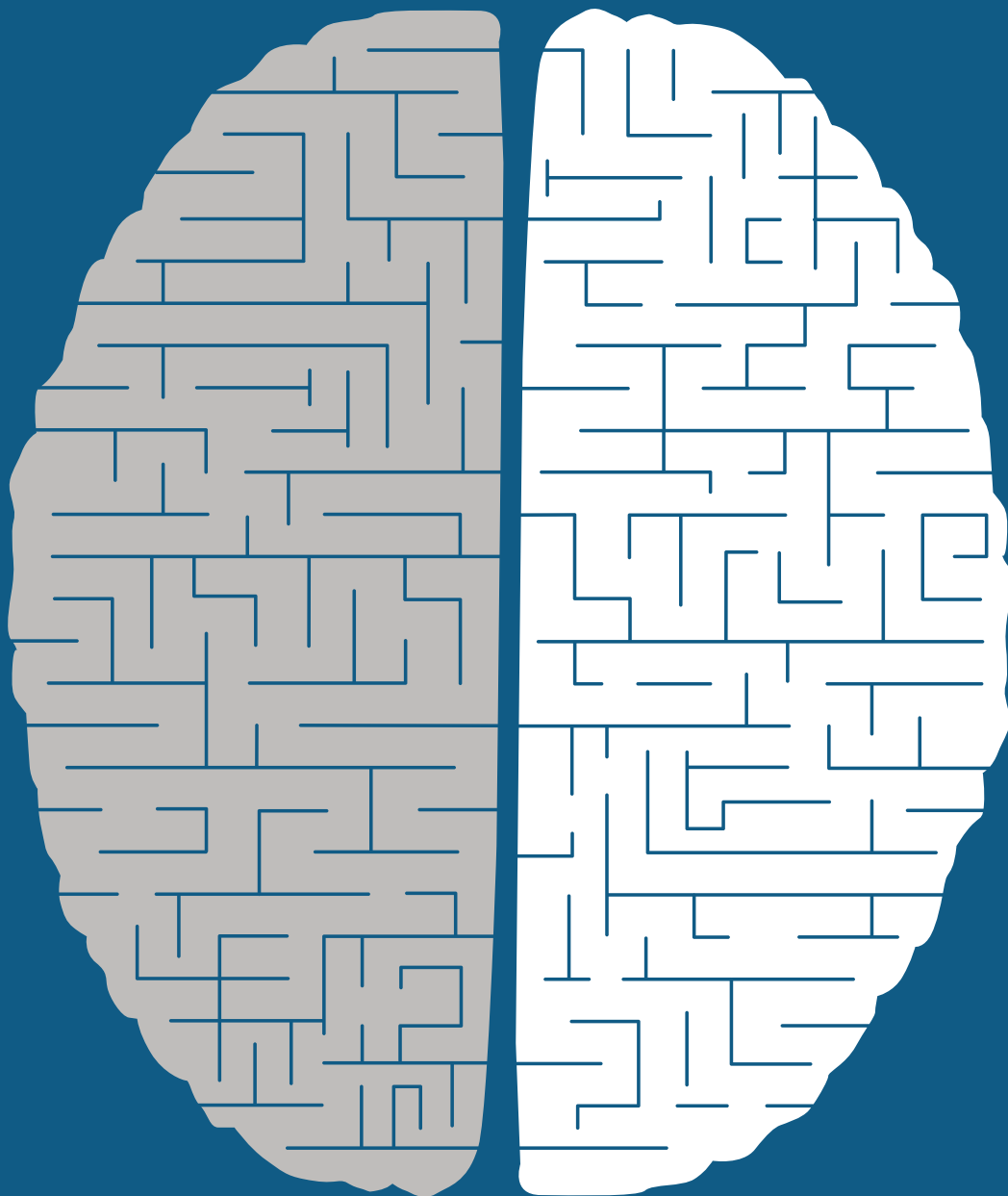




Victorian
Law Reform
Commission

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

REPORT JUNE 2014



Published by the Victorian Law Reform Commission

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Preface

The criminal justice system is frequently called on to respond to people charged with offences who have a mental condition, such as mental illness or disordered or impaired cognitive functioning. The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ('CMIA') deals with a small but significant number of cases involving people whose capacity or behaviour are so significantly affected by their mental condition that they require a specialised response from the law. The CMIA affects some of the most vulnerable members of our society and seeks to provide a humane and appropriate response in process and outcome. More broadly, it exists to ensure the safety of our community and to protect the rights of those people within it who are directly affected, in particular victims of crime and their families, and the family members of people subject to the CMIA.

The CMIA enshrines long-standing legal principles, fundamental to Victorian law, that all people are entitled to a fair hearing and that people should only be punished for behaviour for which they are criminally responsible. The CMIA sets out the law and process for determining whether a person is mentally unfit to stand trial for a criminal charge and whether a person, because of a mental impairment, is not criminally responsible for offending. It also sets out a system for managing people who have been found unfit to stand trial or not criminally responsible because of mental impairment.

Introduced in 1997, the CMIA abolished the system that previously existed, known as the 'Governor's pleasure' regime. The Bill that introduced the CMIA received bipartisan support and was heralded as groundbreaking and progressive. It was landmark legislation that changed how Victorian law responded to people whose mental functioning was impaired to such a degree that they required a different standard of participation in the criminal justice system or for being held to account for criminal conduct. The CMIA abrogated the common law defence of insanity and established the statutory defence of mental impairment.

Three fundamental issues with the Governor's pleasure regime were addressed by the introduction of the CMIA.

It introduced fairness by ensuring a process for determining the criminal responsibility of people unfit to stand trial. Previously, unfit people were detained in custody without any testing of the case against them. It introduced flexibility in the orders for supervision that could be made by a court and a comprehensive system of review of supervision orders that balanced community protection and therapeutic aims. It introduced transparency and accountability by establishing an independent and rigorous framework for release decisions to be made by the judiciary, removing the executive arm of government from such decision making.

There has been no complete review of the CMIA since it was introduced in 1997, 17 years ago. While discrete aspects of the CMIA have been examined, the Commission's reference is the first full-scale review of the operation of this important legislation.

The terms of reference require that the Commission have regard to the recommendations made in 2013 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*. This the Commission has done. The Commission acknowledges the valuable work of that Committee.

The Commission was asked to review the operation of the CMIA and to consider whether changes were needed to ensure that it operates justly, effectively and consistently with its underlying principles. The Commission was asked to consider issues in the terms of reference that comprehended the operation of the CMIA in the Supreme Court and County Court, as well as the possibility of extending its operation in the Magistrates' Court. The supplementary terms of reference, received after the Commission was well advanced in the reference, necessitated examination of the possible expansion of the CMIA's operation in the Children's Court. The terms of reference also sought review of the provisions governing the supervision order regime and how community and other interests are represented under the CMIA. This prompted an examination of its effect with regard to government and non-government organisations in the fields of criminal justice, health and disability that have a role under the CMIA, as well as individuals directly affected by these laws.

The Commission was also asked to have regard to the cost implications of its recommendations. In this, the Commission was greatly assisted by work it commissioned from the Melbourne School of Population and Global Health, University of Melbourne, to model particular aspects of proposed reforms.

Much has changed since the CMIA's introduction in 1997. The jurisdiction of the Magistrates' Court has expanded significantly in terms of the range of indictable offences that are triable at the summary level. Research on children and young people who have contact with the criminal justice system has identified the multiple layers of vulnerability and disadvantage of this population. There has been recognition at both a state and federal level of the disadvantage experienced by people with an intellectual disability under the law, and the need for reform in this area. There also continue to be developments in understanding of the complexities of the mental conditions captured by the legal criteria in the CMIA; for example, identification of the complex relationship between mental illness and substance use, co-morbidity of mental conditions and recognition of the spectrum of decision-making capacity by people who have impaired cognitive functioning.

It is important that legislation is reviewed to ensure that such advances and changes are reflected in our law. The Commission is therefore pleased to have had the opportunity to conduct this review and to make recommendations that build on the significant reform to this area signalled by the commencement of the CMIA in 1997. I am confident that the Commission's recommendations, if implemented, will ensure that the CMIA operates in a manner that is just, effective and consistent with the principles that underlie it.

A recent development is the commencement of the *Mental Health Act 2014* (Vic) on 1 July 2014 that governs the provision of compulsory mental health treatment under the CMIA and repeals the *Mental Health Act 1986* (Vic). The 2014 Act received Royal Assent on 8 April 2014 and comes into operation on 1 July 2014, the day after this report is due to be delivered to the Attorney-General. In the circumstance this report refers to the provisions of the *Mental Health Act 2014* (Vic) as existing law.

I wish to thank the many people who gave their time and expertise to assist the Commission during the reference. I extend particular thanks to the Victorian Institute of Forensic Mental Health (Forensicare), the Department of Human Services, the Office of Public Prosecutions and Victoria Legal Aid which provided significant support during the reference by providing data and extensive input in formal consultations. I would also like to thank the Sentencing Advisory Council, which provided the Commission with data on CMIA cases from its higher courts sentencing database, which the Commission has, with the permission of the courts, used throughout the report.

The Juries Commissioner, Paul Dore provided valuable data for the reference. I particularly acknowledge the substantial contribution of the judiciary made in consultations. I also acknowledge the contribution made by people with personal experience of the CMIA and thank them for sharing their experiences and views with the Commission. I warmly thank members of the advisory committee: Isabell Collins, Dr Ian Freckelton QC, Phil Grano OAM, Tim Marsh, Professor James Ogloff, Gavin Silbert QC and Dr Danny Sullivan.

I would like to thank my fellow Commissioners who comprised the Division which I chaired. They were the Hon. Frank Vincent AO QC, Saul Holt SC and Bruce Gardner PSM. Their contribution and expertise were invaluable to this review.

Finally, I acknowledge and thank the CMIA team for their hard work on the CMIA reference, led by Nina Hudson and supported by policy and research officers Catriona MacIvor and Jacinth Pathmanathan. The CMIA team was assisted on this substantial reference by the contribution of a number of current and former Commission staff: Dr Nicole Schlesinger, Martin Wimpole, Michael Adams, Julie Bransden, Natalie Lilford, Tess McCarthy, Myra White and Shea Wilding (intern). I thank them for their contributions.

Cases that proceed under the CMIA are complex. They require an understanding of how mental illness, intellectual disability and other cognitive impairment can dramatically affect a person's behaviour. They require acknowledgment of the harm that has been caused to victims and their families, who are very often known to the accused. Victims and their families and family members of the accused also need support to maximise their understanding of and participation in this different and procedurally complex area of the law. Community safety is always of central importance. Cases under the CMIA require consideration of how best to ensure the safety of the community and also to provide treatment and support to a person in the least restrictive way appropriate. A successful therapeutic pathway—that ensures the person's recovery or improvement in functioning so that they may return as a well and functioning member of society—also serves to protect the community.

The Commission's proposals for reform seek to ensure that this area of the law, through the CMIA, can respond to these complexities in a manner that is humane, compassionate and responsible, to the benefit of individuals and the entire Victorian community.

I commend the report to you.



The Hon. Philip Cummins AM

Chair, Victorian Law Reform Commission

June 2014

Terms of reference

[Matter referred to the Commission pursuant to section 5(1)(a) of the *Victorian Law Reform Commission Act 2000* (Vic) on 17 August 2012.]

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 Parliamentary 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

[Supplementary matter referred to the Commission pursuant to section 5(1)(a) of the *Victorian Law Reform Commission Act 2000* (Vic) on 18 September 2013.]

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.

Glossary and abbreviations

Accused	Person or people charged with a criminal offence.
Adult Parole Board	An independent statutory body that makes decisions regarding the granting and cancelling of parole and monitoring offenders on parole.
Assessment and Referral Court (ARC) List	A specialist court list, located in the Melbourne Magistrates' Court, developed by the Department of Justice and the Magistrates' Court of Victoria to meet the needs of accused who have a mental illness and/or a cognitive impairment.
Balance of probabilities	The standard of proof in civil proceedings. Often described as 'more likely than not' or 'more probable than not'. Refers to a standard of proof or degree of certainty required to prove something. This is a lesser standard of proof than 'beyond reasonable doubt'.
Basic intent	A fault element for an offence that relates to the intention of an accused while engaging in particular conduct. For example, for the offence of sexual penetration of a child under 16 years, an accused must have intended to take part in the sexual penetration.
Beyond reasonable doubt	The standard of proof in criminal proceedings.
Child	A person under the age of 18 years. In this report, the term 'young person' is used generally to describe a person who qualifies to be dealt with in the Children's Court or under special provisions that apply to 'children' (aged under 18 years) or 'young offenders' (aged 19–20 years) in the <i>Children, Youth and Families Act 2005</i> (Vic).
Child Protection	A program area in the Department of Human Services that provides child-centred, family-focussed services to protect children and young people from significant harm caused by abuse or neglect within the family.
Children's Court Clinic	The Children's Court Clinic conducts independent psychological and psychiatric assessments of children and families for the Children's Court of Victoria.
CMIA	<i>Crimes (Mental Impairment and Unfitness to be Tried) Act 1997</i> (Vic).

Cognitive impairment	A term used in this report to refer to the impact of any of a range of disabilities that may limit a person's ability to think. These include intellectual disability, acquired brain injury, some mental illnesses, autism spectrum disorder and dementia.
Committal	A preliminary examination by the Magistrates' Court to determine whether the case against the accused is sufficient to warrant the person being directed to stand trial before the Supreme Court or the County Court.
Common law	Law that derives its authority from decisions of the courts rather than from legislation.
Court Integrated Services Program (CISP)	A multi-disciplinary rehabilitation program established by the Department of Justice and the Magistrates' Court that provides accused with access to services and support to reduce rates of re-offending and promote safer communities. The program currently operates at the Latrobe Valley, Melbourne and Sunshine Magistrates' Courts.
Custodial supervision order	A supervision order that requires the detention of a person in a mental health service, residential institution or residential treatment facility.
Defence of mental impairment	A defence in Victoria defined under the <i>Crimes (Mental Impairment and Unfitness to be Tried) Act 1997</i> (Vic), replacing the common law defence of insanity. It requires proof that the accused was suffering from a mental impairment at the time of the commission of the alleged offence, and that the mental impairment affected the accused so that they either did not understand the nature and quality of their conduct, or did not know their conduct was wrong. The meaning of mental impairment under current law in Victoria is a 'disease of the mind'.
Director of Public Prosecutions	The Director of Public Prosecutions makes decisions about whether to prosecute, and prosecutes, serious criminal matters in the Supreme Court and County Court. The Director of Public Prosecutions is independent of government.
Disability Forensic Assessment and Treatment Service (DFATS)	A disability forensic service that delivers treatment, support and residential services for people with a disability who display high-risk anti-social behaviour and are involved, or at risk of being involved, in the criminal justice system.
Disability Services	A program area in the Department of Human Services that provides voluntary disability services and support to people with a disability eligible under the <i>Disability Act 2006</i> (Vic).
Discharge	To release an accused, usually because of an acquittal. A court can discharge a person with or without conditions.
Fault element	The state of mind necessary to establish a particular crime commonly referred to as ' <i>mens rea</i> '. The fault element varies depending on the nature of the crime, but may include intention (for example, in the case of murder the intention to kill or cause really serious injury), recklessness, negligence, dishonesty or malice.

Fitness to plead	Refers to the doctrine that existed before the <i>Crimes (Mental Impairment and Unfitness to be Tried) Act 1997</i> (Vic) which exempted an accused from the usual criminal process because at the time of the trial they were unable to enter a plea or understand the nature of the proceedings.
Forensic	Relating to or used in courts of law.
Forensicare	See definition under 'Victorian Institute of Forensic Mental Health'.
Forensic Clinical Specialist Program	A program established by the Victorian Institute of Forensic Mental Health (Forensicare) that aims to enhance the capacity and expertise of the mental health workforce to manage people with mental illness who engage in criminal offending.
Forensic Leave Panel	An independent statutory body with jurisdiction to consider applications for certain types of leave for forensic patients and forensic residents.
Forensic patients	People subject to a supervision order or on remand pending a determination under the <i>Crimes (Mental Impairment and Unfitness to be Tried) Act 1997</i> (Vic), who are in detention at a mental health service.
Forensic residents	People subject to a supervision order or on remand pending a determination under the <i>Crimes (Mental Impairment and Unfitness to be Tried) Act 1997</i> (Vic), who are in a residential institution or residential treatment facility.
Governor in Council	A body that comprises the Governor as Chair and members of the Executive Council (usually the Premier and ministers). It implements aspects of government business, including appointing statutory officers and judges and proclaiming legislation.
Indictable offences	Serious crimes which attract higher maximum penalties. Usually triable before a judge and a jury.
Indictable offences triable summarily	Indictable offences which can be heard before a magistrate.
Intellectual disability	An intellectual disability is a type of cognitive impairment. The <i>Disability Act 2006</i> (Vic) defines a person with an intellectual disability as a person with both significant sub-average general intellectual functioning and significant deficits in adaptive behaviours, which become apparent before the age of 18 years.
Leave	Leave allows a forensic patient or forensic resident to be absent from a mental health service, residential institution or residential treatment facility for a duration of time, subject to any conditions.
Major review	A review of a person's supervision order at least three months before the end of the order's nominal term, or at least every five years after that for the duration of the order. Its purpose is to determine whether the court can release the person subject to the supervision order.

Mental condition	In this report, a mental condition means any condition that results in a person's mental processes becoming disordered or impaired.
Mental Health Court Liaison Service (MHCLS)	A court-based mental health assessment and advice service. There are seven MHCLS officer positions in metropolitan Magistrates' Courts provided by the Victorian Institute of Forensic Mental Health (Forensicare) and four regional roles provided by local area mental health services.
Mental illness	Mental illness is defined in the <i>Mental Health Act 2014</i> (Vic) as 'a medical condition that is characterised by a significant disturbance of thought, mood, perception or memory'. It can include conditions such as depression, schizophrenic disorders, bipolar affective disorder, obsessive-compulsive disorder and post-traumatic stress disorder.
Multiple and Complex Needs Initiative (MACNI)	A collaborative approach between the Department of Human Services, Department of Justice and Department of Health to provide services for people in the criminal justice system who have combinations of impairments and issues. It is governed by the <i>Human Services (Complex Needs) Act 2009</i> (Vic).
Nominal term	A period of time specified in the <i>Crimes (Mental Impairment and Unfitness to be Tried) Act 1997</i> (Vic) which triggers a major review. For the offence of murder, for example, the nominal term is 25 years.
Non-custodial supervision order	A supervision order that does not require the detention of a person in a mental health service, residential institution or residential treatment facility, but requires the person to comply with certain conditions and be subject to supervision in the community.
Office of the Public Advocate	An independent statutory body that works to protect and promote the interests, rights and dignity of people with a disability.
Office of Public Prosecutions	The Office of Public Prosecutions is the independent statutory authority that institutes, prepares and conducts criminal prosecutions on behalf of the Director of Public Prosecutions.
Order	A direction by a court or tribunal that is final and binding unless overturned on appeal.
Physical element	The physical act necessary to establish a particular crime commonly referred to as ' <i>actus reus</i> '. The physical element varies depending on the nature of the crime, but may include the conduct (for example, rape requires the sexual penetration of a person), circumstance (for example, rape requires the absence of consent) or cause (for example, murder causes the death of a person) to establish the crime.
Plea	An accused's answer to a charge of an offence which usually takes the form of 'guilty' or 'not guilty'.
Police prosecutor	A member of Victoria Police who prosecutes state summary offences in the Magistrates' Court or Children's Court.

Residential institution	A place designated under the <i>Disability Act 2006</i> (Vic) where a person with an intellectual disability may be admitted and receive compulsory services.
Residential treatment facility	A place designated under the <i>Disability Act 2006</i> (Vic) where a person with an intellectual disability may be admitted and receive compulsory treatment.
Second reading speech	The speech given by a member of parliament when a Bill has been introduced in parliament and is being considered for debate. A second reading speech outlines the reasons for the Bill's introduction.
Section 47 certificate	A certificate under section 47 of the <i>Crimes (Mental Impairment and Unfitness to be Tried) Act 1997</i> (Vic) confirming the availability of the facilities or services necessary for the custody or provision of services to a person.
Special hearing	A hearing before a jury, after the accused has been found unfit to stand trial, to determine whether they are not guilty of the offence, not guilty because of mental impairment or committed the offence charged.
Specific intent	A fault element for an offence that relates to the intention of an accused to cause particular results or consequences by their conduct. For example, for the offence of murder, an accused must have a specific intent to cause a person's death or really serious injury.
Summary jurisdiction	The power or right a court has to hear and determine summary offences. The Magistrates' Court is a court of summary jurisdiction.
Summary offences	Less serious offences heard by a magistrate without a jury. Police prosecutors generally conduct the prosecution of state summary offences.
Supervision order	<p>An order a court can make under the <i>Crimes (Mental Impairment and Unfitness to be Tried) Act 1997</i> (Vic) if a court finds an accused is one of the following:</p> <ul style="list-style-type: none"> • unfit to stand trial but has committed the offence charged • unfit to stand trial and not guilty because of mental impairment • not guilty because of mental impairment. <p>The order requires the person to be subject to supervision. It can be custodial or non-custodial.</p>
Test	In this report, the legal requirements to establish unfitness to stand trial or the defence of mental impairment or to assess the risk of a person under supervision.

Thomas Embling Hospital	Thomas Embling Hospital is a 116-bed secure forensic mental health hospital managed by the Victorian Institute of Forensic Mental Health (Forensicare). The hospital provides advanced clinical treatment and programs to patients from the criminal justice system (either transferred from the prison system or ordered by the courts to be detained for psychiatric assessment, care or treatment).
Unconditional release	Release of a person without conditions.
Unfitness to stand trial	Refers to the doctrine under the <i>Crimes (Mental Impairment and Unfitness to be Tried) Act 1997</i> (Vic) which exempts an accused from the usual criminal process because at the time of the trial they are unable to enter a plea, understand the nature of the proceedings or participate in the trial process.
Victoria Legal Aid	An organisation that provides legal advice to and representation for accused who cannot otherwise afford legal assistance.
Victorian Civil and Administrative Tribunal (VCAT)	A decision-making body similar in some respects to a court. VCAT decisions can be appealed with leave to the Supreme Court of Victoria (on a point of law).
Victorian Institute of Forensic Medicine (VIFM)	A statutory authority that provides independent and expert forensic medical and scientific services to the justice system, human tissues for transplantation, teaching in medicine and science and undertakes research in these areas.
Victorian Institute of Forensic Mental Health (Forensicare)	A statutory authority with the responsibility for providing adult forensic mental health services in Victoria.
Victorian Parliament Law Reform Committee	A committee of government and non-government members of the Victorian Parliament, established to consider issues of law reform referred to it by the Victorian Government (now the Law Reform, Drugs and Crime Prevention Committee).
Young person	A person under the age of 21 years. In this report, the term 'young person' is used generally to describe a person who qualifies to be dealt with in the Children's Court or under special provisions that apply to 'children' (aged under 18 years) or 'young offenders' (aged 19–20 years) in the <i>Children, Youth and Families Act 2005</i> (Vic).
Youth Justice	A program area in the Department of Human Services responsible for the statutory supervision of young people in the criminal justice system in Victoria and management of the three youth custodial facilities: Parkville Youth Residential Centre, Melbourne Youth Justice Centre and Malmsbury Youth Justice Centre.

Executive summary

Chapter 1 Introduction

This report constitutes the Commission's review of the legislation in Victoria that governs unfitness to stand trial and the defence of mental impairment—the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ('CMIA'). It presents the Commission's conclusions about how the CMIA works in practice and proposes changes to improve its operation.

Terms of reference

The Commission conducted the review in response to terms of reference and supplementary terms of reference made to the Commission by the Attorney-General, the Honourable Robert Clark MP, pursuant to section 5(1)(a) of the *Victorian Law Reform Commission Act 2000* (Vic).

The terms of reference, made on 17 August 2012, ask the Commission to have particular consideration to a number of legal and procedural aspects of the CMIA's operation that largely relate to adults in the criminal justice system.

The supplementary terms of reference, made on 18 September 2013, ask the Commission to consider a number of further matters regarding the operation of the CMIA for young people, including children.

A particular focus of the review is to ensure that the CMIA operates in a manner that is just, effective and consistent with its underlying principles.

How the Commission has approached the issues

The report considers legal and procedural issues in the application of the CMIA across all levels of criminal courts in Victoria and across criminal justice, mental health and disability sectors. It is divided into five parts according to the issues examined.

Part I—Introduction and systemic improvements to the CMIA—provides an overview of the CMIA and identifies the issues that affect its operation in a systemic way.

Part II—Legal concepts and criteria—examines the unfitness to stand trial criteria and the test for the defence of mental impairment, including how mental impairment is defined.

Part III—Application of the CMIA in Victorian courts—examines:

- the limited application of the CMIA in the Magistrates' Court and Children's Court in Victoria
- the involvement of the jury in hearings under the CMIA in the Supreme Court and County Court in Victoria and directions to the jury when unfitness to stand trial and the defence of mental impairment are raised
- how the rights and interests of the community and of people who are directly affected by the CMIA are taken into account in CMIA cases
- the court-hearing process and the effect of the findings that can be made under the CMIA.

Part IV—Management, supervision and release under the CMIA—considers the:

- framework governing the imposition and review of supervision orders and leave under supervision orders
- management of people subject to supervision orders.

Where it has been possible to do so, the report identifies the cost implications of recommendations, without these being determinative of the Commission's conclusions.

The report identifies where the Commission has had regard to the recommendations made in 2013 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*, as well as other relevant developments in the mental health and disability regimes in Victoria for adults and young people (aged under 21 years), including children (aged under 18 years).

What area of the law is governed by the CMIA?

The CMIA governs a specific area of the criminal law where a person has been charged with an offence and one or both of the following circumstances exist:

- at the time the person appears in court for the charge their mental processes are so disordered or impaired, they are 'unfit to stand trial'
- at the time the alleged offence occurred the person was suffering from a 'mental impairment' which negates criminal responsibility for their actions.

In such circumstances there is a legitimate basis for exempting the person from the usual criminal process and diverting them to a specialised criminal process contained in the CMIA. This exemption is based on fundamental criminal law principles, long established under Victorian law, that intersect with a number of other areas of the law, including mental health, disability and human rights law.

The CMIA operates largely in the criminal justice system but it draws on areas of forensic clinical practice, including psychiatry, psychology, neuropsychology and neurology.

The current CMIA system

The CMIA was introduced in 1997 and commenced full operation on 18 April 1998.

The report documents the fundamental problems with the previous 'Governor's pleasure' regime that were addressed by the introduction of the CMIA, providing a fairer, more transparent and balanced approach in this area of the law.

There has been no complete review of the CMIA since it was introduced in 1997, 17 years ago. Discrete aspects of the CMIA have been examined previously. For example, the Victorian Parliament Law Reform Committee's *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* was completed in 2013. However, the Commission's reference is the first full-scale review of the operation of this important legislation.

Chapter 2 Improving the systemic operation of the CMIA

In conducting the review, the Commission has mapped out the operation of the CMIA using key findings from available quantitative data, submissions and consultations. The Commission identifies the threshold issues that have a system-wide effect on the provisions in practice.

Chapter 2 contains these findings and 14 threshold recommendations to change the systemic operation of the CMIA.

Mapping the operation of the CMIA—key findings

CMIA cases are relatively infrequent compared with non-CMIA cases—representing approximately one per cent of criminal cases in a year in the higher courts. They are, therefore, the exception rather than the norm within the criminal justice system. However, due to gaps in available data, this may not reflect a complete picture of the CMIA's operation. When such cases arise, they are of especial significance to the parties, people affected, in particular victims and their families, and the community.

The report identifies the key gaps in the data available on the operation of the CMIA and makes two recommendations for Victorian courts and Victoria Police to make changes to the way that data is recorded in matters under the CMIA.

The CMIA in the higher courts

The CMIA currently largely applies in the higher courts—the Supreme Court and the County Court.

There were 159 cases determined under the CMIA in the Supreme Court and County Court from 2000–01 to 2011–12, with a small but gradual increase in the number of cases per year. Seven in 10 cases were heard in the County Court.

The vast majority of these cases involved adult male accused. Eleven people who proceeded under the CMIA in the higher courts were aged under 21 years at the time an order under the Act was made.

The most common principal offence in CMIA cases was intentionally causing serious injury (21.4 per cent), followed by murder (15.7 per cent), attempted murder (8.8 per cent) and indecent act with a child under 16 years (7.5 per cent).

Over the 12-year period, very few orders were made to unconditionally release the person after a CMIA finding (only 10 in total). Almost two-thirds of people (64.2 per cent, 102) were made subject to non-custodial supervision orders and custodial supervision orders were imposed for 29.6 per cent (47).

An observed trend in CMIA cases involving the defence of mental impairment is that they tend to involve accused with a significant mental illness and comprise the most serious offences of violence, such as murder and attempted murder, against a family member or close acquaintance. However, there is evidence to suggest that it is becoming more common for CMIA cases to involve less serious or non-violent offences, which are more likely to result in non-custodial supervision orders.

Less information is available about people with an intellectual disability or other cognitive impairment who come under the CMIA, although the Commission's research suggests that such cases are different to the 'typical' CMIA case. Such cases often involve people charged with sexual offences and who are unfit to stand trial due to a severe intellectual disability or, in cases involving historical sexual offences, dementia.

At 30 June 2013, there were 154 people with a mental illness subject to supervision by the Victorian Institute of Forensic Mental Health (Forensicare), and there were 30 people with an intellectual disability supervised by the Department of Human Services.

The CMIA in the Magistrates' Court and Children's Court

The CMIA currently has limited application in the Magistrates' Court and the Children's Court.

There is a lack of quantitative data about how the CMIA operates in relation to young people and in the summary courts of jurisdiction. The report documents the Commission's finding that the requirement for unfitness to stand trial to be determined in a higher court, usually the County Court, affects the extent to which such issues are raised by young and adult accused. There are no formal recording practices on how often matters in the Magistrates' Court and Children's Court are withdrawn by police prosecutors due to issues of unfitness or the defence of mental impairment.

The report discusses known cases under the CMIA involving young people, charged with offences as children, where issues of unfitness or the defence of mental impairment were raised, almost all of which involved issues of unfitness due to intellectual disability or developmental issues. Four young people were made subject to supervision in non-custodial settings, all of whom were under 18 years at the time of offending but over 18 years when they became subject to supervision.

What works well and where is change required?

The Commission reports that the CMIA is a significant improvement on the Governor's pleasure regime and has achieved many of its intended objectives. The expertise and experience of a core group of experts and the commitment and dedication by judges, prosecutors and defence practitioners who work under the regime are fundamental elements in the CMIA's successful operation.

However, in addition to the particular issues specified in the terms of reference and supplementary terms of reference, the report identifies several key issues where a holistic approach is required to effect change, addressed through the threshold recommendations in Chapter 2.

A set of statutory principles to guide decision making

The principles that underlie the CMIA, identified in Chapter 2, form the principal framework for the Commission's review and the recommendations in this report.

Broadly speaking, the CMIA seeks to strike a balance between the protection of the community and the rights and clinical or support needs of people subject to the legislation.

The Commission considers that the following principles ought to be given explicit expression through the addition of a set of statutory principles that apply to decision makers under the CMIA in cases involving adults and young people:

- community protection
- least restriction
- conducting proceedings involving an accused who was a child at the time of the alleged offence in accordance with specialised principles that apply in the Children's Court
- conducting proceedings to acknowledge support needs and involve individuals directly affected
- recognising all people under the CMIA affected by an offence.

The Commission recommends an additional set of statutory principles drawn from those in the *Children, Youth and Families Act 2005* (Vic) for decision makers under the CMIA as it applies to young people to reflect:

- recovery and therapeutic-focussed criminal law principles
- best interest principles and decision-making principles derived from family law.

A statutory principle and measures to address unreasonable delay

The Commission acknowledges the significant concerns expressed in submissions and consultations regarding delay in the operation of the CMIA. Delay has a particular impact on vulnerable people involved in CMIA proceedings, including accused with mental conditions and victims of crime. The report notes the particularly deleterious effect of delays on young people.

A statutory principle

Delay is an important consideration in the administration of criminal justice. The right to be tried without unreasonable delay is included in the minimum guarantees in the *Charter of Human Rights and Responsibilities Act 2006* (Vic). The significance of this right is such that the Commission considers that a statutory principle ought to apply to reflect that unreasonable delay is to be avoided and CMIA matters prioritised where the accused was a child at the time of the alleged offences, where unreasonable delay would be inconsistent with the accused's rights, and to support therapeutic outcomes for the accused, victims and family members.

Addressing the factors linked with unreasonable delay

The Commission identifies that a key factor contributing to delay is the currently limited powers under the CMIA in the Magistrates' Court and Children's Court to respond when issues of unfitness or the defence of mental impairment are raised. There can be unreasonable delays when matters involving adults charged with indictable offences triable summarily are required to be transferred to the County Court when they could have been dealt with in the summary jurisdiction. There can be unreasonable delays due to the transfer of matters involving young people charged with indictable offences to the County Court rather than being dealt with in the specialised Children's Court jurisdiction.

The Commission accordingly recommends the application of the CMIA be extended in the Magistrates' Court and the Children's Court to remove this jurisdictional barrier.

The Commission also identifies the court processes where changes could be made to avoid unreasonable delay—in the listing practices of courts and in the delivery of judgments—and recommends that Victorian courts consider current approaches to listing matters under the CMIA, and possible new listing practices.

Education, training and awareness

People who work under the CMIA, such as judges, prosecutors and defence practitioners, play an important role in how its provisions operate in practice.

The Commission agrees with the Victorian Parliament Law Reform Committee's recommendations for professional development for judicial officers and legal practitioners in this area. It is critical that those who are involved in acting on behalf of clients, prosecuting matters and presiding over cases have awareness, understanding and expertise when cases involve accused with a mental illness, intellectual disability or other cognitive impairment.

There will also be a need for professional development if the CMIA's operation is further extended in the Magistrates' Court and Children's Court as the Commission has recommended.

The Commission makes four recommendations for training and education requirements for Victoria Legal Aid lawyers, practice information to provide guidance to defence practitioners, prosecutorial guidelines, education and training for police prosecutors, and judicial education for judicial officers.

Linkages, capacity enhancements and information sharing

The CMIA operates across several government departments, all criminal courts and mental health and disability services sectors. This can make it difficult for a person who is subject to the CMIA to receive a connected pathway through the system. The report acknowledges the initiatives that have helped to improve linkages in this area; however, the Commission identifies that further change in this area is required for the CMIA to operate more effectively and makes recommendations in Chapters 5, 10 and 11 to achieve this.

Chapter 3 Reframing the test for unfitness to stand trial

Unfitness to stand trial refers to the law that exempts an accused from a standard criminal trial, sometimes temporarily, because at the time of the trial they cannot understand or participate in proceedings. The fundamental right of an accused to have a fair criminal hearing underpins this law.

An accused is presumed to be fit to stand trial. If a question of unfitness arises, the CMIA sets out the procedure and the legal test that apply in investigating whether an accused is unfit to stand trial. The test for unfitness centres on whether the accused's mental processes are so disordered or impaired that they are, or at some time during the trial for a charge will be, unable to understand or do certain things required of an accused in order to participate in a hearing. These are constituted by six criteria, set out in the CMIA and derived from the common law (known as the 'Presser criteria').

In Chapter 3, the Commission considers whether the law for determining unfitness to stand trial can be improved.

The basis for the test

In doing so, the Commission evaluates the basis for the test and whether it should retain its focus on the core elements of what constitutes unfitness through the use of specific criteria, or should adopt a new focus on the accused's decision-making capacity or effectiveness of any participation.

The Commission's view is that it is only fair to subject an accused to the trial process where they are able to make the crucial decisions relevant to their trial. The best way to ensure that the test takes these into account is to retain the current test, but to reframe it by refining and supplementing the current criteria. This approach preserves the basic competencies essential for a fair trial that may be excluded by a general test that focuses on decision-making capacity or effective participation.

The Commission also recommends that the unfitness test should be adapted so that it may apply in the Magistrates' Court and Children's Court and take into account the developmental stage of young accused.

Changes to the way the test operates

The Commission's view is that unfitness to stand trial is not a 'black and white' issue, but is decision-specific, time-specific and support-dependent. The law should accommodate the varying abilities, choices and needs of accused who may be unfit to stand trial to the maximum extent appropriate.

The Commission makes a number of further recommendations to change the way the test operates, including:

- A departure from the current test for unfitness to allow an accused's decision to plead guilty to be given effect in some circumstances.
- Measures to ensure that, once an accused has been found unfit, the adjournment period is better used to optimise their ability to become fit prior to a determination of permanent unfitness.

- Approaches that require the law to do more to consider and provide the support needed by an accused with a mental illness, intellectual disability or other cognitive impairment to optimise their fitness, where such measures would assist them to understand and participate in their trial.

The Commission also makes recommendations to improve the rigour with which the test is applied in expert assessments of unfitness.

Chapter 4 Clarifying the law on the defence of mental impairment

The principles underpinning the defence of mental impairment have existed in the law for centuries. They are that:

- a person should not be punished for an offence if they are not criminally responsible for the conduct because of a mental impairment
- the community must be protected from the risk posed by people because of their mental impairment.

The CMIA sets out the test that must be satisfied to establish the defence of mental impairment, retaining the law as it was under the common law defence of insanity, and substituting the outdated term of ‘insanity’ with ‘mental impairment’.

The test requires that at the time of engaging in conduct (acts or omissions) constituting an offence, a person had a mental impairment that had the effect that they did not know the nature and quality of what they were doing, or that they did not know that what they were doing was wrong.

The need for a statutory definition of mental impairment

The CMIA does not define the term ‘mental impairment’—the meaning is derived from the common law notion of a ‘disease of the mind’.

In Chapter 4, the Commission considers whether a definition of mental impairment should be added to the CMIA or whether it should continue to be undefined in the Act.

The Commission agrees with the strong support in submissions and consultations that there is need for a statutory definition to clarify the current uncertainty in this area of the law. The Commission recommends that the CMIA define a mental impairment as ‘a condition that includes but is not limited to mental illness, intellectual disability and cognitive impairment’.

The Commission considers that this should include conditions that result from the ingestion of substances, but only if those conditions exist independently of the effect of the substance on the person. The Commission’s view is that if a person is suffering from an ongoing mental condition to the significant extent required by the test, the original source of that condition should not exclude the availability of the defence.

Conditions that are the temporary effects of the ingestion of substances, such as intoxication, should not be included, on public policy grounds.

Clarifying the test for the defence

The Commission also considers that the second aspect of the test—relating to the accused’s knowledge of whether the conduct is wrong—requires clarification. The Commission recommends a change to the legal meaning of this to focus on the accused’s capacity to think rationally, rather than the accused’s ability to ‘reason with a moderate degree of sense and composure’.

Chapter 5 Application of the CMIA in the Magistrates' Court

The Magistrates' Court does not have the power to determine unfitness to stand trial. If a person charged with an indictable offence raises the issue of unfitness to stand trial, the matter must be transferred to a higher court, usually the County Court, to determine the matter.

The Magistrates' Court can consider the defence of mental impairment in determining the criminal responsibility of an accused charged with an offence within its jurisdiction. However, the only outcome that can be imposed is to discharge the person with no conditions for supervision, support or treatment.

A gap in the CMIA's operation

The limited application of the CMIA in the Magistrates' Court results in a gap that prevents the CMIA from operating justly, effectively and consistently with its underlying principles.

The Commission finds that the lack of powers in the summary jurisdiction to determine unfitness to stand trial results, through no fault of the judiciary, in a lack of judicial oversight, a lack of outcome in terms of community protection and treatment, unfairness to the accused, and artificial decision making by the parties. The Commission also finds that the restriction in the CMIA provisions—that issues of unfitness to stand trial can only be determined in the higher courts—contributes to delay in matters involving indictable offences triable summarily that could otherwise be dealt with in the summary jurisdiction but are required to proceed by way of committal and transfer to a higher court.

Legislative framework for extending jurisdiction

Following its recommendation in Chapter 2 to extend the application of the CMIA in the Magistrates' Court, in Chapter 5 the Commission provides a legislative framework for such an extension.

The framework is designed to suit the specific operation of the Magistrates' Court and provide a flexible but rigorous approach appropriate to the nature of CMIA cases suitable to be determined summarily.

The Commission recommends that magistrates be provided with the power to:

- determine unfitness to stand trial and the criminal responsibility of unfit accused
- discharge a person at any time after determining there is a 'real and substantial question of unfitness', if certain criteria are fulfilled
- make two-year supervision orders following a finding relating to unfitness and/or not guilty because of mental impairment (with liberty to apply for a review of the order rather than mandated reviews).

Work commissioned by the Commission and conducted by consultants at the University of Melbourne estimates significant cost savings in court hearings under the CMIA if these recommendations are implemented. Chapter 5 details the cost implications under the current and proposed models of the CMIA in the Magistrates' Court.

Chapter 6 A specialised approach to the application of the CMIA in the Children’s Court

The CMIA currently operates in the same limited way in the Children’s Court as it does in the Magistrates’ Court.

The need for a specialised approach to address the gap

The Commission makes similar findings to those in relation to the Magistrates’ Court regarding how the lack of powers results in the unjust and ineffective operation of the CMIA, which is inconsistent with its underlying principles. The Commission documents the particular concerns expressed in submissions and consultations regarding the effect of the limited jurisdiction on young people and the need for a specialised approach in this area.

A specialised approach is required to remedy the gap in the application of the CMIA in the Children’s Court and to provide an appropriate response to young accused under the CMIA who face multiple layers of vulnerability, including mental conditions, development issues and trauma in connection with offending behaviour.

Special features of the legislative framework for extending jurisdiction

In Chapter 6, the Commission makes recommendations to provide a legislative framework for the operation of the CMIA in the Children’s Court via the creation of specialised provisions in the *Children, Youth and Families Act 2005* (Vic).

The framework is based on that recommended for the Magistrates’ Court and provides similar powers in relation to determining unfitness, determining criminal responsibility and making orders. However, it has special features designed to maximise early intervention, uphold the rights of young people and ensure protection of the community, including:

- a presumption in favour of diversion and community options if the issue of unfitness and/or the defence of mental impairment are raised
- the creation of an ‘assessment order’ that allows a young person to be assessed for unfitness as well as their suitability for voluntary diversion to a case worker program
- the creation of two-year therapeutic supervision orders with built-in six-month review periods
- the establishment of a youth forensic facility underpinned by a multi-disciplinary model of care.

The Commission’s view is that the extension of the CMIA’s application in the Children’s Court should not occur without the establishment of a youth forensic facility. Such a facility is necessary to provide a secure and therapeutic environment—which currently does not exist in Victoria—to conduct assessments, undertake treatment, and provide services to optimise fitness and protect the community through secure supervision of young people on therapeutic supervision orders.

Work commissioned by the Commission and conducted by consultants at the University of Melbourne estimates significant cost savings in court hearings under the current and proposed models in the Children’s Court, set out in Chapter 6. However, this must be balanced with the cost implications of the Commission’s recommendations to establish new programs and facilities to support the proposed model.

Chapter 7 Juries under the CMIA in the higher courts

Juries are a central part of criminal proceedings in Victoria and are currently involved in a number of the CMIA processes in the higher courts, considered by the Commission in Chapter 7.

Jury involvement in CMIA proceedings

Juries are required to decide whether a person is unfit to stand trial and whether a person is not guilty because of mental impairment in the higher courts. The CMIA currently contains an exception to the requirement for a jury to determine the defence of mental impairment when there is agreement between the prosecution and defence regarding the proposed evidence in the case. In such cases, it is possible for a judge to hear the evidence and make a determination of criminal responsibility, in place of the jury.

The Commission considers changes to the jury's involvement in determining whether a person is unfit to stand trial and the criminal responsibility of people who are unfit and/or who have raised the defence of mental impairment.

Should a jury determine unfitness to stand trial?

Unfitness to stand trial is a pre-trial issue. Consistent with the fact that the role of the jury in non-CMIA matters has, over time, become limited to determining criminal responsibility, the Commission's view is that the jury should no longer determine whether a person is unfit to stand trial.

The Commission recommends that a judge or magistrate determine investigations of unfitness under the CMIA.

Should a jury determine criminal responsibility?

