referred very occasionally under section 349(1):

> Section 349(1) ought be able to be used to good purpose when it is clear that the root cause of a young person's offending relates to him or her being out of home, rejected by family and/or "living around" with no adult supervision, guidance or support. However, in the experience of members of the Melbourne Children's Court, it is uncommon for the Secretary to accept a referral under s.349(1).[162]

2.124 Section 351 of the CYFA requires the Secretary to report back after the determination of a protection application. If the Secretary's investigation finds that 'no protection application is required' there is 'little that the Court can do except tailor a sentencing order to address any identified "welfare needs" of the child if such a sentencing order is otherwise appropriate.'[163]

Therapeutic treatment order

2.125 A therapeutic treatment order is available under the CYFA for young people between the ages of 10 and 15 years who have exhibited sexually abusive behaviours.[164] It remains in force for a period of up to 12 months to ensure the young person's access to or attendance at a therapeutic treatment program.[165] A therapeutic treatment order requires the young person to participate in an appropriate therapeutic treatment program.[166]

2.126 Where a young person has participated in a therapeutic treatment order as part of the conditions of the order, the Children's Court is required to discharge the child without any further hearing of the related criminal proceedings.[167]

Questions

24 If orders were available in the Children's Court in relation to unfitness and the defence of mental impairment, which of the following should be considered as options for reform:

(a) limited supervision orders under the CMIA

(b) orders available in the criminal jurisdiction of the Children's Court

(c) orders available in the civil mental health and disability systems for young people

(d) other orders?

161 *Disability Act 2006* (Vic) s 191(2)(c).
162 Peter Power, 'Criminal—General' (Research Paper No 7, Children's Court of Victoria, 28 May 2012) 7.10.1.
163 Ibid 7.10.1.
164 *Children, Youth and Families Act 2005* (Vic) s 244(a).
165 Ibid s 248.
166 Ibid s 249(1).
167 Ibid s 354(4).

Suitability of the criminal jurisdiction of the Children's Court

2.127 The supplementary terms of reference ask the Commission to consider whether the current criminal jurisdiction of the Children's Court (set out at [1.35]–[1.38]) should apply when unfitness to stand trial or the defence of mental impairment is raised.

2.128 Given the special vulnerability of children with mental conditions, such as a mental illness or intellectual disability, consideration of the applicability of the current criminal jurisdiction of the Children's Court raises a number of questions about whether children with mental conditions should be uplifted to the higher courts in any circumstances.

2.129 Another relevant factor in considering this issue is the range of offending behaviour that may be encompassed within a particular offence and the differences in the nature and severity of offending between children and adults. For example, the offending behaviour of a child who has been charged with armed robbery (stealing from a peer using a pocket knife) may be quite different to the offending behaviour of an adult charged with the same offence (stealing from a service station using a gun). Therefore, it is important to ensure that the actual offending behaviour can be factored into any determination of whether children ought more appropriately to be dealt with in the Children's Court than in the higher courts under the CMIA.

Questions

25 If the CMIA were to be further extended in the Children's Court:

(a) Should all indictable and summary offences (excluding death offences and exceptional circumstances) be dealt with in the Children's Court when unfitness or mental impairment is raised?

(b) What factors should be considered in deciding whether a matter should be uplifted to the higher courts when unfitness or the defence of mental impairment is raised?

26 What issues currently arise from having matters uplifted to the higher courts, where unfitness or the defence of mental impairment is raised?

27 How should committal proceedings in the Children's Court be conducted where unfitness or the defence of mental impairment is raised?

Unfitness to be tried and mental impairment in relation to young people—adult courts

Court procedure in the adult courts

2.130 Section 528 of the CYFA gives the Children's Court all the 'powers and authorities' that the Magistrates' Court has in relation to all matters over which it has jurisdiction. This means that the CMIA applies to the Children's Court in the same way that it does in the Magistrates' Court, subject to the different criminal jurisdictional limits that apply in each court.

Unfitness to be tried

2.131 When the issue of unfitness to stand trial is raised in the Children's Court, all matters involving indictable offences (including indictable offences triable summarily) must be directed to the higher courts for trial which can result in a young person being committed for trial in the Supreme Court or County Court for an investigation of unfitness to stand trial by a jury. If the issue of unfitness to stand trial is raised in relation to a summary offence, the matter must be discontinued.