In the Commission's view, a jury should determine criminal responsibility in all CMIA cases, for accused who are fit and unfit to stand trial.

The jury's involvement ensures public examination of criminal responsibility, for the benefit of the accused, victims and the community. The involvement of the jury requires presentation of the evidence and issues in a case in a way that is comprehensible. Exposure of this kind serves an important public and also educative function. These principles outweigh the support received in submissions and consultations for the current CMIA provision allowing a judge to determine criminal responsibility if the prosecution and defence agree that the proposed evidence is capable of establishing the defence of mental impairment. The Commission accordingly recommends that the provision be removed and the jury restored as the decision maker in all determinations of criminal responsibility under the CMIA.

Directions to the jury

Jury involvement in proceedings gives rise to the obligation on judges to direct the jury about the law to assist the jury in reaching a decision on the question of fact before it.

Particular focus has been given to the approach to directing the jury on the elements of an offence when the defence of mental impairment is in issue.

The Commission considers the approaches currently used and the issues associated with each approach. The Commission considers that there is a need to clarify and simplify the law by providing legislative guidance.

The Commission recommends a new approach that provides a level of prescription with flexible characteristics to ensure that it can be applied to address the different circumstances that arise in cases where the defence of mental impairment is raised. The approach seeks to balance two principles: that an accused with a mental condition should be subject to equal criminal standards and the same opportunity for acquittal as those without a mental condition; and that for people who have a mental impairment that is such that it renders them not responsible for harmful actions, there is a need to protect the community from further conduct through supervision and treatment.

Chapter 8 Rights and interests under the CMIA

The CMIA seeks to ensure there is protection of the rights, and representation and consideration of the interests, of a range of individuals directly affected by the legislation, as well as the community as a whole. The Commission considers that the rights of victims are central to the CMIA process.

Chapter 8 contains the Commission's recommendations regarding changes to the provisions that govern the representation and consideration of the various interests involved in the CMIA.

Victims, victims' families and family members

The Commission considers issues related to the support available to victims, victims' families and family members throughout the CMIA court process, the notification and court report system and the need for acknowledgment that the conduct comprising an offence has occurred.

This is framed with particular regard to the nature of the CMIA cases—which often involve victims who are also family members of the accused—and the different nature and outcomes of CMIA proceedings that provide an additional layer of complexity for victims of crime in negotiating the criminal justice process.

The Commission makes recommendations to enhance victim support, improve victim notification processes and promote meaningful and appropriate sharing of information with victims.

Advocacy for supervised people

The Commission considers issues relating to advocacy for people subject to supervision orders, including the right to legal representation and independent advocacy. The Commission recommends a gap analysis be undertaken of the advocacy services for people who are subject to the CMIA to improve the accessibility of such services.

Representing the community's interests

The Commission considers the range of parties who represent the interests involved in hearings to review, vary and revoke supervision orders. The Commission's conclusion is that the roles of the parties under the CMIA should be re-framed so that the Director of Public Prosecutions represents the interests of the community, including victims and their families.

Suppression orders

The Commission considers issues regarding the balance between the principles of open justice and the successful reintegration of people subject to the CMIA into the community.

Recommendations are made to introduce a statutory principle to recognise the importance of suppression orders for long-term recovery and successful reintegration of people into the community.

Chapter 9 Processes and findings under the CMIA in all courts

The CMIA sets out the law and process for determining whether an accused is unfit to stand trial. It also sets out the process for determining the criminal responsibility of people found unfit and for people who are fit to stand trial who raise the defence of mental impairment.

In Chapter 9, the Commission reviews the law that governs the processes and findings under the CMIA and makes recommendations to improve their operation in all courts where the CMIA applies.

The Commission makes recommendations to:

- resolve a number of procedural anomalies in the way that information is provided to the court following findings
- ensure that the participation of the accused in proceedings that affect them is maximised by the provision of in-court support and ensuring that CMIA processes operate in line with its therapeutic focus
- rename CMIA findings to better reflect the outcome of CMIA proceedings and thus provide transparency and recognise the interests of victims
- streamline existing processes that result in the replication of information or procedures
- provide an approach for the review of ancillary orders and consequences that follow CMIA findings
- ensure that appropriate opportunities for appeal are provided against all CMIA findings.

Chapter 10 Improving the supervision, review and leave framework in the higher courts

The CMIA sets out the law and process for determining how long and under what conditions a person found unfit to stand trial or not guilty because of mental impairment should be detained, supervised and provided with treatment or support.

The CMIA provides a comprehensive decision-making framework that contemplates the gradual progression of a person under supervision with staggered reductions in the level of supervision commensurate with the safety of the community.

Current framework

If a person becomes subject to a CMIA finding, the court must decide whether the person is to be unconditionally released or declared liable to supervision. If declared liable for supervision, the court must then impose a supervision order—either custodial or non-custodial—for an indefinite period, irrespective of the particular offence. The court must impose a nominal term for the order, in accordance with a framework set out in the CMIA that corresponds to the maximum penalty for the offence. The nominal term prescribes the minimum time before a ‘major review’ of the order must occur. At a major review, the court considers whether to release a person or reduce or continue the degree of supervision once the nominal term has expired.

The CMIA provides for a process and criteria for the review, variation and revocation of supervision orders. It also provides for a comprehensive system of reports to ensure that supervised people have regular reviews and are not ‘lost’ in the system.

In addition to the courts, another key decision maker under this framework is the Forensic Leave Panel—an independent body established by the CMIA to introduce transparency and accessibility into the leave system. The Forensic Leave Panel makes the majority of decisions regarding a person’s ability to take leave of absence while under a supervision order, but the court makes decisions regarding extended leave (periods of up to 12 months).

The need for a refined framework

The Commission has reviewed these aspects of the decision-making framework and has considered whether they operate consistently with the CMIA's principles, as well as justly and effectively.

While the Commission acknowledges that the current framework constitutes a vast improvement on the previous Governor's pleasure regime for supervision, this report identifies a number of areas where, in the Commission's view, further improvements can be made. The Commission makes recommendations that aim to ensure that, where it is safe to do so, the level of restriction on the liberty of people subject to supervision orders is reduced. The implementation of a refined supervision, review and leave framework, set out in Chapter 10, will ensure that this occurs in appropriate circumstances.

Improving transparency and clarity in decision making

Transparency and accountability are key principles that run through the CMIA. CMIA processes should promote procedural fairness and open and transparent decision making. Leave is an important part of a person's recovery under the CMIA—the conduct of the process and decisions have a significant impact on people who are subject to supervision orders.

The Commission makes recommendations to improve transparency in the communication of reasons for decisions by the Forensic Leave Panel, and recommends a review of the Internal Leave Review Committee that functions as part of the leave process for forensic patients.

Ensuring the framework operates to achieve community protection and least restriction

A significant focus of the report is to consider whether the supervision framework operates consistently with the key principles of community protection and least restriction.

The Commission recommends the retention of indefinite supervision orders in the higher courts. They are consistent with the therapeutic—not punitive—focus of the CMIA. The duration of an order should be based on the time required to ensure protection of the community and the recovery and progression of a person along a process of gradual reintegration. An indefinite order allows the risk assessment to occur throughout the period of supervision, rather than at the time the order is made.

The Commission has concluded that rather than making changes to the length of supervision orders, reforms should be targeted at ensuring the decision-making framework is rigorous once an indefinite order has been made. The framework should ensure that the period of supervision closely reflects the minimum period necessary to address the person's risk to the community.

The Commission considers that there is a need for more transparency in the framework that governs the timing of reviews of supervision orders. The report identifies that the current nominal term framework is confusing and unclear to people who have professional and personal experience with the CMIA, and raises unfair and inaccurate expectations in the community.

Further, and more significantly, the Commission has formed the view that the nominal term system is an inappropriate way of setting review periods with respect to the seriousness of the offence. It rarely reflects the actual period of supervision required in practice in each particular case, which varies vastly according to the individual circumstances.

Replacement of nominal term system with a new system of ‘progress reviews’ for indefinite supervision orders

The Commission recommends the introduction of a new system of five-year ‘progress reviews’ to replace the nominal term system. This would ensure that the review of orders and duration of supervision are more explicitly linked to the actual decrease or increase in the risk posed by the person and any improvements or decline in the person’s progress or recovery. This is so that, consistent with the principle of least restriction, the point at which a person’s supervision should be reduced can be monitored and identified more accurately, and protects against arbitrary detention.

This change will clarify and promote transparency in this area of the law. Under this system, the implications of a supervision order will be clear to professionals who work under the CMIA, supervised people and their family members, victims of crime and their families, and the community.

The Commission also recommends a modified set of presumptions that are to apply to the court’s consideration at each five-year progress review.

Responsibility for decision making

Importantly, the Commission recommends that the responsibility for decision making should remain the same, whereby the criminal courts make decisions as to whether a person should be supervised, the type of supervision order and any conditions, the review, variation and revocation of supervision orders and extended leave. The Commission does not recommend changes to the types of decisions made by the Forensic Leave Panel.

The Commission considers, however, that improvements are required to the continuity of decision making between the two bodies and makes a number of recommendations to ensure that a lack of information does not stall a person’s progress through the leave system.

Improvements to the factors relevant to decision making

The Commission has also considered the factors that are relevant to decision making by the court and the Forensic Leave Panel. The Commission makes recommendations to improve consistency in the factors that apply across different decision-making processes.

The Commission recommends changes to the tests for ‘endangerment’ that are applied to make the CMIA more consistent with modern risk assessment principles based on ‘unacceptable risk’ and removal of the risk posed by a person to themselves as a relevant factor in the test.

The Commission also considers the relationship between the CMIA and orders under the civil mental health and disability systems, and makes a recommendation to enhance the links between these systems and the CMIA.

The effects of the Commission’s recommendations on the factors guiding decision making in relation to supervision, review, release and leave decisions under the CMIA in each court jurisdiction are demonstrated in **Appendix G**, which sets out the new relevant provisions if the Commission’s recommendations were to be implemented.

Chapter 11 Management of people subject to supervision orders

Once a person has been placed on a supervision order, the responsibility for the supervision of that person is designated according to the place of custody or services received.

Forensicare, a statutory agency in the Department of Health, is responsible for supervising people who are in custody, or receiving services from, an approved mental health service. A person on a custodial supervision order is detained in Thomas Embling Hospital, Victoria's only secure mental health hospital. A person on a non-custodial supervision order is managed by an area mental health service, overseen by the community arm of Forensicare.

The Secretary to the Department of Human Services is responsible for people who are in custody in a residential treatment facility or a residential institution (on a custodial supervision order) or receiving services from a disability service provider (on a non-custodial supervision order).

The management of people subject to supervision orders is governed by the CMIA in conjunction with the relevant mental health or disability legislation.

Barriers to effective management and supervision

The Commission's review identified a number of barriers to the effective management and supervision of people subject to supervision orders. The Commission makes recommendations for change where such barriers, in its view, result in artificial decision making in managing and supervising people on orders or cause the CMIA to operate in a manner that is unjust, ineffective and inconsistent with its underlying principles.

The Commission considers that effective supervision for people with an intellectual disability or other cognitive impairment subject to the CMIA is often limited by a lack of appropriate accommodation. The Commission recommends that the Department of Human Services commission a review of current forensic disability services to identify appropriate models of care and the accommodation needs for this group of people subject to the CMIA.

The Commission identifies that a lack of flexibility affects the operation of the CMIA provisions for the management of people with a mental illness. The Commission recommends changes to the provisions governing breaches of supervision orders and the establishment of a medium-secure facility as an approved mental health service under the CMIA to provide an intermediate step between the high-secure facility of Thomas Embling Hospital and community accommodation.

A new approach for people with an intellectual disability or other cognitive impairment

In response to the significant concerns raised in submissions and consultations, the report specifically examines the suitability of the model of supervision for people who are subject to the CMIA who have an intellectual disability or other cognitive impairment, such as an acquired brain injury.

A consistent feature of submissions and consultations was that changes are needed to ensure that the legislative framework for supervision and management created by the CMIA and the *Disability Act 2006* (Vic) operates in a manner that is appropriate for this group, consistent with the CMIA's underpinning principles.

The Commission makes four recommendations for legislative change to ensure that there is a mandated treatment pathway and legislated clinical oversight for people with an intellectual disability or other cognitive impairment.

These recommendations seek to introduce more safeguards and facilitate a 'person-centred' approach to managing such vulnerable people, to ensure they are not at risk of unequal treatment before the law.

Recommendations

Chapter 2 Improving the systemic operation of the CMIA

Addressing gaps in data on the operation of the CMIA

- 1 All courts in Victoria should make changes to their recording practices for criminal cases to ensure that issues, findings and outcomes in relation to unfitness to stand trial and the defence of mental impairment under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) are recorded and are capable of being analysed in a consistent way.
- 2 Victoria Police should make changes to the procedure for recording withdrawals due to issues of unfitness to stand trial or the defence of mental impairment to ensure more accurate measurement of the matters which do not proceed under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

General statutory principles

- 3 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) and the *Children, Youth and Families Act 2005* (Vic) should be amended so that all relevant powers and functions under these Acts are exercised consistently with the following statutory principles:
 - (a) proceedings should be conducted and, where appropriate and consistent with the rights of the accused, modified in a way that acknowledges the need for support and involves the people affected by the proceedings, including the accused, a family member or a victim of the offence
 - (b) proceedings involving an accused who was a child at the time of the alleged offence should as far as possible be conducted in accordance with the specialised principles that apply to an accused in the Children's Court
 - (c) the need to protect the community
 - (d) the need to recognise all people affected by an offence, including the accused, a family member or a victim of the offence, and
 - (e) the principle of least restriction, that is that restrictions on a person's freedom and personal autonomy must be kept to the minimum consistent with the safety of the community.

Statutory principles—a specialist approach to young people

- 4 The following additional statutory principles should be added to the *Children, Youth and Families Act 2005* (Vic) to apply to all matters in the Children’s Court where unfitness or the defence of mental impairment is raised:
 - (a) the need to strengthen and preserve the relationship between the child and the child’s family
 - (b) the desirability of allowing the child to live at home
 - (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 stigma to the child resulting from a court determination.
- 5 Part 1.3 of the *Children, Youth and Families Act 2005* (Vic) should be amended to provide that the best interests principles in section 10 and decision-making principles in sections 11 and 12 apply to matters in the Children’s Court where unfitness or the defence of mental impairment is raised.

A statutory principle and measures to address unreasonable delay

- 6 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) and the *Children, Youth and Families Act 2005* (Vic) should be amended to reflect the principle that unreasonable delay is to be avoided and particular consideration is to be given to prioritising matters involving unfitness to stand trial and the defence of mental impairment where:
 - (a) the accused is a child or was a child at the time of the alleged offence
 - (b) unreasonable delay would be inconsistent with the accused’s rights, or
 - (c) to support therapeutic outcomes for the accused, victims and family members.
- 7 The jurisdiction of the Magistrates’ Court and the Children’s Court over matters involving unfitness to stand trial and the defence of mental impairment should be extended within the current respective criminal jurisdictions of each court.

The extension of jurisdiction should be provided through amendments to sections 4 and 5 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) and by the recommendations made in Chapters 5 and 6 of this report.
- 8 The Victorian Government should establish working groups as part of any implementation of the recommendations in Chapters 5 and 6 regarding the application of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) in the Magistrates’ Court and Children’s Court. A separate working group should be established for each court with representation from individuals and organisations with expertise in adult and youth justice, forensic mental health and forensic disability.

- 9 Victorian courts should consider current approaches to listing matters under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) and consider how unreasonable delay can be avoided by the adoption of new listing practices at a number of key stages, including:
- (a) first hearing of matters after committal from the Magistrates' Court or Children's Court
 - (b) investigations of unfitness to stand trial
 - (c) special hearings following a permanent finding of unfitness to stand trial
 - (d) matters involving children and young people, and
 - (e) matters involving people who are not eligible to be placed in an 'appropriate place' within the meaning of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

Any new listing practices that are adopted should be supported by a relevant practice note or practice direction.

Education, training and awareness

- 10 Victoria Legal Aid should develop training and education requirements for lawyers acting in matters under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) and the equivalent provisions in the *Children, Youth and Families Act 2005* (Vic). These requirements should be included as a pre-condition for entry into the Victoria Legal Aid Indictable Crime Panel and equivalent panels in matters in the Magistrates' Court and Children's Court.
- 11 The Law Institute of Victoria, in collaboration with the Victorian Bar, should develop practice information to provide guidance for lawyers acting in criminal matters involving accused with a mental illness, intellectual disability or other cognitive impairment.
- 12 Victoria Police should:
- (a) develop a set of prosecutorial guidelines that are consistent with the underlying principles of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) to assist police prosecutors in their prosecution of matters under the Act, and
 - (b) provide education and training for police prosecutors on prosecuting *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) matters in the Magistrates' Court and Children's Court.
- 13 The Judicial College of Victoria should develop and deliver judicial education for judges and magistrates on:
- (a) any new statutory provisions and processes that are introduced under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) and the *Children, Youth and Families Act 2005* (Vic)
 - (b) the best practice management of proceedings involving a person with a mental illness, intellectual disability or other cognitive impairment
 - (c) how the needs of people with a mental illness, intellectual disability or other cognitive impairment can be identified and appropriately met, including by modifications to court procedure and the use of appropriate communication methods, and
 - (d) information on clinical practice in the mental health and disability sectors, including the services that are available to people who may be subject to the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

Review following implementation of recommendations

- 14 The Victorian Government should review the operation of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) 24 months after implementation of any major recommendations.

Chapter 3 Reframing the test for unfitness to stand trial

The new test for unfitness to stand trial

- 15 Section 6(1) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to provide that a person is unfit to stand trial for an offence if, because the person's mental processes are disordered or impaired, the person is or, at some time during the hearing, will be:
- (a) unable to understand the nature of the charge
 - (b) unable to understand the actual significance of entering a plea to the charge
 - (c) unable to enter a plea to the charge
 - (d) unable to understand the nature of the hearing (that it is an inquiry as to whether the person committed the offence)
 - (e) unable to follow the course of the hearing
 - (f) unable to understand the substantial effect of any evidence that may be given in support of the prosecution
 - (g) unable to decide whether to give evidence in support of his or her case
 - (h) unable to give evidence in support of his or her case, if he or she wishes to do so, or
 - (i) unable to communicate meaningful instructions to his or her legal practitioner.

Adapting the test when the accused wishes to plead guilty

- 16 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to provide that:
- (a) notwithstanding Recommendation 15, a person whose mental processes are disordered or impaired may enter a guilty plea to the charge if the person is:
 - (i) able to understand the nature of the charge
 - (ii) able to understand the actual significance of entering a plea of guilty to the charge (that it will waive the person's right to a hearing and the opportunity to contest the charge and the consequences in terms of conviction and sentence)
 - (iii) able to enter a plea to the charge
 - (iv) able to understand the nature of the hearing if a plea of not guilty is entered (that it is an inquiry as to whether the person committed the offence)
 - (v) able to follow the course of the hearing that would follow if a plea of guilty was entered, and
 - (vi) able to communicate meaningful instructions to his or her legal practitioner regarding the decision to plead guilty.
 - (b) paragraph (a) does not apply if the accused is not legally represented.

Applying the test to young people

- 17 Section 6 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to add a requirement, separate to the criteria in section 6(1), that in determining whether a young person (a person who at the time of the hearing is under 21 years of age) is unfit to stand trial, the court must consider the developmental stage of that person.

Optimising fitness to stand trial—in-court support measures

- 18 Section 6 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to add a requirement, separate to the criteria in section 6(1), that in determining whether a person is unfit to stand trial, the court must consider the extent to which modifications can be made to the hearing process to assist the accused to become fit to stand trial. Modifications include:
- (a) whether a support person can assist the person's understanding of the trial
 - (b) whether more appropriate communication methods can be used in court, and
 - (c) whether court procedure can be appropriately modified.
- 19 To support Recommendation 18, there should be more support measures available in the court process to enable a court to modify proceedings and to assist an accused to become fit to participate in the hearing. For example:
- (a) the introduction of a formal support person scheme, similar to intermediary schemes that operate in other jurisdictions, and
 - (b) the development and use of practice notes or practice directions in the Supreme Court, County Court, Magistrates' Court and Children's Court to promote the use of support measures for accused with a mental illness, intellectual disability or other cognitive impairment in court.

Optimising fitness to stand trial—education

- 20 The Victorian Government should consider introducing an education program to enhance the ability of accused adults and accused young people to become fit to stand trial.

Optimising fitness to stand trial—treatment and services

- 21 The following amendments should be made to the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic):
- (a) Section 14(2)(b) should be amended so that the judge must only proceed to hold a special hearing under Part 3 within three months if satisfied that the accused, having regard to the education, treatment and services received, is not fit to stand trial.
 - (b) Section 13(2) should be amended so that the report on the mental condition of the accused should contain information on:
 - (i) the education, treatment and services recommended in any report on the accused's unfitness to stand trial to assist the accused in becoming fit to stand trial, and
 - (ii) the education, treatment and services the accused received during the period of adjournment.
 - (c) Section 13(3)(c) should be amended so that the judge must be satisfied that the accused, having regard to the education, treatment and services received, will not become fit to stand trial by the end of the period of 12 months after the finding of unfitness.

Assessment of unfitness by experts—processes for applying the new tests and improvements

- 22 The following process should be followed to support the Commission's recommendations on unfitness to stand trial:
- (a) In an examination of an accused by a registered medical practitioner or a registered psychologist on whether the accused is unfit to stand trial under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), the assessment should include:
 - (i) whether the accused is unfit to stand trial
 - (ii) if unfit to stand trial, whether or not the accused is likely to become fit to stand trial within a particular period and any measures (education, treatment or services) that would assist the accused to become fit to stand trial, and
 - (iii) if unfit to stand trial, the extent to which modifications can be made to the hearing process to assist the accused to become fit to stand trial.
 - (b) If requested, the assessment should also consider whether the accused is fit to plead guilty.
 - (c) As part of any assessment of unfitness to stand trial of a young person, the assessment should consider the developmental stage of the person.
 - (d) Upon consideration of the assessment, the court may proceed to determine whether the accused is unfit to stand trial, having regard to the extent to which modifications can appropriately be made to the hearing process to assist the accused to become fit to stand trial.
 - (e) If the accused is found fit to stand trial, the hearing should commence or resume in accordance with usual criminal procedures and with any appropriate modifications recommended in the assessment to assist the accused to become fit to stand trial.
 - (f) If the accused is found unfit to stand trial, the court may adjourn the matter for a period specified under section 11(4)(b) to allow the accused to become fit to stand trial, having regard to any measures recommended (education, treatment or services) that would assist the accused to become fit to stand trial.
 - (g) Following the period specified under section 11(4)(b) or in support of an application for an abridgment of the period under section 13 (as amended by Recommendation 21(b)), another examination of the accused by a registered medical practitioner or a registered psychologist should be conducted on the accused's unfitness to stand trial.
 - (h) Any request or order for an assessment on whether the accused is unfit to stand trial should specify the matters the registered medical practitioner or the registered psychologist should consider.

- 23 The Victorian Government should establish an expert advisory group to determine:
- (a) who should conduct assessments of unfitness to stand trial
 - (b) whether the group of people identified under paragraph (a) should be registered or accredited by a professional body, and if so, the requirements for registration or accreditation
 - (c) whether guidelines should be developed or experts should undergo training on applying the test for unfitness to stand trial, and if so, the content of the guidelines or training
 - (d) whether assessments should be standardised to a greater extent and the extent to which these should be standardised
 - (e) whether legislative or other requirements should be introduced to require the application of the process in Recommendation 22, and
 - (f) how to promote better communication techniques in the conduct of assessments.

Chapter 4 Clarifying the law on the defence of mental impairment

Introducing a statutory definition of mental impairment

- 24 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to insert a provision in section 20 of the Act that defines a ‘mental impairment’ for the purposes of the defence as a condition that ‘includes, but is not limited to, mental illness, intellectual disability and cognitive impairment’.

The proposed definition of mental impairment should not include any self-induced temporary conditions resulting from the effects of ingesting substances.

The proposed definition should include self-induced conditions that exist independently of the effect of ingesting substances.

Clarifying the test for the defence

- 25 Section 20(1)(b) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to replace ‘that is, he or she could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong’ with ‘that is, he or she did not have the capacity to think rationally about whether the conduct, as perceived by reasonable people, was wrong’.

Application of the defence in the Children’s Court

- 26 Recommendations 24 and 25 to introduce a definition of mental impairment and make changes to the second limb of the mental impairment defence in the higher courts should apply in the Children’s Court by adding equivalent provisions into the *Children, Youth and Families Act 2005* (Vic).

Chapter 5 Application of the CMIA in the Magistrates' Court

Extending the jurisdiction of the Magistrates' Court

- 27 Parts 1–6 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to provide for the Magistrates' Court to:
- (a) determine whether a person is unfit to stand trial
 - (b) conduct special hearings after a finding of unfitness, and
 - (c) make orders following a finding that the person is not criminally responsible because of mental impairment or that the person's conduct has been proved on the evidence available (but the person is unfit to stand trial).

Model for determining unfitness in the Magistrates' Court

- 28 New provisions should be inserted into the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) to create the following process if the question of unfitness arises in a proceeding in the Magistrates' Court for a summary offence or an indictable offence triable summarily:
- (a) In the Magistrates' Court, the question of the accused's unfitness to stand trial is to be determined on the balance of probabilities by a magistrate.
 - (b) When the question of unfitness to stand trial is raised during the course of proceedings in the summary stream (or where summary jurisdiction has been granted), the magistrate must determine whether there is a real and substantial question as to the unfitness of the accused.
 - (c) If the magistrate determines there is a real and substantial question as to the unfitness of the accused, the magistrate must either:
 - (i) conduct an investigation into the unfitness of the accused to stand trial within three months from the magistrate's determination that there is a real and substantial question as to unfitness, or
 - (ii) make an order under paragraph (m).
 - (d) If the magistrate finds the accused unfit to stand trial, the magistrate must either:
 - (i) proceed to hold a special hearing of the charge within three months, or
 - (ii) adjourn the matter under paragraph (l), or
 - (iii) make an order under paragraph (m).
 - (e) The special hearing should be conducted as nearly as possible as if it were a summary hearing.
 - (f) If the magistrate finds the accused fit to stand trial before the special hearing, the proceeding should be resumed in accordance with usual criminal procedures.
 - (g) For the purposes of paragraphs (b) and (c), if the magistrate considers that it is in the interests of justice to do so, the magistrate may order that the accused undergo an examination by a registered medical practitioner or registered psychologist and that the results of the examination be put before the court.
 - (h) Notwithstanding paragraphs (a)–(f), if the question of the accused's unfitness to stand trial arises in a matter in the committal stream, the committal proceeding must be completed.

- (i) If the accused is committed for trial, the question of the accused's unfitness to stand trial must be reserved for consideration by the trial judge.
- (j) If the accused is not committed for trial, and the matter is to be heard summarily, the question of the accused's unfitness must be investigated by the magistrate in accordance with paragraphs (a)–(f).
- (k) At any time before the investigation into unfitness to stand trial, the magistrate may extend the three-month period in paragraph (c) for a further period not exceeding three months. The three-month period may be extended more than once, provided the magistrate conducts the unfitness investigation within 12 months of the determination that there is a real and substantial question as to the unfitness of the accused.
- (l) If the magistrate finds the accused unfit to stand trial but considers that the accused is likely to become fit within a period of 12 months, the magistrate may adjourn the matter for the period by the end of which the accused is likely to be fit to stand trial. The magistrate may extend the period of adjournment for a further period, but the total period of adjournment from the first finding of unfitness must not exceed 12 months.
- (m) At any time during the course of proceedings in the summary stream (or where summary jurisdiction has been granted), after the magistrate determines there is a real and substantial question as to the unfitness of the accused, and before the special hearing, the magistrate may discharge the accused with or without conditions if the magistrate considers:
 - (i) that the accused does not pose an unacceptable risk of causing physical or psychological harm to another person or other people generally as a result of the discharge, and
 - (ii) the accused is receiving treatment, support or services in the community.

Expanding the Mental Health Court Liaison Service (MHCLS)

- 29 The Mental Health Court Liaison Service (MHCLS) should be extended and this extension resourced. The extension of the service should include the provision of disability liaison services, in addition to mental health liaison services.

Providing a power to make orders in the Magistrates' Court

- 30 Section 5(2) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to provide that if the Magistrates' Court finds a person not criminally responsible because of mental impairment or that conduct has been proved on the evidence available (but the accused is unfit to stand trial), the Magistrates' Court may:

- (a) declare the person liable to supervision, or
- (b) order that the person be released unconditionally.

In deciding whether to declare the person liable to supervision or to unconditionally release the person, the Magistrates' Court must have regard to whether the person would pose an unacceptable risk of causing physical or psychological harm to another person or other people generally.

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- 31 The power to declare a person liable to supervision and make orders for supervision or to unconditionally release a person following a finding under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should apply to both summary offences and indictable offences triable summarily where summary jurisdiction has been granted.
- 32 Section 5(2) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to provide that if the Magistrates' Court declares that a person is liable to supervision:
- (a) the court must make either of the following supervision orders in respect of the person:
 - (i) a custodial supervision order, or
 - (ii) a non-custodial supervision order; and
 - (b) the court must set a fixed term of the supervision order of two years, at the end of which the supervision order lapses.

Review of supervision orders

- 33 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to provide:
- (a) The person subject to the order or the person having the custody, care, control or supervision of that person has the right to apply to the court for a variation of the order (in the case of a custodial supervision order) or a variation or revocation of the order (in the case of a non-custodial supervision order) during the term set by the Magistrates' Court.
 - (b) In a review conducted under paragraph (a), the court must either:
 - (i) confirm the order
 - (ii) vary the conditions of the order
 - (iii) for a custodial supervision order, vary the order to a non-custodial supervision order, or
 - (iv) for a non-custodial supervision order, vary the order to a custodial supervision order or revoke the order.

Factors relevant to decision making for supervision orders

- 34 Part 6 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), including sections 40, 41 and 42, should apply to the Magistrates' Court's consideration of whether to make, vary or revoke a supervision order.

Granting and consenting to summary jurisdiction

- 35 Section 29(2) of the *Criminal Procedure Act 2009* (Vic) should be amended to introduce a requirement that in deciding whether the Magistrates' Court may hear and determine summarily a charge for an indictable offence, if there is a real and substantial question of unfitness to stand trial, the court is to have regard to the statement of principles for decision makers in Recommendation 3.

- 36 Section 29 of the *Criminal Procedure Act 2009* (Vic) should be amended so that the Magistrates' Court may waive the requirement that an accused consent to the summary hearing of a charge for an indictable offence if satisfied that:
- (a) the accused is unable to consent to a summary hearing or the legal practitioner appearing for the accused is unable to obtain instructions on whether the accused consents to a summary hearing, and
 - (b) there is a real and substantial question of the accused's unfitness.

Committals—criteria and process

- 37 Section 141 of the *Criminal Procedure Act 2009* (Vic) should be amended to require that if there is a real and substantial question of unfitness to stand trial, the court is to have regard to the statement of principles for decision makers in Recommendation 3 in conducting committal proceedings.
- 38 If there is a real and substantial question as to the accused's unfitness to stand trial in a committal proceeding, the committal proceeding must be completed without the accused entering a plea. The committal proceeding must otherwise be completed in accordance with Chapter 4 of the *Criminal Procedure Act 2009* (Vic).

Chapter 6 A specialised approach to the application of the CMIA in the Children's Court

Extending the jurisdiction of the Children's Court

- 39 The *Children, Youth and Families Act 2005* (Vic) should be amended to provide for the Children's Court to:
- (a) determine whether a young person is unfit to stand trial
 - (b) conduct special hearings after a finding of unfitness, and
 - (c) make orders following a finding that the young person is not criminally responsible because of mental impairment or that the young person's conduct has been proved on the evidence available (but the young person is unfit to stand trial).

The amendments should be provided for in a new part in Chapter 5 of the *Children, Youth and Families Act 2005* (Vic).

- 40 Recommendation 39 should be implemented in conjunction with Recommendation 49 to establish a youth forensic facility in Victoria to provide for the assessment, treatment and supervision of young people in relation to unfitness to stand trial and the defence of mental impairment.

Preserving the criminal jurisdiction of the Children's Court

- 41 The current criminal jurisdiction of the Children's Court should apply, so that all summary and indictable matters currently within the jurisdiction of the Children's Court should continue to be heard in the Children's Court where unfitness to stand trial or the defence of mental impairment is raised.
- 42 Any matter over which the Children's Court has jurisdiction where unfitness to stand trial or the defence of mental impairment is raised should be transferred to and dealt with in the Melbourne Children's Court.
- 43 The exceptional circumstances criteria in section 356(3) of the *Children, Youth and Families Act 2005* (Vic) should include consideration of whether a matter should remain in the Children's Court jurisdiction where 'there is a real and substantial question of unfitness to stand trial'.

A diversionary approach for young people

- 44 The *Children, Youth and Families Act 2005* (Vic) should be amended to require that in matters in the Children's Court involving young people where unfitness or the defence of mental impairment is raised there are presumptions in favour of:
- (a) diverting the young person from the criminal justice system, and
 - (b) the young person's treatment and support taking place in the community.

Model for determining unfitness in the Children's Court

- 45 New provisions should be inserted into the *Children, Youth and Families Act 2005* (Vic) to create the following process to apply if the question of unfitness arises in a proceeding in the Children's Court for a summary offence or an indictable offence within the court's jurisdiction:
- (a) In the Children's Court, the question of the accused's unfitness to stand trial is to be determined on the balance of probabilities by the President or a magistrate.
 - (b) When the question of unfitness to stand trial is raised during the course of proceedings for an offence within the jurisdiction of the Children's Court, the President or a magistrate must determine whether there is a real and substantial question as to the unfitness of the accused.
 - (c) If the President or a magistrate determines that there is a real and substantial question as to the unfitness of the accused, they must either:
 - (i) conduct an investigation into the unfitness of the accused to stand trial, without unnecessary delay and as soon as is practicably possible within three months from the determination that there is a real and substantial question as to unfitness, or
 - (ii) make an order under paragraph (f).
 - (d) Upon determining there is a real and substantial question of unfitness to stand trial and for the purposes of paragraphs (c) and (e), if the President or magistrate considers it is in the interests of justice to do so, they may make an 'assessment order' for the accused to undergo a multi-disciplinary examination by accredited clinicians, at least one of whom must be a registered medical practitioner, as to:
 - (i) whether the accused is unfit to stand trial
 - (ii) whether the accused is likely to become fit within a particular period and what measures (education or treatment) would assist to restore the accused's fitness in that period, and
 - (iii) whether the accused is suitable for a voluntary referral to a case worker for treatment, services and support.
 - (e) Upon consideration of the assessment order, the President or a magistrate must:
 - (i) proceed to determine unfitness
 - (ii) adjourn the matter for a specified period to optimise the accused's fitness (with recommended measures to optimise fitness), or
 - (iii) adjourn the matter for a specified period for a voluntary referral to an established case worker program.

- (f) At any time during the course of proceedings, after the President or a magistrate determines there is a real and substantial question as to the unfitness of the accused, and before the special hearing, the President or magistrate may discharge the accused with or without conditions if they consider:
 - (i) that the accused does not pose an unacceptable risk of causing physical or psychological harm to another person or other people generally as a result of the discharge, and
 - (ii) the accused is receiving treatment, support or services in the community.
 - (g) For the purposes of paragraph (e), the Children's Court may adjourn a matter as many times as required within a 12-month period. In considering adjournments, delay to the accused should be minimised and the court should take a proactive approach to judicial management in the specialist jurisdiction of the Children's Court. The overall period of adjournments must not exceed 12 months.
 - (h) If the Children's Court finds an accused fit to stand trial before the special hearing, the proceedings should be resumed in accordance with the usual criminal procedures.
 - (i) If the Children's Court finds a person unfit to stand trial, it must either:
 - (i) proceed to hold a special hearing as soon as practicable within a period of three months
 - (ii) adjourn the matter for a specified period for a voluntary referral to an established case worker program, or
 - (iii) adjourn the matter for a referral for a Therapeutic Treatment Order.
 - (j) A special hearing must be conducted as nearly as possible as if it were a criminal procedure in the Children's Court, including the relevant provisions in section 16(2) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).
 - (k) Notwithstanding paragraphs (a)–(j), if the question of an accused's unfitness to stand trial arises in a matter that involves an offence that is excluded from the Children's Court jurisdiction or in a committal proceeding, the committal proceeding must be completed.
 - (l) If the accused is committed for trial, the question of the accused's unfitness must be reserved for consideration by the trial judge.
 - (m) If the accused is not committed for trial, and the matter is to be heard in the Children's Court, the question of the accused's unfitness must be investigated by the President or a magistrate in accordance with paragraphs (a)–(j).
- 46 To support the assessment order, a case worker program should be implemented and resourced.

Conduct of proceedings involving young people in the higher courts

- 47 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to specify that as far as possible, proceedings in the Magistrates' Court, County Court and Supreme Court involving young people who raise unfitness and the defence of mental impairment should be conducted in accordance with applicable principles and approaches in the *Children, Youth and Families Act 2005* (Vic).

A new 'therapeutic supervision order' regime in the Children's Court

- 48 New provisions should be inserted into the *Children, Youth and Families Act 2005* (Vic) to create the following regime for the imposition of orders:
- (a) Upon a finding that an accused is not criminally responsible because of mental impairment or that conduct has been proved on the evidence available (but the accused is unfit to stand trial) in the Children's Court, the court must:
 - (i) declare the young person liable to supervision, or
 - (ii) order that the young person be released unconditionally.
 - (b) A young person is to be unconditionally released unless the court is satisfied that they pose an unacceptable risk of causing physical or psychological harm to another person or other people generally.
 - (c) If the court declares a young person to be liable for supervision, it must impose a 'therapeutic supervision order'. The court must make either:
 - (i) a custodial therapeutic supervision order, or
 - (ii) a non-custodial therapeutic supervision order.
 - (d) If the court imposes a therapeutic supervision order, it must set a fixed term of the therapeutic supervision order of two years with a progress review to be set for every six months. The order can be revoked at any time and there should be a presumption that the order will be made less restrictive at each review.
 - (e) The person subject to the order or the person having the custody, care, control or supervision of that person may apply to the court for a variation of the order (in the case of a custodial therapeutic supervision order) or a variation or revocation of the order (in the case of a non-custodial therapeutic supervision order) during the term set by the Children's Court.
 - (f) On application under paragraph (e), the court must either:
 - (i) confirm the order
 - (ii) vary the conditions of the order
 - (iii) for a custodial therapeutic supervision order, vary the order to a non-custodial therapeutic supervision order, or revoke the order, or
 - (iv) for a non-custodial therapeutic supervision order, vary the order to a custodial therapeutic supervision order, or revoke the order.
 - (g) Part 6 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), including sections 40, 41 and 42, should apply to the Children's Court's consideration of whether to act on an assessment order or to make, vary or revoke a therapeutic supervision order.

Developing a forensic facility and model of care for young people

- 49 A multi-disciplinary youth forensic facility should be established in Victoria.
- 50 The Victorian Government should commission a multi-disciplinary team to develop a model of care to identify and develop the requirements for service delivery, supervision arrangements, management and operation of the youth forensic facility.

Chapter 7 Juries under the CMIA in the higher courts

Unfitness to be determined by a judge or a magistrate

- 51 Section 7(3) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to provide that the question of a person's fitness to stand trial is to be determined on the balance of probabilities by a judge or a magistrate.

Defence of mental impairment to be determined by a jury

- 52 A jury should determine criminal responsibility in all criminal trials in the higher courts under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic). Section 21(4) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be abolished.
- 53 A jury should determine the criminal responsibility of all people found unfit to stand trial in the higher courts under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic). If Recommendation 52 to abolish section 21(4) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) is not adopted, the process provided for in that section should not be available to determine the criminal responsibility of a person found unfit.

Directions to the jury—findings in special hearings

- 54 Part 3 of the *Jury Directions Act 2013* (Vic) should apply to the judge's obligation to direct the jury on the findings that are available in special hearings under section 16(3)(d) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

Directions to the jury—approach to the elements of an offence and the defence of mental impairment

- 55 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to provide the following approach to directing the jury on how to approach the elements of an offence when the defence of mental impairment is in issue:
- (a) Threshold question for the judge: is the fault element unable to be established because evidence of the accused's mental condition is capable of demonstrating that the accused did not know the nature and quality of their conduct?
 - (b) If the answer to the threshold question is yes, Direction 1 should be given to the jury as follows:
 - (i) The physical elements of the offence must be proved beyond reasonable doubt.
 - (ii) If they cannot be so proved, the accused should be acquitted.
 - (iii) If the physical elements of the offence are proved beyond reasonable doubt, the jury should be directed to consider the defence of mental impairment.
 - (c) If the answer to the threshold question is no, Direction 2 should be given to the jury as follows:
 - (i) All elements of the offence must be proved beyond reasonable doubt.
 - (ii) The accused is presumed to be of sound mind; however, evidence of a mental condition can be taken into account in considering whether the fault element of the offence is proved beyond reasonable doubt.

- (iii) If they cannot be so proved, the accused should be acquitted.
- (iv) If all elements of the offence are proved, the jury should be directed to consider the defence of mental impairment.

Directions to the jury—legal consequences of a mental impairment finding

- 56 The requirements of a judge in directing a jury on the legal consequences of a mental impairment finding should be specified in section 22(2)(a) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) and provide that in explaining the legal consequences of a finding of not criminally responsible because of mental impairment, the judge:
- (a) must explain that the person may be made subject to an indefinite supervision order or unconditionally released
 - (b) must explain that there is a process to be followed by the judge in deciding whether an accused is made liable to supervision or unconditionally released which includes the judge considering evidence on the risk to community safety and appropriate treatment in the particular case, and
 - (c) must not otherwise indicate the probable or likely outcome in relation to the legal consequence of the finding, or convey any impression concerning the desirability, punitive features or public safety aspects of arriving at a particular verdict.

Chapter 8 Rights and interests under the CMIA

Better support for and communication with victims and family members

- 57 The Victims Support Agency in the Department of Justice should conduct work to develop a victim support scheme to provide court support, information on processes and outcomes and to assist victims to make court reports under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).
- 58 Section 74 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to provide that notice of a hearing required to be given to a family member or victim under the Act must be sent by a form of communication that allows the sender to determine if the notice has been received. Such means include, but are not limited to, registered post and other correspondence that involves notification of receipt, including electronic communication.
- 59 The Office of Public Prosecutions should investigate options for the development of a register specifically for victims and family members under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic). The register should include contact details of people on the register, indicate a person's nominated level of participation in processes under the Act and their preferred form of communication. The register should be automated and capable of being updated by the people on the register.
- 60 The Victorian Institute of Forensic Mental Health (Forensicare), the Department of Human Services and the Office of Public Prosecutions should investigate options that promote more meaningful information sharing with victims about the processes governing people subject to supervision orders. Key features of the scheme should be as follows:
- (a) The guiding principle underpinning the scheme should be to assist counselling and treatment processes for all people affected by an offence.
 - (b) Participation by victims is voluntary and can only occur with the consent of the victim.

- (c) Where general information about the order is provided to the victim, information sharing could occur without the consent of the person on the supervision order.
- (d) If the person on the supervision order consents, and doing so would not be detrimental to the recovery of the person, additional information about the person's treatment could be provided to the victim.

Improving access to advocacy services for people subject to supervision orders

- 61 The Department of Human Services and the Department of Health should undertake a gap analysis of advocacy services for people who are subject to the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) to ensure that all people subject to the Act have access to advocacy services. The analysis should have specific reference to the gaps in relation to a range of advocacy services, from formal advocacy to 'peer advocacy' programs and the exercise of rights that include the following:
- (a) rights of appeal against findings and supervision orders imposed under the Act
 - (b) rights to apply for a variation or revocation of a supervision order
 - (c) rights to apply for extended leave and other leave
 - (d) rights in relation to bail and remand (including place of custody)
 - (e) rights in relation to restrictive practices and compulsory treatment.

Responsibility for representing the community's interests

- 62 Amendments should be made to the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) to re-frame the roles of the Attorney-General, the Director of Public Prosecutions and the Secretaries to the Department of Health and Department of Human Services in proceedings under the Act as follows:
- (a) The Attorney-General should not be a party to proceedings under the Act or be specifically mentioned as having a role under the Act.
 - (b) The Attorney-General should not have an entitlement to appear under section 37(1)(a) of the Act.
 - (c) The interests of the community should be represented by the Director of Public Prosecutions. The Director of Public Prosecutions should be a party to the following proceedings:
 - (i) hearings of applications to make, vary or revoke a supervision order
 - (ii) hearings of applications for extended leave
 - (iii) appeals against decisions to make, vary, confirm or revoke a supervision order
 - (iv) appeals against decisions to grant extended leave
 - (v) appeals against decisions to refuse extended leave.
 - (d) The Secretary to the Department of Health and the Secretary to the Department of Human Services should not be a party to proceedings. The role of the Secretaries to these departments should be to provide reports to assist the court in decision making and to give evidence in hearings on the treatment and management of people on supervision orders under the Act.

Clarifying the purposes of and provisions relating to suppression orders

- 63 A statutory principle should be added to the provisions governing suppression orders under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) that outlines that the purpose of making a suppression order is to enable the long-term recovery of people subject to the Act and to facilitate community reintegration for the protection of the community.
- 64 Section 75 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to:
- (a) insert a presumption in favour of suppression of a person's name and identifying information, and
 - (b) provide that where the court is satisfied that it is in the public interest to do so:
 - (i) the court may make a suppression order in any proceeding (within the meaning of section 4 of the Act), or
 - (ii) a person may make an application for a suppression order at any time once any proceeding (within the meaning of section 4 of the Act) has commenced.

Chapter 9 Processes and findings under the CMIA in all courts

Power to remand in an appropriate place after a permanent finding of unfitness

- 65 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to enable a judge or magistrate to make any order under section 12(2) of the Act, including remanding the accused in custody in an appropriate place for the period before the special hearing following a finding that the accused is unfit to stand trial and is not likely to become fit within 12 months.

Providing exceptions to the requirement that an accused attend a special hearing

- 66 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to:
- (a) enable a judge or magistrate to excuse an accused from attending a special hearing with the consent of both parties, and
 - (b) provide that an accused may 'attend' a special hearing by audiovisual link, with the consent of both parties.

Streamlining the hearing of multiple matters

- 67 The *Criminal Procedure Act 2009* (Vic) should be amended to permit the court, with the consent of the accused and the prosecution, to make an order allowing:
- (a) a charge-sheet or indictment to contain charges for multiple matters in which the question of unfitness to stand trial has been raised, and
 - (b) a charge-sheet or indictment to contain charges for multiple matters in which the issue of whether the defence of mental impairment is established is to be determined.

Changing the names of findings

- 68 Section 17(1) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to change the finding that the accused 'committed the offence charged' to a finding that the 'conduct is proved on the evidence available'.
- 69 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to change the finding that the accused is 'not guilty of the offence because of mental impairment' to a finding that the 'conduct is proved but not criminally responsible because of mental impairment'.

Ensuring that information is provided to the court after a finding

- 70 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to enable the court to adjourn a matter to obtain any reports necessary under section 40(2) or a certificate of available services under section 47 prior to a decision to declare that the person is liable to supervision or to order the person be released unconditionally under sections 18(4) or 23.
- 71 Section 41 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended so that reports on the mental condition of a person under that section can be prepared and filed prior to a decision to declare that the person is liable to supervision under sections 18(4) or 23.
- 72 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended so that the court need not consider the report on the mental condition of a person under section 41(1) and a report under section 40(2)(a) if the report under section 41(1) addresses the matters listed in section 40(2)(a).

Extending the timeframe for preparing certificate of available services

- 73 Section 47(4) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to require the provision of a certificate of available services to the court within 30 days after receiving a request under section 47(1) or within such a longer period as the court allows.

Improving the process where a person is already subject to a supervision order

- 74 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to enable a court to decline to impose a subsequent supervision order where a person is already subject to a supervision order.

Approach to reviewing ancillary orders and consequences

- 75 The Victorian Government should review the ancillary orders and consequences that may follow a finding under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) with the aim of clarifying the ancillary orders or consequences that should or should not be available following a finding under the Act. In conducting any such review, the following approach should be taken:
- (a) Ancillary orders and consequences following findings under the Act should, as far as possible, not be punitive in intention or effect and should be made where necessary for the safety of the community.
 - (b) Ancillary orders and consequences following findings under the Act should not be mandatory or imposed automatically, but should instead be founded on the court's discretion.

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- (c) The ancillary orders and consequences that follow a finding that the 'conduct is proved on the evidence available' and a finding that the 'conduct is proved but not criminally responsible because of mental impairment' should be distinguished where appropriate.

Expanding rights of appeal against fitness findings

- 76 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended so that in a criminal proceeding in the County Court or the Trial Division of the Supreme Court, the accused may appeal to the Court of Appeal against:
 - (a) any finding on fitness to stand trial, and
 - (b) any finding on fitness to plead guilty.

Allowing *de novo* appeals to the County Court from the Children's Court and Magistrates' Court

- 77 The *Criminal Procedure Act 2009* (Vic) should be amended so that an appeal to the County Court against a supervision order does not result in a stay of any supervision order imposed on the person.
- 78 The *Criminal Procedure Act 2009* (Vic) should be amended so that a person may appeal to the County Court against:
 - (a) a finding and supervision order made in the Magistrates' Court under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) and in the Children's Court, under the *Children, Youth and Families Act 2005* (Vic), or
 - (b) a supervision order made in the Magistrates' Court under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) and in the Children's Court, under the *Children, Youth and Families Act 2005* (Vic).

Chapter 10 Improving the supervision, review and leave framework in the higher courts

Retaining the judicial model of decision making

- 79 The judicial model of decision making should be retained under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

Transparency and continuity in leave decisions

- 80 Sections 40(1) and 54(4) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to require the court and the Forensic Leave Panel respectively to have regard to any on-ground or off-ground leave the person has been granted and their compliance with the conditions of their leave when deciding whether to grant leave.
- 81 An education and training package should be developed for Forensic Leave Panel members that:
 - (a) emphasises the importance of explaining each type of leave that has been granted or rejected and any variations in leave
 - (b) emphasises the communication of the reasons why the Panel, as an independent body, has reached its decision to approve or reject the leave application

- (c) encourages Panel members to provide suggestions on how the person can improve their likelihood of success in subsequent leave applications, and
 - (d) ensures that Panel members inform the person of their right to request written reasons at the end of the hearing.
- 82 A review should be conducted of the processes of the Internal Leave Review Committee to consider whether they operate consistently with the principles that underlie the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

Retaining indefinite terms for supervision orders in the higher courts

- 83 There should be no change to the indefinite term of supervision orders imposed in the higher courts as provided in section 27 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

Replacement of nominal term system with a new system of five-year 'progress reviews'

- 84 The provisions in the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) relating to nominal terms in the higher courts should be repealed, and replaced by provisions to the effect that:
- (a) a supervision order is for an indefinite term and that the matter is to be brought back to the court at the end of every five years for a 'progress review'
 - (b) the court must set a term of five years before the first progress review of a supervision order to run from the day the person was first made subject to the supervision order, and
 - (c) the court that made the supervision order must conduct the first progress review of the order before the end of the five-year term and thereafter at intervals not exceeding five years for the duration of the order.

Presumptions under the new system of 'progress reviews'

- 85 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to introduce the following presumptions to apply at progress reviews of supervision orders:
- (a) the court must not vary a custodial supervision order to a non-custodial supervision order before the first progress review unless satisfied on the evidence available that the person would not pose an unacceptable risk of causing physical or psychological harm to another person or other people generally as a result of the variation
 - (b) at the second progress review of a custodial supervision order and progress reviews thereafter, the court must vary the custodial supervision order to a non-custodial supervision order unless satisfied on the evidence available that the person would pose an unacceptable risk of causing physical or psychological harm to another person or other people generally as a result of the variation, and
 - (c) at the second progress review of a non-custodial supervision order and progress reviews thereafter, the court must revoke the non-custodial supervision order unless satisfied on the evidence available that the person would pose an unacceptable risk of causing physical or psychological harm to another person or other people generally as a result of the revocation of the order.

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- 86 Section 35(3)(a)(i) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to clarify that a custodial supervision order should not be varied to a non-custodial supervision order at a progress review unless the forensic patient or forensic resident has completed a period of at least 12 months extended leave.

A new test of 'unacceptable risk' for decision making

- 87 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to require:
- (a) When making decisions, the relevant decision maker to:
 - (i) for section 40(1)(c), consider whether the person would pose an unacceptable risk of causing physical or psychological harm to another person or other people generally because of his or her mental impairment
 - (ii) for sections 50(3)(b), 54(2)(b), 54(3)(b), 57(2) and Schedule 3 clause 4, be satisfied that the person would not pose an unacceptable risk of causing physical or psychological harm to another person or other people generally
 - (iii) for sections 55(1), 58(1), 58(4)(a) and 73F(5) be satisfied that the person would pose an unacceptable risk of causing physical or psychological harm to another person or other people generally, and
 - (iv) for section 30(1)(b), have a reasonable belief that the person would pose an unacceptable risk of causing physical or psychological harm to another person or other people generally.
 - (b) The court under section 40(1)(d) to consider the need to protect people from such risk.
- 88 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to require that, in deciding whether to declare the person liable to supervision or to unconditionally release the person, the court is to have regard to whether the person poses an unacceptable risk of causing physical or psychological harm to another person or other people generally.
- 89 References to the danger the person poses to themselves or the person's safety in sections 40(1)(c), 54(2)(b), 54(3)(b), 55(1), 57(2), 58(1), 58(4)(a), 30(1)(b), 73F(5) and Schedule 3 clause 4 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be removed.

Additional factors relevant to decision making

- 90 Section 40(1) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to require that, for the purpose of considering whether a less restrictive order is more appropriate, the court is to have regard to whether the person is receiving treatment or services under a civil order under the *Mental Health Act 2014* (Vic) or the *Disability Act 2006* (Vic), and the conditions of any such order.
- 91 Sections 40(1) and 54(4) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to require the court and the Forensic Leave Panel respectively to have regard to the supervised person's recovery or progress in terms of treatment progression and personal improvement.

Increasing flexibility—extending and suspending leave

- 92 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended so that:
- (a) A grant of special leave, on-ground leave or off-ground leave can be extended for the same period and subject to the same conditions by the authorised psychiatrist of the approved mental health service or the Secretary to the Department of Human Services.
 - (b) The authorised psychiatrist for the approved mental health service or the Secretary to the Department of Human Services must provide the Forensic Leave Panel with a report of the person's progress while on leave and their compliance with the conditions of their leave for each period for which leave is extended.
 - (c) The Chief Psychiatrist may delegate the power to suspend a special leave of absence, on-ground leave or limited off-ground leave under section 55 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) to the authorised psychiatrist of the approved mental health service.

Increasing flexibility—leave conditions

- 93 Education and training for Forensic Leave Panel members in Recommendation 81 should include guidelines on making leave conditions sufficiently prescriptive so that they are consistent with the safety of the community but sufficiently flexible to not unduly restrict the person's freedom or personal autonomy.

Other improvements to leave processes

- 94 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to reflect that the applicant profile may be provided by an authorised psychiatrist at the Victorian Institute of Forensic Mental Health (Forensicare) or their delegate under section 54A(1)(a).
- 95 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to clarify that a person whose leave is suspended under section 58, or a person on their behalf, may apply for special leave of absence.

Providing exceptions to the requirement that an accused attend a review hearing

- 96 The following amendments should be made to the review provisions in the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) to provide that:
- (a) If a supervised order is being confirmed, the court may order the review hearing to be conducted on the papers with the consent of all parties.
 - (b) The court may order that any person required to attend a review hearing attend via video link with the consent of all parties.
 - (c) If the attendance of the supervised person before the court would be detrimental to the person's health, the court may order that the person not attend the hearing or attend via video link with the consent of all parties.

Removing the three-year restriction on applying for a variation of a custodial supervision order

- 97 Section 31(2) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be abolished.

Chapter 11 Management of people subject to supervision orders

Models of care and accommodation needs for people with an intellectual disability or other cognitive impairment

- 98 The Department of Human Services should commission a review of current forensic disability services to identify appropriate models of care and the accommodation needs of people with an intellectual disability or other cognitive impairment who are subject to supervision orders under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

The review should include an analysis of the cost of any recommendations regarding appropriate models of care and accommodation needs.

Flexibility in responding to breaches of supervision orders

- 99 The following amendments should be made to the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) to allow for greater flexibility in managing people who have breached the conditions of their non-custodial supervision order:
- (a) Section 29(4) should be amended to allow the court to adjourn an application under section 29(1) for variation of a supervision order for a period not exceeding 12 months where the court is satisfied by evidence on oath, whether orally or by affidavit, from the supervisor, the Department of Human Services or the Department of Health that, having regard to the person's risk, a period of assessment and treatment is appropriate prior to consideration of the application to vary the non-custodial supervision order to a custodial supervision order.
 - (b) Section 30(4) should be amended to create an exception to the requirement that a person detained under this section be released within 48 hours if an application has been made and a court has made an order adjourning the application to vary the supervision order.
 - (c) Section 30 should be amended to provide a power for the authorised psychiatrist of the approved mental health service or the Secretary to the Department of Human Services to authorise the release of a person from detention following an application under section 29(1) and prior to the court hearing an application in section under 30(4).
- 100 A new medium-secure forensic mental health facility should be established as an approved mental health service for adults with a mental illness who are subject to supervision orders under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).
- 101 The Department of Health and the Department of Human Services should develop workforce strategies to increase the capacity of the general mental health and disability sectors to undertake forensic mental health and disability work. Such strategies could include the development of guidelines on decision making in relation to supervision orders.

Police contact with people subject to supervision orders

- 102 Victoria Police should add a flag to the 'attendance module' in the Law Enforcement Assistance Program (LEAP) database to enable data to be entered and accessed that will immediately notify a police officer that a person is subject to a supervision order under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

Improving the suitability of the system for people with an intellectual disability or other cognitive impairment

- 103 Section 26 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to require a court, when making a supervision order in respect of a person, to specify the department that is responsible for the person's supervision.
- 104 A requirement should be added to section 26 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) that the department which is specified as having responsibility for the person's supervision must prepare a treatment plan for the person on the supervision order.
- 105 Section 40(e) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to require that the court have regard to 'whether there are adequate resources available for treatment, support or services in the community'.
- 106 The definition of 'compulsory treatment' in the *Disability Act 2006* (Vic) should be amended to include people subject to a supervision order that designates the Secretary to the Department of Human Services as responsible for the person's supervision.

Interstate transfer orders

- 107 Sections 73D and 73E of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to provide that:
 - (a) the relevant Secretary has the power to make an order authorising the interstate transfer of a person, and
 - (b) sections 73D(2)(a) and 73E(2)(a) allow either the Chief Psychiatrist or the Secretary of the Department of Human Services to certify that the transfer is of benefit to the person and that facilities and services are available.

PART I INTRODUCTION AND SYSTEMIC IMPROVEMENTS TO THE CMIA

Introduction

- 2 Terms of reference**
- 3 The Commission's process**
- 5 The Commission's approach**
- 7 Structure of this report**

1. Introduction

Terms of reference

- 1.1 On 17 August 2012, the Attorney-General, the Honourable Robert Clark, MP asked the Victorian Law Reform Commission to review and report on the desirability of changes to the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ('CMIA') to ensure it operates justly, effectively and consistently with the principles that underlie it. The terms of reference set out on page xiii ask the Commission to give particular consideration to a number of legal and process aspects that largely relate to adults in the criminal justice system.
- 1.2 On 18 September 2013, the Attorney-General made to the Commission supplementary terms of reference that asked it to consider a number of further matters regarding the operation of the CMIA for young people¹ in the Children's Court. The supplementary terms of reference set out on page xiv ask the Commission to consider whether the application of the CMIA should be further extended to the Children's Court and to consider a number of specific matters.
- 1.3 The supplementary terms of reference revised the reporting date of the reference from 31 March 2014 to 30 June 2014.
- 1.4 In conducting the review, the Commission is required to have regard to:
 - the cost implications of recommendations, including the costs of supervision and treatment services
 - any recommendations 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* published in March 2013.²
- 1.5 This report relates to both the terms of reference and supplementary terms of reference.
- 1.6 The CMIA governs a specific area of the criminal law where a person comes into contact with the criminal justice system and:
 - at the time the person appears in court on a charge for a criminal offence, their mental processes are so disordered or impaired, they are 'unfit to stand trial', and/or
 - at the time an alleged offence occurred the person was suffering from a mental impairment which negates criminal responsibility for their actions.

¹ The term 'young people' is used as a general term in this report 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.

² Victorian Parliament Law Reform Committee, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (2013).

- 1.7 When either of these circumstances exists there is a legitimate basis for exempting a person charged with a criminal offence from the usual criminal process and diverting them to special criminal processes. These exemptions are based on long-established criminal law principles and are given expression through the provisions of the CMIA.
- 1.8 Although the CMIA has its foundation in the criminal law, it intersects with a number of other areas of the law, including mental health, disability and human rights law. Its operation is based largely in the criminal justice system but it draws on areas of forensic clinical practice, including psychiatry, psychology, neuropsychology and neurology.
- 1.9 The CMIA was introduced in 1997 and commenced full operation on 18 April 1998. The CMIA replaced the previous system, known as the 'Governor's pleasure' regime. Under that system, people charged with criminal offences who were found either 'unfit to plead'³ to criminal charges or not guilty of criminal charges on the ground of 'insanity'⁴ were ordered to be kept in strict custody until the Governor's pleasure was known (meaning when the executive,⁵ specifically ministers in the Victorian Government, approved the release of the person).⁶
- 1.10 The CMIA's enactment was precipitated by a number of reviews that had examined the operation of the Governor's pleasure regime.⁷ These reviews, along with much academic commentary, had cumulatively identified problems with the regime. The CMIA abolished the Governor's pleasure regime and established new procedures for determining unfitness to stand trial. The CMIA abrogated the common law defence of insanity and established the statutory defence of mental impairment and a new process for determining the criminal responsibility of people who are unfit to stand trial. It also created a new regime for imposing and reviewing supervision orders in relation to people made subject to findings under the CMIA.
- 1.11 The current reference is the first comprehensive review of the CMIA's operation. While specific aspects of the CMIA have been reviewed,⁸ there has been no systemic review of the CMIA since it commenced operation in 1998.

The Commission's process

- 1.12 The Commission's review was guided by a Division chaired by the Hon. Philip Cummins AM, the Chair of the Commission. The other Division members were the Hon. Frank Vincent AO QC, Saul Holt SC and Bruce Gardner PSM, who are part-time members of the Commission.
- 1.13 The Commission formed an advisory committee of experts (see **Appendix A**) to provide insights into how the CMIA and surrounding systems work in practice and to discuss issues and options for reform. The members of the advisory committee were asked to bring their expertise to the issues discussed and not necessarily represent the views of any organisation with which they work or are affiliated. The advisory committee met twice.

3 The CMIA replaced the expression 'unfit to plead' with 'unfit to stand trial' to reflect that a person must be fit at any stage of the proceedings: *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) pt 2.

4 The CMIA abolished the defence of 'insanity' and introduced the defence of 'mental impairment': *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) pt 4.

5 The executive is the administrative arm of government and comprises government employees who work in government departments and agencies. Ministers, who are members of the legislature, also are part of the executive.

6 In practice, the decision was made in the form of an initial recommendation by the Adult Parole Board, which if the Attorney-General agreed, was referred to Cabinet for approval. If approved by Cabinet, the Premier made a recommendation to release the person, which was then signed by the Governor.

7 These include: the Model Criminal Code Officers' Committee's model legislation, the Model Mental Impairment and Unfitness to be Tried (Criminal Proceedings) Bill 1995; Victorian Parliament Community Development Committee, *Inquiry into Persons Detained at the Governor's Pleasure* (1995); Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility*, Report No 34 (1990); Victorian Sentencing Committee, *Sentencing – Report of the Victorian Sentencing Committee*, Volume 2 (1998).

8 These include: Review Panel Appointed to Consider the Leave Arrangements for Patients at the Victorian Institute of Forensic Mental Health, Report (2001) ('Vincent Review'); Victorian Law Reform Commission, *People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care*, Report No 4 (2003); Victorian Law Reform Commission, *Defences to Homicide*, Final Report No 6 (2004); Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012); Victorian Parliament Law Reform Committee, above n 2.

- 1.14 In June 2013, the Commission published *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997: consultation paper* ('the consultation paper'). The consultation paper addressed the issues raised by the terms of reference and sought written submissions on the issues and suggestions for reforms. Submissions were due by 23 August 2013.
- 1.15 Following receipt of the supplementary terms of reference, the Commission published *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 and the Children's Court of Victoria: supplementary consultation paper* ('the supplementary consultation paper'). The supplementary consultation paper addressed the new issues raised and sought written submissions by 18 December 2013.
- 1.16 Submissions were accepted by the Commission after both submission deadline dates. The Commission received 34 submissions to the terms of reference and supplementary terms of reference. Most of the submissions are public and can be viewed on the Commission's website.⁹ They are listed at **Appendix B**.
- 1.17 Throughout the reference the Commission consulted widely with members of the community and professionals experienced with and/or affected by the CMIA. After release of the consultation papers, 55 consultations were conducted across regional and metropolitan Victoria. Meetings were held in regional locations, including Geelong, Morwell, Shepparton, Euroa and Traralgon, and many locations in metropolitan Melbourne, including Clifton Hill, Dandenong, Fairfield, Parkville, Box Hill, Preston and Richmond, as well as in central Melbourne.
- 1.18 Consultations were conducted with people who had personal experience of the CMIA, including family members of victims in CMIA matters, people subject to supervision orders and family members and carers of people subject to supervision orders. A wide range of professional stakeholders were consulted, including judges and magistrates, legal practitioners (defence and prosecution), representatives of Victoria Police, service providers who provide supervision under the CMIA (including area mental health services and other non-government organisations), staff of government departments involved in the CMIA (including the Victorian Institute of Forensic Mental Health (Forensicare), the Department of Health, the Department of Human Services and the Department of Justice) and forensic clinicians from a range of disciplines.
- 1.19 The Commission held four roundtable consultations.
- 1.20 On the terms of reference, the Commission held roundtables on:
- the operation of the CMIA in the higher courts—attended by legal practitioners (defence and prosecution), staff of advocacy groups, forensic clinicians and academics
 - the operation of the CMIA in the Magistrates' Court—attended by legal practitioners (defence and prosecution), police prosecutors, staff of non-government service providers and a staff member of the Melbourne Magistrates' Court.
- 1.21 On the supplementary terms of reference, the Commission held roundtables on the operation of the CMIA in the Children's Court with:
- legal practitioners—attended by barristers, private practitioners, practitioners from Victoria Legal Aid and the Office of Public Prosecutions, and Victoria Police prosecutors
 - clinicians experienced in working with young people in forensic settings—attended by psychiatrists, psychologists, neurologists and neuropsychologists.

- 1.22 The consultations held after the consultation papers were published are listed at **Appendix C.**
- 1.23 As some of the law reform options drew on Queensland legislation and practice, the Chair of the Commission held discussions in Brisbane with members and staff of the Queensland Mental Health Court and the Queensland Mental Health Review Tribunal, and representatives of Queensland Health and the Department of Communities, Child Safety and Disability Services.
- 1.24 The Commission held discussions with other organisations conducting law reform work or reviews in the area covered by the CMIA review.
- 1.25 Discussions were held in Sydney with the New South Wales Law Reform Commission (NSWLRC) early in the review, as there was significant overlap in the issues being considered as part of the NSWLRC's review of 'People with cognitive and mental health impairments in the criminal justice system'.¹⁰ The Commission met with Graeme Innes AM, Australian Disability Discrimination Commissioner, and staff of the Australian Human Rights Commission in August 2013 when it was conducting its inquiry into 'Access to justice in the criminal justice system by people with disability'.¹¹ Cooperative discussions were held with Donald Cant Watts Corke (DCWC) during its review, commissioned by the Department of Health and Department of Justice, of adult forensic mental health services in Victoria. Discussions were held in March 2014 with the Australian Law Reform Commission during its review of 'Legal Barriers for People with an Intellectual Disability' to examine equal recognition before the law and legal capacity for people with a disability.¹²
- 1.26 In addition, the Commission received many comments and further information informally from interested members of the public as well as from individuals with specialist knowledge and expertise.
- 1.27 The Commission records its thanks for the substantial contribution made to its work by the people and entities stated above and in particular to the members of its advisory committee.

The Commission's approach

- 1.28 In considering the issues arising from the terms of reference and supplementary terms of reference for the review, the Commission has been guided by its principal framework—to consider whether changes are needed to ensure the CMIA operates 'justly, effectively and consistently with the principles that underlie it'.
- 1.29 In reviewing the CMIA, the Commission focussed on how the existing laws and procedures under the CMIA function in practice, not whether they should exist at all. The Commission has sought to identify the areas where the CMIA is not operating in accordance with the objectives stated in the principal framework. The Commission has made recommendations where it considers them to be necessary to ensure that the CMIA operates justly, effectively and consistently with the principles that underlie it.

¹⁰ The New South Wales Law Reform Commission has published a number of reports as part of its review, including New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion*, Report No 135 (2012) and New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report No 138 (2013).

¹¹ The Australian Human Rights Commission published its report on its inquiry in February 2014: Australian Human Rights Commission, *Equal Before the Law – Towards Disability Justice Strategies* (2014).

¹² The Australian Law Reform Commission has published an issues paper and a discussion paper as part of its review: Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Issues Paper No 44 (2013); Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014).

Principles underlying the CMIA

- 1.30 As part of this framework for the review, the Commission has identified that the principles underlying the CMIA, broadly speaking, seek to strike a balance between the protection of the community and the rights and clinical needs of accused who are subject to the laws and processes under the CMIA. The underlying principles have been identified by the Commission as:
- community protection
 - fairness to an accused and the right to a fair trial
 - legitimate punishment
 - least restrictive alternative
 - rights of victims and their families and family members of people subject to the CMIA
 - gradual reintegration
 - therapeutic focus
 - transparency and accountability.¹³
- 1.31 These provisions are either explicitly stated or reflected in the CMIA provisions. The CMIA also sits within a broader human rights framework as encapsulated in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Victims' Charter Act 2006* (Vic). Also relevant are the principles and provisions in Victorian legislation that operate to protect the rights of people with a mental illness or intellectual disability, including the *Mental Health Act 2014* (Vic)¹⁴ and the *Disability Act 2006* (Vic).

Operation of the CMIA for vulnerable groups in the criminal justice system

- 1.32 The Commission has paid particular regard to how the CMIA operates for vulnerable groups in the criminal justice system.

People with a cognitive impairment

- 1.33 In considering how the CMIA operates for people with a cognitive impairment, the Commission has had regard to the recommendations 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*, as well as the other significant recent work¹⁵ that has been conducted in relation to people with disabilities in the criminal justice system.

Young people

- 1.34 In considering how the CMIA operates for young people and making recommendations for change, the Commission has been mindful of the high rates of disadvantage among young people who appear in the criminal justice system and the significant challenges they experience due to their level of maturity and development. The Commission has thus adopted a specialised approach in the Children's Court that recognises the multiple layers of vulnerability faced by young people with mental conditions in the criminal justice system.

¹³ For a more detailed discussion of these principles, see Chapter 2 at [2.101] and Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, Consultation Paper No 17 (2013) 18–26.

¹⁴ The *Mental Health Act 1986* (Vic) was in operation for the period of the CMIA reference. The *Mental Health Bill 2014* was introduced into Victorian Parliament on 18 February 2014 and received Royal Assent and was proclaimed as the *Mental Health Act 2014* (Vic) on 8 April 2014. The *Mental Health Act 2014* (Vic) replaced the *Mental Health Act 1986* (Vic) on 1 July 2014.

¹⁵ See Chapter 11 at [11.45]–[11.50].

Victims and their families and family members of people subject to the CMIA

- 1.35 In considering how the CMIA operates for victims and their families, the Commission has had regard to recent work and advances to acknowledge and support the participation of victims in the criminal justice process. The complexity of court processes and the different nature of findings and consequences can be additional factors that victims and their families must deal with in cases heard and determined under the CMIA.
- 1.36 In considering how the CMIA operates for family members of people subject to the CMIA, the Commission has also had regard to their support needs as carers, and their rights of involvement in CMIA proceedings.
- 1.37 The Commission has also paid particular attention, in considering the issues, to the difficult nature of CMIA cases in the way that they affect victims of crime, their families and the family members of people who are involved in cases on the CMIA pathway. Such cases require an understanding of the effects that a mental illness, intellectual disability or other cognitive impairment can have on behaviour, as well as an acknowledgment of the trauma caused to victims, victims' families and family members of the accused who are very often all within the same family.

Cost implications

- 1.38 In making recommendations, the Commission has been mindful of and had regard to their cost implications, without these being determinative of the Commission's views and decisions. The Commission engaged the services of consultants at the Melbourne School of Population and Global Health, University of Melbourne¹⁶ to undertake a feasibility study and then conduct an analysis of the cost implications of a number of specific aspects of its recommendations for the further extension of the application of the CMIA in the Magistrates' Court and Children's Court. The results of these analyses are largely documented in Chapters 5 and 6, which contain the Commission's recommendations in relation to these two courts.

Other jurisdictions

- 1.39 Although not specified in the terms of reference for the review, the Commission also considered equivalent regimes interstate and overseas, particularly in New South Wales, New Zealand and the United Kingdom, where reviews are being or have recently been conducted.

Structure of this report

- 1.40 The structure of this report generally follows the pathway that is established under the CMIA and it is divided into parts that mark four key aspects of the CMIA's operation. In doing so, the report considers issues that are raised under both the terms of reference and supplementary terms of reference.
- 1.41 This introductory chapter and Chapter 2 form Part I of the report—'Introduction and systemic improvements to the CMIA'. Chapter 2 maps out the current operation of the CMIA, using information available to the Commission, and identifies the areas where the CMIA is operating well and the areas where change is required. It presents the Commission's findings on these and contains recommendations on a number of threshold issues designed to achieve systemic change in the operation of the CMIA.

- 1.42 Part II—‘Legal concepts and criteria’—considers the test for unfitness to stand trial and the defence of mental impairment in relation to both adults and young people who are subject to CMIA processes. Chapter 3 focuses on unfitness to stand trial and includes the Commission’s recommendations to modify the test for determining unfitness to stand trial and how the test is to be applied by the courts and experts who conduct assessments. It also considers a number of special considerations in the application of the test, including those to optimise the fitness of accused and how the test is to be applied in relation to young people. Chapter 4 focuses on clarifying the law on the defence of mental impairment. This includes the issue specified in the terms of reference as to whether the CMIA should define ‘mental impairment’, and if so, how it should be defined.
- 1.43 Part III—‘Application of the CMIA in Victorian courts’—deals with the operation of the CMIA across the courts in Victoria.
- 1.44 Chapters 5–7 present the Commission’s recommendations specific to the application of the CMIA in particular jurisdictions. Chapter 5 details the approach to the extension of the Magistrates’ Court’s jurisdiction over CMIA matters and the Commission’s recommendations on the issues raised in the terms of reference in this area. Chapter 6 details the Commission’s specialised approach in extending the application of the CMIA to the Children’s Court of Victoria and deals with the bulk of the matters specified in the supplementary terms of reference. Chapter 7 considers issues regarding the application of the CMIA in the higher courts, in particular the involvement of juries in the determination of unfitness and the determination of criminal responsibility in the higher courts. It also examines the approach to jury directions in CMIA matters, including whether legislative clarification is required in the approach to directing a jury on the elements of an offence where the defence of mental impairment is in issue.
- 1.45 Chapters 8 and 9 consider issues relating to the application of the CMIA in all courts. Chapter 8 examines the arrangements for the consideration and representation of interests under the CMIA, including the interests of victims of crime in CMIA cases, family members of people subject to the CMIA, people subject to supervision orders and the community. Chapter 9 considers a number of aspects relating to the processes and findings under the CMIA relevant to all courts. It includes recommendations for general improvements to the process for determining unfitness to stand trial. It also recommends changes to the findings available under the CMIA and considers a range of issues regarding the consequences that can follow a CMIA finding in all courts.
- 1.46 Part IV—‘Management, supervision and release under the CMIA’—contains two chapters that focus on changes to the system that governs the management of people who have been placed on supervision orders under the CMIA. Chapter 10 sets out improvements to decision making in the supervision, review and leave framework that applies to people on supervision orders in the higher courts. Chapter 11 focuses on the system for the management of people on supervision orders. It details a range of operational issues that have been identified as affecting the management of supervised people under the CMIA and identifies those that the Commission considers can be addressed through legislative change. Chapter 11 also identifies the need for a new approach to how supervision and management under the CMIA operate for people with an intellectual disability or other cognitive impairment. It sets out the Commission’s recommendations on what this should be.
- 1.47 Part V concludes the report and the body of recommendations that have been made by the Commission.

Improving the systemic operation of the CMIA

10	Introduction
11	Overview of the CMIA
12	Mapping the systemic operation of the CMIA
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2. Improving the systemic operation of the CMIA

Introduction

- 2.1 The terms of reference and supplementary terms of reference for the review of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ('CMIA') raise issues that cut across criminal courts in multiple jurisdictions in Victoria, as well as across multiple systems that function within the justice, mental health, disability and youth sectors.
- 2.2 In conducting the review, the Commission has mapped the operation of the CMIA and identified areas where there are threshold issues that affect the operation of the CMIA as a whole or across multiple areas of operation.
- 2.3 In this chapter, the Commission sets out its findings regarding the broad operation of the CMIA and makes overall recommendations that lay the path for detailed recommendations or are designed to bring about system-wide operational change.
- 2.4 The chapter commences with the Commission's holistic view of how the CMIA is currently operating. The Commission uses available data on cases under the CMIA to map its current operation and identifies, from the input received in submissions and consultations, what works well and where change is required. The Commission makes two recommendations to improve the way in which data is recorded in relation to CMIA cases to ensure better information can be ascertained about the continued operation of the legislation.
- 2.5 The Commission discusses the key issues, identified in submissions and consultations, that flow across a range of areas of the CMIA's operation or affect the operation of the Act in a systemic way.
- 2.6 The chapter then details the Commission's overall approach to addressing these systemic issues through 12 recommendations to change the way the CMIA operates across multiple jurisdictions and sectors. These threshold recommendations provide the foundation for the changes to discrete areas of operation detailed in Chapters 3–11 that follow.

- 2.7 The recommendations seek to bring about changes in how the CMIA currently operates by:
- enshrining a set of statutory guiding principles for decision makers under the CMIA, including a specialised set of statutory principles for decisions made in relation to young people¹
 - enshrining a statutory principle and additional measures targeted at addressing unreasonable delay
 - ensuring there is education, training and raised awareness of people who work under the CMIA provisions to support the effective operation of the Commission's recommended changes.
- 2.8 Finally, the Commission presents four case scenarios to illustrate, from a holistic perspective, the changes and improvements to the operation of the CMIA under the new pathways created by its recommendations.

Overview of the CMIA

- 2.9 Section 1 of the CMIA sets out its purposes as follows:
- (a) to define the criteria for determining if a person is unfit to stand trial;
 - (b) to replace the common law defence of insanity with a statutory defence of mental impairment;
 - (c) to provide new procedures for dealing with people who are unfit to stand trial or who are found not guilty because of mental impairment.
- 2.10 The CMIA sets out the law and procedure regarding:
- the process and criteria for determining if a person is unfit to stand trial
 - the process and criteria for the statutory defence of mental impairment (which replaced the common law defence of insanity)
 - the consequences of findings of unfitness to stand trial and of not guilty because of mental impairment
 - the supervision and management of people found unfit to stand trial or not guilty because of mental impairment.

1

The term 'young people' is used as a general term in this report 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.

- 2.11 The CMIA is structured around 10 primary parts, which relate to the key aspects of the legislation.
- *Part 1: preliminary matters*—the purposes of the CMIA, definitions and the proceedings and courts where the CMIA applies.
 - *Part 2: unfitness to stand trial*—the process and criteria for determining whether an accused is unfit to stand trial, the findings that can be made and appeals in relation to unfitness to stand trial.
 - *Part 3: special hearings*—the process for the hearing that occurs after an accused has been found unfit to stand trial, to determine whether he or she committed the offence charged, the findings that can be made and appeals in relation to special hearings.
 - *Part 4: defence of mental impairment*—the process and test for determining whether an accused is not guilty of an offence because of mental impairment, the findings that can be made and appeals in relation to the mental impairment defence.
 - *Part 5: supervision of people under the CMIA*—supervision orders, the process for making supervision orders, the process for reviewing, varying and revoking supervision orders and the parties that are represented in the supervision and review processes.
 - *Part 6: principles*—the principles on which the court is required to act in making, reviewing, varying and revoking supervision orders, information about the supervised person's mental condition and available treatment services and information from family members and victims.
 - *Part 7: leave of absence*—types of leave for people subject to a supervision order under the CMIA, processes for applying for, granting, suspending and revoking leave, the bodies and parties involved in leave processes and principles that apply to granting leave.
 - *Part 7A: interstate transfer*—provisions that apply to the transfer of people subject to a supervision order from Victoria to other states and from other states to Victoria.
 - *Part 7B: absconders*—provisions that apply to people subject to a supervision order who abscond to Victoria from another state.
 - *Part 8: general*—requirements for giving notice of hearings to family members and victims, suppression orders and other procedural matters.

Mapping the systemic operation of the CMIA

- 2.12 This section maps out the current operation of the CMIA in Victoria, using available data on cases under the CMIA and information gathered in consultations and submissions.

Data on the current operation of the CMIA

Available data provided to the Commission

- 2.13 The Commission requested and received significant and helpful information regarding the people who are subject to the CMIA and cases in which unfitness to stand trial and the defence of mental impairment are raised.

2.14 This information includes:

- data provided by the Sentencing Advisory Council from its higher courts sentencing database on cases in the higher courts that had been determined and resulted in a finding under the CMIA. The data covered a 12-year period from 1 July 2000 to 30 June 2012. Access was also provided to the judgments for these cases, where such judgments were available, which were manually analysed by the Commission²
- data provided by the Victorian Institute of Forensic Mental Health (Forensicare) on the number of requests for reports by the Office of Public Prosecutions under the CMIA³
- data provided by the Department of Human Services on the people subject to supervision orders as at 30 June 2013⁴
- data on the people supervised by Forensicare on supervision orders as at 30 June 2013 and on the number of hearings relating to the review of supervision orders and granting of extended leave under the CMIA⁵
- approximate data provided by the Department of Human Services and the Office of Public Prosecutions on 25 young people who were known to each organisation to have had some involvement in the current CMIA processes over the period from 1 July 2012 to 31 October 2013⁶
- data provided by the Children's Court Clinic on the number of assessments for unfitness to stand trial.

2.15 This information has materially assisted the Commission to understand how the CMIA operates and to identify the areas where change is required to improve the operation of the Act.

Gaps in the data

2.16 Information was not available to represent a complete picture of the cohort of people dealt with under the CMIA in either the Supreme Court or County Court or where there have been issues of unfitness or the defence of mental impairment raised in the Magistrates' Court or Children's Court.

2.17 Information was not available on the incidence and outcomes of CMIA cases in a way that enables identification of the following:

- the number of cases in which an issue was raised regarding unfitness to stand trial and/or the defence of mental impairment
- in cases where an issue regarding unfitness to stand trial and/or the defence of mental impairment was raised, what findings were made as to unfitness and criminal responsibility
- the number of cases in the Magistrates' Court or Children's Court where an issue as to unfitness to stand trial was raised and the charges were withdrawn by Victoria Police (due to a current lack of process to deal with the charges in those jurisdictions)

2 The higher courts sentencing database is collated and maintained by the Sentencing Advisory Council using data obtained from the Supreme Court and County Court on all cases finalised by way of sentence or other order, such as a supervision order under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic). See **Appendix D** for an explanation of the data source and methodology.

3 Data provided by the Victorian Institute of Forensic Mental Health (Forensicare) on report requests by the Office of Public Prosecutions (OPP) in 2012–13 and the first two quarters of 2013–14; see also Victorian Institute of Forensic Mental Health (Forensicare), *Report of Operations 2012–2013* (2013) 34.

4 Data provided by the Department of Human Services (DHS) as at 30 June 2013.

5 Data provided by Forensicare on court hearings relating to people supervised by Forensicare from 2010–11 to 2012–13; see also Victorian Institute of Forensic Mental Health (Forensicare) above n 3, 32–3.

6 De-identified data provided by DHS (collated by the OPP and DHS). The information was initially collated by the OPP to identify the cases where it had been asked to provide advice regarding the jurisdiction of matters involving young people and the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (approximately 21 matters). DHS added to the data by identifying four additional matters and documenting the known previous or current involvement with its programs. See **Appendix D** for an explanation of the data source and methodology.

- the number of cases in the Magistrates' Court or Children's Court where the defence of mental impairment was raised and the accused was found not guilty because of mental impairment and discharged
- the socio-demographic and health characteristics of people who raise unfitness to stand trial or the defence of mental impairment and become subject to a finding and/or supervision under the CMIA
- comprehensive data on the length of time that people subject to CMIA supervision orders are supervised by either the Department of Health or the Department of Human Services prior to being released.

2.18 The reasons why this information is not currently available include:

- The processes involved operate in a very complex manner and involve multiple organisations, including Victoria Police, Victoria Legal Aid, the Office of Public Prosecutions, four jurisdictions of Victorian courts, the Department of Justice, Forensicare, the Department of Health and the Department of Human Services.
- Some information regarding cases under the CMIA is not routinely recorded or collected by organisations involved in the operation of the CMIA. For example, over the review period Victorian courts did not record the particular findings made when there is an issue as to unfitness or the defence of mental impairment.
- Some information regarding cases under the CMIA relies on individual practices. For example, practices of police prosecutors differ in recording whether charges are withdrawn due to unfitness or mental impairment.
- Some information is solely reliant on anecdotal evidence. For example, the prevalence of cases where a person has chosen to plead guilty rather than raise the defence of mental impairment or has proceeded through a usual criminal proceeding rather than raise the issue of unfitness.

2.19 The Commission has formed the view that the gaps in the data on the operation of the CMIA and people who raise issues of unfitness or the defence of mental impairment should be addressed through two recommendations.

2.20 In making these recommendations, the Commission notes the recommendations to improve data collection 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*.⁷

Recommendations

- 1 All courts in Victoria should make changes to their recording practices for criminal cases to ensure that issues, findings and outcomes in relation to unfitness to stand trial and the defence of mental impairment under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)* are recorded and are capable of being analysed in a consistent way.
- 2 Victoria Police should make changes to the procedure for recording withdrawals due to issues of unfitness to stand trial or the defence of mental impairment to ensure more accurate measurement of the matters which do not proceed under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)*.

How is the CMIA currently operating?

How prevalent are CMIA cases compared with other criminal cases?

- 2.21 In its *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997: consultation paper* ('the consultation paper'), the Commission described the context in which the CMIA operates in the criminal justice system and the strict ambit of its operation within the population of people with mental conditions who come into contact with the criminal justice system. Such mental conditions can include mental illness, intellectual disability or other cognitive impairments, such as acquired brain injury or fetal alcohol spectrum disorder.⁸
- 2.22 It has been clearly established that people with such conditions are over-represented in the criminal justice system in jurisdictions, including Australia, the United Kingdom and the United States. There is evidence of over-representation in Victorian prisons of people with mental conditions, including acquired brain injury,⁹ intellectual disability¹⁰ and mental illness.¹¹ Evidence has also emerged in other Australian jurisdictions, such as New South Wales, of the over-representation of people with mental conditions at various stages of the criminal justice system, including prisons and contact with police, and of the over-representation of young people with mental conditions in the juvenile justice population.¹²
- 2.23 The CMIA applies to a very particular group of the larger cohort of people with mental conditions who come into contact with the criminal justice system—people who are charged with an offence and who have a mental condition that:
- impairs their capacity to stand trial for the charge according to one of the criteria for unfitness to stand trial, and/or
 - satisfies the requirements for the defence of mental impairment and renders them not criminally responsible for the offending behaviour.
- 2.24 The information available to the Commission suggests that such cases make up a relatively small proportion of the overall cases that proceed through the criminal courts in Victoria.
- 2.25 Over a 12-year period from 2000–01 to 2011–12, there were 159 cases determined under the CMIA in the higher courts (the Supreme Court and County Court).¹³ That is, cases where there was an issue of unfitness to stand trial and/or mental impairment that resulted in a finding and an order being made (either an unconditional release or a custodial or non-custodial supervision order).
- 2.26 In comparison to the number of cases that are finalised by way of a sentence (following a plea or finding of guilty) in the criminal courts under non-CMIA processes, CMIA cases are very infrequent.
- 2.27 In 2011–12, the Supreme Court and County Court ordered sentences in 1,939 cases.¹⁴ In that same year, the Supreme Court and County Court made orders in 19 CMIA cases. CMIA cases therefore made up only approximately one per cent of the total cases that resulted in a sentence or a CMIA order in the higher courts.