2.132 If the question of an accused person's unfitness to stand trial arises in a committal proceeding in the Children's Court, the committal proceeding must be completed and if the accused person is committed for trial, the question of unfitness to stand trial must be reserved for the trial judge. If the judge determines that there is a real and substantial question as to the unfitness of the accused person to stand trial, an investigation into the accused person's unfitness is then held before a jury.[168] An investigation also proceeds in this way if the question of the accused person's unfitness to stand trial is raised after the committal or at any time during the trial.[169]

2.133 During the investigation into the accused person's unfitness to stand trial, the court will hear any relevant evidence and submissions put to the court by the prosecution or the defence and the judge may also call evidence on their own initiative, including expert evidence.[170] The judge must explain to the jury the reason for the investigation, the findings that may be made (whether the accused person is fit or unfit to stand trial) and that the standard of proof in relation to the fitness of the accused person to stand trial is the balance of probabilities.[171]

2.134 If a jury finds the accused person unfit to stand trial, the matter proceeds to a special hearing before a jury unless the judge determines that the accused person is likely to become fit to stand trial within 12 months and adjourns the matter. A special hearing is also conducted if the accused person remains unfit following the period of adjournment.

2.135 The current process for determining unfitness to stand trial has been criticised because of the 'possible danger of too readily dismissing the person's capacity to comprehend'.[172] During its preliminary research, the Commission was made aware that in some cases the level of fitness of accused people, who would otherwise be unfit, may be enhanced if appropriate support was provided to them in court (for example, the support of a social worker or the provision of hearing loops to provide hearing assistance to people with a hearing impairment).

168 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 8(2)(b).
169 Ibid s 9(1).
170 Ibid s 11(1).
171 Ibid s 11(3).
172 Victorian Intellectual Disability Review Panel, Submission, 17 December 1992, 8, cited in Freckelton, 'Rationality and Flexibility in Assessments of Fitness to Stand Trial', (1996) 19(1) *International Journal of Law and Psychiatry* 39, 45.

2.136 While not binding, the trial judge in the case of CL (at trial) endorsed the Practice Direction of the Lord Chief Justice of England and Wales of 16 February 2000, which lists a number of support measures that should be implemented by higher courts when conducting trials involving young people.[173] They include:

- Participants should all be on the same or almost the same level.
- The young person should be allowed to sit with members of their family or others.
- The course of proceedings should be explained to the young person in terms they are able to understand.
- The trial should be conducted with regular and frequent breaks to take into account the inability of a young person to concentrate for long periods of time.
- Robes and wigs should not be worn and police officers should not be in uniform.
- Trial attendance should be restricted to a small number of people.[174]

Mental impairment

2.137 The defence of mental impairment applies to summary offences and to indictable offences heard and determined summarily, which allows the defence to be relied on in the Children's Court.

2.138 The CMIA provides, however, that if the Magistrates' Court finds a person not guilty because of mental impairment of a summary offence or an indictable offence heard and determined summarily, the Magistrates' Court must discharge the person. The Magistrates' Court therefore has no power to make orders in relation to people found not guilty because of mental impairment.

2.139 If a young person is charged with an indictable offence triable summarily, as previously discussed, the matter can be uplifted to the higher courts where there is an objection to a summary hearing,[175] or where the judge decides that 'exceptional circumstances' justify a hearing by judge and jury in the higher courts.[176]

Question

28 How appropriate are the current processes under the CMIA for young people who are transferred or uplifted to adult courts?

173 *CL (A Minor) v Tim Lee and Ors and Children's Court of Victoria at Broadmeadows* [2010] VSC 517 (16 November 2010) at [85].
174 United Kingdom, Ministry of Justice, Practice Direction, *Trial of Children and Young Persons in the Crown Court*, February 2000 1.1.
175 *Children, Youth and Families Act 2005* (Vic) s 356(3)(a).
176 Ibid s 356(3)(b).

Orders

Orders currently under the CMIA

2.140 Following particular findings in the unfitness and mental impairment process the Supreme Court or County Court must either:

- declare that the person is liable to supervision, or
- order the person to be released unconditionally.