8 Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, Consultation Paper No 17 (2013) 34–9.

9 Martin Jackson and Glen Hardy, Department of Justice, *Acquired Brain Injury in the Victorian Prison System* (Corrections Research Paper Series, Paper No 4, April 2011) 22; Jane Lee, 'One in Two Inmates has Brain Injury', *The Age* (Melbourne), 25 March 2013, 2.

10 Victorian Parliament Law Reform Committee, above n 7, 14, 33. See also Shasta Holland et al, Department of Justice, *Intellectual Disability in the Victorian Prison System: Characteristics of Prisoners with an Intellectual Disability Released from Prison in 2003–2006* (Corrections Research Paper Series, Paper No 2, 2007) 9.

11 Victorian Ombudsman, *Investigation into Prisoner Access to Health Care* (2011) 5.

12 Eileen Baldry, 'Disabling Justice' (2013) 8 *Crime and Justice: Insight* 26.

13 Data provided by the Sentencing Advisory Council, higher courts sentencing database.

14 Ibid.

- 2.28 As a further comparison, the Magistrates' Court ordered sentences in 80,900 cases in this same period.¹⁵ In the Children's Court in the same year, 4,533 cases were finalised by way of a sentence or other disposition after a finding of guilt.¹⁶ These statistics reflect that there is a significantly larger volume of cases that are determined in the Magistrates' Court involving relatively less serious crimes and quicker disposal methods. In the higher courts matters are more serious and complex and can involve a jury trial to determine criminal responsibility, and hence take more time to finalise. The Children's Court deals with matters that involve young people and a wider range of offences than the Magistrates' Court in terms of seriousness and complexity, and these require a specialised approach.

How prevalent are issues of unfitness to stand trial compared with mental impairment?

- 2.29 Whether the issue of unfitness to stand trial and the defence of mental impairment require examination in a criminal case is dependent on the timing of the mental condition.
- If an accused has a mental condition at the time of the trial, the issue that is to be determined is whether they are unfit to stand trial.
 - If an accused had a mental condition at the time of the alleged offence, the issue that is to be determined is whether they committed the offence as charged or whether they have a defence of mental impairment.
- 2.30 It is therefore important, in considering the operation of the CMIA, to distinguish between people who go down the CMIA pathway after raising unfitness to stand trial and those people where there is no issue as to unfitness and who proceed under the CMIA solely by raising the defence of mental impairment. In some cases, both issues can be present.
- 2.31 An accused can become subject to the CMIA in three possible scenarios:
- *Scenario 1—issue of unfitness alone*: there is an issue about whether the accused is unfit to stand trial but the defence of mental impairment is not raised to the charge.
 - *Scenario 2—issues of unfitness and defence of mental impairment*: there is an issue about whether the accused is unfit to stand trial and the defence of mental impairment is raised to the charge.
 - *Scenario 3—defence of mental impairment alone*: there is no issue about whether the accused is unfit to stand trial but the defence of mental impairment is raised to the charge.
- 2.32 The limited information available to the Commission suggests that Scenario 2 may be the most prevalent overall in terms of issues raised. Forensicare received 61 requests for reports under the CMIA from the Office of Public Prosecutions¹⁷ in 2012–13.¹⁸ Of these, 27 requests (44.3 per cent) were for reports about unfitness and mental impairment. A further 18 requests (29.5 per cent) were for issues of fitness alone. Fifteen report requests were made for mental impairment alone (24.6 per cent).¹⁹ In the first two quarters of the following year (2013–14), there were nine report requests for unfitness and mental impairment, nine for unfitness alone and seven for mental impairment alone.

¹⁵ Data provided by the Sentencing Advisory Council, Magistrates' Court sentencing database.

¹⁶ Children's Court of Victoria, *Annual Report 2011–2012* (2013) 15.

¹⁷ The Commission was advised that it is the practice of the OPP to seek expert opinion by way of a report on unfitness to stand trial if there is a question as to an accused's unfitness to stand trial and on the defence of mental impairment if the defence has raised this as a defence to a charge.

¹⁸ Data provided by Forensicare on report requests by the OPP in 2012–13 and the first two quarters of 2013–14. This information did not include the outcomes of such cases and does not represent all the requests for reports made over the relevant period. Prior to the beginning of 2012, when funding was secured for such reports from the Department of Justice, Forensicare's practice was to cap the number of reports completed in response to such requests due to a lack of specific funding for such work.

¹⁹ One report request was recorded as for 'other', which relates to a one-off report that was for a matter involving the offence of infanticide. Generally, Forensicare only accepts requests related to unfitness and mental impairment under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

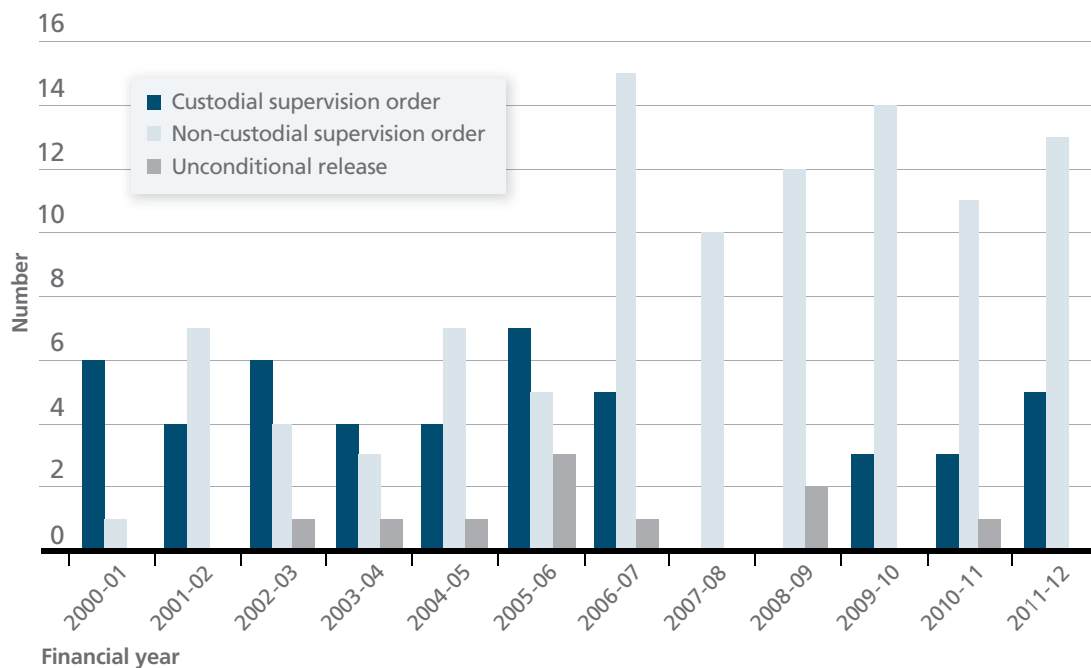
- 2.33 Approximate information available in relation to young people under the CMIA indicates that the most prevalent circumstance is one where there is an issue of unfitness alone due to intellectual disability.²⁰

How does the CMIA operate in the higher courts?

- 2.34 The provisions of the CMIA largely apply to trials and proceedings for indictable offences in the higher courts (the Supreme Court of Victoria and County Court of Victoria).²¹

Orders

- 2.35 **Figure 1** shows the number of orders for unconditional release, custodial supervision orders and non-custodial supervision orders imposed in the Supreme Court and County Court over the period 2000–01 to 2011–12.²² It shows that there has been a small but gradual increase in the number of cases where orders have been imposed under the CMIA.
- 2.36 It is very rare for the court to release a person unconditionally under the CMIA. There were only 10 such orders over the past 12 years. The remaining 149 orders were for custodial or non-custodial supervision. Overall, there were more non-custodial supervision orders (102) imposed over the 12-year period than custodial supervision orders (47).



Source: Sentencing Advisory Council, higher courts sentencing database

Figure 1: Number of orders imposed under the CMIA in the higher courts by order type, 2000–01 to 2011–12

²⁰ De-identified data provided by DHS (collated by the OPP and DHS): see **Appendix D**. In 13 of the 25 cases of which DHS and the OPP were collectively aware, the issue was unfitness to stand trial. Two cases concerned both issues of unfitness and the defence of mental impairment. Only one case involved a defence of mental impairment only. In nine cases information was not available on this issue. In 18 cases, there was information available on the young person's mental condition, which in all 18 cases was an intellectual disability. In one of these cases the young person had autism as well.

²¹ *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 4(1).

²² Data was not available on the number of discharges in the Magistrates' Court and Children's Court after a finding of not guilty because of mental impairment.

People subject to orders

- 2.37 The vast majority of people subject to supervision orders from 2000–01 to 2011–12 were males (131, 82.4 per cent), with the remaining 28 orders imposed on females.
- 2.38 The majority of people in cases under the CMIA in the higher courts were adults. The average age was 38.5 years. At the time the order was imposed, 93.1 per cent were aged 21 years or older. The oldest person made subject to a CMIA order was 85 years old and the youngest two were 17 years old when the order was imposed.
- 2.39 Eleven individuals were under 21 years old at the time the order was imposed (see **Table 5** in **Appendix D**). It is likely that in most of these cases, these young people were children (under 18 years old) at the time of the offences, given the time it can take for a matter to progress through the court system and be heard, determined and an order imposed in a higher court.²³ As recently noted by Victoria Legal Aid, ‘it is not unusual for trials in Victoria to occur up to two or three more years after the alleged offences were detected or committed’.²⁴ It can take an average of 14 months for a matter to be finalised in Victoria from date of initiation in a summary court to date of finalisation in a higher court.²⁵ The Productivity Commission’s latest report on government services indicates that as at 30 June 2013, 18.1 per cent of non-appeal cases in the County Court²⁶ were older than 12 months and 3.2 per cent were older than 24 months.²⁷
- 2.40 The average age for people who were unconditionally released was higher than for custodial supervision orders and non-custodial supervision orders (although there were only 10 people who were unconditionally released).²⁸ Analysis of the five available judgments in these cases showed that four cases where the person was unconditionally released involved elderly people who were charged with historical sex offences and found unfit to stand trial due to the onset of dementia.

Offences

- 2.41 The most common principal offences in cases under the CMIA over the 12-year period, in descending order of frequency, were:
- intentionally causing serious injury (34 orders, 21.4 per cent)
 - murder (25 orders, 15.7 per cent)
 - attempted murder (14 orders, 8.8 per cent)
 - indecent act with a child under 16 years (12 orders, 7.5 per cent).
- 2.42 This is consistent with the observation made in a study of 146 CMIA cases involving people found not guilty because of mental impairment, from the commencement of the CMIA to mid-2006 (including people transitioned over from the ‘Governor’s pleasure’ regime). The study observed that while the offences in such cases tended to be a ‘violent act, usually murder against a family member or close acquaintance’, there was now a ‘substantial minority of cases [involving] minor or non-violent offences’.²⁹

23 This includes investigation and charging of an offence, preliminary and committal hearings in the Children’s Court or Magistrates’ Court, transfer to a higher court for preliminary hearing, being listed for trial, reaching and completion of trial and a hearing to determine and impose an order.

24 Victoria Legal Aid, *Delivering High Quality Criminal Trials*, Consultation and Options Paper (2014) 29. The paper identifies the many complex factors that underlie the time taken and delays in criminal trials, discussion of which are beyond the scope of this report. See also Jason Payne, Australian Institute of Criminology, *Criminal Trial Delays in Australia: Trial Listing Outcomes*, Research and Public Policy Series No 74 (2007).

25 Australian Bureau of Statistics, *Criminal Courts Australia 2012–13* (2013) 4513, Table 17: in 2012–13, it took an average of 17.2 weeks for a matter to be finalised in the Magistrates’ Court, 17.8 weeks in the Children’s Court and 38.1 weeks in the higher courts (Supreme Court and County Court). Combining these figures to get a sense of the time taken to finalise matters that are committed from the lower courts to the higher courts produces an average time of 55.8 weeks (matters committed from the Magistrates’ Court) and 55.9 weeks (matters committed from the Children’s Court). Converted into months, this equates to approximately 14 months. This does not include the time taken to investigate and lay charges for the offence.

26 The majority (nine) of the 11 cases involving people aged under 21 years were dealt with in the County Court.

27 Steering Committee for the Review of Government Service Provision, *Report on Government Services 2014* (2014) Table 7A.19, 5.

28 See **Table 5** in **Appendix D**.

29 Janet Ruffles, *The Management of Forensic Patients in Victoria: The More Things Change, The More They Remain the Same* (PhD Thesis, Monash University, 2010) ii.

- 2.43 The offence distribution data on the CMIA cases from 2000–01 to 2011–12 (**Table 6 in Appendix D**) shows that while the most serious offences such as murder, attempted murder and intentionally causing serious injury make up the majority of cases, a substantial minority (41.5 per cent) of cases involved indictable offences triable summarily. Such cases have involved more minor and non-violent offences, such as theft, assault and obtaining financial advantage by deception. **Figure 1** also shows that there have been more non-custodial supervision orders in the latter six years than in the first six years of the 12-year period, which may indicate that it is more common for people to become subject to the CMIA for less serious offences than it has been in previous years.
- 2.44 A custodial supervision order was imposed in 88.0 per cent of cases involving murder and in 64.3 per cent of cases involving attempted murder. A non-custodial supervision order was more prevalent for the offence of causing serious injury intentionally (73.5 per cent) and for almost all other offence types. The distribution of orders according to offence types is discussed further in Chapter 10 in the context of nominal terms imposed on supervision orders.

Jurisdiction

- 2.45 More CMIA cases are heard in the County Court than in the Supreme Court.
- 2.46 The majority of cases under the CMIA from 2000–01 to 2011–12 were heard and determined in the County Court (70.4 per cent, 112 cases). The remaining 47 cases were heard and determined in the Supreme Court (29.6 per cent).
- 2.47 Forensicare received 48 requests for reports from the Office of Public Prosecutions in 2012–13 for matters in the County Court compared with eight in the Supreme Court. There were also more reports requested for matters in the County Court in the first two quarters of 2013–14, with 14 requested in that jurisdiction compared with four reports requested for matters in the Supreme Court.³⁰

How does the CMIA operate in the Magistrates' Court and Children's Court?

- 2.48 The CMIA currently has limited application in courts of summary jurisdiction—the Magistrates' Court of Victoria and the Children's Court of Victoria. The defence of mental impairment applies to summary offences and indictable offences heard and determined summarily in the Magistrates' Court and the Children's Court.³¹ The only outcome that can occur after a finding of not guilty because of mental impairment in the summary jurisdiction is for the person to be discharged. The unfitness to stand trial process does not apply in the Magistrates' Court or the Children's Court. If a person appears in either court on an indictable offence and the question of fitness arises, the matter must go through committal and transfer to the County Court in order to proceed by way of an investigation of unfitness.
- 2.49 There was no data equivalent to that on the CMIA in the higher courts available on the operation of the CMIA within the limited jurisdiction of the Magistrates' Court and Children's Court.

- 2.50 Therefore, the Commission was not able to ascertain the volume of cases under the CMIA's current operation in those courts, including cases:
- involving summary offences where unfitness to stand trial or the defence of mental impairment was raised and charges were withdrawn by Victoria Police³²
 - where the accused was found not guilty because of mental impairment and was discharged
 - where the issue of unfitness to stand trial and/or the defence of mental impairment was raised and committal and transfer of the matter to a higher court was required due to the lack of powers of the Magistrates' or Children's Court to determine unfitness and make orders.
- 2.51 Report requests provide some indication of the number of matters in the summary jurisdiction where unfitness or the defence of mental impairment were raised.
- 2.52 In the Children's Court, in 2012–13, the Children's Court Clinic received four referrals for an assessment of unfitness to stand trial (of a total 262 criminal referrals).³³
- 2.53 Forensicare received five report requests for matters in the Magistrates' Court in 2012–13, and seven requests were received in the first two quarters of 2013–14.³⁴
- 2.54 Information gathered in submissions and consultations suggests that it is more common for issues of unfitness to be raised in the summary jurisdiction than the defence of mental impairment for both adults and young people.
- 2.55 The Office of Public Prosecutions (OPP) provided information to the Commission on the number of cases that it had been involved in or had been asked by Victoria Police to provide advice³⁵ involving adults and children in the summary jurisdiction where issues of unfitness or the defence of mental impairment had been raised. These figures are approximate only and do not provide a complete picture of the matters in which issues of unfitness or the defence of mental impairment may have arisen.
- From 15 July 2008 to 14 November 2013, the OPP provided advice in approximately 48 matters involving adults.
 - From 1 July 2012 to 31 October 2013, the OPP provided advice in approximately 21 matters involving young people charged with offences as children.

How many CMIA matters determined in the County Court were within the jurisdiction of the Magistrates' Court or the Children's Court?

- 2.56 A key issue for the Commission in this review is whether the application of the CMIA should be further extended in the Magistrates' Court and Children's Court. Accordingly, the Commission has paid particular attention to the cases that proceeded in the higher courts under the current CMIA provisions that could have proceeded in the Magistrates' Court or Children's Court if either court had the requisite powers under the CMIA. In relation to this issue, the Commission has focussed in particular on matters dealt with in the County Court. This is because cases involving offences that could be dealt with in the Magistrates' Court or Children's Court would generally be committed to the County Court for disposition, rather than the Supreme Court, which has jurisdiction over the most serious criminal offences, such as murder.

32 Victoria Police provided the Commission with some indicative information about the number of summary matters withdrawn in both courts due to mental impairment. However, as this data is not recorded in a systematic way, it does not reliably indicate how frequently the issue of unfitness to stand trial or the defence of mental impairment is raised.

33 The Children's Court Clinic also provided information for 2009–10, which indicated that of the 337 youth criminal referrals, there were six young people referred state-wide for fitness to stand trial.

34 Data provided by Forensicare on report requests by the OPP in 2012–13 and the first two quarters of 2013–14.

35 The Director of Public Prosecutions is empowered to give advice to Victoria Police in relation to an investigation: *Public Prosecutions Act 1994* (Vic) s 22(1)(ce).

- 2.57 Analysis of the 159 cases dealt with in the higher courts under the CMIA from 2000–01 to 2011–12 indicated that 59 cases (37.1 per cent of all higher court cases) were determined in the County Court and involved a principal offence (or a form of that offence)³⁶ that was an indictable offence triable summarily. Therefore, approximately half of the 112 cases over the 12-year period that proceeded in the County Court could have been heard and determined in the Magistrates' Court had there been the power for the court to deal with unfitness or make orders following a finding of not guilty because of mental impairment.
- 2.58 Nine of the 11 people aged under 21 who were dealt with in the higher courts under the CMIA from 2000–01 to 2011–12 had been charged with offences within the jurisdiction of the Children's Court (non-death-related indictable offences). This comprises 5.7 per cent of total CMIA cases in the higher courts and 8.0 per cent of the cases determined in the County Court. Given the time that matters take to proceed and be heard in the higher courts (see [2.39]), it can be assumed that most if not all of the nine cases involved an accused who was under 18 at the time of the offence. If so, these cases would have come within the criminal jurisdiction of the Children's Court. This provides some indication of the number of cases that could have been dealt with in the Children's Court if it had the power to deal with unfitness or impose orders after a finding of not guilty because of mental impairment.

Who are the people subject to the CMIA?

- 2.59 A person who becomes subject to the CMIA may have a particular mental condition³⁷ that has resulted in a determination of unfitness to stand trial or not guilty because of mental impairment. Information available to the Commission suggests that it is people with a mental illness rather than an intellectual disability or other cognitive impairment who most frequently come under the CMIA provisions under its current operation.
- 2.60 In 2012–13, Forensicare received 50 requests for a psychiatric report and 11 requests for a psychological report. In the first two quarters of 2013–14, Forensicare received 18 requests for a psychiatric report and seven requests for a psychological report.³⁸ Psychiatric reports are usually required for a person who has a mental illness, while a person with an intellectual disability will require a different assessment, either by a psychologist, neuropsychologist or neurologist.

People with a mental illness who are subject to the CMIA

- 2.61 Mental illness could be the basis for a person being found unfit to stand trial because of 'disordered or impaired mental processes' or not guilty because of 'mental impairment'. A study of 146 people who had been found not guilty because of mental impairment (from the commencement of the CMIA to mid-2006), and people transitioned over from the Governor's pleasure regime, drew the following conclusion about the 'typical' person who is subject to the CMIA:

the picture of the typical [person found not guilty because of mental impairment] was of a disenfranchised and seriously disordered individual with a strong history of contact with psychiatric services but whose contact with the criminal justice system resulting in the verdict was often an isolated event.³⁹

³⁶ In relation to some offences, whether or not the particular offence is categorised as indictable triable summarily depends on the value of the damage caused or property stolen or the particular level of intention associated with the commission of an offence. See **Appendix D** for more detail of the categorisation of indictable offences triable summarily.

³⁷ It is possible for the condition underlying unfitness to stand trial to be a physical one: see Chapter 3 at [3.18].

³⁸ Data provided by Forensicare on report requests by the OPP in 2012–13 and the first two quarters of 2013–14.

³⁹ Ruffles, above n 29, iii.

- 2.62 Of the 146 participants, 72.4 per cent had previous contact with psychiatric services, 58.2 per cent had prior psychiatric hospitalisation, 65.1 per cent had a primary diagnosis of schizophrenia and 10.3 per cent had another psychotic disorder.⁴⁰
- 2.63 The study also reported that only a very small number of participants in the study had been returned to custody while on extended leave or a non-custodial supervision order due to further offending. It was noted that this is consistent with other research⁴¹ that demonstrates that the ‘risk of serious reoffending amongst current forensic patients on release to the community is low’.⁴²
- 2.64 Forensicare, a statutory agency in the Department of Health, is responsible for supervising people with a mental illness under the CMIA. At the end of 2012–13, there were 154 people with a mental illness supervised by Forensicare under the CMIA. Of these:
- 70 people were on custodial supervision orders
 - seven people were on extended leave under custodial supervision orders
 - 77 people were on non-custodial supervision orders.⁴³
- 2.65 People on custodial supervision orders reside in Thomas Embling Hospital. It is the only secure mental health service in Victoria for people subject to the CMIA and has 116 beds. These beds are for people detained under the CMIA, as well as for people who are transferred from the prison system due to a mental illness and patients from the public mental health system who require specialised management. Beds at Thomas Embling Hospital are spread across distinct units, according to two programs—Acute Care and Continuing Care.
- 2.66 Forensicare has the primary responsibility for the treatment and management of people on a custodial supervision order. The Community Operations arm of Forensicare supervises people on a non-custodial supervision order. However, different services can carry out the actual management and treatment of a person under supervision. An area mental health service or private practitioners may have the responsibility for the treatment and management of people subject to a non-custodial supervision order.⁴⁴ They are also responsible for monitoring whether the person is complying with the conditions of their non-custodial supervision order and for identifying and managing any risks.

People with an intellectual disability or other cognitive impairment under the CMIA

- 2.67 There is less information available about people who become subject to the CMIA by reason of an intellectual disability or other cognitive impairment. Information available to the Commission suggests that it is more common for such conditions to underlie unfitness to stand trial than a defence of mental impairment.⁴⁵
- 2.68 The study described above at [2.61] of 146 people found not guilty because of mental impairment under the CMIA,⁴⁶ and people transitioned from the Governor’s pleasure regime, reported that only 10 participants had a primary diagnosis of intellectual disability (6.8 per cent).⁴⁷

40 Ibid 117–18.

41 Lisa Jo Bertman-Pate et al, ‘The New Orleans forensic aftercare clinic: A Seven Year Review of Hospital Discharged and Jail Diverted Clients’ (2004) 22(1) *Behavioral Sciences and the Law* 159; Alexander Simpson et al, ‘Outcome of patients rehabilitated through a New Zealand Forensic Psychiatry Service: A 7.5 year retrospective study’ 24 *Behavioral Sciences and the Law* (2006) 833, cited in Ruffles, above n 29, 173.

42 Ruffles, above n 29, 173. Her study found that of the 41 forensic patients who were granted extended leave while on a custodial supervision order, two (4.88%) had extended leave suspended or revoked on the grounds of the commission of a criminal act. Of the 24 forensic patients who were originally detained under a custodial order but were subsequently granted non-custodial status, two (8.33%) were returned to custodial supervision by reason of the commission of a criminal act.

43 Victorian Institute of Forensic Mental Health (Forensicare), above n 3, 32.

44 Department of Health, *Program Management Circular—Protocol between Forensicare and Area Mental Health Services for People Subject to Non-custodial Supervision Orders* (PMC07031, 2012) 1.

45 This may be due to the uncertainty surrounding the current definition of mental impairment and whether it includes an intellectual disability. This is discussed further in Chapter 4.

46 From the commencement of the CMIA to mid-2006.

47 Ruffles, above n 29, 118.

- 2.69 Analysis of the available judgments in the 159 cases in the higher courts under the CMIA from 2000–01 to 2011–12, together with information provided to the Commission in consultations, provides some indication of the features of these kinds of cases. Such cases often involved accused who had an intellectual disability and were charged with sexual offences or accused charged with historical sex offences who were elderly and had dementia.⁴⁸ While these were a small group within the sample, this group is very different to the ‘typical’ person who may be subject to the CMIA and illustrates the range of circumstances in CMIA cases.
- 2.70 Disability Services (through the Department of Human Services) supervises people with an intellectual disability or cognitive impairment who are subject to a supervision order under the CMIA.
- 2.71 The Department of Human Services advised the Commission that since 1998 there have been 40 orders made under the CMIA in relation to people with an intellectual disability. As at the end of 2012–13, there were 30 people subject to a supervision order under the CMIA. Of these:
- three people were on a custodial supervision order
 - 27 were on a non-custodial supervision order.
- 2.72 The ages of people subject to supervision ranged from 19 to 71 years.⁴⁹
- 2.73 There are 19 places in residential treatment institutions and treatment facilities. These places are available for people who meet the criteria for admission under the *Disability Act 2006* (Vic). This may include people who are subject to a custodial supervision order. There are five beds at the Long Term Rehabilitation Program at Plenty Residential Services in Bundoora managed within the North Division, North Eastern Melbourne Area of the Department of Human Services; and 14 beds at the Intensive Residential Treatment Program of the Disability Forensic Assessment and Treatment Service (DFATS).⁵⁰ People subject to custodial supervision orders must also meet criteria under the Disability Act in order to be admitted to a residential institution or residential treatment facility.⁵¹
- 2.74 The Secretary to the Department of Human Services also has responsibility for supervising people with an intellectual disability or cognitive impairment subject to a non-custodial supervision order. Case management is delivered across the state by the Department of Human Services.
- 2.75 The Commission is aware of two cases under the CMIA involving people who had other cognitive impairments—suggested in both cases to be an acquired brain injury.⁵² The Commission’s analysis at [2.69] suggests that a small number of people who were dealt with under the CMIA had dementia, also classified as a cognitive impairment.

48 In almost all of the cases involving people with dementia, the offences were historical offences and had occurred many years earlier and prior to the onset of the dementia.

49 Data provided to the Commission by DHS as at 30 June 2013.

50 Ibid.

51 People must meet the criteria under section 87 for admission to a residential institution and section 152 for admission to a residential treatment facility.

52 *R v Stein* [2012] VSC 487 (8 October 2012); *R v Coulter* [2014] VSC 42 (27 February 2014).

Young people subject to the CMIA

- 2.76 The limited information available about young people who come into contact with the CMIA suggests that issues of unfitness to stand trial and the defence of mental impairment arise less frequently than with adults. However, the low numbers could merely reflect the currently limited jurisdiction of the CMIA in the Children's Court and not the actual prevalence of such issues.
- 2.77 Approximate information provided by the Department of Human Services and the Office of Public Prosecutions on 25 cases involving young people who had contact with the CMIA⁵³ suggests that issues of unfitness—linked with impairments that are the result of factors related to developmental difficulties and intellectual disability—arise more commonly than the defence of mental impairment. The youngest person was 13 years of age, and in many cases the accused had passed the age of 18 years by the time the matter had resolved.⁵⁴ The most common ages were 16 years (five young people) and 17 years (seven young people).
- 2.78 **Table 11 in Appendix D** shows that 16 of the 25 young people were committed from the Children's Court to the County Court to be dealt with under the CMIA provisions. In four cases the young person was declared liable for supervision under the CMIA, with a non-custodial supervision order imposed in each case. All four young people were 18 years or over when the CMIA supervision order was imposed. In one further case, the young person had been declared liable to supervision but a supervision order had not been made.
- 2.79 Supervision of children and young people who are on CMIA orders may be provided jointly across a range of areas in the Department of Human Services, including Youth Justice, Child Protection and Disability Services. The information available to the Commission suggests that it is common for such young people to have had current or previous involvement in the youth justice, child protection and disability services systems (see [6.25]–[6.28]).

Key themes on the CMIA's operation from submissions and consultations

- 2.80 The ambit of the Commission's review of the CMIA—under the terms of reference and supplementary terms of reference—is to examine its operation and report on those areas where change is required to ensure that the CMIA operates justly, effectively and consistently with the principles that underlie it. This necessitated coverage of multiple jurisdictions and government departments and people from a range of professional and non-professional backgrounds.
- 2.81 The operation of the CMIA was examined within all court levels in Victoria and three government departments: the Department of Justice (including courts—now Court Services Victoria), the Department of Health (including Forensicare) and the Department of Human Services (including Disability Services, Youth Justice and Child Protection). The Commission examined how the CMIA operated for different groups, and the issues specific to people with a mental illness and those specific to people with an intellectual disability or other cognitive impairment. The Commission also examined the particular issues in relation to young people under the law. The Commission considered the roles of a range of different people who work under the legislation and how they functioned under the CMIA. These included:

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De-identified data provided by DHS (collated by the OPP and DHS): see **Appendix D**.
In order for a person to be dealt with in the Children's Court they must have been aged under 18 years at the time of committing the offence.

- lawyers who represent accused with mental conditions where there might be an issue of unfitness or the defence of mental impairment or who are dealt with under the CMIA
- police prosecutors who prosecute matters in the Magistrates' Court and Children's Court where issues of unfitness and the defence of mental impairment arise
- prosecutors at the Office of Public Prosecutions who prosecute matters in the Supreme Court and County Court where issues of unfitness and the defence of mental impairment arise
- judicial officers in the Magistrates' Court and the Children's Court who are required to act in accordance with the limited powers under the CMIA in criminal matters where issues of unfitness and the defence of mental impairment arise
- judicial officers in the Supreme Court and County Court who are required to act in accordance with the CMIA in presiding over investigations of unfitness, determinations of criminal responsibility and reviews of supervision orders
- experts from a range of fields who conduct assessments of people and provide clinical opinions on whether an accused is unfit to stand trial and/or has a defence of mental impairment (including psychiatrists, psychologists, neuropsychologists and neurologists)
- psychiatrists who are responsible for the supervision and treatment of people subject to supervision orders and clinicians who provide treatment to people under supervision orders
- case managers at area mental health services and in the Department of Human Services who manage people on non-custodial supervision orders
- judicial and non-judicial members of the Forensic Leave Panel who are responsible for considering and granting or refusing leave to people under supervision orders.

2.82 The Commission also sought to understand how the CMIA affected the general community and particular people in the community who had direct experience of the Act, including victims of crime and their families, accused and people subject to supervision orders and the family members of people who are subject to the CMIA.

2.83 A vast array of issues was raised concerning the CMIA's operation across these groups. There was significant variation in the views expressed on many of the issues. However, key themes emerged in the areas where people agreed that the CMIA worked well and in the areas where there was consensus that there was a need for change.

What works well?

2.84 The Commission identifies the following themes in what currently works well under the CMIA:

- improvements from the Governor's pleasure regime
- expertise and experience of a core group of experts
- commitment of people who work under the regime
- current initiatives to enhance capacity and links between services that support the CMIA.

Improvements from the Governor's pleasure regime

- 2.85 Many people highlighted that the CMIA had achieved some of its proposed objectives and brought improvements to this area of the law since it commenced in place of the Governor's pleasure regime, including:
- creating a pathway towards release and ensuring that people who are subject to the regime did not feel like they were being punished but rather were being rehabilitated
 - shifting decision making in relation to leave, extended leave and ultimate release to an independent judiciary and Forensic Leave Panel in a way that has been of benefit to the person while still ensuring the consideration of community safety.

Expertise and experience of a core group of experts

- 2.86 People consistently acknowledged the expertise and experience of those who conduct assessments and supervise people under the CMIA.
- 2.87 However, a need was identified to expand this small group, through forensic training and accreditation and more regulation of how assessments are conducted, particularly in relation to unfitness to stand trial generally and young people.

Commitment of people who work under the regime

- 2.88 It was evident that people who work in this area, including judges, prosecutors and defence practitioners, demonstrate a high level of commitment and dedication. Generally positive feedback was provided about lawyers who represent people in CMIA proceedings.
- 2.89 However, feedback indicated a general need for more education about the CMIA provisions, and training to equip judges and lawyers with the tools and understanding to communicate effectively with people with a mental illness, intellectual disability or other cognitive impairment to ensure equal treatment before the law.

Current initiatives to enhance the capacity and links between services that support the CMIA

- 2.90 Support was consistently expressed for two programs that currently operate in connection with the CMIA legislation:
- the Mental Health Court Liaison Service (MHCLS)—a court-based assessment and advice service currently provided by Forensicare in seven metropolitan Magistrates' Courts and by area mental health services in four regional courts
 - the Forensic Clinical Specialists program—part of the Victorian Government's 10-year mental health plan, *Because mental health matters*, in which 10 forensic clinical specialists are placed in area mental health services to build the capacity of the workforce to work with patients with a forensic history.⁵⁵

Where is change required?

2.91 The Commission identified the following key areas where change is required under the regime, in addition to those specified in the terms of reference and supplementary terms of reference:

- ‘artificial decision making’
- delay
- limited application of the CMIA in the summary jurisdiction
- maximising rights and participation through support measures
- the consistency of the CMIA’s operation with its underlying principles
- enhancements to the forensic capacity of facilities and services that support the operation of the CMIA.

‘Artificial decision making’

2.92 An overwhelming theme underpinning the areas where change is required was where people considered ‘artificial decisions’ were made by parties because of the current CMIA provisions—that is, inappropriate decisions are made to avoid undesirable outcomes.⁵⁶ In particular, artificial decision making was identified as a consequence of the current limited jurisdiction of the CMIA in the Magistrates’ Court and Children’s Court and the current regime that governs supervision orders under the CMIA. For example, the delay created by matters proceeding by way of committal and transfer to a higher court or the very onerous consequences under the CMIA sometimes leads to:

- the accused (or their lawyers) deciding not to raise issues of unfitness to stand trial
- the accused deciding to plead guilty to charges when they may be unfit to stand trial or have a defence of mental impairment.

Delay

2.93 Concerns were expressed about delay throughout the system, in particular:

- Matters are delayed when they are committed from the summary jurisdiction to the County Court, due to the limited powers of the Magistrates’ Court and Children’s Court to deal with unfitness to stand trial and the defence of mental impairment.
- People subject to the CMIA may be remanded in prison, either because there is no appropriate place (a mental health or disability facility), with capacity for them to be remanded there, or because there has not yet been a finding made under the CMIA. This results in people with mental conditions, such as a mental illness, intellectual disability, dementia or autism, being detained in prison for long periods of time.
- Delays have a particularly deleterious effect on young people.

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For example, if a person charged with an indictable offence triable summarily is unfit to stand trial and cannot fully understand advice received from their lawyer about the consequences of particular decisions, and makes a decision to plead guilty to the charge, rather than raising the issue of unfitness, to avoid being transferred to a higher court.

Limited application of the CMIA in the summary jurisdiction

- 2.94 Linked in with the themes of artificial decision making and delay, there was strong support for broadening the currently limited application of the CMIA in the summary jurisdiction.
- 2.95 In relation to the Magistrates' Court, it was noted that the jurisdiction of that court had expanded significantly over the period of the CMIA's operation, and so there was a need for the CMIA's application to be changed to reflect this. Such a change would ensure that outcomes in cases involving indictable offences triable summarily would more appropriately reflect the level of risk posed by the accused to the community through supervision and treatment.
- 2.96 In relation to the Children's Court, there was consistent support for the extension of the CMIA to ensure that young people whose vulnerability is heightened by the fact of mental illness, intellectual disability or other cognitive impairment could be kept within the specialist jurisdiction of that court as far as possible. A strong theme in this regard was the need for this to occur within a specialised approach in the Children's Court, supported by necessary programs, facilities and services.

Maximising rights and participation through support measures

- 2.97 There was nearly unanimous support among those consulted for more support measures to be provided to people under the CMIA, in particular:
- support for accused, where the question of unfitness is raised, to optimise their ability to become fit and exercise their rights under the criminal process, or, if found unfit, to assist them to participate as much as possible in the modified proceedings that take place under the CMIA
 - support and assistance for victims of crime and their family members in CMIA matters to assist in their recovery, including the provision of formal support through the court process to facilitate their participation and understanding of the issues.

The consistency of the CMIA's operation with its underlying principles

- 2.98 People identified areas where change was required to the CMIA's operation on the basis that it was not operating consistently with its underlying principles. These included:
- *Over-cautiousness and perceived barriers to the staggered system of release under the supervision regime*—The system of review was described by many people as overly risk-averse, with some people expressing the view that there was a tendency for over-cautiousness which could prevent a person progressing along the staggered system of release as intended. This was particularly highlighted in the context of the principle of least restriction and decision making in the supervision order regime. Some submissions called for that principle to be strengthened. Many people commented on the high thresholds that apply throughout the stages of decision making for review of and leave under supervision orders, which resulted in people with mental conditions subject to the CMIA being held to a higher standard than other people with the same mental conditions in the community.
 - *Lack of equal treatment under the CMIA for people with an intellectual disability or other cognitive impairment*—Many people considered the CMIA does not reflect the approach that is now taken with regard to people with an intellectual disability or other cognitive impairment to ensure equal treatment before the law. In particular, people identified gaps in how the CMIA operated and interacted with other Victorian legislation to protect rights and ensure clinical oversight along the CMIA pathway.

Enhancements to the forensic capacity of facilities and services that support the operation of the CMIA

- 2.99 It was evident from submissions and consultations that there are gaps in the current facilities and services that support the CMIA legislation, in particular:
- a need for enhancements to the ‘forensic capacity’ of area mental health services and disability services to provide supervision, management and treatment of people on supervision orders
 - lack of step-down medium-secure facilities for people with a mental illness subject to the CMIA
 - lack of appropriate custodial facilities for people with an intellectual disability or other cognitive impairment, in particular acquired brain injury
 - no appropriate custodial facility for young people who raise unfitness to stand trial and the defence of mental impairment.

A set of statutory principles to guide the operation of the CMIA

- 2.100 The requirement that the Commission consider whether changes are required to ensure that the CMIA operates ‘justly, effectively and consistently with its underlying principles’ has formed the principal framework for its review.

General statutory principles

- 2.101 In the consultation paper, the Commission identified the principles underlying the CMIA. These principles are expressed specifically in the CMIA or implied through its aims and objectives, processes and relevant case law. They are:
- *Fairness to an accused 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, there is a need to protect the community or the person from any likely danger because of the person’s 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.

- 2.102 The consultation paper also outlined additional principles that underlie the CMIA from different sources:
- International human rights instruments—these include the *International Covenant on Civil and Political Rights*,⁵⁷ the *Convention on the Rights of Persons with Disabilities*⁵⁸ and the *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care*.⁵⁹
 - National agreements—these include the *Fourth National Mental Health Plan: An Agenda for Collaborative Government Action in Mental Health 2009–2014*⁶⁰ and the *National Statement of Principles for Forensic Mental Health*.⁶¹
 - Victorian human rights, mental health and disability legislation, in particular the *Charter of Human Rights and Responsibilities Act 2006* (Vic)⁶² ('Charter'), the *Disability Act 2006* (Vic) and the *Mental Health Act 2014* (Vic) ('MHA 2014').⁶³
- 2.103 Broadly speaking, the CMIA seeks to strike a balance between the protection of the community and the rights and clinical needs of accused who are unfit to stand trial or not guilty because of mental impairment.
- 2.104 This balance, known as the 'principle of least restriction', is an important feature of mental health and disability law both in Australia and overseas. Section 39 of the CMIA sets out the principle of least restriction that underlies the legislation:
- In deciding whether to make, vary or revoke a supervision order, to remand a person in custody, to grant a person leave or extended leave under this Act, the court must apply the principle that restrictions on a person's freedom and personal autonomy should be kept to the minimum consistent with the safety of the community.
- 2.105 The principle of least restriction is fundamental to considering the protection of the community, as the rehabilitation of people subject to the CMIA through successful community reintegration is the best way to ensure protection of the community, as well as restoring the person to a state in which they can be a functioning member of that community.

Views in submissions and consultations

- 2.106 The majority of these principles were reflected in the input received in submissions and consultations.

Treatment of and support provided to accused

- 2.107 The need to provide appropriate supports to people with impaired cognitive capacity who are charged with offences, to ensure equal treatment before the law, was consistently raised in submissions and consultations. For example, the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) submitted that the 'right to a fair hearing includes the right to effective participation' which underpins the minimum guarantees, including:
- the right of a person to defend him or herself in person, examine or have examined witnesses against him or her, to have the free assistance of an interpreter and the free assistance of the assistants and specialised communication tools if required.⁶⁴

57 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

58 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

59 *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care*, GA Res 119, UN GAOR, 46th sess, 75th plen mtg, Supp No 49, UN Doc A/RES/46/119 (17 December 1991).

60 Commonwealth of Australia, *Fourth National Mental Health Plan: An Agenda for Collaborative Government Action in Mental Health 2009–2014* (2009).

61 Australian Health Ministers' Advisory Council, Mental Health Standing Committee, *National Statement of Principles for Forensic Mental Health* (2006).

62 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 8, 21–22, 24–25.

63 The *Mental Health Act 2014* (Vic) has replaced the *Mental Health Act 1986* (Vic): see Chapter 1 n 14.

64 Submission 10 (Victorian Equal Opportunity and Human Rights Commission).

- 2.108 The VEOHRC also suggested that the ‘paradigm shift’ reflected in contemporary rights statements, such as the Charter and the *Convention on the Rights of Persons with Disabilities* (‘CRPD’) was a useful way to frame the decision-making rights of people subject to the CMIA. The VEOHRC, citing the Supreme Court decision in *Nicholson v Knaggs*,⁶⁵ submitted that the CRPD:

reflects a movement away from treating persons with disabilities as objects of social protection towards treating them as subjects with rights, who are capable of claiming and exercising those rights and making decisions based on free and informed consent as active members of society.⁶⁶

The principle of least restriction

- 2.109 The principle of least restriction was particularly emphasised in submissions and consultations as paramount in ensuring that the CMIA operates consistently with human and legal rights of people subject to it.
- 2.110 The VEOHRC suggested that the principle of least restriction expressed in section 39 of the CMIA could be stated in clearer terms and in language that is more consistent with Charter rights.⁶⁷ It referred to other Victorian legislation that set out a similar decision-making principle including the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) that provides:

The court must ensure that any conditions of a supervision order (other than the core conditions)—constitute the minimum interference with the offender’s liberty, privacy or freedom of movement that is necessary in the circumstances to ensure the purposes of the conditions; and are reasonably related to the gravity of the risk of the offender re-offending.⁶⁸

- 2.111 The VEOHRC also referred to the Disability Act which provides:

If a restriction on the rights or opportunities of a person with a disability is necessary, the option chosen shall be the least restrictive of the person as is possible in the circumstances.⁶⁹

Community protection

- 2.112 The principle of community protection was reflected in different ways in submissions and consultations.
- 2.113 Some submissions expressed concerns regarding the lack of powers under the CMIA in the Magistrates’ Court and Children’s Court. For example, the current requirement to discharge an accused found not guilty because of mental impairment, and lack of power to make orders, means there is no process by which the court can seek to address the person’s mental illness, intellectual disability or other cognitive impairment or ensure the person is supervised to address any risk they may pose to the community.⁷⁰ Concerns about the how the CMIA functioned in terms of community protection were also raised in relation to the Magistrates’ Court’s and Children’s Court’s lack of powers under the Act.⁷¹

65 [2009] VSC 64 (27 February 2009) [13].