2.141 In deciding whether to remand a person declared liable to supervision, the court can remand the person in custody in an 'appropriate place'. Before making a supervision order, the court must first receive a certificate under section 47 of the CMIA confirming the availability or otherwise of the facilities or services necessary for the custody of that person (section 47 certificate).[177]

2.142 When the court declares a person liable to supervision, the court must then make a supervision order. A supervision order is for an indefinite term. A supervision order can either be a custodial supervision order (CSO) or a non-custodial supervision order (NCSO). Before the court imposes a supervision order, it can also make orders in relation to bail, remand in custody and for a medical or psychological examination of the person.

2.143 If a person found unfit to stand trial is then found by a jury in a special hearing not to have committed the offence, this is taken to be a finding of not guilty at a criminal trial.[178] This is an acquittal and the court is required to release the person.

2.144 As explained at [2.58], in the Children's Court, the only option available to a magistrate if they find a young person not guilty because of mental impairment is to discharge the person.

Question

29 What are the factors that influence the making of orders in relation to young people under the CMIA in the higher courts?

177 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 24(1)(b), (2).
178 Ibid s 18(1).

Indefinite orders and young people

2.145 A supervision order under the CMIA is an indefinite order.[179] This means that the person can be subject to the order for an indefinite period, possibly for the rest of their life.

2.146 In its preliminary research and discussions, the Commission has identified a number of possible issues with the current nature of supervision orders under the CMIA when applied to young people. These issues relate to how the indefinite nature of supervision orders affects different young people under the CMIA, in particular people who may be subject to supervision orders, their family members and victims in CMIA matters.

2.147 The indefinite nature of an order may have a detrimental effect on the recovery of people subject to the CMIA, which may be contrary to one of its underlying principles—the therapeutic aim of the process.

Questions

30 Should young people be subject to indefinite orders?

31 What issues are raised in making young people subject to indefinite orders?

32 Should there be an expansion of the range of orders available to young people subject to the CMIA in the higher courts equivalent to any expansion that may be contemplated in the Children's Court?

Supervision of young people

Framework

2.148 As for adults who are subject to the CMIA, the arrangements for the supervision, treatment and management of young people subject to supervision orders are complex. While the CMIA has set out some of the arrangements, to a large degree they are contained in various policies and procedures of agencies in the Department of Human Services that are responsible for managing and providing treatment to people subject to supervision orders.

2.149 For adults, the CMIA system of supervision has been characterised as 'gradualist'[180] or 'staggered',[181] in recognition 'that the treatment and reintegration of people with a mental disorder is most appropriately considered on a gradual basis'.[182] The CMIA therefore envisages a pathway for release for a person subject to a supervision order, where a person on a custodial supervision order receives increasing leave entitlements (from on-ground leave, supervised then unsupervised, to off-ground leave, supervised then unsupervised, and then extended leave), eventually 'graduating' to a non-custodial supervision order and is finally released following revocation of the non-custodial supervision order.[183]

179 Ibid s 27(1).
180 Ian Freckelton, 'Applications for Release by Australians in Victoria Found Not Guilty of Offences of Violence by Reason of Mental Impairment' (2005) 28 *International Journal of Law and Psychiatry* 375.
181 Janet Ruffles, 'The Management of Forensic Patients in Victoria: The More Things Change, The More They Remain the Same' (PhD Thesis, Monash University, 2010).
182 Victoria, Parliamentary Debates, Legislative Assembly, 18 September 1997, 186 (Jan Wade, Attorney-General).
183 For example, section 32(3) of the CMIA provides that the court cannot vary a custodial supervision order to a non-custodial supervision order unless the forensic patient or forensic resident has completed a 12-month period of extended leave.

2.150 In general, young people are detained for much shorter periods of time and are more likely to be detained in a non-custodial setting. Given this, a key question for the Commission is whether this 'staggered' pathway for release is also suitable for young people subject to supervision orders under the CMIA.

Question

33 Should a treatment pathway for young people differ to that for adults under the CMIA? If so, what differences should there be?

Facilities and services

2.151 Young people in the criminal justice system in Victoria are supervised by the Department of Human Services (DHS) through three areas:

- Youth Justice
- Disability Services
- Child Protection.

Youth Justice

2.152 Youth Justice is responsible for the statutory supervision of young people in the criminal justice system in Victoria.