66 Submission 10 (Victorian Equal Opportunity and Human Rights Commission).

67 Ibid.

68 *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) s 15(6).

69 *Disability Act 2006* (Vic) s 5(4).

70 Submissions 30 (Victoria Police); 17 (Name withheld); 20 (Law Institute of Victoria). Consultations 20 (Geelong Magistrates’ Court); 27 (Victoria Police—police prosecutors).

71 Submissions 12 (Progressive Law Network); 33 (Commission for Children and Young People). Consultations 11 (Melbourne Magistrates’ Court); 19 (Forensic Clinical Specialists).

- 2.114 Community protection was also a strong feature of the feedback on ancillary orders and consequences in matters under the CMIA, in particular the lack of ancillary orders under the limited application of the Act in the summary jurisdiction⁷² and the inconsistencies in the extent to which they are available following different findings under the CMIA in the higher courts.⁷³
- 2.115 Some submissions expressed support for the continued representation of the community's interests under the CMIA.⁷⁴

Victims and their families and family members of accused

- 2.116 The need to recognise victims and family members and to provide appropriate supports to them throughout the CMIA process was a consistent theme raised throughout submissions and consultations.
- 2.117 Victims who had experienced CMIA processes spoke in particular about the importance of recognising and acknowledging them as victims of crime and the need for more support, in terms of accessible information and explanation of the complex legal processes and the progress of the matter.
- 2.118 For example, a victim's partner consulted by the Commission talked about how they felt they had a 'lack of knowledge', expressed concern that they would 'not be told about the outcome of the court case' and stressed the importance of acknowledgment.⁷⁵ Another victim's partner said 'it's about making sure you get the information along the way about what is happening.'⁷⁶ A person who was a family member of the victim and the accused spoke about the 'intimidating' court processes and the need for more support during the court process from someone who 'understands the complexities of the issues, perhaps someone who had been through the court process themselves' in some capacity.⁷⁷

The Commission's conclusion

- 2.119 Many of the issues raised are addressed individually in recommendations throughout the report according to their relevance to a particular aspect of the CMIA pathway.⁷⁸
- 2.120 Separate to these individual recommendations, the Commission considers that the following principles ought to be given explicit expression through statutory principles that apply to decision makers under the CMIA:
- community protection
 - least restriction
 - acknowledgment of the rights and support needs of individuals directly affected.
- 2.121 The Commission's recommendation to create a set of statutory principles to encapsulate the principles described above is contained below in Recommendation 3.

72 Submission 12 (Progressive Law Network). Consultations 27 (Victoria Police—police prosecutors); 19 (Forensic Clinical Specialists). See also Office of Public Prosecutions, Submission No 20 to Victorian Parliament Law Reform Committee, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (2013) 4.

73 Submissions 8 (Office of Public Prosecutions); 25 (Criminal Bar Association); 30 (Victoria Police). Consultation 27 (Victoria Police—police prosecutors).

74 Submissions 8 (Office of Public Prosecutions); 18 (Victoria Legal Aid); 13 (Australian Community Support Organisation Inc.); 21 (Criminal Bar Association).

75 Consultation 37 (Partner of a victim of crime).

76 Consultation 22 (Partner of a victim in a CMIA matter).

77 Consultation 4 (Family and Friends Support Group, Forensicare).

78 For example, the principle of legitimate punishment is expressed through Recommendation 24 in Chapter 4 to introduce a definition of mental impairment and Recommendation 55 in Chapter 7 on the approach to directing the jury when the defence of mental impairment is in issue.

Community protection

- 2.122 The Commission considers that community protection, a paramount consideration underpinning the operation of the CMIA, should be enshrined as a statutory principle to reflect its importance. The protection of members of the Victorian community is a central object of the CMIA and one of the key bases for its existence, the other being the restoration or support of people who are subject to the CMIA in way that is humane and consistent with their rights. The Commission therefore recommends that the principle of community protection should apply to all decisions and powers that are provided under the CMIA.

Principle of least restriction

- 2.123 In the Commission's view, the rights and interests of people subject to detention or other restrictive practices should be protected to the fullest extent possible, consistent with community safety.⁷⁹ The Commission considers that the best way to do this is to emphasise the importance of the principle of least restriction more clearly throughout the CMIA by also enshrining it as a statutory principle.
- 2.124 The Commission notes that currently only the court is required to apply the principle of least restriction even though there are others, such as the Forensic Leave Panel, authorised psychiatrists and the Secretary to the Department of Human Services, who make decisions that affect a person's freedom and personal autonomy. In contrast, section 8 of the *Forensic Disability Act 2001* (Qld) requires that the powers and functions under that Act be exercised or performed in accordance with the principle of least restriction. The MHA 2014 requires a person to have regard to mental health principles in performing any duty or function or exercising any power under the Act.⁸⁰ These principles include the principle of least restriction.⁸¹ In the Commission's view, the principle of least restriction should apply not only to decision making by courts but to all decisions made under the CMIA.⁸²

Rights and support needs of individuals affected by the CMIA

- 2.125 The Commission is of the view that the rights and support needs of all those involved in CMIA proceedings, including victims, family members and the accused, should be strengthened through the introduction of a statutory principle.
- 2.126 The additional complexities of CMIA matters require a special approach to the way in which victims of crime, their families and family members of people subject to the Act are supported and acknowledged. As is discussed in Chapter 8 at [8.6]–[8.11], matters that proceed under the CMIA can be procedurally complex, commonly involve offences alleged to have been committed against family members or vulnerable victims, and result in outcomes that can be confusing and difficult to accept.⁸³
- 2.127 Cases under the CMIA involve challenging issues that require an understanding of mental illness, intellectual disability or other cognitive impairment and how they affect capacity and behaviour. They involve vulnerable accused and therefore require a specialised approach to providing support to ensure their rights are protected and can be exercised to the fullest extent possible.

79 Victorian Law Reform Commission, *People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care*, Report No 4 (2003) 40.

80 *Mental Health Act 2014* (Vic) s 11(3).

81 *Ibid* s 11(1)(a).

82 Recommendations 79–91 in Chapter 10 to improve decision making under the supervision, review and leave framework for supervision orders also give effect to the underpinning principles of community protection, least restriction, gradual reintegration and therapeutic focus.

83 The rights of victims of crimes and family members have also been addressed in Chapter 8 through Recommendations 57–60 to improve the support provided to, and communication with, victims and family members in CMIA proceedings.

- 2.128 The Commission is therefore also of the view that a statutory principle recognising the need to provide supports to an accused in CMIA proceedings is necessary to embed such an approach as a feature in the conduct of such proceedings. If a person charged with an offence has a mental condition to the extent that they cannot participate in the trial process, or it impairs their functioning to such a degree that they are not criminally responsible for their conduct, the onus is on the state to ensure that criminal justice processes are modified or supports are provided so that the person can, as far as possible, participate and exercise their legal rights in those processes.
- 2.129 The Commission considers there is a particular need for such supports for people with an intellectual disability who are charged with offences, who are 'extremely reliant on dedicated lawyers to guide them through the court process',⁸⁴ but who could meaningfully participate in criminal proceedings and avoid the CMIA pathway if additional and appropriate supports were provided. This approach should be inherent in the way in which courts, equipped with adequate resources and the right tools, conduct proceedings under the CMIA. For people with a mental illness, there should be an inherent focus on the way that proceedings are conducted to ensure that treatment opportunities are maximised so as to restore fitness and avoid the CMIA pathway.⁸⁵

Statutory principles to support a specialist approach to young people

- 2.130 The Commission's *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 and the Children's Court of Victoria: supplementary consultation paper* ('the supplementary consultation paper') identified principles and rights that currently apply to children in the criminal jurisdiction in Victoria. These include:
- *Best interests principles*—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.⁸⁶
 - *Decision-making principles*—These are found in section 11 of the *Children, Youth and Families Act 2005* (Vic) ('CYFA') and apply to any decision that is made or action taken in relation to a child.⁸⁷ There are additional decision-making principles for Aboriginal children in recognition of 'the principle of Aboriginal self-management and self-determination'.⁸⁸
 - *Criminal principles*—The CYFA contains generally applicable principles relating to criminal procedure and sentencing of children.⁸⁹
 - *Parens patriae (the state as parent)*—A doctrine that is based in the common law, and provides courts with a 'best interests' jurisdiction relating to the welfare of a child.
 - *Principles of the CMIA*—The principles outlined above at [2.101] apply to children in CMIA matters which have been committed and transferred to the higher courts including community protection, the rights of victims and the principle of least restriction.

84 Victoria Legal Aid, *Equality, Capacity and Disability in Commonwealth Laws, Submission to the Australian Law Reform Commission's Issues Paper* (2014) 11.

85 The principle of fairness to an accused and the right to a fair trial are reflected through Recommendations 18–21 in Chapter 3 which aim to provide modifications to court procedure and measures to optimise the fitness of the accused so that they may participate in CMIA proceedings.

86 *Children, Youth and Families Act 2005* (Vic) ss 10(1)–(2).

87 Ibid s 11. These do not currently apply to chapters of the legislation that govern the Children's Court or the criminal responsibility of children: ibid s 9(2).

88 Ibid s 12(1).

89 Ibid s 522(1), pts 5.2, 5.3.

- *Human rights principles*—The CYFA and the CMIA exist within a broader Victorian human rights framework as encapsulated in the Charter. Also relevant are the principles contained in international human rights law such as the United Nations *Convention on the Rights of the Child*⁹⁰ and the *Standard Minimum Rules for the Administration of Juvenile Justice*.⁹¹
- *Other principles governing the treatment of people with a mental condition*—principles in the MHA 2014,⁹² and the Disability Act.

- 2.131 In the supplementary consultation paper, the Commission asked questions about how these principles are currently applied to children in the criminal jurisdiction and whether there are areas of the current process that conflict with human rights principles.
- 2.132 The Commission also sought views on whether the current CMIA principles are appropriate for young people and 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.

Views in submissions and consultations

- 2.133 While many submissions indicated that CMIA principles can be appropriately applied in the Children's Court, CMIA principles were thought to be inadequate on their own when applied to young people:

The principles that should govern the application of the CMIA to young people in the Children's Court and adult courts include the current CMIA principles, combined with the consideration of what is in the child's best interests, the general decision-making principles, additional decision-making principles when an Aboriginal or Torres Strait Islander child is the subject and careful consideration of cultural and religious influences when the child is from a culturally and linguistically diverse (CALD) background.⁹³

- 2.134 Liberty Victoria supported this view, suggesting that the principles in the CYFA should also be considered as a starting point in CMIA matters for young people:

The principles as enshrined in the Children Youth and Families Act 2005 need to be maintained as the starting point. The legislation and Children's Court jurisdiction has a different emphasis – what is in the child's best interest and rehabilitation. This too, must be the starting point for any CMIA matter dealt with in the Children's court.⁹⁴

- 2.135 One clinician experienced in forensic child psychiatry was of the view that the CMIA principles are not appropriate for children and that, in practice, they are not always applied to children, particularly in relation to unfitness matters.⁹⁵
- 2.136 The VEORHC expressed strong support for the development of specialised principles for young people in recognition of 'the particular vulnerability of children and young people with mental illness, intellectual disability or cognitive disability to whom the CMIA applies'.⁹⁶

90 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 40.

91 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').

92 At the time the supplementary consultation paper was published, the relevant legislation was the *Mental Health Act 1986* (Vic): see Chapter 1 n 14.

93 Submission 33 (Commission for Children and Young People).

94 Submission 32 (Liberty Victoria).

95 Consultation 54 (Dr Katinka Morton).

96 Submission 29 (Victorian Equal Opportunity and Human Rights Commission).

- 2.137 Liberty Victoria agreed with this view, also highlighting the importance of acknowledging the special vulnerability of children:
- Liberty Victoria acknowledges that children's interactions within the criminal justice system needs to be managed carefully given the particular vulnerability of children within society. The complexity of children with mental illnesses and fitness issues cannot be underestimated.⁹⁷
- 2.138 Youthlaw suggested that specific human rights principles relating to young people in the criminal justice system be applied, such as the Charter and the *Convention on the Rights of the Child*.⁹⁸ This view was supported by Victoria Legal Aid, which argued that if the CMIA was to be extended to the Children's Court, it was vital that:
- there continues to be legislative acknowledgment of the fragility and unique needs of children and young people to be treated consistently with the *Charter of Human Rights and Responsibilities Act* (2006) and United Nations Convention on the Rights of the Child [citation omitted].⁹⁹
- 2.139 Several submissions recommended incorporating the 'best interests principles' outlined in section 10 of the CYFA, that require decision makers to consider factors in determining what decision to make or action to take in the best interests of a child.¹⁰⁰
- 2.140 It was suggested that the sentencing principles in section 362 of the CYFA, with their emphasis on rehabilitation, may also be useful to incorporate into specialised principles for young people.¹⁰¹

The Commission's conclusion

- 2.141 The Commission agrees that while CMIA principles are applicable to young people, additional principles are required that are tailored to the specialised needs and vulnerability of young people who raise unfitness or the defence of mental impairment.
- 2.142 The Commission therefore proposes that the CYFA be amended to include statutory principles which will apply specifically to young people who raise unfitness or the defence of mental impairment. These statutory principles should be incorporated into Chapter 5 of the CYFA as part of the provisions that the Commission recommends to provide for an extension of the Children's Court jurisdiction under the CMIA (see Chapter 6).
- 2.143 Human rights principles contained in the Charter apply to all young people and do not need to be incorporated into statutory principles.
- 2.144 The best interests principles in section 10 of the CYFA and the decision-making principles in sections 11 and 12 do not currently apply to criminal matters in the Children's Court. These sections should therefore be incorporated into the statutory principles in Chapter 5 of the CYFA.
- 2.145 The Commission considers that it would not be appropriate for all the principles contained in section 362 of the CYFA to apply to young people in matters under the CMIA as these also encompass sentencing principles. As the CMIA operates under a different framework of principles to those in sentencing law, some of these are not appropriate to be applied in the CMIA context, such as 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'.¹⁰² However, in the Commission's view it is appropriate for the recovery and therapeutic principles in section 362, for example, those directed towards preserving relationships and reducing stigma, to be included in the application of the CMIA in the Children's Court.

⁹⁷ Submission 32 (Liberty Victoria).

⁹⁸ Consultation 45 (Youthlaw).

⁹⁹ Submission 27 (Victoria Legal Aid).

¹⁰⁰ Submissions 31 (Australian Psychological Society); 29 (Victorian Equal Opportunity and Human Rights Commission); 26 (Youthlaw).

¹⁰¹ Submissions 26 (Youthlaw); 27 (Victoria Legal Aid); 25 (Criminal Bar Association). In particular, the following provisions were suggested: *Children, Youth and Families Act 2005* (Vic) ss 362(a)–(d), (g).

¹⁰² *Ibid* s 362(1)(f).

- 2.146 The Commission recommends that a set of principles to apply to young people dealt with in the Children's Court under the new CMIA processes be incorporated into the CYFA.

Recommendations

- 3 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) and the *Children, Youth and Families Act 2005* (Vic) should be amended so that all relevant powers and functions under these Acts are exercised consistently with the following statutory principles:
 - (a) proceedings should be conducted and, where appropriate and consistent with the rights of the accused, modified in a way that acknowledges the need for support and involves the people affected by the proceedings, including the accused, a family member or a victim of the offence
 - (b) proceedings involving an accused who was a child at the time of the alleged offence should as far as possible be conducted in accordance with the specialised principles that apply to an accused in the Children's Court
 - (c) the need to protect the community
 - (d) the need to recognise all people affected by an offence, including the accused, a family member or a victim of the offence, and
 - (e) the principle of least restriction, that is that restrictions on a person's freedom and personal autonomy must be kept to the minimum consistent with the safety of the community.
- 4 The following additional statutory principles should be added to the *Children, Youth and Families Act 2005* (Vic) to apply to all matters in the Children's Court where unfitness or the defence of mental impairment is raised:
 - (a) the need to strengthen and preserve the relationship between the child and the child's family
 - (b) the desirability of allowing the child to live at home
 - (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 stigma to the child resulting from a court determination.
- 5 Part 1.3 of the *Children, Youth and Families Act 2005* (Vic) should be amended to provide that the best interests principles in section 10 and decision-making principles in sections 11 and 12 apply to matters in the Children's Court where unfitness or the defence of mental impairment is raised.

A statutory principle and measures to address unreasonable delay

- 2.147 The issue of delay was not directly addressed in the consultation paper. However, concerns were consistently raised in submissions and consultations about the effects of delay on progressing and resolving matters under the CMIA or where issues of unfitness or the defence of mental impairment were raised.
- 2.148 The issue of delay was directly raised in the supplementary consultation paper, where the Commission sought input on its particular effect on young people. Feedback received in submissions and consultations on the supplementary consultation paper noted the deleterious effect on young people of delays in criminal proceedings involving issues of unfitness and the defence of mental impairment. 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 conduct a committal hearing and transfer matters to the higher courts to determine unfitness. Other issues relating to the Children's Court's lack of jurisdiction are discussed in Chapter 6 at [6.32]–[6.37].

Views in submissions and consultations

- 2.149 The Commission's submissions and consultations indicated that delay was a concern in the way that the CMIA operated. These areas were identified as:
- the detrimental effect of delay on people with mental conditions and the particular parts of the process that are prone to delay
 - delays caused by the lack of a summary power to determine unfitness to stand trial in the Magistrates' Court and the Children's Court
 - general delays in the system when a person is on remand and there is no appropriate place for them to be detained, particularly affecting people with an intellectual disability
 - the especially deleterious consequences of delays in cases involving young people.

Detrimental effect of delays on people with mental conditions

- 2.150 The submission from the Forensicare Patient Consulting Group highlighted the negative effects of delays in criminal proceedings on accused in CMIA matters, describing the difficulties in dealing with a prolonged period of uncertainty and multiple and unexpected adjournments. It was noted that this can be particularly unsettling for a person who might already be unwell. The experience was described in the submission as follows: 'You are stuck in limbo and you never know what to do or what to think'.¹⁰³
- 2.151 A particular part of the process where delays were identified is in the unfitness to stand trial process, in particular the period between a permanent finding of unfitness and the conduct of a special hearing to determine criminal responsibility.
- 2.152 If an accused is found unfit to stand trial and the judge determines that the accused is not likely to become fit within 12 months ('permanent finding of unfitness'), the court must proceed to hold a special hearing within three months.¹⁰⁴

- 2.153 The Criminal Bar Association noted that there are pending cases now outside the three-month period following a permanent finding of unfitness, with no clear power for the court to extend that period.¹⁰⁵ The Commission considers that this is an example of unreasonable delay that should not occur. The Commission considers that the interests of an accused who has been found unfit to stand trial are best served with a resolution of the matter and the commencement of their treatment pathway as soon as practicable.¹⁰⁶

Lack of summary power to determine unfitness

- 2.154 The lack of summary jurisdiction under the CMIA to determine unfitness was a key issue raised in relation to delay.
- 2.155 Submissions and consultations that addressed this issue confirmed that the current process was lengthy. Aside from the inefficiency, the length of the process can be difficult for both victims and accused. The Commission was given examples of cases that took two years to resolve¹⁰⁷ and accused who were unfit to stand trial being held on remand in prison for long periods.¹⁰⁸
- 2.156 The Criminal Bar Association was of the view that substantial delays result when a matter has to be transferred to the higher courts and this has a particular impact on young people where the young person is 'not receiving appropriate supports or treatment and/or continues to commit offences'.¹⁰⁹
- 2.157 The impact of delay on young people was also raised by a judge of the County Court who stressed the importance of preventing unnecessary delays in seeking to achieve outcomes under the CMIA:
- [There was] a case involving an accused child who has an intellectual disability and is unfit and had been charged with a number of offences (mainly theft-related) that would normally have been dealt with in the Children's Court. [The accused] was 16 years old when the alleged offences occurred. The only reason the matter was [committed to the County Court] was because the Children's Court could not deal with the unfitness issue. The matter took 10 months to get to the County Court and a fitness hearing. The accused has been found unfit by a jury and now is facing a special hearing for offences that could take six weeks to hear ... If there is a fitness to plead process in the Children's Court, this would ensure a better therapeutic outcome for the child.¹¹⁰
- 2.158 A number of other case examples were provided in submissions and consultations about the unreasonable delays caused by the lack of powers in the summary jurisdiction to deal with matters under the CMIA.¹¹¹
- 2.159 A number of submissions raised the issue of delays resulting from the lack of jurisdiction in the Children's Court to determine unfitness and the need for a more streamlined process to ensure matters proceed without unnecessary delay.¹¹² The issue of delay was raised both in relation to concerns about procedural fairness and the impact of delays on the development of the young person.

105 Submission 21 (Criminal Bar Association). This issue was also noted by a member of the Commission's advisory committee: Advisory committee (meeting 2).

106 In Chapter 9, the Commission considers this issue in the context of the process for determining unfitness to stand trial, where it expresses the view that there should not be a power to extend this time period.

107 Consultation 27 (Victoria Police—police prosecutors).

108 Consultations 24 (County Court of Victoria—judges); 7 (Morwell Magistrates' Court).

109 Submission 25 (Criminal Bar Association).

110 Consultation 46 (County Court of Victoria—judges).

111 Submissions 17 (Name withheld); 18 (Victoria Legal Aid).

112 Submissions 27 (Victoria Legal Aid); 25 (Criminal Bar Association); 23 (Dr Robert G Adler). Consultation 46 (County Court of Victoria—judges).

Concerns about delay for people on remand

- 2.160 Another area of operation where concerns were expressed about delay was for accused with mental conditions who are on remand for prolonged periods.
- 2.161 One experienced forensic child psychiatrist considered the issue of timely access to justice for young people as a human rights concern. In particular, she highlighted the impact of delay on the development of young people who are required to spend a significant amount of time in remand. The clinician noted that prolonged exposure to custodial experiences, through 'peer group effects and long periods of remand', can result in the following:
- institutionalisation and 'unhealthy' identification with the youth justice system
 - disruption of healthy experiences in the community, such as school, vocational training and relationships.¹¹³
- 2.162 Delay was also identified as an issue for people with an intellectual disability or other cognitive impairment charged with offences, particularly where there are issues of unfitness to stand trial. It is a matter of particular concern when people with an intellectual disability or other cognitive impairment are deemed ineligible to be admitted to a residential institution or a residential treatment facility under the Disability Act and, if not granted bail, are remanded to a prison while awaiting determination of the matter.
- 2.163 A number of submissions expressed concerns about this issue, including the Office of the Public Advocate and the Victorian Equal Opportunity and Human Rights Commission (VEOHRC). The Commission was given examples in submissions and consultations of cases where delays in the determination of a matter had resulted in people with an intellectual disability or other cognitive impairment spending long periods of time in prison.
- 2.164 The Office of the Public Advocate said in its submission that it 'is concerned about delays experienced by prisoners with cognitive impairment waiting for their case to be heard under the CMIA' and identified that the '[a]vailability of appropriate accommodation is a key reason for the delays experienced by prisoners with an intellectual disability'.¹¹⁴ The Office of the Public Advocate provided a case example about a man who had 'a moderate to severe intellectual disability and paranoid schizophrenia' and was found unfit to stand trial for minor offences. Due to a lack of supported accommodation in Disability Services, the man was in prison for a prolonged period of remand and was subject to restrictive practices to manage his behaviour, and as a result of this trauma became 'agoraphobic depressed and now shows signs of post-traumatic stress disorder'.¹¹⁵
- 2.165 Another recent example, described by the Commission in its consultation paper, was reported in *The Age* newspaper. In this case, a person who was intellectually disabled and had early stages of dementia had been held in remand for 371 days prior to being found unfit to stand trial and not guilty because of mental impairment. There had been no application for bail over this period because of a lack of supervised accommodation. Judge Taft, who presided over the unfitness hearing, made the following comments regarding the situation '[t]hat a man with a significant intellectual disability and dementia should be imprisoned for such a time is an embarrassment to the administration of the criminal justice system'.¹¹⁶

113 Consultation 54 (Dr Katinka Morton).

114 Submission 14 (Office of the Public Advocate).

115 Ibid. The full case study is detailed in Chapter 11 at [11.76].

116 Jane Lee, 'Imprisonment of Intellectually Disabled Man "Embarrassing"', *The Age* (Melbourne), 23 February 2013, 5.

The effect of delay on young people

- 2.166 The particular effects of delay on young people also featured in submissions and consultations on the supplementary terms of reference.
- 2.167 Victoria Legal Aid submitted that delay is of primary concern in relation to young people, given that:
- A child's development can be substantial during such a period, and a more streamlined process is necessary to ensure matters proceed without unnecessary delay, acknowledging that the Court is dealing with the most vulnerable accused.¹¹⁷
- 2.168 The Commission for Children and Young People also raised concerns about the impact that the length of proceedings can have on young people due to their ongoing development, which 'can be negatively impacted by protracted proceedings'. It highlighted the effects of delay on young people who are charged with offences and victims of crime and submitted that:
- Delays can affect young people and their victims (who are more likely to also be young people) disproportionately in CMIA matters compared to adults, given that it is crucial that they are provided with intervention and therapeutic treatment as soon as possible.¹¹⁸
- 2.169 Dr Adler, an experienced forensic child psychiatrist, also noted the particular impacts that delay can have on the lives of young people. He submitted:
- Delays lead to extended periods in custody or waiting for the matter to be heard seriously disrupt schooling and may even contribute to further offending while waiting for the matter to be heard.¹¹⁹
- 2.170 The VEOHRC submitted that the anxiety and stress that an adult accused might feel when facing trial for an offence is heightened for a young person, and is prolonged when there are delays in proceedings.¹²⁰ It noted, in support of this position, a decision made in the Australian Capital Territory where a magistrate found that delay in the prosecution of a young person breached the child's right¹²¹ to be brought to trial as quickly as possible.¹²² The VEOHRC further submitted that in making this finding, the magistrate highlighted the detrimental effects of delay in matters for both young accused and young victims:
- It prolongs the stress of a vulnerable accused.
 - It interferes with the provision of an intervention to address any issues that the accused may have.
 - It interferes with any counselling or therapeutic assistance that can be provided to the victim without the risk of tainting any evidence that the victim may be required to give in determination of the matter.
 - It prejudices the fairness of the trial itself.¹²³

117 Submission 27 (Victoria Legal Aid).

118 Submission 33 (Commission for Children and Young People).

119 Submission 23 (Dr Robert G Adler).

120 Submission 29 (Victorian Equal Opportunity and Human Rights Commission).

121 *Human Rights Act 2004* (ACT) s 20(3).

122 *Perovic v CW* No CH 05/1046 (Unreported, ACT Children's Court, Magistrate Somes, 1 June 2006).

123 Submission 29 (Victorian Equal Opportunity and Human Rights Committee), citing *Dwyer v Watson and another and K v HM Advocate* (2002) 3 WLR 1488.

The Commission's conclusion

- 2.171 Delay is an important consideration in the administration of criminal justice. Included in the minimum guarantees in the Charter is the right for people charged with criminal offences to be tried without unreasonable delay.¹²⁴ This right recognises that when proceedings are delayed and not finalised within a reasonable time, the delay can impose an additional burden on those involved in criminal proceedings.¹²⁵
- 2.172 A recent decision made by the Supreme Court in the Australian Capital Territory in *R v Forsyth*¹²⁶ illustrates what is meant by 'unreasonable delay' within the context of criminal proceedings. In this case the court held, consistent with approaches followed by courts in the United Kingdom, New Zealand and Canada, that 'there is no need to establish that a trial cannot be fair, [or] to identify [or infer] prejudice ... before a finding can be made that there has been unreasonable delay'.¹²⁷ The court concluded that the delay was unreasonable as it was significantly caused by limits on institutional resources and the actions of the prosecution.¹²⁸ In doing so, the following factors were identified and applied as being relevant to considering whether there has been unreasonable delay:
- the length of the delay
 - whether the accused has waived certain time periods in the proceedings
 - the reasons for the delay.¹²⁹
- 2.173 General delay in criminal proceedings can affect their fairness, as well as cost and efficiency.¹³⁰ This has practical as well as public interest effects.¹³¹
- 2.174 Delay in criminal proceedings is an issue that affects many areas of the justice system, but has a particular impact on people involved in CMIA matters, including vulnerable accused who may have a mental impairment or be unfit to stand trial, and vulnerable victims of crime who must deal with the particular difficult circumstances involved in CMIA matters.
- 2.175 The Commission acknowledges that delay in criminal proceedings has a significant impact on accused involved in CMIA matters given their particular vulnerabilities. The Commission also acknowledges the special vulnerability of young people under the CMIA and the particular impact that delays in proceedings may have on their development and overall wellbeing.
- 2.176 Delays in criminal proceedings can lead to delays in young people accessing treatment and other interventions. This can have a particular impact on young people who, according to expert opinion provided to the Commission, benefit greatly from being provided with treatment and intervention strategies at the earliest possible opportunity.
- 2.177 Delays in matters being transferred to the higher courts can also result in the generation of multiple expert reports. Given that young people are continually developing, significant changes can occur in much shorter periods of time and so a report obtained a few months earlier may no longer be current.

124 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(c).

125 Sentencing Advisory Council, *Sentence Indication: A Report on the Pilot Scheme*, Report (2010) 5. (2013) 281 FLR 62.

126 Ibid 106.

127 Ibid 101. The court, however, did not grant a remedy as the prosecution had not acted unlawfully and the accused had not suffered any prejudice due to the delay (relevant to remedy).

128 Ibid 105, applying the factors set out in the Canadian decision of *R v Morin* [1992] 1 SCR 771. For a discussion of the case, see Human Rights Legal Centre, *Case notes, ACT Supreme Court clarifies the principles applicable to the determination of 'unreasonable delay'* (31 October 2013) <<http://hrlc.org.au/act-supreme-court-clarifies-the-principles-applicable-to-the-determination-of-unreasonable-delay/>>.

129 Sentencing Advisory Council, above n 125, 4.

130 Ibid 5.

Enshrining a statutory principle

- 2.178 The Commission agrees that unreasonable delay should be avoided in matters under the CMIA as they involve accused who are particularly vulnerable due to their mental condition. Delays in criminal proceedings can have a particularly significant impact on young people given their continual development and the need for early intervention and treatment. Victims, their families and the family members of accused should be spared the additional trauma and confusion that unreasonable delay can cause in matters that are already complex and involve a high degree of emotional stress and grief.
- 2.179 Accordingly, the Commission recommends the introduction of an additional statutory principle to apply to both the CMIA and the CYFA to create a statutory imperative to avoid delay in the following particular circumstances:
- in cases involving children and young people
 - where the delay infringes an accused's rights
 - to support therapeutic outcomes for the accused, victims and family members.

Recommendation

- 6 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) and the *Children, Youth and Families Act 2005* (Vic) should be amended to reflect the principle that unreasonable delay is to be avoided and particular consideration is to be given to prioritising matters involving unfitness to stand trial and the defence of mental impairment where:
- (a) the accused is a child or was a child at the time of the alleged offence
 - (b) unreasonable delay would be inconsistent with the accused's rights, or
 - (c) to support therapeutic outcomes for the accused, victims and family members.

Extending the jurisdiction of summary courts under the CMIA

- 2.180 The Commission has also identified that a significant contributor to delay is the current limited jurisdiction of the Magistrates' Court and Children's Court to determine unfitness to stand trial and make orders following a finding of not guilty because of mental impairment.
- 2.181 The Commission accordingly makes a broad recommendation that the jurisdiction of both courts should be extended within the current respective criminal jurisdictions of each court. Chapters 5 and 6 contain the Commission's recommendations for the proposed model to apply in each court under such an extension. However, to ensure that this is applied in a way that is appropriate and has regard to the current operational constraints of each court and is consistent with the aim of reducing unreasonable delay, the Commission also recommends that working groups be formed to give effect to the recommendations made in Chapters 5 and 6.

Recommendations

- 7 The jurisdiction of the Magistrates' Court and the Children's Court over matters involving unfitness to stand trial and the defence of mental impairment should be extended within the current respective criminal jurisdictions of each court.

The extension of jurisdiction should be provided through amendments to sections 4 and 5 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) and by the recommendations made in Chapters 5 and 6 of this report.
- 8 The Victorian Government should establish working groups as part of any implementation of the recommendations in Chapters 5 and 6 regarding the application of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) in the Magistrates' Court and Children's Court. A separate working group should be established for each court with representation from individuals and organisations with expertise in adult and youth justice, forensic mental health and forensic disability.

Improvements to court processes to target areas of unreasonable delay

- 2.182 Two further areas in which unreasonable delays could be avoided are in:
 - the listing practices of all courts in matters that proceed under the CMIA
 - the delivery of judgments in such matters.
- 2.183 With respect to listing practices, the Commission considers that it would be valuable for all Victorian courts to consider under the proposed changes made to the CMIA, how listing practices could be improved to avoid unreasonable delays in the areas identified.

Recommendation

- 9 Victorian courts should consider current approaches to listing matters under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) and consider how unreasonable delay can be avoided by the adoption of new listing practices at a number of key stages, including:
- (a) first hearing of matters after committal from the Magistrates' Court or Children's Court
 - (b) investigations of unfitness to stand trial
 - (c) special hearings following a permanent finding of unfitness to stand trial
 - (d) matters involving children and young people, and
 - (e) matters involving people who are not eligible to be placed in an 'appropriate place' within the meaning of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

Any new listing practices that are adopted should be supported by a relevant practice note or practice direction.

- 2.184 With respect to the delivery of judgments, it should be recognised that any unreasonable or excessive delay in the delivery of judgments in matters determined under the CMIA is highly undesirable. This is particularly so in matters involving children or young people.
- 2.185 The matter of *CL (A Minor) v Lee*¹³² ('CL at trial') and *CL, A Minor (by his Litigation Guardian) v Director of Public Prosecutions (on behalf of Lee)*¹³³ ('CL on appeal') unfortunately involved extensive delay in the delivery of judgment at trial level and a lack of affirmation at appellate level of children's and young people's right to, and need for, timely judgment.
- 2.186 The matter of *CL at trial* was heard in the Supreme Court on 8 and 9 December 2009. On 17 March 2010 the Victorian Court of Appeal delivered its judgment in *R v Momcilovic ('Momcilovic')*,¹³⁴ as a consequence of which the parties in *CL at trial* and the Victorian Attorney-General filed written submissions with the court on the effect of the Charter on the CYFA in the light of *Momcilovic*. Judgment in *CL at trial* was delivered on 16 November 2010.
- 2.187 CL was a child (under 18 years) at the time of the offences charged and when the matter came before the Supreme Court. The nature and circumstances of the charges demonstrated that CL was deeply troubled and vulnerable. The victims of the charges were also vulnerable young people. Over an eight-month period, CL was charged with the offences of criminal damage, committing an indecent act, making child pornography, attempted armed robbery, intentionally causing serious injury, unlawful assault, assault in company, indecent assault, attempted rape, rape, sexual penetration and unlawful imprisonment.¹³⁵

132 (2010) 29 VR 570.

133 [2011] VSCA 227 (5 August 2011).

134 (2010) 25 VR 436. The decision of the Victorian Court of Appeal (Maxwell P and Ashley and Neave JJA) was reversed by the High Court (*Momcilovic v The Queen* (2011) 245 CLR 1).

135 Ultimately, in 2012 in the County Court of Victoria, CL pleaded guilty to one count of sexual penetration of a child under the age of 16 years, three counts of indecent act with a child under the age of 16 years, one count of making child pornography and two counts of criminal damage. CL was sentenced by imposition of a Youth Supervision Order until the age of 21 years: *DPP v CL* (Unreported, County Court of Victoria, Judge Lacava, 14 May 2012) [19]. The matter of CL is further referred to in Chapter 6 at [6.15]–[6.18].

- 2.188 In the judgments of the Court of Appeal (Chief Justice Warren and Acting Justice of Appeal Sifris) in *CL on appeal*, there was no reference to the fact or period of delay in the delivery of judgment at trial. There was no reference to the need for timely delivery of judgment. There was no reference to the principle enshrined in section 25(2)(c) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Charter') that a person charged with a criminal offence is entitled to be tried without unreasonable delay. There was no reference to the principle enshrined in section 23(2) of the Charter that an accused child must be brought to trial 'as quickly as possible'. There was no reference to the provision in resolution 40/33 of the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985* ('The Beijing Rules') that '[e]ach case shall from the outset be handled expeditiously, without any unnecessary delay'. There was no reference to article 40(iii) of the *United Nations Convention on the Rights of the Child* (1989) that it is a child's right '[t]o have the matter determined without delay'.
- 2.189 In the absence of any reference by the Court of Appeal in *CL on appeal* to the significant needs and rights of children and young people as stated by the principles and instruments rehearsed in the preceding paragraph, and in the absence of curial affirmation of those rights, the Commission affirms that those rights are of profound significance.
- 2.190 The period from the laying of the initial charges against CL to CL's ultimate sentencing on consolidated charges was four years and eight months.

Education, training and awareness

- 2.191 In the consultation paper and supplementary consultation paper, the Commission did not specifically seek views on the education and training requirements for people who work under the CMIA. However, submissions and consultations highlighted the need for education and training opportunities for the different groups who have regular interaction with the CMIA.¹³⁶ The need to enhance the expertise of people in the summary jurisdiction was also emphasised as integral if the application of the CMIA were to be extended in the Magistrates' Court and the Children's Court.¹³⁷ Some people thought that an extension of the CMIA could only be effective if there were adequate resources, specialised training for magistrates,¹³⁸ specialised court staff¹³⁹ and a specialised list to manage these matters.¹⁴⁰
- 2.192 The Commission agrees that, to support its recommendations, there is a need for education and training programs directed at the specific needs of these different groups, in particular decision makers, prosecutors, lawyers and health professionals who are involved in CMIA matters.

136 Consultation 3 (Villamanta Disability Rights Legal Service).

137 Consultations 26 (Office of the Chief Psychiatrist and Legal Branch, Department of Health); 28 (Senior Practitioner—Disability Practice Leader, Office of Professional Practice, Department of Human Services); 7 (Morwell Magistrates' Court).

138 Consultation 7 (Morwell Magistrates' Court).

139 Ibid.

140 Ibid.

- 2.193 In the following section the Commission makes recommendations to facilitate education and training for people who work under the CMIA. These suggestions are drawn from the feedback given to the Commission throughout its reference and with regard to the recommendations made in the Victorian Parliament Law Reform Committee's *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers*. In the Commission's view, these professional development opportunities will enable the people who work in the CMIA field to be properly trained to address the many challenges that arise in relation to:
- the practical application of the law under the CMIA and reforms to the law if the Commission's recommendations are adopted
 - prosecuting accused who may be unfit to stand trial or not guilty because of mental impairment
 - the ethical issues that lawyers face in defending accused who may be unfit to stand trial or not guilty because of mental impairment
 - the specific needs of accused who may be unfit to stand trial, in terms of communication assistance, support and services.
- 2.194 The Commission also makes recommendations in support of the training of experts who assess people who may be unfit to stand trial (Chapter 3) and Forensic Leave Panel members (Chapter 10).
- 2.195 The Commission notes the importance of members of the media having an understanding of the operation of the CMIA and the mental conditions of the people who come under it to ensure the accurate portrayal of the nature and implications of the CMIA regime in the community. This is discussed in more detail at [8.202]–[8.208] in Chapter 8.

Education, training and accreditation for lawyers

- 2.196 Lawyers play an important role in CMIA processes. The process of determining unfitness to stand trial under the CMIA begins when the question of an accused's unfitness to stand trial arises. Lawyers, particularly defence lawyers, are often the ones who will raise the question of unfitness to stand trial. Similarly, lawyers advise and assist their clients in deciding whether to rely on the defence of mental impairment.

Views in submissions and consultations

Understanding and the ability to provide support

- 2.197 The Commission received some positive feedback on the expertise of lawyers who work under the CMIA.¹⁴¹ One submission noted:
- When I went through [the CMIA process] I got advice from my lawyer about this right. From the very beginning, he stayed by my side throughout the entire processes [sic] that I had to go through ... The lawyer representing me was highly skilled in this area of the mental impairment act which he advised me to do and go ahead with. ... I was very unwell and now looking back my lawyer at the time was concerned for [my welfare].¹⁴²
- 2.198 Some positive feedback was also provided about support and communication methods. A person consulted by the Commission who was previously subject to a supervision order said that their lawyer was 'good at helping me to understand what was going on in court' and that there was good communication between them.¹⁴³

¹⁴¹ Submission 15 (Name withheld). Consultations 13 (Mental Health Court Liaison Service officer); 5 (Consumer Advisory Group (CAG), Community Forensic Mental Health Service).

¹⁴² Submission 15 (Name withheld).

¹⁴³ Consultation 29 (Person previously subject to a non-custodial supervision order under the CMIA).

- 2.199 However, there were three main areas that were identified for improvement in lawyers' understanding and approach:
- Sometimes lawyers lack understanding of the CMIA and the implications of the CMIA regime which affects their ability to provide accurate advice.¹⁴⁴ For example, one submission noted that a person had been told by their lawyer that a CMIA finding would not result in a criminal record, which is not necessarily true.¹⁴⁵
 - Sometimes lawyers lack understanding of mental illness, intellectual disability or other cognitive impairment.¹⁴⁶
 - Some lawyers have insufficient skills to support people with a mental illness, intellectual disability or other cognitive impairment and to communicate effectively with them.¹⁴⁷
- 2.200 The following suggestions were made:
- Lawyers could be better trained to support their client's decision-making capacity and ability to participate in proceedings.¹⁴⁸
 - Lawyers could go through an accreditation process to ensure that they are acting consistently with contemporary communication assistance approaches.¹⁴⁹

Ethical issues

- 2.201 In the consultation paper, the Commission discussed some of the ethical issues a lawyer may face in the CMIA process.
- 2.202 One ethical issue that can arise concerns the decision as to whether to raise the question of unfitness to stand trial on behalf of the client and consequently take the client through the CMIA process. Similarly, lawyers representing the accused may face ethical issues in deciding whether to raise the defence of mental impairment. These can be difficult decisions, particularly when their client may be unable to provide instructions on which path they want to take. In making this decision, a lawyer may feel conflicted between the benefits of the CMIA process for their client (for example, the availability of a special hearing process and the absence of recorded conviction and a sentence of imprisonment) and its potential drawbacks (for example, the indeterminate period of supervision).
- 2.203 Submissions and consultations indicated that this issue was indeed one that lawyers had to address in many cases.¹⁵⁰ In a consultation attended by people who had direct experience of going through the CMIA process as accused, many participants indicated that they were mentally impaired at the time of the trial and could not remember making decisions in relation to this.¹⁵¹
- 2.204 It was suggested that a practice guide be developed to assist lawyers in navigating ethically challenging scenarios.¹⁵²

144 Submission 2 (Forensicare Patient Consulting Group). Consultation 9 (Department of Human Services case managers, Gippsland and Latrobe).
 145 Submission 2 (Forensicare Patient Consulting Group).
 146 Submission 2 (Forensicare Patient Consulting Group). Consultations 36 (Family member of person subject to a non-custodial supervision order under the CMIA); 5 (Consumer Advisory Group (CAG), Community Forensic Mental Health Service).
 147 Consultations 1 (Consumer Advisory Group (CAG), Thomas Embling Hospital); 36 (Family member of person subject to a non-custodial supervision order under the CMIA); 4 (Family and Friends Support Group, Forensicare).
 148 Consultations 25 (Victoria Legal Aid—criminal lawyers); 36 (Family member of person subject to a non-custodial supervision order under the CMIA).
 149 Consultations 28 (Senior Practitioner—Disability Practice Leader, Office of Professional Practice, Department of Human Services); 40 (Communication Resource Centre, Scope).
 150 Submissions 18 (Victoria Legal Aid); 21 (Criminal Bar Association). Consultations 3 (Villamanta Disability Rights Legal Service); 11 (Melbourne Magistrates' Court); 13 (Mental Health Court Liaison Service officer); 15 (Northern Area Mental Health Service); 16 (Shepparton Magistrates' Court); 17 (Department of Human Services case managers, Shepparton); 19 (Forensic Clinical Specialists); 21 (Consultant psychiatrists, Forensicare); 25 (Victoria Legal Aid—criminal lawyers).
 151 Consultation 1 (Consumer Advisory Group (CAG), Thomas Embling Hospital).
 152 Submission 18 (Victoria Legal Aid).

- 2.205 The Commission notes that in 2007, the Victorian Bar provided guidance on appearances in criminal matters where there are issues of mental impairment.¹⁵³ This was to be incorporated into the *Victorian Bar Incorporated Practice Rules*¹⁵⁴ but it does not appear that this has occurred.

The Commission's conclusion

- 2.206 In the Commission's view, lawyers need to have a thorough understanding of the CMIA regime when providing advice to clients who may be unfit to stand trial or eligible for the defence of mental impairment, to ensure the accused appreciates the legal consequences of the CMIA pathway.
- 2.207 The Victorian Parliament Law Reform Committee's *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* recommended that the Victorian Government support the Law Institute of Victoria and the Victorian Bar to develop and distribute information to their members on how to interact better with, and respond appropriately to, clients with an intellectual disability or cognitive impairment.¹⁵⁵ It noted that this information could include:
- how to identify intellectual disability or cognitive impairment
 - issues involved in prosecuting and representing clients who have an intellectual disability or cognitive impairment
 - the disadvantages experienced by people with an intellectual disability or cognitive impairment
 - organisations that can provide information to assist both practitioners and clients.
- 2.208 The Commission supports this recommendation and supports its extension to people with a mental illness. In the Commission's view, the education and training for lawyers should also specifically address:
- information about the CMIA and the implications of the CMIA regime
 - the use of appropriate communication methods
 - how lawyers can increase the ability of their clients to participate in hearings
 - advice on navigating ethically challenging situations.
- 2.209 In addition, the Commission considers that there should be training and education requirements for defence lawyers for entry into the Victoria Legal Aid Indictable Crime Panel or the creation of additional training and education requirements for defence lawyers acting in CMIA matters.
- 2.210 Such training and education requirements could be combined with current accreditation arrangements. Victoria Legal Aid may establish different panels for different classes of matters in relation to which legal assistance may be provided.¹⁵⁶ It may also determine the conditions which a private law practice or private legal practitioner must satisfy to be included on a panel.¹⁵⁷ CMIA matters could be assigned to legal practitioners on the panel who have gained the entitlement to act in such matters.¹⁵⁸

153 Victorian Bar, *Ethics Bulletin*, No 1 of 2007, 'Appearances in criminal matters—mental impairment' (21 December 2007) <<http://www.vicbar.com.au/about-us/about-the-victorian-bar/bar-committees/committees/ethics-committee/ethics-bulletins>>.

154 Victorian Bar, *Victorian Bar Incorporated Practice Rules*, Rules of Conduct and Compulsory Continuing Development Rules (2009).

155 Victorian Parliament Law Reform Committee, above n 7, Recommendation 22.

156 *Legal Aid Act 1978* (Vic) s 29A.

157 *Ibid.*

158 *Ibid* s 29B.

- 2.211 In the Commission's view, training and education, particularly as part of accreditation requirements, would be an effective method of promoting high standards and of avoiding situations where lawyers take on cases that are beyond their expertise. It should ensure that lawyers have an accurate working knowledge of the CMIA, the skills to interact with and promote the participation of clients who have a mental illness, intellectual disability or other cognitive impairment and the ability to manage ethical issues.

Recommendations

- 10 Victoria Legal Aid should develop training and education requirements for lawyers acting in matters under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) and the equivalent provisions in the *Children, Youth and Families Act 2005* (Vic). These requirements should be included as a pre-condition for entry into the Victoria Legal Aid Indictable Crime Panel and equivalent panels in matters in the Magistrates' Court and Children's Court.
- 11 The Law Institute of Victoria, in collaboration with the Victorian Bar, should develop practice information to provide guidance for lawyers acting in criminal matters involving accused with a mental illness, intellectual disability or other cognitive impairment.

Education, training and guidelines for prosecutors

- 2.212 The Commission's recommendations to extend the operation of the CMIA to the Magistrates' Court and Children's Court will require education and training to be provided for police prosecutors in prosecuting CMIA matters in both courts.¹⁵⁹
- 2.213 Further, the Commission considers that police prosecutors should be provided with guidelines on dealing with CMIA matters more generally. When a question of unfitness to stand trial or the defence of mental impairment is raised, police prosecutors have options in exercising their prosecutorial discretion. At present, they may withdraw the charge (which they may choose to do because of the lack of an outcome following some CMIA matters in the Magistrates' Court or Children's Court), or consider whether the matter should be tried in a higher court. Under the Commission's recommendations, police prosecutors may be more likely to pursue the matter in the Magistrates' Court or Children's Court.
- 2.214 In exercising this discretion, police prosecutors may seek advice from the Office of Public Prosecutions. The key guiding principle applied by police prosecutors in exercising their discretion is community safety. Other factors include the prospects of gaining conviction and the views of the victim. In the Commission's consultations, some police prosecutors also indicated that in applying this discretion, factors such as whether the accused may be unfit to stand trial or have a mental impairment were also relevant to this decision.¹⁶⁰ In other consultations it was suggested that the approach taken by police prosecutors on these issues varied.¹⁶¹
- 2.215 In the Commission's view, it is desirable to have a set of prosecutorial guidelines to ensure greater consistency in decision making.

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Consultation 44 (Victoria Police—Children's Court police prosecutor and policy staff).
Consultation 27 (Victoria Police—police prosecutors).
Consultations 25 (Victoria Legal Aid—criminal lawyers); 11 (Melbourne Magistrates' Court).

Recommendation

12 Victoria Police should:

- (a) develop a set of prosecutorial guidelines that are consistent with the underlying principles of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) to assist police prosecutors in their prosecution of matters under the Act, and
- (b) provide education and training for police prosecutors on prosecuting *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) matters in the Magistrates' Court and Children's Court.

Education and training for judges and magistrates

2.216 The approach by and skills of judges and magistrates form an integral part of how the CMIA provisions operate in practice and are experienced by individuals who are directly affected by the Act, in particular accused and people subject to supervision orders, their family members and victims and their families, as well as the broader community through the jury. This includes techniques for communicating with people with a mental illness, intellectual disability or other cognitive impairment, for example in the delivery of reasons or explanation of court processes, and flexibility, within the available resources, to modify proceedings to ensure that they are as appropriate as possible, having regard to the capacity of the person.

2.217 Individuals who are involved in CMIA proceedings will generally be suffering high levels of anxiety and stress, in addition to managing a mental condition or the trauma of being a victim of crime. It is therefore crucial that any information communicated in court, via the judicial officer is done in a way that acknowledges their need for support and is as clear and accessible as possible. The Commission is aware of cases where the court was able to modify the language used in a judgment under the CMIA so as to ensure the accused understood the court's decisions and reasons. For example, in one judgment involving an accused with a significant intellectual disability, the court used simple and plain language to describe the offences committed and the outcome of the order imposed on the person.¹⁶² The Commission supports the use of such language where it would assist the accused or other individuals directly affected, such as victims of crime and their families and family members of the accused.

Views in submissions and consultations

- 2.218 The Commission's recommendations to extend the operation of the CMIA to the Magistrates' Court and the Children's Court will require education and training to be provided for magistrates in hearing CMIA matters in those courts.¹⁶³ This would require information to be provided for magistrates in both metropolitan and regional areas on the listing of matters, the new processes that will apply in these courts and other topics specific to CMIA matters (such as the assessment of expert reports). Victoria Legal Aid suggested in its submission that education could be provided for the judiciary (and medical experts) to support the Commission's recommendations, if implemented.¹⁶⁴
- 2.219 It was suggested in consultations that education and training could be provided for the judiciary to:
- ensure that court procedures promote appropriate communication with people who come under the CMIA¹⁶⁵
 - give the judiciary a greater understanding of clinical practice in the mental health and disability sectors, including the services that are available to people who may be subject to the CMIA.¹⁶⁶

The Commission's conclusion

- 2.220 The Victorian Parliament Law Reform Committee's *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* recommended that the Victorian Government support the Judicial College of Victoria in providing more training opportunities for members of the judiciary about best practice management in proceedings involving a person with an intellectual disability or cognitive impairment.¹⁶⁷ The Commission agrees that the Judicial College of Victoria, whose major function is to assist with the professional development of judicial officers, is well placed to take the lead in developing education and training programs that will meet the needs of the judiciary at all levels. The Commission endorses the recommendation of the Victorian Parliament Law Reform Committee, and supports the extension of this recommendation to people with a mental illness.
- 2.221 The Victorian Parliament Law Reform Committee also recommended that the Victorian Government support the Judicial College of Victoria to develop, in consultation with members of the judiciary and the disability sector, guidance material on how the needs of people with an intellectual disability or cognitive impairment can be identified and appropriately met, including with modifications to court proceedings.¹⁶⁸ The Commission supports the extension of this recommendation to people with a mental illness and in addition, supports the inclusion in such guidance material of information about the use of communication techniques with people with a mental illness, intellectual disability or other cognitive impairment.

¹⁶³ Consultations 44 (Victoria Police—Children's Court police prosecutor and policy staff); 7 (Morwell Magistrates' Court).

¹⁶⁴ Submission 18 (Victoria Legal Aid).

¹⁶⁵ Consultations 28 (Senior Practitioner—Disability Practice Leader, Office of Professional Practice, Department of Human Services); 40 (Communication Resource Centre, Scope).

¹⁶⁶ Consultation 19 (Forensic Clinical Specialists).

¹⁶⁷ Victorian Parliament Law Reform Committee, above n 7, Recommendation 26.

¹⁶⁸ Ibid Recommendation 27.

- 2.222 Finally, the Commission recommends that education or training also include information that will increase the understanding of the judiciary of clinical practice in the mental health and disability sectors, including the services that are available to people who may be subject to the CMIA.
- 2.223 In response to the Victorian Parliament Law Reform Committee's recommendations, the Judicial College of Victoria informed the Commission that it is continuing to incorporate training regarding the complex needs of people with a cognitive impairment as part of its curriculum, which is revised and renewed on an annual basis. As in previous years, this consists of programs delivering information on the causes of cognitive impairment and programs to assist judicial officers in developing skills to help or manage people with a cognitive impairment in court. It noted that any expansion of the College's range of activities in relation to people with an intellectual disability would require further resources.¹⁶⁹ The Commission also acknowledges the cost implication that the recommendation below will have for the Judicial College of Victoria.

Recommendation

- 13 The Judicial College of Victoria should develop and deliver judicial education for judges and magistrates on:
- (a) any new statutory provisions and processes that are introduced under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) and the *Children, Youth and Families Act 2005* (Vic)
 - (b) the best practice management of proceedings involving a person with a mental illness, intellectual disability or other cognitive impairment
 - (c) how the needs of people with a mental illness, intellectual disability or other cognitive impairment can be identified and appropriately met, including by modifications to court procedure and the use of appropriate communication methods, and
 - (d) information on clinical practice in the mental health and disability sectors, including the services that are available to people who may be subject to the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

2.224 The Commission also notes that there are examples in other jurisdictions of the resources that have been developed to provide judicial education and skills in relation to the conduct of proceedings in an equitable and accessible way for vulnerable groups. They include:

- The *Equality before the Law Bench Book* published by the Judicial Commission of New South Wales provides 'statistics and information about the different values, cultures, lifestyles, socioeconomic disadvantage and/or potential barriers in relation to full and equitable participation in court proceedings for nine different groups of people' and 'guidance about how judicial officers might need to take account of this information in court—from the start to the conclusion of court proceedings'.¹⁷⁰
- In Queensland, the Supreme Court has published a *Supreme Court Equal Treatment Benchbook*, which is a resource for judicial officers to assist in equal treatment of participants in court proceedings and aims 'to provide information and background knowledge so that judges are alert to circumstances, which, if overlooked, could result in an injustice or a perceived injustice'.¹⁷¹

Linkages, capacity enhancements and information sharing

2.225 The CMIA system operates across several government departments, a range of courts and the mental health and disability service sectors. This can make it difficult for a person who is subject to the CMIA to receive a connected pathway through the system.

2.226 As a person progresses along the CMIA pathway, they will be in contact with different government departments, agencies, courts and services. These may range from police, the Magistrates' Court, the County Court or the Supreme Court, through to the Department of Corrections while on remand and the Department of Health or Department of Human Services once they become subject to a supervision order. If a person is released into the community, they may receive services from area mental health services, disability services providers or services provided by non-government organisations.

2.227 It is therefore difficult for a person to progress smoothly through the CMIA system given the level of co-ordination, expertise and information sharing that is required. While linkages between departments and services are improving, many programs, services or facilities operate in silos.

2.228 The Victorian Parliament Law Reform Committee also identified this as an issue and recommended that the 'Victorian Government consider establishing a steering committee for the purpose of coordinating Government agencies involved in the care and support of people with an intellectual disability who are involved in the justice system'.¹⁷²

2.229 The Commission has made recommendations through this report aimed at enhancing the linkages between the criminal justice, mental health and disability systems, the forensic capacity of services that support the operation of the CMIA and information sharing between bodies or agencies involved in decision making under the CMIA. These include:

- A recommendation to expand and resource the Mental Health Court Liaison Service that currently operates in selected Magistrates' Courts—Recommendation 29 (Chapter 5).

170 Judicial Commission of New South Wales, *Equality before the Law Bench Book* (June 2013) <<http://www.judcom.nsw.gov.au/publications/benchbks/equality>>.

171 Supreme Court of Queensland, *Supreme Court Equal Treatment Benchbook* (12 March 2014) 13 <http://www.courts.qld.gov.au/__data/assets/pdf_file/0004/94054/s-etbb.pdf>.

172 Victorian Parliament Law Reform Committee, above n 7, Recommendation 6. See also Finding 3.

- Recommendations to promote stronger linkages and awareness of whether a person is receiving treatment or services in civil mental health and disability systems, including:
 - giving the Magistrates' Court and the Children's Court the power to discharge a person without determining unfitness to stand trial if it is satisfied that they are receiving treatment, support and services in the community (Recommendation 28(m) in Chapter 5 and Recommendation 45(f) in Chapter 6) and
 - an addition to section 39 requiring a court to consider whether a person is receiving treatment or services under the MHA 2014 or the Disability Act (Recommendation 90 in Chapter 10).
- Recommendations focussed on the appropriateness, availability and flexibility of forensic mental health and disability facilities for young people and adults with a mental illness, intellectual disability or other cognitive impairment (Recommendations 49 and 50 in Chapter 5 and Recommendations 98 and 100 in Chapter 11).
- Recommendations to support and promote workforce strategies and provide more guidance for people working under CMIA to enhance the forensic capacity of civil services to manage people on supervision orders (Recommendation 101 in Chapter 11).

New pathways under proposed changes to the CMIA

- 2.230 The recommendations made in this chapter and in Chapters 3–11 propose significant changes to the CMIA. The review has resulted in the identification of issues which require attention after 17 years of the CMIA's operation.
- 2.231 Given the significant changes recommended to the CMIA regime and its current operation in the higher courts, and the recommended expansion into the Magistrates' Court and the Children's Court, the Commission makes a further recommendation that the Victorian Government review the continued operation of the CMIA 24 months after the commencement of any new legislation.

Recommendation

- 14 The Victorian Government should review the operation of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) 24 months after implementation of any major recommendations.

- 2.232 To illustrate the new CMIA pathways that could operate under the Commission's recommendations, four scenarios have been developed and are presented below. The scenarios portray fictional cases that are composites of a range of cases under the CMIA.

Scenario 1—pathway in the Magistrates' Court

Talia is driving her car while in an acutely psychotic state. In a shopping centre car park, she backs her car into another car, driven by Roger. Talia then drives at Jamal, a passer-by, running over his feet. Jamal suffers serious fractures and feels traumatised by the experience.

Talia is charged with dangerous driving of a motor car and recklessly causing serious injury. Her lawyer raises the issue of her unfitness to stand trial while her matter is listed in the Magistrates' Court in the committal stream.

CURRENT SYSTEM		PROPOSED SYSTEM
The magistrate has no power to deal with the question of unfitness to stand trial.	COMMITTAL	The magistrate has regard to the statutory principles in the CMIA in deciding to grant summary jurisdiction (Rec 35).
Even though the offences are within the Magistrates' Court's jurisdiction, a committal hearing is conducted. Roger and Jamal attend the committal hearing. Talia is committed for trial. There are delays in the matter being listed for trial.		Talia is not committed for trial and the matter continues in the summary jurisdiction (Rec 28(j)). The Magistrates' Court has the power to deal with the question of unfitness to stand trial (Rec 27).
The question of Talia's unfitness to stand trial is reserved for consideration by the trial judge.		The case is given priority listing in the summary jurisdiction (Rec 6).
Roger and Jamal have little information on the CMIA process.		Roger and Jamal are given information on the CMIA process (Recs 57, 58, 59).
		The court waives the requirement that Talia consent to the summary hearing of the charge in the summary jurisdiction (Rec 36).
The trial judge determines there is a real and substantial question as to Talia's unfitness to stand trial.	UNFITNESS INVESTIGATION	The court orders that Talia undergo an independent expert assessment concerning her unfitness to stand trial (Rec 28(g)).
A jury is empanelled to determine whether Talia is unfit to stand trial. Talia is stressed by the proceedings, causing her condition to deteriorate.		The expert assessment indicates that Talia is unfit to stand trial, but could be fit for the particular hearing she has to face if she had time for her condition to stabilise. The Mental Health Court Liaison officer refers Talia to local area mental health services and she receives treatment for her mental illness (Rec 29).
Talia is found unfit to stand trial but likely to become fit within 12 months.		Before the unfitness determination is made another expert assessment is conducted that demonstrates that Talia's symptoms are in remission and Talia is fit to stand trial (Rec 21).
Following an adjournment period, Talia's symptoms are in remission and Talia is fit to stand trial. The proceeding resumes in accordance with usual criminal procedures.		The proceeding is resumed in accordance with usual criminal procedures (Rec 28(f)).
Roger and Jamal are confused about the stages of the proceedings.		Roger and Jamal are given information and supported throughout the proceedings (Recs 57, 58, 59).

CURRENT SYSTEM		PROPOSED SYSTEM
Talia is found not guilty because of mental impairment. Jamal does not understand why she has been found 'not guilty' and feels dissatisfied by the court process.	OUTCOME	A summary hearing is conducted to determine Talia's criminal responsibility.
In total, the matter has taken 14 months to be finalised.		Talia is found not criminally responsible because of mental impairment (Rec 69).
Talia is declared liable to supervision and is placed on an indefinite non-custodial supervision order with a 7.5 year nominal term. Talia, Roger and Jamal do not understand the meaning of a nominal term and think that she has been sentenced to 7.5 years.		The court has the power to make orders following the CMIA finding (Rec 32). Talia is declared liable to supervision (Recs 30, 31) and is placed on a non-custodial supervision order of two years (Rec 32) after the magistrate considers the principles in the CMIA (Rec 34).
Talia's supervision order is reviewed annually but her order is not revoked until the nominal term (7.5 years).	REVIEW	Talia continues to show improvement. With the support of her treating doctors and area mental health service, she applies for a review to revoke the order before the end of the two-year period (Rec 33).
At the major review, Talia's supervision order is revoked.		The court considers whether she is receiving services under a civil order under the <i>Mental Health Act 2014</i> (Vic) (Rec 90). Her area mental service confirms that she is also subject to a treatment order.
		The court concludes that Talia does not pose an unacceptable risk to the community. It also concludes that Talia's mental health can be managed through the civil treatment order. The court revokes Talia's non-custodial supervision order (Rec 33).

Scenario 2—pathway in the Children’s Court

Jason, a high school student, is 15 years old and has an intellectual disability. A fellow student, Caitlin, also has an intellectual disability. One day at school, Jason asks Caitlin to come into the boys’ bathroom with him. Some time later, Caitlin comes out of the bathroom, very upset. She tells her teacher that Jason made her have sex with him in the bathroom.

Jason is charged with rape. Jason’s lawyer raises the issue of his unfitness to stand trial while his matter is listed in the Children’s Court.

CURRENT SYSTEM		PROPOSED SYSTEM
The magistrate has no power to deal with the question of unfitness to stand trial.	COMMITTAL	The magistrate determines there is a real and substantial question of unfitness and a presumption in favour of diversion is considered (Recs 44, 45(b)).
Even though the offence is within the Children’s Court jurisdiction, Jason is committed for trial in the County Court. There are delays in the matter being listed for trial.		Jason’s matter is prioritised to prevent unreasonable delay (Rec 6(a)). Delay is also prevented by the Children’s Court having jurisdiction to determine unfitness (Recs 39, 41, 45).
The question of Jason’s unfitness to stand trial is reserved for consideration by the trial judge.		Jason is not committed for trial and the matter continues in the Children’s Court (Recs 45(m)).
Jason is held on remand in a youth justice facility but is the only young person with an intellectual disability. The other young people take advantage of Jason’s vulnerability to intimidate him and abuse him verbally.	UNFITNESS INVESTIGATION	The magistrate makes an assessment order. Jason has a comprehensive assessment that includes recommendations on whether an education program or support measures will optimise Jason’s fitness and takes into account Jason’s developmental stage (Recs 17, 18, 45(d)).
The trial judge determines there is a real and substantial question as to Jason’s unfitness to stand trial and a jury is empanelled to determine whether he is unfit to stand trial.		The court is provided with an expert report that concludes that Jason is unfit to stand trial but identifies that particular modifications to court procedure will increase his capacity to participate in the special hearing (Recs 22, 33).
Jason finds the County Court scary and the jury intimidating.		
Jason is found unfit to stand trial but does not have access to education programs or support measures.	SPECIAL HEARING	Jason is found unfit to stand trial by the magistrate.
Jason finds the courtroom proceedings very stressful and does not understand what is happening. He is unable to participate in the special hearing proceedings.		The magistrate has the power to conduct a special hearing and does so within three months (Rec 45(i)).
		Jason is provided with communication assistance throughout the special hearing and is able to understand some of what is happening in court (Rec 19).

CURRENT SYSTEM		PROPOSED SYSTEM
Jason is found to have committed the offence.	OUTCOME	Jason's conduct is 'proved on evidence available' (Rec 68).
In total, the matter has taken 14 months to be finalised.		Jason is declared liable to supervision and placed on a custodial therapeutic supervision order for a period of two years (Recs 48a, 48c).
The judge declares Jason liable for supervision and he is placed on an indefinite custodial supervision order with a nominal term of 25 years.		Specialised decision-making principles are applied in deciding which order to make for Jason (Recs 3, 4, 5, 48(g)).
Caitlin does not make a court report.		Caitlin and her mother are supported to make a court report (Rec 57).
Jason continues to reside in a youth justice facility and does not receive treatment or services.	SUPERVISION	Jason resides in a youth forensic facility where he receives specialised treatment and care and learns appropriate sexual behaviour and life skills (Recs 49, 50).
Once Jason turns 18, he is required to be transferred to an adult forensic disability service, the Disability Forensic Assessment and Treatment Service (DFATS).		Jason's progress is reviewed every six months (Recs 48(d), (e)).
		Jason is able to stay in the youth forensic facility until he is 21 years of age.

Scenario 3—pathway in the County Court

Li has an intellectual disability. His carer, Dave, has worked with Li for six months. Li sometimes gets violent when he is upset. One day, Li becomes frustrated with Dave and throws a rock at his head. The rock hits Dave in the face and he permanently loses sight in his left eye.

Li is charged with intentionally causing serious injury. Li's lawyer raises the issue of his unfitness to stand trial and the defence of mental impairment while his matter is listed in the Magistrates' Court in a committal hearing.

CURRENT SYSTEM		PROPOSED SYSTEM
Li does not understand what is happening and feels pressure to plead guilty after his lawyer advises that if he does this he could avoid being committed for trial.	COMMITTAL	Li's lawyer does not advise Li to plead guilty (Recs 10, 11, 27).
It is not clear how the committal should be conducted.		The magistrate has regard to the statutory principles in the CMIA in conducting the committal and making the decision to commit Li for trial (Recs 37, 38). Li's matter is prioritised for listing for trial in the County Court (Recs 6, 9).
Dave does not understand the committal process and is given limited information and support.		Dave is given information and support throughout the committal and trial proceedings (Recs 57, 58, 59).
Li is committed for trial in the County Court and a jury is empanelled to determine unfitness.	UNFITNESS	The judge orders an assessment of Li's unfitness and the report recommends support strategies and an education program to optimise Li's fitness (Recs 18, 22).
The reports provided to the court vary in quality but all agree that Li is unfit. Li is found unfit by the jury.		The judge adjourns the matter and Li undergoes an education program and is found fit to stand trial by a judge (Recs 20, 21).
Li finds the court and the proceedings confusing and is scared and intimidated by the jury. Dave is confused about the unfitness process.		
Li is unable to participate in the special hearing and is not provided with any in-court support.	TRIAL/SPECIAL HEARING	A support person accompanies and provides support to Li in the trial and court proceedings are modified so that Li is able to participate in the hearing (Recs 18, 19).
There is legal argument about whether an intellectual disability falls within the definition of mental impairment. Li is found not guilty because of mental impairment. Dave is confused about what this means.		It is clear that an intellectual disability meets the definition of mental impairment and the defence is raised by Li (Rec 24).
Dave is provided with limited support throughout the special hearing.		Li is found not criminally responsible because of mental impairment. Dave understands the outcome of the trial (Rec 69).

CURRENT SYSTEM		PROPOSED SYSTEM
<p>The judge declares Li liable to supervision and finds that a custodial supervision order is appropriate given the risk Li poses. Li is assessed as not suitable for a secure custodial facility and so he is put on a non-custodial supervision order.</p>	ORDERS	<p>The judge declares Li liable for supervision and Li is placed on an indefinite custodial supervision order as he poses an unacceptable level of risk. Li will have five-year progress reviews of the order (Recs 83, 84, 87).</p>
<p>Li receives a 10-year nominal term. Li and Dave do not understand what this means. Li thinks he has been sentenced to 10 years and becomes angry and upset.</p>		<p>Both Li and Dave understand the conditions of the order (Recs 60, 83).</p>
<p>The reports are tendered to court in an uncoordinated way.</p>		<p>The court is provided with comprehensive reports that are presented in a more coordinated way (Recs 70, 71, 72, 73).</p>
<p>Dave does not make a report to the court.</p>		<p>Dave is supported to make a report to court (Rec 57).</p>
<p>Li does not receive any specialist forensic disability treatment or services and the accommodation facility that he resides in does not have forensic disability expertise.</p>	LEAVE AND REVIEW	<p>Li resides in a specialised forensic disability facility and has a treatment plan and clinical oversight by the Senior Practitioner (Recs 98, 104, 106). Li has a progress review at five years and demonstrates some progress, but in accordance with the presumption, the court does not vary the custodial supervision order (Rec 85).</p>
<p>Li's supervision order is reviewed at 10 years. Multiple parties attend the hearing and Li is confused and unable to demonstrate any progress or improvement.</p>		<p>After successful periods on leave, Li has a second progress review at 10 years and the court varies the order to a non-custodial supervision order (Rec 85).</p>
<p>Li repeatedly breaches the supervision order but no action is taken because there is no flexibility to respond to the breach. Li remains on a supervision order indefinitely.</p>		<p>Li breaches the non-custodial supervision order by stealing a Mars Bar but the breach is managed flexibly and modifications made to Li's treatment plan (Recs 99, 101). Li's supervision order is revoked after 15 years.</p>

Scenario 4—pathway in the Supreme Court

Mario has been regularly hospitalised because he suffers from chronic paranoid schizophrenia. At the time of the offence, he lives with his parents, Antonio and Sophia. Mario has been showing signs of disturbed behaviour. One day, Sophia leaves the family home to run errands while Mario stays with Antonio. When Sophia returns, Mario tells Sophia that he has killed his father. Mario later tells his lawyer that he believed his father was stealing his thoughts and that he had to kill his father to prevent this from happening. Mario is remanded to the Thomas Embling Hospital.

Mario is charged with murder. His symptoms resolve sufficiently so that he is fit to stand trial. On Mario's instructions, his lawyer raises the defence of mental impairment to the charge. Mario is committed for trial to the Supreme Court.

CURRENT SYSTEM		PROPOSED SYSTEM
Sophia has little information on the CMIA process. She is grieving Antonio's death but is also concerned for Mario's welfare.	COMMITTAL	Sophia is given information on the CMIA process and provided with emotional support (Recs 57, 58, 59).
There are delays in the matter being listed for trial.		The case is given priority following the committal (Recs 6, 9).
Mario's symptoms are still resolving. Although he is fit to stand trial, he finds the trial process difficult to sit through.	TRIAL	More breaks are taken throughout the trial so that Mario can participate to a greater extent (Rec 18).
Sophia still has little information about the court proceedings.		Sophia is given information and supported throughout the proceedings (Recs 57, 58, 59).
There is a lack of clarity on the second limb of the mental impairment defence test. The prosecution and defence have different interpretations of what constitutes a 'moderate degree of sense and composure'.		Improvements to the second limb of the test clarify the law and reduce the length of the trial (Rec 25).
The jury finds the directions given by the judge difficult to follow.		The jury has a better understanding of the directions given to them. They do not have to engage in complex or artificial reasoning (Rec 55).
Mario is found not guilty because of mental impairment. Some of his family feel that what happened to Antonio has not been recognised because Mario is 'not guilty'.		Mario is found not criminally responsible because of mental impairment (Rec 69). His family members accept the finding more readily.

CURRENT SYSTEM		PROPOSED SYSTEM
The judge declares Mario liable to supervision and places him on an indefinite custodial supervision order with a 25-year nominal term.	ORDERS	The judge declares Mario liable to supervision and places him on an indefinite custodial supervision order. Mario will have five-year progress reviews of the order (Recs 83, 84, 87). Mario and his family understand the consequences of the order and know what to expect.
Reports are tendered to court in an uncoordinated way.		The court is provided with more comprehensive reports presented in a coordinated way (Recs 70, 71, 72, 73).
Mario, Sophia and their family do not understand the meaning of a nominal term and think that he has been sentenced to 25 years.		Mario's family members are added to the OPP register with their notification preferences recorded (Rec 59).
When Mario is refused leave by the Forensic Leave Panel, he does not understand why he did not get leave. He feels frustrated and this affects his recovery.	LEAVE AND REVIEW	Mario's order is reviewed at a progress review every five years.
Mario is eventually granted extended leave and after a successful period of extended leave for 12 months, his order is varied to a non-custodial supervision order.		He applies for leave after five years but his leave is refused because his condition has not stabilised. The Forensic Leave Panel members communicate the reasons for their decision and Mario understands why his leave was refused and what he can do to improve (Rec 81). Mario begins to receive increasing leave entitlements and is granted extended leave after 12 years. The court has regard to his progress while on leave (Rec 80).
After a year subject to a non-custodial supervision order, Mario breaches his order when he is caught with marijuana. It takes substantial time and resources before the police find out that Mario is a person subject to the CMIA and should be dealt with under those processes.		His order is varied to a non-custodial supervision order at his third progress review (at 15 years). The court has regard to the new presumptions that apply (Recs 84, 85, 86).
Mario is placed back on a custodial supervision order following his breach. He needs to go through the leave process, including 12 months' extended leave, before he can transition to a non-custodial supervision order again.		After a year subject to a non-custodial supervision order, Mario breaches his order by being caught with marijuana. The police are able to identify him as a person subject to the CMIA in the LEAP system and are able to use CMIA processes to manage his case (Rec 102).
		Mario's breach is dealt with flexibly and he is supervised in a medium-secure facility while the breach is being addressed (Recs 99, 100).

PART II LEGAL CONCEPTS AND CRITERIA

Reframing the test for unfitness to stand trial

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3. Reframing the test for unfitness to stand trial

Introduction

- 3.1 'Unfitness to stand trial' refers to the doctrine which exempts an accused from a standard criminal trial, sometimes temporarily, because at the time of the trial they cannot understand the trial or participate in it.¹ Unlike the defence of mental impairment, discussed in Chapter 4, which concerns the accused's mental condition at the time of the offence, unfitness to stand trial relates to the accused's mental condition at the time they are involved in court proceedings.
- 3.2 The doctrine of unfitness to stand trial is underpinned by the fundamental right of an accused to have a fair hearing. It seeks to avoid inaccurate verdicts,² maintain the moral dignity of the trial process³ and avoid unfairness to an accused.⁴
- 3.3 Under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ('CMIA') an accused is presumed to be fit to stand trial.⁵ Thus, if the question arises, it is not a question of fitness to stand trial but a question of unfitness to stand trial. To be conceptually correct, this report will refer to 'unfitness to stand trial' unless the context requires otherwise.⁶ In some instances the shorthand 'unfitness' will also be used.
- 3.4 The terms of reference specifically ask the Commission to consider whether the process of determining unfitness under the CMIA can be improved. The supplementary terms of reference ask the Commission whether the process for determining unfitness should be adapted for the Children's Court. The Commission sought to identify issues in relation to the current operation of the law on unfitness to stand trial in its publications: *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997: consultation paper* ('the consultation paper') and *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 and the Children's Court of Victoria: supplementary consultation paper* ('the supplementary consultation paper').

1 Arlie Loughnan, *Manifest Madness: Mental Incapacity in Criminal Law* (Oxford University Press, 1st ed, 2012) 67.

2 R A Duff, *Trials and Punishments* (Cambridge University Press, 1986) 119.

3 Richard J Bonnie, 'The Competence of Criminal Defendants: A Theoretical Reformulation' (1992) 10(3) *Behavioural Sciences and the Law* 291, 295.

4 *R v Cumming* [2010] 2 NZLR 433, 441.

5 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 7(1).

6 For example, in referring to the law prior to the CMIA, quoting a section of the CMIA which uses the expression 'the question of a person's fitness to stand trial' or decisions of courts which use that expression.

3.5 This chapter focuses on the Commission's recommendations about how the current test for unfitness to stand trial under the CMIA, and its application, can be improved for both adults and young people.⁷ Based on the views and suggestions received in submissions and consultations, the Commission has come to the following key conclusions that underpin its recommendations for change:

- It is only fair to subject accused to the trial process where they are able to make the crucial decisions relevant to their trial. The Commission recommends reframing the test for unfitness to stand trial to include all these decisions. The Commission also recommends a reformulation of the test to clarify the law and promote consistency in expert assessments where a delusional disorder is affecting an accused's fitness.
- Flexibility in the law is essential so that it can apply in different jurisdictions and cater to the individual circumstances of an accused. The Commission makes recommendations that will allow the test to be adapted for use in the Magistrates' Court and the Children's Court and that are consistent with the Commission's specialised approach to young people.
- Unfitness to stand trial is not a 'black and white' issue, but is decision-specific, time-specific and support-dependent. The law should accommodate the varying abilities, choices and needs of accused who may be unfit to stand trial to the greatest extent possible. The Commission therefore recommends a departure from the current test on unfitness, so that an accused's decision to plead guilty can be given effect in certain circumstances. The Commission recommends that once an accused has been found unfit, measures should be taken to ensure that better use is made of the adjournment period to optimise their ability to become fit prior to a court determining that they are permanently unfit. The Commission also recommends that the law should do more to consider and provide the support that an accused with a mental illness, intellectual disability or other cognitive impairment may require to enhance their ability to participate in their trial.
- Expert assessments form the evidentiary foundation of findings of unfitness to stand trial. The Commission makes recommendations that aim to address any unnecessary variability in expert assessments of unfitness.

The current test for unfitness to stand trial

3.6 In the consultation paper, the Commission outlined some of the earliest cases on 'fitness to plead' including *R v Dyson*⁸ ('Dyson') and *R v Pritchard* ('Pritchard').⁹ In *Pritchard*, Baron Alderson set out what is now regarded as the legal basis for determining unfitness to stand trial, or the 'Pritchard criteria':

There are three points to be inquired into:— First, whether the prisoner was mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper defence — to know that he might challenge any of you to whom he may object — and to comprehend the details of the evidence, which in a case of this nature must constitute a minute investigation.¹⁰

⁷ 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 to 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 terms 'children' or 'young offenders' will be used to describe individuals.

⁸ (1831) 1 Lewin 62; 168 ER 960.

⁹ (1836) 7 C&P 303, 304; 173 ER 135.

¹⁰ Ibid.

- 3.7 The Victorian test for unfitness to stand trial derives from the judgment of Justice TW Smith in the case of *R v Presser* ('Presser').¹¹ Expanding on the Pritchard criteria, Justice TW Smith identified seven criteria ('the Presser criteria'), to determine unfitness:
- ability to understand the charge
 - ability to plead to the charge and to exercise the right to challenge jurors
 - ability to understand generally the nature of the proceedings (that it is an inquiry as to whether the accused did what they are charged with)
 - ability to follow the course of the proceedings
 - ability to understand the substantial effect of any evidence that may be given against them
 - ability to make their defence or answer to the charge
 - ability to give any necessary instructions to their legal counsel.¹²
- 3.8 The test for unfitness to stand trial in the CMIA is based on the Presser criteria.¹³ The CMIA provides that an accused 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:
- (a) unable to understand the nature of the charge; or
 - (b) unable to enter a plea to the charge and to exercise the right to challenge jurors or the jury; or
 - (c) unable to understand the nature of the trial (namely that it is an inquiry as to whether the person committed the offence); or
 - (d) unable to follow the course of the trial; or
 - (e) unable to understand the substantial effect of any evidence that may be given in support of the prosecution; or
 - (f) unable to give instructions to his or her legal practitioner.¹⁴
- 3.9 Each of these criteria stands alone. An accused need only satisfy one of the above criteria to be found unfit to stand trial.
- 3.10 As stated at [3.3], under the CMIA, an accused is presumed to be fit to stand trial.¹⁵ This is the case even where an accused has previously been found unfit. The presumption is rebutted if it is established, following an investigation by a jury, that the accused is unfit.¹⁶
- 3.11 The test for unfitness to stand trial in other Australian jurisdictions, the United Kingdom and New Zealand is broadly based on the Pritchard or Presser criteria, or a variation of those criteria.

11 [1958] VR 45.

12 Ibid 48.

13 Victoria, *Parliamentary Debates*, Legislative Assembly, 18 September 1997, 187 (Jan Wade, Attorney-General).

14 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 6.

15 Ibid s 7(1).

16 Ibid ss 7(2)–(3).

Review of the test for unfitness to stand trial

- 3.12 In the consultation paper, the Commission asked for views on possible issues concerning the test for unfitness to stand trial. These included:
- whether the test should define the mental condition the accused must have to be found unfit
 - whether the test should be based on the decision-making capacity or effective participation of the accused
 - whether the test should consider the accused's rationality in some way
 - whether any of the existing Presser criteria should be changed.

Threshold definition

- 3.13 In the consultation paper, the Commission sought views on whether a threshold definition, or a definition of the mental condition that the accused would have to meet to be found unfit to stand trial, should be included as part of the test for unfitness.
- 3.14 Providing for a threshold definition would require the existence of some sort of mental condition (for example, a mental illness, intellectual disability or other cognitive impairment), in addition to an inability to satisfy one of the capacity-based criteria in the test, to be found unfit to stand trial. It was suggested to the Commission in its preliminary research that a threshold definition could provide a useful link between the accused's mental condition and the criteria for unfitness.

Views in submissions and consultations

- 3.15 The majority of submissions that addressed this issue and those consulted did not support introducing a threshold definition. It was noted that there were no problems with the absence of a threshold definition.¹⁷ Further, some people thought that the emphasis of the test should be on the functional consequences of the accused's mental condition, such as the inability to understand the nature of the trial, rather than on the mental condition itself.¹⁸
- 3.16 Two submissions saw merit in a threshold definition,¹⁹ for example, to improve on the current requirement that the accused has 'disordered or impaired' mental processes.²⁰

The Commission's conclusion

- 3.17 Based on these views, the Commission has concluded that it is unnecessary to introduce a threshold definition.²¹
- 3.18 There do not appear to be any problems with the lack of definition or the requirement that the accused's mental processes are 'disordered or impaired'. The Commission agrees with the views expressed that the test's focus should be on the effect any condition has on the accused. As the Commission observed in the consultation paper, not everyone who should be found unfit to stand trial would necessarily have a diagnosis of a mental condition. For example, it was noted by one of the Commission's advisory committee members, that it is possible for a physical condition to affect a person's capacity without fitting the definition of a 'disability'.²² In the Commission's view, including a threshold definition based on mental diagnoses may unduly limit the application of the test.

17 Submission 8 (Office of Public Prosecutions). Consultation 21 (Consultant psychiatrists, Forensicare).

18 Submissions 4 (The Australian Clinical Psychology Association); 11 (Jamie Walvisch); 19 (Forensicare). Consultation 26 (Office of the Chief Psychiatrist and Legal Branch, Department of Health).

19 Submissions 6 (Associate Professor Andrew Carroll); 16 (Australian Psychological Society).

20 Submission 6 (Associate Professor Andrew Carroll).

21 The Commission notes that in its guardianship reference, it recommended a new definition for 'disability' in the assessment of capacity. The Commission has taken a different position in relation to the test for unfitness to stand trial because of the views it received in submissions and consultations. Further, unlike the CMIA, the *Guardianship and Administration Act 1986* (Vic) had an existing definition of 'disability'.

22 Advisory committee (meeting 1). For example, a severe urinary tract infection could result in fever and hallucinations which could affect an accused's capacity.

Re-evaluating the basis of the test

- 3.19 A number of jurisdictions have been grappling with the question of whether the Pritchard or Presser criteria continue to be a 'suitable modern basis'²³ for determining the issue of unfitness to stand trial. The discussion on this issue has focussed on whether the test should consider:
- the accused's decision-making capacity or effective participation in the trial
 - the accused's ability to make decisions rationally or exercise some of the Presser criteria rationally.
- 3.20 There appear to be two main reasons the current test for unfitness to stand trial is being re-evaluated.
- 3.21 First, the current test may set too high a threshold for a finding of unfitness.²⁴ In some jurisdictions, debate has focussed on whether the test for unfitness should be based on the Pritchard or Presser criteria (that rely substantially on the factual understanding of the accused), or something more than this (such as the decision-making capacity or effective participation of the accused).²⁵ Although the discussion in other jurisdictions is yet to result in legislative change, this debate signals a potential shift from the current emphasis on passive participation, based on mere factual understanding, to a requirement that the accused be able to participate to a greater extent in the trial, for example, by making decisions.
- 3.22 Second, the current criteria were developed based on accused in cases such as *Dyson* and *Pritchard* involving people who were deaf and mute, and by extension accused with an intellectual disability.²⁶ The criteria can therefore be difficult to apply when an accused has a mental illness that is resulting in disordered or impaired mental processes.²⁷ An accused with a mental illness, unlike a person with an intellectual disability or other cognitive impairment, may have a factual understanding of the nature of the trial. However, their delusional beliefs may hinder their capacity to make decisions concerning their trial, or to make such decisions in an appropriate manner. This prompts an examination of whether the current criteria are suitable for people with a mental illness, and in particular, whether their 'decision-making capacity' or 'rationality' should also be taken into account in the test.

The ability to make decisions

- 3.23 'Decision-making capacity' generally covers the ability of an accused to understand the information relevant to the decisions that they will have to make in the course of the trial, retain that information, use or weigh that information as part of a decision-making process and communicate their decisions. It relies on competencies that equip an accused to process alternative courses of action and to express a choice among alternatives.²⁸

23 Law Commission (England and Wales), *Unfitness to Plead*, Consultation Paper No 197 (2012) 27–32.

24 Ibid. See also, Lucy Scott-Moncrieff and Guy Vassall-Adams, 'Yawning Gap: Capacity and Fitness to Plead' (October 2006) *Counsel* 14.

25 See, eg, Law Commission (England and Wales), above n 23, 51–66; W J Brookbanks and R D Mackay, 'Decisional Competence and "Best Interests": Establishing the Threshold for Fitness to Stand Trial' (2010) 12(2) *Otago Law Review* 265; New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Consultation Paper No 6 (2010) 7–12.