2.153 The majority of people involved with Youth Justice are on community-based orders with a small proportion in custodial facilities. In 2009–2010, 22 per cent of all proven cases were given some sort of supervisory order and 2.4 per cent were sentenced to youth detention.[184]

2.154 Youth Justice supervises probation, youth supervision orders , youth attendance orders and custodial orders (youth residential order and youth justice centre order).

2.155 There are three youth custodial facilities in Victoria:

- Parkville Youth Residential Centre (10–14 year olds)
- Melbourne Youth Justice Centre (15–20 year olds)
- Malmsbury Youth Justice Centre (males 15–20 years old).

2.156 In 2010, the Victorian Ombudsman released a report *Investigations into conditions at the Melbourne Youth Justice Precinct.* The report identified that there is no facility comparable to Thomas Embling Hospital for young offenders who are mentally ill and have received custodial sentences. It was noted that while the Adolescent Forensic Health Service is situated on-site at the Parkville Youth Justice Precinct, it 'does not oversee the well-being of young people on a 24 hour a day basis.'[185] It was therefore recommended that DHS:

> Review the adequacy of the current response to young offenders with significant mental health problems who are detained in custodial centres. This review should also consider establishing a purpose built facility operated by trained health professionals.[186]

184 Sentencing Advisory Council, above n 149, 13.
185 Ombudsman Victoria, *Whistleblowers Protection Act 2001: Investigation into conditions at the Melbourne Youth Justice Precinct* (2010) 13.
186 Ibid 71.

2.157 As part of DHS's response to the Ombudsman's report, Youth Justice Custodial Services agreed to 'review the response to detainees with significant mental health issues to identify service improvements.'[187]

Disability Services

2.158 Disability Services provides and funds services for people with intellectual, physical, sensory, cognitive and neurological disabilities.

2.159 Disability Services may play a number of roles when a person with a disability becomes involved in the criminal justice system, including developing justice plans and reports for the court and working with Youth Justice to provide appropriate support.

Child Protection

2.160 The Victorian Child Protection Service targets young people at risk of harm or where families are unable or unwilling to protect them. Child Protection provides a range of services to protect young people under the age of 18 years from significant harm resulting from abuse or neglect within the family.

2.161 Child Protection services have a range of functions which include supervising young people on orders granted by the Children's Court and providing and funding accommodation services, specialist support services, and adoption and permanent care for young people as required.

Question

34 When a young person is found not guilty because of mental impairment or to have committed the offence in a special hearing:

(a) Are there appropriate custodial facilities available?

(b) What are the options for supervising young people in the community?

187 Ibid.

Interaction between the child/adolescent and adult systems

2.162 There are certain circumstances where a young person between 18 and 20 years of age who is convicted of a serious offence can be detained in a youth justice centre instead of an adult prison. This is called the 'dual track' system by virtue of the *Sentencing Act 1991* (Vic).[188]

2.163 The dual track system is unique to Victoria and applies where the court believes the young person:

- has reasonable prospects for rehabilitation
- is particularly impressionable or immature
- is likely to be subjected to undesirable influences in an adult prison.[189]

2.164 The benefits of the dual track system are that it provides flexibility to meet the individual needs of young people who all mature at different rates:

> The transition between child and adolescent services and adult services can increase the risk of young people losing contact with support services. People mature at different rates and strict age eligibility criteria may have the effect of prematurely ceasing specialised adolescent and young adult supports. Services offered by adult services to young people should be appropriately flexible to their developmental needs; abrupt cessation of supports after transition should be avoided.[190]

2.165 Under the dual track system, the maximum period of detention that the Magistrates' Court can order is two years, and the maximum that the Supreme Court or County Court can order is three years.[191]

Question

35 **Should there be an equivalent to the 'dual track' system that applies to the transition between child/adolescent and adult systems for young persons subject to the CMIA? If so, what factors should guide the development of such an equivalent system?**

188 *Sentencing Act 1991* (Vic) s 32.
189 Ibid ss 32(1)(a), (b)
190 Justice Health, above n 136, 81.
191 *Sentencing Act 1991* (Vic) s 32(3).

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Questions

Questions

1 How are the principles of the CMIA currently applied in the higher courts to young people who are subject to the CMIA?

2 Are the current CMIA principles appropriate for young people?

3 Are there areas of the current process that conflict with human rights principles? If so, which areas?

4 What principles should govern the application of the CMIA to young people in the Children's Court and adult courts?

5 Do the issues raised in the Magistrates' Court also have a particular impact in the Children's Court? If so:

(a) What issues arise from the lack of jurisdiction to determine unfitness and the requirement to discharge a young person found not guilty because of mental impairment in the Children's Court?