26 Warren J Brookbanks, 'Fitness to Plead and the Intellectually Disabled Offender' (1994) 1(2) *Psychiatry, Psychology and Law* 171, 173–4.

27 Brookbanks and Mackay, above n 25, 271.

28 Warren Brookbanks and Jeremy Skipworth, 'Fitness to Plead' in Warren Brookbanks and Sandy Simpson (eds) *Psychiatry and the Law* (LexisNexis New Zealand, 2007) 169.

- 3.24 The Law Commission of England and Wales has proposed replacing the test based on the Pritchard criteria with a new legal test that assesses whether the accused has the decision-making capacity for trial or can effectively participate in it.²⁹ In its view, an accused cannot participate meaningfully in their trial unless they have the capacity to make decisions relating to the trial.³⁰ The New South Wales Law Reform Commission has recommended that the New South Wales test also include a consideration of decision-making capacity.³¹
- 3.25 Scotland, in contrast to England and Wales, has introduced legislation based on an accused's 'effective participation'. While effective participation covers similar ground to decision-making capacity, it is arguably a wider concept that includes the full or rational appreciation by the accused of the proceedings.³² The New South Wales Law Reform Commission in its consultation paper *People with cognitive and mental impairments in the criminal justice system: criminal responsibility and consequences* noted weaknesses with this approach, including the risk that it would be overly inclusive and require a level of knowledge or competence that would go beyond rational decision making.³³
- 3.26 In Victoria, the criteria in the CMIA do not necessarily exclude a consideration of an accused's decision-making capacity. However, a clear link has not been expressed. In the consultation paper, the Commission asked whether the test for unfitness to stand trial should include a consideration of decision-making capacity or effective participation.

Views in submissions and consultations

- 3.27 Views expressed in submissions and consultations were divided on whether there should be a change in the basis of the test for unfitness to stand trial in Victoria. The majority of stakeholders who addressed this issue supported some change to achieve a fairer test for unfitness. Within this group, some favoured a test based on decision-making capacity, some favoured a test based on effective participation, while others did not express a preference. Those who supported a change expressed the following views:
- The current test does not set the threshold for unfitness at the right level.³⁴
 - While an understanding of the proceedings is important, an accused must also be able to effectively use this knowledge through their judgment, behaviour and participation.³⁵
 - For an accused to be able to account for their actions, they must be able to make decisions relevant to the trial.³⁶ For example, they must know how to answer the accusations that have been made against them.³⁷
 - Decision-making capacity is a conceptually easier way of describing and assessing unfitness to stand trial.³⁸
- 3.28 Those who did not support changes to the test in this way noted that:
- The current threshold for unfitness to stand trial is set at the right level.³⁹
 - The current test and its application already consider decision-making capacity implicitly.⁴⁰

29 Law Commission (England and Wales), above n 23, 62; Law Commission (England and Wales), *Unfitness to Plead*, Issues Paper (2014) 11–12. Ibid 39.

31 New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report No 138 (2013) 31–2.

32 Scottish Law Commission, *Report on Insanity and Diminished Responsibility*, Report No 195 (2004) 48; New South Wales Law Reform Commission, above n 25, 9–10.

33 New South Wales Law Reform Commission, above n 25, 10.

34 Submissions 4 (The Australian Clinical Psychology Association); 11 (Jamie Walvisch).

35 Submission 16 (Australian Psychological Society).

36 As discussed in the consultation paper, one of the justifications for the requirement that an accused be fit to stand trial is so the accused is able to form a link between their alleged crime and their trial or punishment and be accountable for their actions. See also, Bonnie, above n 3, 295.

37 Submission 11 (Jamie Walvisch).

38 Submission 18 (Victoria Legal Aid).

39 Submissions 8 (Office of Public Prosecutions); 19 (Forensicare).

40 Submission 19 (Forensicare).

- Such a change could introduce too much subjectivity into the test.⁴¹ For example, it would be difficult for experts to ‘draw the line’ between when an accused has decision-making capacity and when they do not, given that their ability to make decisions may differ depending on the nature and complexity of the decision to be made.⁴²
- Changing the test in this way could apply too broadly and capture people with a mild intellectual disability, people suffering from stress or people from poor educational backgrounds.⁴³

3.29 Members of the Commission’s advisory committee had differing views on this subject. The value of decision-making capacity as the basis for the test and the value of consistency between the criminal and civil capacity regimes were noted. However, it was also noted that a test based on decision-making capacity or effective participation would be difficult for experts to assess.⁴⁴

The Commission’s conclusion

- 3.30 The Commission agrees that, in practical terms, having a test based on ‘decision-making capacity’ or ‘effective participation’ could introduce too much subjectivity. Subjectivity in the test, particularly in terms of which decisions the accused needs to be able to make and what sort of participation is required before it is ‘effective’, would also be problematic for expert assessments. Further, the Commission understands the concern that such a test risks being overly inclusive.
- 3.31 It should be noted that in a trial there are forensic decisions as to the conduct of the trial that are properly made by an accused’s counsel. They include what questions and legal submissions should be made, and whether to call witnesses or tender documentary evidence. However, fundamental decisions—including whether to plead guilty or not guilty, and whether to give evidence—are properly the decision not of counsel but of the accused. Further, decisions properly to be made by counsel should be informed by competent factual instructions by the accused, which involves the accused being able to understand the main elements of the evidence led against them.
- 3.32 In the Commission’s view, it is only fair to subject an accused to the trial process where they are able to make the crucial decisions relevant to their trial. This is in line with the justifications for the doctrine of unfitness to stand trial, including to avoid unfairness and to ensure that a person is able to be accountable for their actions.⁴⁵
- 3.33 The Commission considers that the best way to ensure that the test takes into account the accused’s ability to make the crucial decisions in their trial is to:
- evaluate the current criteria for unfitness to stand trial against the crucial decisions an accused should be expected to make
 - supplement the criteria with a requirement that the accused be able to make these specific decisions, where the current criteria do not already cover them.
- 3.34 The Commission considers that this approach will result in a test that is easier to apply than a test based generally on decision-making capacity or effective participation. Further, it preserves the basic competencies essential for a fair trial in the test, which a test based on decision-making capacity or effective participation may leave out. For example, a person with paranoid delusions could have the ability to use and weigh information as part of a decision-making process but might not have the basic competency of instructing their lawyer because of their delusions.⁴⁶

41 Submission 8 (Office of Public Prosecutions). Consultation 21 (Consultant psychiatrists, Forensicare).

42 Submission 19 (Forensicare). Consultation 21 (Consultant psychiatrists, Forensicare).

43 Submission 8 (Office of Public Prosecutions).

44 Advisory committee (meeting 1); (meeting 2a); (meeting 2b).

45 *R v Cumming* [2010] 2 NZLR 433, 441. Bonnie, above n 3, 295.

46 Law Commission (England and Wales), *Unfitness to Plead*, Analysis of Responses (2013) 7–8.

- 3.35 Having taken this approach, the Commission considers that the current CMIA criteria already take into account most of the crucial decisions the accused needs to make during a trial, such as the decision to enter a plea and deciding what instructions to give to their legal practitioner. As Mudathikundan et al have observed, 'the component criteria [of the Pritchard criteria] already closely resemble a capacity based test in both nature and scope'.⁴⁷
- 3.36 However, the main area of decision making not covered in the current CMIA criteria is the decision relating to giving evidence. As one barrister observed in a study that considered barristers' views on the Pritchard criteria in England:
- one of the ridiculous difficulties about 'Pritchard' is that it doesn't even address the most crucial part – going into the witness box and telling the jury what you did or didn't do ... they are often swayed to acquit somebody who may or may not be innocent, because their explanation makes sense, because they like them ... there is no substitute ... if someone is not able to do that because cross examination will be meaningless, it may well be that that person should not be standing trial.⁴⁸
- 3.37 The Commission recommends that two further criteria be added to the current criteria. They are that the accused must have the capacity to decide whether to give evidence and be capable of giving evidence if they wish to do so.⁴⁹ The capacity to make this decision and the ability to give evidence when an accused is affected by delusions is discussed at [3.53]. The original Presser criteria required that the accused 'be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel'. It is unclear why this requirement was not ultimately included in the CMIA criteria.
- 3.38 The Commission acknowledges that there may be value in more closely aligning the criteria for unfitness to stand trial with capacity standards used in the civil context.⁵⁰ In its 2012 report on guardianship, the Commission recommended the adoption of a single civil capacity standard for guardianship laws (rather than the various standards currently used), similar to that adopted in the *Mental Capacity Act 2005* (UK).⁵¹ The test in the Mental Capacity Act also forms part of the definition of 'informed consent'⁵² for the purpose of the *Mental Health Act 2014* (Vic).⁵³
- 3.39 However, the Commission considers that in the specific context of unfitness to stand trial, the core elements of what constitutes unfitness should continue to be specified in legislation, as this provides a stronger contextual basis for assessing capacity. A more generic test is less useful and does not provide the same degree of guidance to experts in assessing an accused's unfitness to stand trial, or to courts in making determinations of unfitness to stand trial.

47 Faisal Mudathikundan, Oriana Chao and Andrew Forrester, 'Mental Health and Fitness to Plead Proposals in England and Wales' (2014) 37(2) *International Journal of Law and Psychiatry* 6.

48 Timothy Rogers et al, 'Reformulating Fitness to Plead: A Qualitative Study' (2009) 20(6) *The Journal of Forensic Psychiatry & Psychology* 815, 823.

49 The wording of this proposed criterion is based on a formulation by Ian Freckelton in 'Rationality and Flexibility in Assessment of Fitness to Stand Trial' (1996) 19(1) *International Journal of Law and Psychiatry* 39, 57: 'he or she cannot rationally make the decision on whether to give evidence and, if he or she wishes to give evidence, do so rationally and without being substantially prejudiced by psychiatric or intellectual impairment'.

50 See, eg, Scott-Moncrieff and Vassall-Adams, above n 24; Helen Howard, 'Unfitness to Plead and the Vulnerable Defendant: An Examination of the Law Commission's Proposals for a New Capacity Test' (2011) 75 *Journal of Criminal Law* 194.

51 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) 118–20.

52 *Mental Health Act 2014* (Vic) s 69.

53 The *Mental Health Act 2014* (Vic) replaced the *Mental Health Act 1986* (Vic) on 1 July 2014: see Chapter 1 n 14.

Rationality

- 3.40 In the consultation paper the Commission considered whether an accused's rationality should be taken into account in some way in a determination of unfitness to stand trial.
- 3.41 As discussed at [3.22], the current test is problematic when applied to an accused who has a mental illness and may have disordered or impaired mental processes as a result of delusions. For example, an accused who is delusional may be able to understand the trial process and instruct their legal practitioner, but their capacity to make decisions may be impaired by delusional beliefs. They may believe that the trial is part of a 'benevolent divine plan and has no punitive purpose or effect'.⁵⁴ In Australia, the current test may already require that the relevant criteria are exercised rationally, but this has not been expressly stated.⁵⁵
- 3.42 In contrast, the test in the United States requires that the accused have the ability to instruct a lawyer with a reasonable degree of rational understanding.⁵⁶ In Scotland, effective participation captures the notion of full or rational appreciation of the proceedings.⁵⁷ The South Australian test for unfitness to stand trial explicitly incorporates the requirement of rationality.⁵⁸ The New South Wales Law Reform Commission has recommended that the criteria for unfitness include the ability to use information as part of a rational decision-making process.⁵⁹ The Law Commission of England and Wales, on the other hand, did not propose that any new test be qualified with a requirement of rationality.⁶⁰
- 3.43 The Commission has had regard to the relevant recommendations 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*.⁶¹ The Committee recommended that the Victorian Government consider amending the CMA to require the court, when considering unfitness to stand trial, to determine:
- the ability of the accused to understand or respond *rationally* to the charge, or
 - the ability of the accused to exercise or to give *rational* instructions about the exercise of procedural rights.⁶²

Views in submissions and consultations

- 3.44 There were mixed views in submissions and consultations on whether the test should consider the accused's ability to make rational decisions or exercise some of the criteria for unfitness to stand trial rationally.
- 3.45 Those who supported a consideration of rationality observed that:
- It would provide more clarity in situations where delusional disorders are affecting a person's understanding of the court process and their instructions to their lawyer.⁶³
 - The current test sets the threshold for determining unfitness too high.⁶⁴

54 Bonnie, above n 3, 298.

55 Freckelton, above n 49, 45.

56 *Dusky v United States* 362 US 402 (1960).

57 Scottish Law Commission, above n 32, 48.

58 *Criminal Law Consolidation Act 1935 (SA)* s 269H.

59 New South Wales Law Reform Commission, above n 31, 31–2.

60 Law Commission (England and Wales), above n 23, 65.

61 Victorian Parliament Law Reform Committee, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (2013).

62 Ibid 231.

63 Submission 6 (Associate Professor Andrew Carroll).

64 Submission 11 (Jamie Walvisch). Submission 12 (Progressive Law Network) also supported an inclusion of rationality.

- 3.46 Those who did not support a change in this area were of the view that:
- The current criteria already implicitly consider rationality.⁶⁵
 - Rationality is difficult to define, assess clinically or otherwise apply in practice. It would introduce too much subjectivity.⁶⁶
 - More people with an intellectual disability or personality disorder could be found unfit to stand trial. This is undesirable given the potential for indefinite detention under the CMIA.⁶⁷
- 3.47 The Victorian Equal Opportunity and Human Rights Commission cautioned that any change to the test should not unjustifiably limit an accused's autonomy and their choice to make decisions, including 'unwise' decisions.⁶⁸ Jamie Walvisch submitted that the current criteria should include a consideration of the accused's ability to understand the meaning of conviction and sentence.⁶⁹
- 3.48 In the Commission's consultation with Forensicare consultant psychiatrists, some participants thought that there was a need to address the problem of accused providing delusional instructions. However, participants generally did not agree that using the measure of 'rationality' was the way to achieve this.⁷⁰
- 3.49 Some members of the Commission's advisory committee were of the view that the accused should be able to undertake the relevant CMIA criteria meaningfully or rationally. However, these members did not express a strong view on whether either approach should be expressly adopted.⁷¹

The Commission's conclusion

- 3.50 The Commission agrees that the current test for unfitness to stand trial does not adequately address situations where an accused's mental processes are disordered or impaired as a result of delusions caused by a mental illness. This is largely due to the historical basis of the test. As Brookbanks has observed:
- the fitness to plead rules have developed without proper regard for the distinctive characteristics and needs of the people whose very interests they are designed to protect.
- As a consequence of this development, subsequent legislation in many jurisdictions also failed to distinguish intellectually disabled from insane offenders.⁷²
- 3.51 The New South Wales Law Reform Commission observed that since the case of *Eastman v The Queen*,⁷³ it has become unclear whether the law requires an accused to be found unfit where they make decisions based on delusions.⁷⁴ In Victoria, while there do not seem to be major practical difficulties with the current test, addressing this issue will promote clarity in the law and consistency in expert assessments.

65 Submission 8 (Office of Public Prosecutions). Consultation 21 (Consultant psychiatrists, Forensicare).
 66 Submission 4 (The Australian Clinical Psychology Association). Consultations 21 (Consultant psychiatrists, Forensicare); 52 (Dr Adam Deacon).
 67 Consultation 21 (Consultant psychiatrists, Forensicare).
 68 Submission 10 (Victorian Equal Opportunity and Human Rights Commission).
 69 Submission 11 (Jamie Walvisch).
 70 Consultation 21 (Consultant psychiatrists, Forensicare).
 71 Advisory committee (meeting 2a).
 72 Brookbanks, above n 26, 174.
 73 (2000) 203 CLR 1.
 74 New South Wales Law Reform Commission, above n 31, 23.

- 3.52 In the Commission's view, the need to promote clarity and consistency should be balanced against the risk that revising the test will add to its complexity and import too much subjectivity. The Commission agrees that the measure of 'rationality' is susceptible to this risk. The Commission therefore proposes an alternative formulation that does not rely on rationality but that achieves the similar aim of ensuring that the accused is able to make 'true choices' concerning the crucial decisions in the trial that are not substantially prejudiced by their mental condition.⁷⁵
- 3.53 The Commission recommends a test that considers:
- *The accused's ability to understand the actual significance of entering a plea, in addition to the ability to enter a plea*—Under the current test for unfitness to stand trial, an accused could enter a plea without understanding its actual significance because of delusional beliefs or because of their impaired ability to understand. Reframing this criterion will clarify that the accused's ability to enter a plea must be based on not just a factual understanding of what a plea is, but also on an understanding of its significance and implications. This must not be substantially prejudiced by their mental condition.
 - *The accused's ability to communicate meaningful instructions to their legal practitioner*—An accused could instruct their legal practitioner based on their delusional beliefs. This situation would not necessarily result in a finding of unfitness to stand trial under the current application of the test. At the Commission's roundtable with clinicians on the CMIA and the Children's Court, participants thought that addressing this issue with a requirement to give 'meaningful' instructions was clearer and was preferable to 'rational' instructions.⁷⁶ The Commission agrees with this view. Requiring an accused to 'communicate' rather than just 'give' instructions is also consistent with the Commission's emphasis on the importance of communication with this cohort of people.⁷⁷ The Commission has recommended improvements to communication between accused with mental conditions and their legal representatives, as well as education on communication techniques for judicial officers presiding over CMIA matters.⁷⁸
 - *The accused's ability to decide whether to give evidence to support their case, and if they wish to give evidence, their ability to do so*—At [3.37] above, the Commission discussed its recommendation on two additional criteria regarding the decision and the ability of the accused to give evidence. In the Commission's view, qualifying this requirement so that the accused's decision to give evidence and their ability to do so must be 'to support their case' will ensure that their decision to give evidence and their testimony is not prejudiced by delusional beliefs.

Removing the jury component of the Presser criteria

- 3.54 The consultation paper sought views on the existing criteria for unfitness to stand trial under the CMIA and whether any improvements could be made to these criteria. In particular, the Commission asked whether the second criterion of the test—the accused's ability to 'enter a plea to the charge' and the accused's ability to 'exercise the right to challenge jurors or the jury'—was operating well in practice.

⁷⁵ Freckelton, above n 49, 56. Freckelton proposes that a criterion for assessment should be based on whether the accused's mental condition means that they are significantly prejudiced as criminal defendants.

⁷⁶ Consultation 55 (Children's Court roundtable—clinicians). Freckelton uses the term 'meaningful' in Freckelton, above n 49.

⁷⁷ See, eg, the discussion at [3.114]–[3.133] and Recommendation 18.

⁷⁸ See Chapter 2, Recommendations 10, 11 and 13.

Views in submissions and consultations

- 3.55 The majority of submissions and consultations focussed on the requirement that the accused be able to exercise the right to challenge jurors or the jury ('the jury component'). Submissions that addressed this issue and stakeholders who were consulted expressed support for splitting the requirement that the accused be able to enter a plea from the jury component. Some supported removing the jury component completely from the second criterion.
- 3.56 It is unclear whether splitting the second criterion into two separate criteria would make a difference in practice. In its submission, the Victorian Institute of Forensic Mental Health (Forensicare) noted that while it may be 'neater' to split the two components of the second criterion, this would have a negligible impact on the practical application of the test because the failure to meet either component (whether these are stated separately or together) deems an accused unfit to stand trial.⁷⁹ The Commission agrees with this submission and considers that the key issue is whether the 'jury component' should be removed entirely from the test.
- 3.57 Those who supported removing the jury component argued that:
- Jury selection may have been a more integral part of the trial at the time the unfitness to stand trial test was first developed.⁸⁰ However, counsel usually deals solely with juror challenges, without input by the accused. Jury selection is therefore no longer an issue that is fundamental to trials in Australia.⁸¹
 - A trial would still be fair even if a represented accused did not understand their right to challenge jurors or the jury.⁸²
 - Removing the jury component would enable the test to be used in summary jurisdictions where juries do not determine criminal responsibility.⁸³
- 3.58 Advisory committee members generally supported removing the jury component altogether or splitting it from the requirement that the accused have the ability to enter a plea.⁸⁴ It was thought that in practice the accused would make this decision based on their lawyers' advice.

The Commission's conclusion

- 3.59 The Commission agrees with the arguments to remove the jury component from the test completely. As discussed at [3.32], the Commission's position is that an accused needs to be able to make the crucial decisions in the trial for them to be fit to stand trial. The Commission recognises that, in Victoria, challenges must be voiced by the accused unless there is a 'very good reason' to depart from this 'usual practice'.⁸⁵ However, challenges to jurors, while properly a right of an accused and not counsel, are very substantially exercised by counsel on delegation from the accused, or are exercised by the accused in accordance with the advice of counsel. In these circumstances, the Commission considers that operationally, the decision to challenge jurors, important though it is, does not equate with the decision to plead or give evidence.

79 Submission 19 (Forensicare).

80 Consultation 21 (Consultant psychiatrists, Forensicare).

81 Submission 11 (Jamie Walvisch).

82 Ibid.

83 Consultation 47 (Magistrates' Court roundtable).

84 Advisory committee (meeting 2); (meeting 2a).

85 *R v Sonnet* (2010) 30 VR 519, 549. An exception to this rule is where a 'special hearing' is being conducted under the CMIA following a finding that the accused is not fit to stand trial. Section 16(2)(b) allows the accused's legal representative to exercise the accused's right to challenge jurors in such cases.

- 3.60 Further, as the Commission noted in its *Jury Empanelment* report, peremptory challenges are not necessarily, of themselves, required for procedural fairness. It has been recognised that aspects of the jury empanelment system can be modified or abolished by parliament.⁸⁶
- 3.61 The Commission also recognises the value of having a test that is flexible enough to be applied in the Magistrates' Court and the Children's Court. The Commission's recommended test therefore does not include the jury component.

The test in the Magistrates' Court and the Children's Court

Replacing 'trial' with 'hearing'

- 3.62 In addition to removing the jury component from the test, the Commission has considered whether any other changes are needed to ensure that the test for unfitness to stand trial can be applied in the summary jurisdiction.
- 3.63 In the Commission's roundtable on the extension of the CMIA to the Magistrates' Court, participants were of the view that the reference to 'trial' in the test should be changed to another term because trials were not held in the Children's Court or the Magistrates' Court. Participants otherwise thought that the test was sufficiently flexible for the summary jurisdiction and that it was preferable to have the same test across jurisdictions so that magistrates would have precedent to draw on.
- 3.64 The Commission agrees with these views and recommends that references to 'trial' presently in the test for unfitness to stand trial be changed to 'hearing'. The term 'hearing' is consistent with the process in place in the summary jurisdiction to determine criminal responsibility.

Whether the test should consider the length and complexity of the hearing

- 3.65 In the consultation paper the Commission considered whether the test for unfitness to stand trial should better reflect that some proceedings are more difficult than others to follow and whether the test should have regard to the individual proceedings faced by the accused. This has specific relevance to the Magistrates' Court and the Children's Court, where the hearing of a summary offence would be brief, easier to follow and demand a lower level of participation by the accused.
- 3.66 There was some support in submissions and consultations for including a consideration of the length and complexity of the particular hearing the accused will face in a test for unfitness to stand trial,⁸⁷ and no major practical difficulties were raised. Forensicare submitted that it was unnecessary to include such a consideration in the test as the complexity of the particular proceeding is already taken into account when considering the existing criteria.⁸⁸ The Commission agrees with this view. In Australia, there is already some recognition of the specific hearing the accused will be subject to in case law. In *R v Gillard*,⁸⁹ for example, the court held:
- An accused who is not unfit for the purposes of a trial because there are a limited range of facts and issues, may well be unfit for the purposes of a long, complicated fraud trial. Much will depend upon the individual circumstances.⁹⁰
- 3.67 Further, the Commission's recommendation that the test refer to a 'hearing' in place of 'trial' should bring emphasis to the particular hearing the person will face in a determination of unfitness to stand trial.

86 *Ronen v The Queen* (2004) 211 FLR 320, 329–33 [50]–[68] (Ipp JA); Victorian Law Reform Commission, *Jury Empanelment*, Report No 27 (2014) 40.

87 Submissions 4 (The Australian Clinical Psychology Association); 11 (Jamie Walvisch).

88 Submission 19 (Forensicare).

89 [2006] SASC 46 (23 February 2006).

90 *Ibid* [50], quoting *R v Wahlstedt* (2003) 231 LSJS 140, 143–4 (Rice DCJ).

- 3.68 The Commission therefore does not recommend that the test for unfitness to stand trial expressly include a consideration of the length and complexity of the hearing.

The new test for unfitness to stand trial

- 3.69 The Commission recommends that the proposed changes discussed above be adopted to create a new test for unfitness to stand trial.
- 3.70 The proposed test below aims to:
- ensure that an accused is only subject to the trial process where they are able to make the crucial decisions relevant to their trial
 - clarify the law and promote consistency in expert assessments where an accused's fitness to stand trial is affected by a delusional disorder
 - ensure that the test is flexible enough to be adapted for use in the Magistrates' Court and the Children's Court.

Recommendation

- 15 Section 6(1) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to provide that a person is unfit to stand trial for an offence if, because the person's mental processes are disordered or impaired, the person is or, at some time during the hearing, will be:
- (a) unable to understand the nature of the charge
 - (b) unable to understand the actual significance of entering a plea to the charge
 - (c) unable to enter a plea to the charge
 - (d) unable to understand the nature of the hearing (that it is an inquiry as to whether the person committed the offence)
 - (e) unable to follow the course of the hearing
 - (f) unable to understand the substantial effect of any evidence that may be given in support of the prosecution
 - (g) unable to decide whether to give evidence in support of his or her case
 - (h) unable to give evidence in support of his or her case, if he or she wishes to do so, or
 - (i) unable to communicate meaningful instructions to his or her legal practitioner.

Adapting the test when the accused wishes to plead guilty

- 3.71 In some cases, an accused may be able to understand the nature of the charge, enter a plea to the charge and meaningfully instruct their legal practitioner to that effect,⁹¹ but they may not be able to understand the more complex or lengthy elements of the trial process. Where an accused in this situation wishes to plead guilty, the CMIA precludes that plea, and requires the person to be subject to the special hearing process to determine criminal responsibility. The CMIA requires the capacity to understand the trial process even though in that situation the trial is a hypothetical.
- 3.72 In the consultation paper, the Commission asked for views on whether there should be an exception to the unfitness to stand trial test when the accused wishes to plead guilty.

Views in submissions and consultations

- 3.73 Submissions that addressed this issue expressed differing views on whether the test for unfitness to stand trial should be adapted when an accused wishes to plead guilty.
- 3.74 Some thought that it was appropriate to adapt the test in these circumstances.⁹² The Office of Public Prosecutions, for example, observed that in many cases it is not in the accused's best interests to be found unfit to stand trial and placed on an indefinite supervision order, particularly for less serious offences.⁹³ Forensicare had a similar view, noting that adapting the test could provide a fairer outcome for accused.⁹⁴
- 3.75 Others, however, expressed concern about providing an exception to the test when the accused wishes to plead guilty.⁹⁵ The Australian Psychological Society said that it would raise questions about the accused's ability to provide informed consent at various stages of the trial process.⁹⁶ The Australian Clinical Psychology Association noted that accused who had difficulty understanding legal processes may see no other choice but to plead guilty to avoid going through the trial process.⁹⁷
- 3.76 Some of the submissions that supported an adaptation of the test noted that any adaptation had to ensure that the accused truly understands the nature of the guilty plea.⁹⁸ The Office of Public Prosecutions, Victoria Legal Aid, Forensicare and Jamie Walvisch set out the circumstances in which the accused should be permitted to plead guilty.⁹⁹
- 3.77 Advisory committee members held different views on this issue. On one hand, an adaptation of the test was thought to have difficulties, particularly for people with delusional disorders and young people. On the other hand, a view was expressed that some people currently under CMIA supervision orders had been denied participation in the usual criminal process even though they understood that what they had done was unlawful, had a strong prosecution case against them and could make the choice to plead guilty.¹⁰⁰

91 As required by section 6(1)(f) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

92 Submissions 8 (Office of Public Prosecutions); 11 (Jamie Walvisch); 18 (Victoria Legal Aid); 19 (Forensicare).

93 Submission 8 (Office of Public Prosecutions).

94 Submission 19 (Forensicare).

95 Submissions 21 (Criminal Bar Association); 16 (Australian Psychological Society); 4 (The Australian Clinical Psychology Association).

96 Submission 16 (Australian Psychological Society).

97 Submission 4 (The Australian Clinical Psychology Association).

98 Submissions 11 (Jamie Walvisch); 8 (Office of Public Prosecutions).

99 Submissions 8 (Office of Public Prosecutions); 11 (Jamie Walvisch); 18 (Victoria Legal Aid); 19 (Forensicare).

100 Advisory committee (meeting 2a).

The Commission's conclusion

3.78 In the Commission's view, where an accused has the capacity to make a particular decision, that decision should be given effect as far as possible. As the Commission noted in its report on guardianship, capacity is decision-specific.¹⁰¹ The law must be flexible enough to accommodate different levels of capacity,¹⁰² and by extension different levels of unfitness to stand trial.

3.79 The Commission has concluded that if an accused who has disordered or impaired mental processes wishes to plead guilty, they should be able to do so if certain factors are present.

3.80 However, the Commission is conscious of the risks involved in creating an exception to the test to accommodate an accused's decision to plead guilty, such as those outlined in submissions. The Commission is also conscious of the tendency of accused to plead guilty to avoid the onerous CMIA regime.¹⁰³ This is discussed in greater detail in Chapter 5. The Commission considers that any exception to the test should contain safeguards to protect against these risks and to ensure that the guilty plea is reliable. As Bonnie has observed:

In the context of guilty pleas, the legal system has a compelling interest in assuring reliability of the admissions embedded in a plea entered by a person with mental disability, and in assuring that the defendant understands the essential nature of the rights being waived and the consequences of the plea.¹⁰⁴

3.81 To address these concerns, the Commission's recommendation allows the accused to plead guilty if they wish to do so, provided they can also satisfy criteria (developed from those suggested in submissions) as follows:

- understand the nature of the charge
- understand the nature of the hearing if they pleaded not guilty
- understand the significance of entering a plea of guilty and its consequences
- meaningfully communicate to their legal practitioner their decision to plead guilty
- follow the course of the plea and sentencing hearing that will follow a plea of guilty.

3.82 Clearly this exception to the test for unfitness to stand trial relies on the accused's lawyer and ultimately the court, informed by expert opinion, being able to assess that they do in fact satisfy each of these elements. Recommendations the Commission has made on the training and accreditation of lawyers will support the ability of lawyers to make such an assessment (see Recommendations 10 and 11), as well as recommendations directed at the application of the test by experts (Recommendations 22 and 23). The judge or magistrate overseeing the plea will provide the ultimate layer of scrutiny.

3.83 It is critical that under this test the accused is properly represented. The Commission recommends that this exception should not apply if the accused does not have legal representation.

3.84 The recommendation below can be added to the CMIA as a new sub-section within section 6 to provide a separate set of criteria on which an assessment is made by experts to assist the court to determine whether the accused is 'fit to plead guilty'. The recommended criteria have been drafted to be consistent, where possible, with the recommended criteria for 'fitness to stand trial'.

¹⁰¹ Victorian Law Reform Commission, above n 51, 121.

¹⁰² Ibid 53.

¹⁰³ Submission 14 (Office of the Public Advocate). Consultations 5 (Consumer Advisory Group (CAG) Community Forensic Mental Health Service); 11 (Melbourne Magistrates' Court); 15 (Northern Area Mental Health Service); 8 (Latrobe Community Mental Health Service); 19 (Forensic Clinical Specialists); 25 (Victoria Legal Aid—criminal lawyers).

¹⁰⁴ Bonnie, above n 3, 313.

Recommendation

- 16 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to provide that:
- (a) notwithstanding Recommendation 15, a person whose mental processes are disordered or impaired may enter a guilty plea to the charge if the person is:
 - (i) able to understand the nature of the charge
 - (ii) able to understand the actual significance of entering a plea of guilty to the charge (that it will waive the person's right to a hearing and the opportunity to contest the charge and the consequences in terms of conviction and sentence)
 - (iii) able to enter a plea to the charge
 - (iv) able to understand the nature of the hearing if a plea of not guilty is entered (that it is an inquiry as to whether the person committed the offence)
 - (v) able to follow the course of the hearing that would follow if a plea of guilty was entered, and
 - (vi) able to communicate meaningful instructions to his or her legal practitioner regarding the decision to plead guilty.
 - (b) paragraph (a) does not apply if the accused is not legally represented.

Application of the test for unfitness to stand trial

Prevalence of issues of unfitness

- 3.85 As discussed in Chapter 2 at [2.32], the limited information available to the Commission suggests that issues of unfitness to stand trial may arise more frequently than the defence of mental impairment.
- 3.86 Of the 61 requests for reports received by Forensicare from the Office of Public Prosecutions in matters under the CMIA in 2012–13, 27 (44.3 per cent) were for assessments of unfitness to stand trial and the mental impairment defence. A further 18 (29.5 per cent) were for assessments of unfitness alone. Fifteen requests for reports were made for the mental impairment defence alone (24.6 per cent). In the first two quarters of the following year (2013–14), there were nine requests for reports on unfitness and mental impairment, nine for unfitness alone and seven requests for mental impairment alone.¹⁰⁵

¹⁰⁵ Data provided by the Victorian Institute of Forensic Mental Health (Forensicare) on report requests by the Office of Public Prosecutions (OPP) in 2012–13 and the first two quarters of 2013–14. This information did not include the outcomes of such cases and does not represent all the requests for reports made over the relevant period. Prior to the beginning of 2012, when funding was secured for such reports from the Department of Justice, Forensicare's practice was to cap the number of reports completed in response to such requests due to a lack of specific funding for such work.

- 3.87 The approximate information available to the Commission on young people indicates that issues regarding unfitness also arise more often than the defence of mental impairment.¹⁰⁶

Applying the test to young people

- 3.88 The supplementary terms of reference asked the Commission to consider whether the process for determining unfitness to stand trial should be adapted for use in the Children's Court. In considering this, the Commission has examined the application of the test for unfitness to accused young people who appear in the Children's Court (and in the higher courts).¹⁰⁷
- 3.89 Currently in Victoria the same test for unfitness to stand trial applies to both young people and adults. This is also the case in New Zealand, Canada and the United Kingdom.
- 3.90 In the supplementary consultation paper, the Commission asked for views on whether:
- the test for unfitness to stand trial was appropriate to be applied to young people
 - any modification was required if the test was to apply to young people.

Developmental factors and unfitness to stand trial

- 3.91 Cases involving young people in Victoria under the CMIA have tended to involve issues of unfitness due to an intellectual disability.¹⁰⁸
- 3.92 Concerns have been expressed in other jurisdictions about the applicability of the test for unfitness to stand trial for young people. In particular, there is some suggestion that the current test for unfitness does not adequately take into account the developmental delays faced by many young people.¹⁰⁹
- 3.93 The New South Wales Law Reform Commission in its review of *Young People with Cognitive and Mental Health Impairments in the Criminal Justice System* 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.¹¹⁰
- 3.94 This view was supported by a Queensland study that examined research that shows that executive functioning develops continually throughout childhood and adolescence.¹¹¹ The study found that some young people suffer from developmental delays, which may have an important impact on their ability to understand the trial process.¹¹² Further, while a young person may be able to understand what is being said to them in court, their decision-making capacity may be reduced compared to an adult.¹¹³

106 De-identified data provided by the Department of Human Services (DHS) (collated by the OPP and DHS). The information was initially collated by the OPP to identify the cases where it had been asked to provide advice regarding the jurisdiction of matters involving young people and the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (approximately 21 matters). DHS added to the data by identifying four additional matters and documenting the known previous or current involvement with its programs: see **Appendix D**. There was information in 16 of the 25 total cases on whether the issue raised was one of unfitness or the defence of mental impairment. Of these, 13 related to an issue of unfitness alone, while two cases concerned both issues of unfitness and the defence of mental impairment. Only one case involved a defence of mental impairment alone.

107 Chapter 6 contains the Commission's recommendations regarding the process for determining unfitness to stand trial in the Children's Court.

108 See Chapter 2 at [2.77].

109 Jodie O'Leary, Suzie O'Toole and Bruce D Watt, 'Exploring Juvenile Fitness for Trial in Queensland' (2013) 20(6) *Psychiatry, Psychology and Law* 853, 861.

110 New South Wales Law Reform Commission, *Young People with Cognitive and Mental Health Impairments in the Criminal Justice System*, Consultation Paper No 11 (2010) 82.

111 O'Leary, O'Toole and Watt, above n 109, 855.

112 Ibid.

113 Eraka Bath and Joan Gerring, 'National Trends in Juvenile Competency to Stand Trial' (2014) 53(3) *Journal of the American Academy of Child & Adolescent Psychiatry* 265, 266.

- 3.95 A New Zealand study pointed to research demonstrating that 30 per cent of young people aged between 11 and 13 years and 19 per cent aged between 14 and 15 years showed significant impairment in understanding or reasoning. This would place them at the equivalent level of an adult with a serious mental illness who would normally be declared unfit to stand trial.¹¹⁴

Views in submissions and consultations

- 3.96 In submissions and consultations, some people observed that many young people would be unfit to stand trial based on the current unfitness criteria, due to immaturity or their developmental stage, even without a mental illness or intellectual disability.¹¹⁵ It was also noted that children and young people have varied developmental (physical, social and psychological) trajectories.¹¹⁶
- 3.97 The majority of those who addressed this issue were of the view that the test for unfitness to stand trial should not ‘simply mirror’ the criteria for adults.¹¹⁷ However, it was also observed that the Presser criteria were generally suitable with some modification.¹¹⁸
- 3.98 The need for a consistent test for unfitness to stand trial across jurisdictions was also noted.¹¹⁹
- 3.99 A unifying theme to arise from submissions and consultations was that the test for unfitness to stand trial should take into account the developmental stage of a young person.¹²⁰ This was seen to have a significant impact on the young person’s unfitness. The Australian Psychological Society noted the importance of relying on the developmental level of the young person and not their chronological age:

chronological age is not an infallible predictor of a young person’s capacity to fully comprehend and participate in the legal process. The justice system therefore needs to be sufficiently flexible to be able to respond to young people in a manner that matches the individual developmental level of the young person in question.¹²¹

- 3.100 Other suggestions in submissions and consultations included:
- The test for unfitness to stand trial should consider modifications that can be made to the hearing and education that can be provided to enable the young person to reach the fitness threshold.¹²² The Commission considers this suggestion for reform at [3.123]–[3.126] and [3.138]–[3.143].
 - The test should include a consideration of decision-making capacity or effective participation.¹²³ The Commission’s discussion at [3.30]–[3.39] is also applicable to young people.
 - The test should take into account the differences in the length and complexity of proceedings.¹²⁴ The Commission’s discussion at [3.65]–[3.68] also applies to young people.
 - The test should consider the young person’s ability to understand what it means to enter a plea.¹²⁵ The test the Commission recommends now includes a requirement that the accused be able to understand the significance of entering a plea.

114 Sophie Klinger, ‘Youth Competence on Trial’ [2007] *New Zealand Law Review* 235, 253.

115 Submission 26 (Youthlaw). Consultations 45 (Youthlaw); 51 (Children’s Court roundtable—legal practitioners); 44 (Victoria Police—Children’s Court police prosecutor and policy staff); 50 (Parkville Youth Justice Centre, Department of Human Services); 53 (Head Office (Youth Justice, Forensic Disability, Child Protection and Senior Practitioner), Department of Human Services).

116 Consultation 53 (Head Office (Youth Justice, Forensic Disability, Child Protection and Senior Practitioner), Department of Human Services).

117 Submission 33 (Commission for Children and Young People). Consultation 48 (Children’s Court—President and magistrates, Melbourne).

118 Submission 33 (Commission for Children and Young People). Consultations 48 (Children’s Court—President and magistrates, Melbourne); 46 (County Court of Victoria—judges).

119 Consultations 47 (Magistrates’ Court roundtable); 51 (Children’s Court roundtable—legal practitioners).

120 Submissions 23 (Dr Robert G Adler); 31 (Australian Psychological Society); 33 (Commission for Children and Young People). Consultations 45 (Youthlaw); 54 (Dr Katinka Morton); 44 (Victoria Police—Children’s Court police prosecutor and policy staff).

121 Submission 31 (Australian Psychological Society).

122 Submission 28 (The Australian Clinical Psychology Association). Consultation 55 (Children’s Court roundtable—clinicians).

123 Submissions 31 (Australian Psychological Society); 33 (Commission for Children and Young People).

124 Submission 30 (Victoria Police). Consultations 55 (Children’s Court roundtable—clinicians); 52 (Dr Adam Deacon).

125 Consultation 55 (Children’s Court roundtable—clinicians).

The Commission's conclusion

- 3.101 The Commission agrees that there should be a consistent test across jurisdictions to avoid an artificial jurisdictional distinction being made when applying the test. It would not, for example, be desirable for there to be one test that applies to an accused who is 17 years of age who appears in the Children's Court and another for a person of the same age who appears in the County Court.
- 3.102 Another reason is to avoid a distinction being made based on the chronological age of an accused. It was considered inappropriate for a different test to apply to an accused merely because of their chronological age given that this is not generally an accurate reflection of their developmental stage, particularly within the cohort of young people appearing in the criminal justice system. For example, an accused who is 18 years and 6 months could be at the same developmental stage as a 15-year-old. If there were different tests for unfitness based on age, then these two accused would be subject to different tests even though they may be at the same stage developmentally.
- 3.103 The Commission recognises the significant effect a young person's developmental stage has on their unfitness to stand trial. Young people may fail to meet the current criteria for unfitness simply because of their stage of development or maturity. As the Australian Institute of Criminology (AIC) has concluded, 'immaturity is a significant factor in shaping juveniles' competence in court, irrespective of other influences'.¹²⁶
- 3.104 The Commission agrees with submissions and consultations indicating that the test for unfitness to stand trial should be modified to take into account the developmental stage of a young person. The Commission recommends that in applying the test, the judge or magistrate be required to consider this factor.
- 3.105 The Commission otherwise agrees that the criteria in the test can be applied fairly to young people and is of the view that, as far as possible, the test should be consistent between jurisdictions and not dependent on chronological age.

Recommendation

- 17 Section 6 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to add a requirement, separate to the criteria in section 6(1), that in determining whether a young person (a person who at the time of the hearing is under 21 years of age) is unfit to stand trial, the court must consider the developmental stage of that person.

Applying the test to optimise fitness to stand trial

3.106 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’.¹²⁷ There are good reasons why measures to optimise an accused’s fitness to stand trial should play a greater role in court processes. This was discussed in the Queensland Court of Appeal decision in *R v M*,¹²⁸ an appeal from *Re IMM*¹²⁹ where the Queensland Mental Health Court found that a person with an intellectual disability was fit to be tried because the trial court could adapt its procedures sufficiently to accommodate his condition:

To deny a person like [the accused] a trial would, having regard to both his interest in responding to the charge and possibly having his name cleared (while acknowledging of course that he bears no onus), and the interest of the community in ensuring that criminal charges are properly pursued, be frankly inconsistent with the rule of law, essentially because it would be discriminatory. Contemporary courts are sensitive to the varying needs of those who come before them.¹³⁰

3.107 The Law Commission of England and Wales expressed the view that ‘special measures’ should play a greater role in the test for unfitness to stand trial.¹³¹ Its view is that in determining whether the accused has decision-making capacity, consideration should be given to the extent to which special measures could assist the accused to participate in their trial.¹³² It also considered whether expert assessments of unfitness to stand trial could be supplemented with suggestions on how the accused can be assisted during the trial in order for it to proceed fairly.¹³³

3.108 In Australia, there is some opportunity for courts to consider the availability of measures to optimise an accused’s fitness to stand trial. In *Ngatayi v The Queen*,¹³⁴ for example, the High Court held that whether an accused is provided with an interpreter or assisted by counsel would be a factor in determining whether someone was able to understand the proceedings.

3.109 In the consultation paper the Commission discussed the following ways to optimise fitness to stand trial:

- providing adjustments in court to accused to enable them to participate more fully in proceedings (‘support measures’)
- providing education for an accused during the adjournment period following a temporary finding of unfitness to enable them to participate more fully in proceedings.

3.110 Both options could be particularly beneficial for improving the fitness to stand trial of accused with an intellectual disability and young people.