(b) What practices, if any, take place in the Children's Court to address issues arising under the CMIA and reach a satisfactory outcome for the young person? In what situations?

6 What other issues arise in the Children's Court due to the limited jurisdiction regarding issues arising under the CMIA?

7 If the CMIA is further extended in the Children's Court, should there be any differences in approach to any further extension in the Magistrates' Court?

8 How do delays affect young people and victims involved in CMIA matters?

9 Should the Children's Court be given the jurisdiction to deal with unfitness when it is raised in matters in the Children's Court? If so:

(a) How should this jurisdiction be provided (ie by an express power to investigate, determine and make a finding of unfitness or by an existing power in the Children's Court)?

(b) On what evidence should any unfitness determination be made?

10 Do issues currently exist in the Children's Court regarding the provision of expert reports? If so, what are they?

11 Can the current unfitness test be appropriately applied to young people?

12 Should any changes be made to the current test for determining unfitness to make the criteria more appropriate for young people?

13 If changes were made to the Presser criteria to include consideration of decision-making capacity or effective participation, what implications could this have for the application of the test for young people?

14 In considering criminal responsibility of a young person, how are issues relating to the inquiry of doli incapax separated from inquiries about establishing the defence of mental impairment

15 Should mental impairment be defined as it relates to young people? If so, how should it be defined?

16 What specific mental conditions affecting young people should the Commission have regard to in considering the application of the CMIA?

17 Are there specific mental conditions that more commonly affect young people in contact with the criminal justice system?

18 Can the defence of mental impairment be appropriately applied to young people?

19 Do the operational elements of the defence of mental impairment require modification for application with young people?

20 Does the requirement that a person be able to 'reason with a moderate degree of sense and composure' need reformulating if applied to young people?

21 If special hearings were to apply in the Children's Court, would procedural modifications be required to make it appropriate for young people?

22 Should a program be introduced in the Children's Court to divert young people who raise unfitness to stand trial or the defence of mental impairment? If so:

(a) What eligibility factors or criteria should be considered?

(b) How should such a program interact with any other powers that may be recommended in the Children's Court for dealing with unfitness or the mental impairment defence?

23 Should the Children's Court be given the power to make orders following findings in relation to unfitness and the defence of mental impairment, other than a discharge?

24 If orders were available in the Children's Court in relation to unfitness and the defence of mental impairment, which of the following should be considered as options for reform:

(a) limited supervision orders under the CMIA

(b) orders available in the criminal jurisdiction of the Children's Court

(c) orders available in the civil mental health and disability systems for young people

(d) other orders?

25 If the CMIA were to be further extended in the Children's Court:

(a) Should all indictable and summary offences (excluding death offences and exceptional circumstances) be dealt with in the Children's Court when unfitness or mental impairment is raised?

(b) What factors should be considered in deciding whether a matter should be uplifted to the higher courts when unfitness or the defence of mental impairment is raised?

26 What issues currently arise from having matters uplifted to the higher courts, where unfitness or the defence of mental impairment is raised?

27 How should committal proceedings in the Children's Court be conducted where unfitness or the defence of mental impairment is raised?

28 How appropriate are the current processes under the CMIA for young people who are transferred or uplifted to adult courts?

29 What are the factors that influence the making of orders in relation to young people under the CMIA in the higher courts?

30 Should young people be subject to indefinite orders?

31. What issues are raised in making young people subject to indefinite orders?

32 Should there be an expansion of the range of orders available to young people subject to the CMIA in the higher courts equivalent to any expansion that may be contemplated in the Children's Court?

33 Should a treatment pathway for young people differ to that for adults under the CMIA? If so, what differences should there be?

34 When a young person is found not guilty because of mental impairment or to have committed the offence in a special hearing:

(a) Are there appropriate custodial facilities available?

(b) What are the options for supervising young people in the community?

35 Should there be an equivalent to the 'dual track' system that applies to the transition between child/adolescent and adult systems for young persons subject to the CMIA? If so, what factors should guide the development of such an equivalent system?

Victorian
Law Reform
Commission

Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 and the Children's Court of Victoria
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