Outcomes in cases where unfitness to stand trial is raised

3.111 The limited information available to the Commission suggests that when an issue of unfitness to stand trial is raised, it is likely that the person will be found to be unfit.

¹²⁷ Victorian Intellectual Disability Review Panel, Submission, 17 December 1992, 8, cited in Freckelton, above n 49, 45.

¹²⁸ [2002] QCA 464 (15 November 2002).

¹²⁹ [2002] QMHC12 (28 June 2002).

¹³⁰ [2002] QCA 464 (15 November 2002) [15] (de Jersey CJ).

¹³¹ Law Commission (England and Wales), above n 23, 80–8. The Law Commission of England and Wales uses the term ‘special measures’ to refer to measures that assist vulnerable people to participate in proceedings. This report uses the term ‘support measures’. In May 2014 the Law Commission of England and Wales published an issues paper, asking whether accused should have a statutory right to the support of a registered intermediary: Law Commission (England and Wales), above n 29, 27–9. Registered intermediaries are discussed in more detail at [3.128].

¹³² Ibid 86.

¹³³ Law Commission (England and Wales), above n 46, 32.

¹³⁴ (1980) 147 CLR 1, 9.

- 3.112 Analysis of the 65 judgments available in the 159 CMIA cases dealt with in the higher courts over a 12-year period from 2000–01 to 2011–12 indicates that the issue of unfitness to stand trial was raised in 19 cases. In 16 of these 19 cases (84.2 per cent) the accused was found unfit to stand trial.
- 3.113 There was insufficient information from which to draw any conclusions about how common it is for young people to be found unfit to stand trial from those who raised the issue. However, the data indicated that there was a range of outcomes (detailed in **Table 10** in **Appendix D**), including being found fit to stand trial, pleading guilty, being found unfit to stand trial and charges being dismissed or withdrawn, and being placed on a non-custodial supervision order.

In-court support measures to optimise fitness to stand trial

- 3.114 The Commission sought views on whether support measures should be taken into consideration when determining unfitness to stand trial and whether accused should be provided with more support in court. The Commission highlighted potential support measures including:
- using a support person such as a ‘communication assistant’ or ‘intermediary’ who can interpret what is being said in court to the accused in a way that they can understand
 - improving communication methods in court, for example, by using short sentences or providing hearing loops to people with a hearing impairment.

Views in submissions and consultations

- 3.115 The Commission also asked about the appropriate role of support people, including the scope of their legal responsibility, and the qualifications they should have.
- 3.116 Submissions that addressed this issue and stakeholders who were consulted agreed that the law should recognise that fitness to stand trial can be enhanced if appropriate support is provided in court, and that accused with mental conditions should be provided with more support in court.¹³⁵ It was noted that giving support measures a greater role in the process for determining unfitness to stand trial would have the following benefits:
- It would ensure that support measures are considered in every investigation into unfitness to stand trial and would encourage the use of support measures in individual cases.¹³⁶
 - It would encourage experts to take support measures into account in their assessments.¹³⁷
 - It would ensure that the criteria are applied to the hearing being contemplated.¹³⁸
 - The test for unfitness would not capture a broader class of individuals than is necessary.¹³⁹
 - It is humane.¹⁴⁰
 - It would promote more meaningful participation by the accused.¹⁴¹
 - It upholds the right to equality, as well as the right to a fair hearing and access to justice in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (‘Charter’) and the *Convention on the Rights of Persons with Disabilities*.¹⁴²

135 Submissions 6 (Associate Professor Andrew Carroll); 8 (Office of Public Prosecutions); 10 (Victorian Equal Opportunity and Human Rights Commission); 19 (Forensicare). Consultation 21 (Consultant psychiatrists, Forensicare).

136 Submission 4 (The Australian Clinical Psychology Association).

137 Advisory committee (meeting 2a).

138 Consultation 23 (Supreme Court of Victoria—judges). Advisory committee (meeting 2a).

139 Submission 10 (Victorian Equal Opportunity and Human Rights Commission).

140 Submission 6 (Associate Professor Andrew Carroll).

141 Submission 4 (The Australian Clinical Psychology Association). Advisory committee (meeting 2a).

142 Submission 10 (Victorian Equal Opportunity and Human Rights Commission).

- 3.117 There were also some specific suggestions that experts should assess what type of support may assist an accused to participate in the trial.¹⁴³
- 3.118 In relation to support measures for young people, it was recognised by legal practitioners that the Children’s Court generally operates consistently with section 522 of the *Children, Youth and Families Act 2005* (Vic).¹⁴⁴ This provision requires the court to take steps to ensure proceedings are comprehensible to children and ensure that the child understands the nature and implications of the proceeding. Practitioners noted that those who represented young people in the Children’s Court were experienced in matters involving young people and would use a more suitable approach with them.¹⁴⁵ Victoria Police prosecutors provided examples of modifications that are currently made to proceedings, including addressing accused young people by their first name in court and encouraging prosecutors not to wear uniforms.¹⁴⁶
- 3.119 However, it was noted that while some regional courts and higher courts did modify proceedings to suit young people, this practice was less common in those courts.¹⁴⁷ There was also support for a requirement to use support measures in CMIA matters specifically.¹⁴⁸
- 3.120 Submissions highlighted the need for a specialised approach for young people in terms of support measures. The Australian Clinical Psychology Association observed that children required more help than adults in court and younger children needed more assistance and support than older children. The Victorian Equal Opportunity and Human Rights Commission referred to the Charter on the right of children to have ‘a procedure that takes account of his or her age’.¹⁴⁹
- 3.121 It was suggested that the Commission should consider the use of support people such as carers, communication assistants or intermediaries to interpret for adults and young people what is said in court.¹⁵⁰ However, some clinicians at the Commission’s roundtable on the CMIA and the Children’s Court expressed concerns about such a role, in terms of how it would operate in practice as well as whether it could give rise to ethical problems regarding confidentiality and possible disclosures. Those who expressed such concerns noted that the role of the support person (whether they are impartial or an advocate) and who would fill that role (an expert or someone familiar to the young person) should be clearly defined.¹⁵¹
- 3.122 Submissions and consultations also suggested:
- improvements to communication methods in court—for example, using more visual aids¹⁵² and making questions asked in court and other discussions in court easier to understand.¹⁵³
 - modifications to court procedure—for example, introducing shorter sessions¹⁵⁴ or reducing the formality or intimidation of proceedings.¹⁵⁵

143 Submissions 19 (Forensicare); 8 (Office of Public Prosecutions). Consultation 55 (Children’s Court roundtable—clinicians).

144 Consultation 51 (Children’s Court roundtable—legal practitioners).

145 Ibid.

146 Consultation 44 (Victoria Police—Children’s Court police prosecutor and policy staff).

147 Submission 33 (Commission for Children and Young People). Consultations 51 (Children’s Court roundtable—legal practitioners); 46 (County Court of Victoria—judges).

148 Submissions 27 (Victoria Legal Aid); 28 (The Australian Clinical Psychology Association); 29 (Victorian Equal Opportunity and Human Rights Commission). Consultations 44 (Victoria Police—Children’s Court police prosecutor and policy staff); 55 (Children’s Court roundtable—clinicians); 54 (Dr Katinka Morton).

149 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(3).

150 Submissions 4 (The Australian Clinical Psychology Association); 8 (Office of Public Prosecutions). Consultations 54 (Dr Katinka Morton); 40 (Communication Resource Centre, Scope); 21 (Consultant psychiatrists, Forensicare); 17 (Department of Human Services case managers, Shepparton); 23 (Supreme Court of Victoria—judges).

151 Consultation 55 (Children’s Court roundtable—clinicians).

152 Consultation 40 (Communication Resource Centre, Scope).

153 Ibid.

154 Submission 8 (Office of Public Prosecutions). Consultations 40 (Communication Resource Centre, Scope); 23 (Supreme Court of Victoria—judges); 24 (County Court of Victoria—judges).

155 Consultations 23 (Supreme Court of Victoria—judges); 24 (County Court of Victoria—judges). Note that one person consulted did not believe that proceedings should be made less formal, but noted that proceedings should reflect the seriousness of the matter: Consultation 37 (Partner of a victim of crime).

The Commission's conclusion

- 3.123 The Commission recognises that unfitness to stand trial is support-dependent. As the Commission observed in its report on guardianship,¹⁵⁶ a person's capacity depends on the nature of their disability and the novelty or complexity of the situation. In the Commission's view, the law should accommodate the varying abilities and needs of accused who may be unfit to stand trial, to the greatest extent possible.
- 3.124 The importance of support measures in the unfitness to stand trial process was one of the strongest themes to come out of the Commission's review of the CMIA. In the Commission's view, support measures should be considered in determinations of unfitness with the aim of optimising an accused's fitness where they might otherwise be unfit. For an accused, this provides them with the opportunity to participate in their trial. It also enables a full trial of the accused where this is fair and this is in the public interest.
- 3.125 Although it is currently open to courts and experts to consider the availability of support measures in determinations of unfitness to stand trial, it is evident from the input received that these are not necessarily considered, provided or available in all cases under the CMIA. The Commission has formed the view that it is necessary to expressly provide for the consideration of support measures in the test to ensure that such measures are considered in every investigation into unfitness and used where appropriate and available.¹⁵⁷
- 3.126 In developing this recommendation, the Commission has adapted the wording used in the New South Wales Law Reform Commission's recommended test for unfitness to stand trial.

Recommendation

- 18 Section 6 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to add a requirement, separate to the criteria in section 6(1), that in determining whether a person is unfit to stand trial, the court must consider the extent to which modifications can be made to the hearing process to assist the accused to become fit to stand trial. Modifications include:
- (a) whether a support person can assist the person's understanding of the trial
 - (b) whether more appropriate communication methods can be used in court, and
 - (c) whether court procedure can be appropriately modified.

¹⁵⁶
¹⁵⁷

Victorian Law Reform Commission, above n 51, ch 7.
This is consistent with the Law Commission's proposals: see Law Commission (England and Wales), above n 23, 88. See also Law Commission (England and Wales), above n 29, 27–9.

- 3.127 To support Recommendation 18, the Commission also recommends that these in-court support measures be made available.
- 3.128 The Commission considers that any support person appointed should have specialist skills in mental health or disability, and with young people, have specialist knowledge of child development. The United Kingdom may provide a helpful model that Victoria can refer to. In the United Kingdom, registered intermediaries have been introduced to help vulnerable witnesses and accused in communication.¹⁵⁸ Intermediaries take on a role that goes beyond that of an interpreter.¹⁵⁹ Generally, the intermediary will spend time developing a relationship with the individual while assessing their communication needs.¹⁶⁰ The intermediary will advise the court and lawyers about changes to procedure that may be necessary, and the type of language that should be used to communicate with the accused.¹⁶¹ The intermediary will also provide support during the trial by interpreting responses.¹⁶²
- 3.129 In its *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers*, the Victorian Parliament Law Reform Committee recommended that the Victorian Government consider establishing a witness intermediary scheme modelled on the United Kingdom scheme to provide support for people with an intellectual disability or other cognitive impairment.
- 3.130 In the Commission's view, it is essential that the operational, legal and ethical role of support people, such as intermediaries, be defined with clarity. Such people should not substitute their views for those of the accused, or the accused's lawyers, and should not seek to influence the accused.
- 3.131 While there are many recognised benefits with having support people, there are also concerns about how impartial they can be, especially if they are required to establish a relationship with the accused before the trial.¹⁶³ To counter any problems that may occur when a support person interprets a witness's answer, one approach is to have the support person interpret the questions to the witness but not translate the answer. This approach was recommended by the Law Commission of New Zealand,¹⁶⁴ and is currently used in Ireland.¹⁶⁵ The Commission recommends that consideration be given to the appropriate scope of support people, and in particular registered intermediaries, in Victoria.
- 3.132 The Commission considers that the education and training it recommends for lawyers and the judiciary under Recommendations 10, 11 and 13 will encourage the use of more appropriate communication methods in court and modifications to court procedure.
- 3.133 In addition, courts could introduce practice notes to support the use of these measures. The Practice Direction on criminal procedure rules applying in the United Kingdom Crown and Magistrates' Courts, for example, lists support measures that should be implemented when conducting trials involving young people.¹⁶⁶ These are discussed in more detail at [6.118] in Chapter 6.

158 Department of Justice (UK), *Registered Intermediaries: Assisting Vulnerable Witnesses and Defendants with Communication Difficulties in the Criminal Justice System*, Factsheet (September 2013) <<http://www.dojni.gov.uk/index/publications/publication-categories/pubs-criminal-justice/registered-intermediaries-information-leaflet.pdf>>. The 2013 Criminal Practice Directions permit the court to appoint an intermediary for the accused. See Court of Appeal (Criminal Division), *Criminal Practice Directions* [2013] EWCA Crim 1631, [3F.1]–[3F.6].

159 Penny Cooper and David Wurtzel, 'A Day Late and a Dollar Short: in Search of an Intermediary Scheme for Vulnerable Defendants in England and Wales' (2013) 1 *Criminal Law Review* 4, 5.

160 Ibid.

161 Department of Justice (UK), above n 158.

162 *Youth Justice and Criminal Evidence Act 1999* (UK) c 23, s 29(2).

163 Kirsten Hanna et al, 'Questioning Child Witnesses: Exploring the Benefits and Risks of Intermediary Models in New Zealand' (2013) 20(4) *Psychiatry, Psychology and Law* 527, 533.

164 Law Commission (New Zealand), *The Evidence of Children and Other Vulnerable Witnesses*, Preliminary Paper No 26 (1996) 45.

165 Terese Henning, 'Obtaining the Best Evidence from Children and Witnesses with Cognitive Impairments—"plus ça change" or Prospects New?' (2013) 37 *Criminal Law Journal* 155, 174.

166 Crown Court and Magistrates' Courts (UK), *Practice Direction—Part III.30: Further Practice Directions Applying in The Crown Court and Magistrates' Courts—Criminal Procedure Rules, Treatment of Vulnerable Defendants* (19 April 2013) <<http://www.justice.gov.uk/courts/procedure-rules/criminal/practice-direction/part3>>.

Recommendation

- 19 To support Recommendation 18, there should be more support measures available in the court process to enable a court to modify proceedings and to assist an accused to become fit to participate in the hearing. For example:
- (a) the introduction of a formal support person scheme, similar to intermediary schemes that operate in other jurisdictions, and
 - (b) the development and use of practice notes or practice directions in the Supreme Court, County Court, Magistrates' Court and Children's Court to promote the use of support measures for accused with a mental illness, intellectual disability or other cognitive impairment in court.

Education programs to optimise fitness to stand trial during the adjournment period following a temporary finding of unfitness

- 3.134 If a jury finds the accused unfit to stand trial, the judge must determine whether that person is likely to become fit to stand trial within 12 months. If the judge determines that the accused is likely to become fit ('temporary finding of unfitness') and they do become fit after a period of adjournment, the trial will proceed. If the judge determines that the accused is not likely to become fit within 12 months, or remains unfit after the period of adjournment ('permanent finding of unfitness'), a special hearing must be conducted before a jury to determine whether the accused is not guilty, not guilty because of mental impairment or committed the offence charged.

Views in submissions and consultations

- 3.135 Some submissions and people consulted supported the provision of education to optimise fitness to stand trial.¹⁶⁷ It was noted that:
- This is a humane option that may ultimately enable the accused to participate in their trial.¹⁶⁸
 - The finding that an accused cannot participate in their own trial is a serious one and therefore there is a responsibility to ensure that their ability to do so is maximised through education and treatment.¹⁶⁹
- 3.136 Participants in the Commission's clinician roundtable on the CMIA and the Children's Court thought that it was important to distinguish between young people who could be fit to stand trial given the appropriate education, and those who would be unfit regardless.¹⁷⁰
- 3.137 Some members of the advisory committee supported measures to provide education to optimise the fitness of people who had the capability to become fit and thought that this requirement should be enforceable through the CMIA.¹⁷¹

¹⁶⁷ Submissions 19 (Forensicare); 18 (Victoria Legal Aid); 8 (Office of Public Prosecutions). Consultations 21 (Consultant psychiatrists, Forensicare); 28 (Senior Practitioner—Disability Practice Leader, Office of Professional Practice, Department of Human Services).

¹⁶⁸ Submissions 19 (Forensicare); 6 (Associate Professor Andrew Carroll).

¹⁶⁹ Consultation 21 (Consultant psychiatrists, Forensicare).

¹⁷⁰ Consultation 55 (Children's Court roundtable—clinicians).

¹⁷¹ Advisory committee (meeting 2a).

The Commission's conclusion

- 3.138 Consistent with the Commission's reasoning on the role of support measures, the law should accommodate the varying abilities and needs of accused who may be unfit to stand trial to the greatest extent possible. The Commission considers that an education program could increase the extent to which an accused can participate in their own trial and therefore promotes an accused's right to a fair hearing and to equality before the law.
- 3.139 A number of jurisdictions in the United States have examples of such programs (often referred to as 'competency training' or 'competency restoration'). These are generally conducted in psychiatric hospitals, in an outpatient or community-based service or are jail-based.¹⁷² The programs are designed to educate accused to understand the nature of the charge, the roles of court staff, the nature of legal proceedings and so on.¹⁷³ The programs can be conducted by clinicians, including psychologists, social workers and case managers.¹⁷⁴ One particular program is based on the 'Slater Method' which is a 'formal competency tool designed for persons with intellectual disabilities'.¹⁷⁵
- 3.140 There are also specialised competency programs for young people. Virginia, for example, has introduced the Virginia Juvenile Competency Program.¹⁷⁶ It uses an interactive CD-ROM, a workbook, videos and flash cards with games and exercises designed for each young person based on their needs.¹⁷⁷
- 3.141 However, it will be important to consider the feasibility and effectiveness of education programs. In California, for example, there is a waitlist that averages between 200 and 300 individuals each month for competency restoration constrained by the 'physical capacity of these facilities and the state's ability to hire sufficient staff'.¹⁷⁸ If the program is not adequately resourced, there is also a risk that accused will be detained for longer periods of time while waiting for a place in the program.
- 3.142 It will also be important to develop a program that is effective. One study in Florida found that 21 per cent of accused with an intellectual disability became competent after undergoing the program between 1977 and 1991.¹⁷⁹ In a more recent study, 56 per cent of accused who completed the program were found to be competent.¹⁸⁰ For young people, Viljoen and Grisso have observed that the likelihood of success varies depending on the type of impairment.¹⁸¹ Success also depends on the suitability of the education program to the young person and the existence of a consistent relationship with trained counsellors.¹⁸² Decisional skills may be particularly difficult to teach because they require an ability to weigh risks and the long-term consequences of options.¹⁸³
- 3.143 The Commission recommends that the Victorian Government consider introducing an education program to enhance the accused's ability to be found fit to stand trial for both adults and young people. The Commission considers that an education program to assist accused adults and accused young people to become fit to stand trial is a valuable initiative, provided a program that is adequately resourced and sufficiently effective can be developed. This recommendation also ties in with the recommendations made by the Commission in Chapter 6 on the model for the operation of the CMIA in the Children's Court.

172 Hogg Foundation for Mental Health, *Restoration of Competency to Stand Trial* (Issue Brief, 2013); Legislative Analyst's Office (California), *An Alternative Approach: Treating the Incompetent to Stand Trial* (2012) 10.

173 Barry W Wall and Paul P Christopher, 'A Training Program for Defendants With Intellectual Disabilities Who Are Found Incompetent to Stand Trial' (2012) 40 *The Journal of the American Academy of Psychiatry and the Law* 366, 366.

174 Ibid 368.

175 Ibid 367.

176 Janet Warren et al, 'Developing a Forensic Service Delivery System for Juveniles Adjudicated Incompetent to Stand Trial' (2009) 8 *International Journal of Forensic Mental Health* 245, 246.

177 Ibid 249.

178 Legislative Analyst's Office (California), above n 172, 3, 9.

179 Wall and Christopher, above n 173, 367.

180 Ibid.

181 Jodi L Viljoen and Thomas Grisso, 'Prospects for Remediating Juveniles' Adjudicative Incompetence' (2007) 13(2) *Psychology, Public Policy and Law* 87, 107. See also, Warren et al, above n 176, 258–9.

182 Warren et al, above n 176, 259.

183 Viljoen and Grisso, above n 181, 107.

Implementation of a program should be considered as part of the case worker program in the Children's Court model.¹⁸⁴ A specialised approach has been recommended to provide specialised support to young people as part of the operation of the CMIA in that jurisdiction.

Recommendation

- 20** The Victorian Government should consider introducing an education program to enhance the ability of accused adults and accused young people to become fit to stand trial.

Treatment and services to optimise fitness to stand trial during the adjournment period following a temporary finding of unfitness

- 3.144 Support measures in court and education programs are likely to be more effective in optimising the fitness to stand trial of people with an intellectual disability, and less effective for people with a mental illness where the focus is on the treatment of the mental condition to restore fitness. This raises the question of whether the adjournment period can be better used to optimise the fitness of people with a mental illness.

Views in submissions and consultations

- 3.145 In consultations forensic clinicians expressed the view that the period of adjournment following a temporary finding of unfitness should be used to the fullest extent, given the long-term and serious consequences for people who come under the CMIA. It was suggested that there should be intensive or optimal efforts during the adjournment period to treat the person to assist them to become fit to stand trial.¹⁸⁵
- 3.146 Another suggestion made in consultations was that two independent psychiatrists should be consulted before an accused is found permanently unfit, given the serious implications of this decision.¹⁸⁶

The Commission's conclusion

- 3.147 The Commission agrees with this view and considers that the best way to achieve this would be to introduce requirements on the court in relation to the adjournment period following a temporary finding of unfitness to stand trial.
- 3.148 After the adjournment period following a temporary finding of unfitness to stand trial, if a real and substantial question is raised again, the judge must either:
- extend the period of adjournment for a further period (as long as the entire period does not exceed 12 months), or
 - proceed to hold a special hearing under Part 3 of the CMIA within three months.¹⁸⁷

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See Recommendation 46.
Consultations 21 (Consultant psychiatrists, Forensicare); 55 (Children's Court roundtable—clinicians).
Consultation 21 (Consultant psychiatrists, Forensicare).
Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) s 14(2)(b).

- 3.149 The Commission recommends a requirement that the court must only proceed to hold a special hearing if it is satisfied that the accused, having regard to the education, treatment and services received, is not fit to stand trial. To support this recommendation, Recommendation 22 below proposes that assessments of unfitness to stand trial should include the measures (in terms of education, treatment or services) that would assist the accused to be fit to stand trial. The Commission also recommends that an expert advisory group consider whether legislative or other requirements should be introduced to require the application of the process in Recommendation 22 (Recommendation 23).
- 3.150 The Commission also makes a recommendation in relation to the provisions governing the abridgement of the adjournment period after a temporary finding of unfitness. During this period, at any time, the accused or the Director of Public Prosecutions may apply to the court for an order that the court proceed to a special hearing if they are of the opinion that the accused will not become fit to stand trial by the end of the 12-month period. This application must be accompanied by a report on the mental condition of the accused by a registered medical practitioner or a registered psychologist.¹⁸⁸ The Commission recommends a requirement that such a report on the mental condition of the accused should:
- expressly refer to the education, treatment and services recommended in any report on the accused's unfitness to stand trial to assist the accused in becoming fit
 - detail the education, treatment and services that the accused has received during the adjournment period.
- 3.151 On such an application, if the court is satisfied that the accused will not become fit to stand trial within 12 months after the finding of unfitness, an order must be made for the court to proceed to hold a special hearing.¹⁸⁹ The Commission recommends that this should not occur unless the court is satisfied that, having regard to the education, treatment and services received, the accused will not become fit to stand trial by the end of the 12 months after the finding of unfitness.
- 3.152 In the Commission's view, these requirements will create a greater impetus to optimise the treatment of the accused during the adjournment period and also ensure that there is accountability for how that period is used.

Recommendation

- 21 The following amendments should be made to the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic):
- (a) Section 14(2)(b) should be amended so that the judge must only proceed to hold a special hearing under Part 3 within three months if satisfied that the accused, having regard to the education, treatment and services received, is not fit to stand trial.
 - (b) Section 13(2) should be amended so that the report on the mental condition of the accused should contain information on:
 - (i) the education, treatment and services recommended in any report on the accused's unfitness to stand trial to assist the accused in becoming fit to stand trial, and
 - (ii) the education, treatment and services the accused received during the period of adjournment.
 - (c) Section 13(3)(c) should be amended so that the judge must be satisfied that the accused, having regard to the education, treatment and services received, will not become fit to stand trial by the end of the period of 12 months after the finding of unfitness.

Assessment of unfitness to stand trial by experts

Processes for applying the new tests for unfitness

- 3.153 The Commission's recommendations (15–21) in relation to the test for unfitness to stand trial have broader implications for the process to be followed by experts in conducting assessments of unfitness. The recommendations propose changes to the way in which unfitness to stand trial is assessed and introduce new requirements for the court in various stages of the investigation of unfitness.
- 3.154 Some members of the Commission's advisory committee suggested a two-stage process for expert assessments. Based on their advice, the Commission has set out below the process that should be followed in an assessment for the purposes of an investigation of unfitness under the recommended changes. This can be used as a basis for the work to be conducted by the advisory group that the Commission recommends be established to examine potential improvements to the application of the test by experts (see Recommendation 23 below).
- 3.155 This process can also be applied as part of the expert assessment conducted following an assessment order in the Children's Court, discussed in more detail in Chapter 6 at [6.132]–[6.141].

Recommendation

- 22 The following process should be followed to support the Commission's recommendations on unfitness to stand trial:
- (a) In an examination of an accused by a registered medical practitioner or a registered psychologist on whether the accused is unfit to stand trial under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), the assessment should include:
 - (i) whether the accused is unfit to stand trial
 - (ii) if unfit to stand trial, whether or not the accused is likely to become fit to stand trial within a particular period and any measures (education, treatment or services) that would assist the accused to become fit to stand trial, and
 - (iii) if unfit to stand trial, the extent to which modifications can be made to the hearing process to assist the accused to become fit to stand trial.
 - (b) If requested, the assessment should also consider whether the accused is fit to plead guilty.
 - (c) As part of any assessment of unfitness to stand trial of a young person, the assessment should consider the developmental stage of the person.
 - (d) Upon consideration of the assessment, the court may proceed to determine whether the accused is unfit to stand trial, having regard to the extent to which modifications can appropriately be made to the hearing process to assist the accused to become fit to stand trial.
 - (e) If the accused is found fit to stand trial, the hearing should commence or resume in accordance with usual criminal procedures and with any appropriate modifications recommended in the assessment to assist the accused to become fit to stand trial.
 - (f) If the accused is found unfit to stand trial, the court may adjourn the matter for a period specified under section 11(4)(b) to allow the accused to become fit to stand trial, having regard to any measures recommended (education, treatment or services) that would assist the accused to become fit to stand trial.
 - (g) Following the period specified under section 11(4)(b) or in support of an application for an abridgment of the period under section 13 (as amended by Recommendation 21(b)), another examination of the accused by a registered medical practitioner or a registered psychologist should be conducted on the accused's unfitness to stand trial.
 - (h) Any request or order for an assessment on whether the accused is unfit to stand trial should specify the matters the registered medical practitioner or the registered psychologist should consider.

Improving the application of the test by experts

- 3.156 In the consultation paper the Commission noted that the lack of clarity in some of the Presser criteria may cause problems for expert assessments of unfitness to stand trial. The lack of clarity could result in the inconsistent application of the criteria when determining the 'cut-off point' on the fitness continuum where it becomes fair that the accused stands trial.¹⁹⁰ The recommendations made above in relation to the test should make it easier for experts to apply. However, the Commission's review identified other ways in which expert assessments can be improved.

Views in submissions and consultations

- 3.157 There was general recognition of the expertise and objectivity of experts on issues of unfitness.¹⁹¹ The Criminal Bar Association, for example, observed that 'They are on the whole comprehensive and well-targeted to the needs of the case'.¹⁹²
- 3.158 It is also important to recognise the difficult task faced by experts in assessing unfitness to stand trial that involves subjective judgments about an accused's functional abilities.¹⁹³
- 3.159 Submissions and consultations noted problems in relation to assessments of unfitness to stand trial.¹⁹⁴ These included:
- discrepancies in experts' training and expertise¹⁹⁵
 - reports sometimes lacking a forensic direction or familiarity with CMIA legal concepts¹⁹⁶
 - assessments conducted inappropriately (for example, questions not communicated effectively to people with an intellectual disability or in a culturally appropriate manner)¹⁹⁷
 - a small pool of experts, which could compromise objectivity.¹⁹⁸
- 3.160 Similar concerns were expressed in relation to unfitness assessments of young people. For example, staff of the Department of Human Services informed the Commission that there is little or no guidance for determining whether a person with a cognitive impairment is unfit.¹⁹⁹ In these circumstances, it is difficult to disentangle what could be an issue of unfitness, development or disability.²⁰⁰ Further, it was noted by staff of the Department of Human Services that there may be complexities in determining the ability of a young person to stand trial in view of developmental considerations.²⁰¹ It was also noted that approaches to communication with a young person are a key consideration in assessing unfitness to stand trial.²⁰²

190 Astrid Birgden and Don Thomson, 'The Assessment of Fitness to Stand Trial for Defendants with an Intellectual Disability: A Proposed Assessment Procedure Involving Mental Health Professionals and Lawyers' (1999) 6(2) *Psychiatry, Psychology and Law* 207, 211.

191 Consultation 23 (Supreme Court of Victoria—judges).

192 Submission 21 (Criminal Bar Association).

193 Submission 19 (Forensicare).

194 Submissions 5 (Patricia Farnell); 13 (Australian Community Support Organisation Inc.). Consultations 27 (Victoria Police—police prosecutors); 55 (Children's Court roundtable—clinicians).

195 Consultation 55 (Children's Court roundtable—clinicians).

196 Consultation 27 (Victoria Police—police prosecutors).

197 See, eg, consultation 28 (Senior Practitioner—Disability Practice Leader, Office of Professional Practice, Department of Human Services).

198 Submission 13 (Australian Community Support Organisation Inc.).

199 Consultation 53 (Head Office (Youth Justice, Forensic Disability, Child Protection and Senior Practitioner), Department of Human Services).

200 Ibid.

201 Ibid.

202 Ibid.

3.161 Suggestions to improve expert assessments of unfitness to stand trial included:

- Unfitness assessments should be conducted by a multi-disciplinary specialised team of psychologists, psychiatrists and speech pathologists.²⁰³ For young people, the expert should also have appropriate specialist skills in assessing young people.²⁰⁴
- There should be careful regulation of experts who assess unfitness in terms of qualifications and expertise through registration or accreditation of their competency to conduct these assessments.²⁰⁵ Where the assessment concerns a young person, the expert should have demonstrated experience with young people.²⁰⁶
- There should be clearer guidance to experts about the test for unfitness. This could be achieved through the development of best practice guidelines on what should be included in a report, or through training.²⁰⁷
- A component of every assessment should be standardised.²⁰⁸ For example, there should be standard information that should be included as part of every report. At the Commission's roundtable with clinicians, it was noted that this would strike a balance between ensuring there is consistency between reports but also allowing for clinical discretion.
- Assessments should be conducted using appropriate communication techniques.²⁰⁹ The Commission's consultations with the Office of the Senior Practitioner and SCOPE highlighted the importance of effective communication techniques in assessments of unfitness.

The Commission's conclusion

3.162 The Commission recognises that expert assessments form the evidentiary foundation of findings of unfitness to stand trial. In the Commission's view, changes should be made to address unnecessary variability and to ensure the fairness and accuracy of expert assessments of unfitness to stand trial. As Freckelton has observed:

given that determinations have to be made about accused persons' fitness to stand trial and given that those decisions are significantly influenced by expert evidence from psychiatrists and psychologists, it is important to reduce subjectivity and arbitrariness in the assessment process so far as that is possible by the provision of clear guidelines for what constitutes unfitness.²¹⁰

3.163 The Commission considers that experts themselves are the best people to determine the changes that need to be introduced to address unnecessary variability and to ensure the fairness and accuracy of assessments of unfitness to stand trial. Experts are also best placed to determine how any changes should be implemented.²¹¹ The Commission therefore recommends that the Victorian Government establish an expert advisory group to determine how best to resolve the issues outlined above.

²⁰³ Consultation 40 (Communication Resource Centre, Scope).

²⁰⁴ Submissions 31 (Australian Psychological Society); 33 (Commission for Children and Young People); 29 (Victorian Equal Opportunity and Human Rights Commission).

²⁰⁵ For example, the Australian Clinical Psychology Association suggested training and accreditation requirements similar to those in place for providing assessments to the Motor Accidents Authority of New South Wales: Submission 4 (The Australian Clinical Psychology Association).

²⁰⁶ Submission 28 (The Australian Clinical Psychology Association). Consultations 55 (Children's Court roundtable—clinicians); 54 (Dr Katinka Morton).

²⁰⁷ For example, Victoria Legal Aid suggested that a guide for experts could specify what should be included in a report; for example, specifying that reports explicitly address each element of the unfitness criteria. Submissions 11 (Jamie Walvisch); 16 (Australian Psychological Society); 18 (Victoria Legal Aid); 4 (The Australian Clinical Psychology Association).

²⁰⁸ Submission 33 (Commission for Children and Young People). Consultations 54 (Dr Katinka Morton); 55 (Children's Court roundtable—clinicians).

²⁰⁹ Submission 31 (Australian Psychological Society). Consultations 36 (Family member of person subject to a non-custodial supervision order under the CMIA); 28 (Senior Practitioner—Disability Practice Leader, Office of Professional Practice, Department of Human Services); 40 (Communication Resource Centre, Scope).

²¹⁰ Freckelton, above n 49, 54.

²¹¹ For example, any change could be implemented through the introduction of statutory provisions or regulations in the CMIA, education and training or the development professional guidelines.

Recommendation

- 23 The Victorian Government should establish an expert advisory group to determine:
- (a) who should conduct assessments of unfitness to stand trial
 - (b) whether the group of people identified under paragraph (a) should be registered or accredited by a professional body, and if so, the requirements for registration or accreditation
 - (c) whether guidelines should be developed or experts should undergo training on applying the test for unfitness to stand trial, and if so, the content of the guidelines or training
 - (d) whether assessments should be standardised to a greater extent and the extent to which these should be standardised
 - (e) whether legislative or other requirements should be introduced to require the application of the process in Recommendation 22, and
 - (f) how to promote better communication techniques in the conduct of assessments.

Cost implications

- 3.164 Some of the Commission's recommendations on the test for unfitness to stand trial may have cost implications.
- 3.165 The Commission's additions to the criteria add factors on which an accused must be assessed, which may increase the complexity of assessments and possibly the resources or time required to conduct them.
- 3.166 The recommendations that have the most significant cost implications are those that contemplate the introduction of a formal support person scheme for providing support in court and an education program to optimise the fitness of accused adults and accused young people. It has not been possible for the Commission to quantify the cost implications of these recommendations in any detail due to the need for more exploration and research to be done by the Victorian Government prior to them being established. Recommendation 19, which suggests the courts introduce practice notes to promote the use of support measures, will also have a small cost implication for the courts to develop and publish such material.
- 3.167 However, the costs incurred to establish and resource such programs and the work to provide support and education to optimise the fitness of accused may be offset by the costs saved if the measures to optimise fitness are successful and fewer people are found unfit to stand trial. A person who is fit will be dealt with via the usual criminal process to determine their criminal responsibility. If found guilty of the offence, the person is liable to be convicted and sentenced, in almost all cases a sentence with a definite period. This can be compared with a person whose conduct is proved on the evidence available after being found unfit to stand trial. If declared liable to supervision under the CMIA in the higher courts, they will be placed on an indefinite supervision order. Thus, there are costs that will be saved where accused are not required to go through the specialised processes under the CMIA and be subject to longer periods of supervision under an indefinite CMIA order, compared with a finite sentencing order. The recommendation made by the Commission to allow an accused to be found 'fit to plead guilty' may also contribute to these cost savings.

- 3.168 Due to the very complex supervision arrangements under the CMIA, Forensicare and the Department of Human Services were not able to provide comprehensive information to the Commission to enable a proper analysis of the costs of supervision under the CMIA, compared with supervision under some form of sentence, which may be the result if an accused was fit to stand trial or plead to a charge and subsequently found guilty and sentenced. Forensicare advised the Commission that it costs \$588.83 per day (approximately \$214,923 per year) per forensic patient for supervision and treatment in the high-secure custodial setting at Thomas Embling Hospital.²¹² This can be compared with the cost per Victorian prisoner in 2012–13 of \$270.12 per day (approximately \$98,594 per year).²¹³ It costs significantly more for the custodial supervision of young people—the cost per day, per young person subject to detention-based supervision on an average day in Victoria in 2012–13 was \$1,109.69 (approximately \$405,037 per year).²¹⁴
- 3.169 It is clear that it costs less to detain a person in prison than it does in a secure mental health hospital. The measures recommended by the Commission to optimise the fitness of accused—where appropriate and in accordance with their human rights—could therefore have a long term cost-saving effect in those cases where a person has been assisted or restored to fitness to participate in the criminal justice system.
- 3.170 Recommendation 23, regarding the establishment of an expert advisory committee to make improvements to the application of the unfitness test by experts, will also have cost implications in the resourcing of such a group. However, in the Commission’s view, these costs should be offset by improvements in the way that unfitness assessments are conducted, consistent with the Commission’s reform aims that fitness be optimised where appropriate through the production of high quality reports and fuller consideration of the measures that can be used by courts to optimise fitness.

212 This figure was calculated over a one-year period from February 2013 to February 2014 and includes all the direct inpatient costs at the hospital, including clinical services provided by other agencies and non-medical services. It does not include an allocation for the indirect costs of running the hospital, such as the clinical and corporate management and support. The figure provided is an average produced from the total costs across the number of patients the hospital can accommodate. It does not take account of the different costs between units depending on their staffing models and programs and does not distinguish between the legal status of individual forensic patients and their leave requirements.

213 Steering Committee for the Review of Government Service Provision, *Report on Government Services 2014* (2014) Table 8A.7.

214 Ibid Table 16A.24.

Clarifying the law on the defence of mental impairment

102 Introduction

103 Background

105 Should mental impairment be defined in the CMIA?

116 The test for establishing the defence of mental impairment

121 Application of the defence of mental impairment in the Children's Court

4. Clarifying the law on the defence of mental impairment

Introduction

- 4.1 The terms of reference ask the Commission to consider issues with regard to the defence of mental impairment. The Commission is asked to consider whether a definition of mental impairment should be introduced into the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ('CMIA') and, if so, how it should be defined.
- 4.2 This chapter contains the Commission's recommendations on this issue. These include recommendations that seek to clarify the law on the defence of mental impairment by:
- introducing a statutory definition of mental impairment that comprises a non-exhaustive list of underlying conditions that ought to be included as a mental impairment with a focus on the underlying pathology of the condition rather than the source of the condition
 - changing the meaning of the second limb of the mental impairment test to be consistent with its application by clinicians and interpretation in case law.
- 4.3 The Commission also makes a recommendation to ensure that these changes to the defence of mental impairment are included in the *Children, Youth and Families Act 2005* (Vic) under the expansion of the CMIA to the Children's Court (see Chapter 6) to ensure the consistent application of the law to young people.¹
- 4.4 Other issues in the terms of reference and supplementary terms of reference that relate to the defence of mental impairment examined by the Commission in this report include:
- whether there should be an expansion of the orders available in the Magistrates' Court after a finding of not guilty because of mental impairment (Chapter 5)²
 - whether there should be an expansion of the orders available in the Children's Court after a finding of not guilty because of mental impairment (Chapter 6)
 - whether legislative clarification is required on 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 (Chapter 7).

1 The term 'young people' is used as a general term in this report 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 terms 'children' or 'young offenders' will be used to describe individuals.

2 The Commission has recommended in Chapter 9 of this report replacing the finding of 'not guilty because of mental impairment' with the accused's 'conduct is proved but not criminally responsible because of mental impairment': see Recommendation 69.

Background

Criminal responsibility and the defence of mental impairment

- 4.5 For a person to be found guilty of an offence, it must be proved that the person committed both the physical elements and the fault elements of the offence:
- *Physical element* (also referred to as the *actus reus*)—This element varies depending on the nature of the crime, but may include the conduct (for example, rape requires the sexual penetration of a person), circumstance (for example, rape requires the absence of consent) or cause (for example, murder causes the death of a person) to establish the crime.
 - *Mental or fault element* (also referred to as the *mens rea*)—This element describes the ‘fault’, which applies in relation to a physical element of an offence. The ‘fault’ usually refers to the state of mind of the accused and includes concepts such as intention, knowledge and recklessness.
- 4.6 The law has long recognised that a person should not be held criminally responsible if at the time of committing an offence, the person lacked the mental capacity to commit the offence because of a ‘mental impairment’. The defence of mental impairment is grounded in two important principles:
- a mental impairment may act as an excuse from criminal responsibility
 - the community must be protected from people who, as a result of a mental impairment, are a risk to others.³
- 4.7 Under the current law in Victoria, this also includes consideration of the risk people pose to themselves.⁴

Development of the defence of mental impairment

- 4.8 In the Commission’s *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997: consultation paper* (‘the consultation paper’), it outlined the background to the current defence of mental impairment under the CMIA—previously called the ‘defence of insanity’.
- 4.9 While the principles underlying the insanity defence have been in existence for centuries, it was not developed as a legal doctrine until the early 1800s. The legal defence was formulated as a result of two English cases: *R v Hadfield* and *Daniel M’Naghten’s Case*.⁵
- 4.10 The case of *R v Hadfield* prompted the introduction of the *Criminal Lunatics Act 1800*, which allowed for people acquitted on the grounds of insanity to be kept in custody at the King’s pleasure.⁶ This legislation was later adopted in Australia and formed the basis for the ‘Governor’s pleasure’ regime.⁷

3 New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Consultation Paper No 6 (2010) 47.

4 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 40(1). In Chapter 10 of the report, the Commission has recommended that consideration of the risk posed by a person to themselves be removed from the factors that a court must have regard to in making decisions regarding the supervision of a person subject to a CMIA finding: see Recommendation 89.

5 (1800) 27 State Tr 1281; (1843) 8 ER 718. Daniel M’Naghten was accused of the murder of Edward Drummond, the Secretary to the English Prime Minister, Sir Robert Peel. M’Naghten was under the delusion that the Tory party was persecuting him and that his life was in danger and he mistakenly shot Mr Drummond, thinking he was the Prime Minister. M’Naghten was acquitted on the grounds of insanity. There was a public outcry at the verdict and the court was asked to provide an explanation of the operation of the insanity defence.

6 James Hadfield, while suffering from delusions, attempted to shoot King George III. Hadfield was found not guilty by reason of insanity and held in custody. However, at the time there was no authority to detain people found not guilty by reason of insanity.

7 Under the Governor’s pleasure regime, the detention of a person found not fit to plead or not guilty on the ground of insanity was authorised by sections 420(1) and 393(1) of the *Crimes Act 1958* (Vic).

- 4.11 *Daniel M’Naghten’s Case* provided the requirements for establishing the common law defence of insanity. The court (House of Lords), provided the following explanation of the operation of the insanity defence:

jurors ought to be told that in all cases every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.⁸

- 4.12 In Victoria, these requirements known as the ‘M’Naghten rules’ provided the basis for the common law defence of insanity that existed under the Governor’s pleasure regime. These rules provide the ‘template for the defence of insanity in the criminal law of numerous jurisdictions’.⁹

The defence of mental impairment under the CMIA

- 4.13 The CMIA explicitly abrogated the common law defence of insanity and replaced it with the statutory defence of mental impairment.¹⁰ However, the concept of mental impairment and the statutory test for the defence of mental impairment under the CMIA remains the same as they were under the common law defence of insanity. In the second reading speech for the Crimes (Mental Impairment and Unfitness to Stand Trial) Bill 1997, the Attorney-General explained:

The term ‘insanity’ has been replaced by the term ‘mental impairment’ because the former term is antiquated and carries [a] historical stigma. However, it is important to note that the bill does not alter the existing criminal law in relation to determining criminal responsibility ... The bill makes it clear that the new defence of mental impairment has the same meaning as the defence formerly known as the defence of insanity and is to be interpreted accordingly.¹¹

- 4.14 Under current law in Victoria, the term ‘mental impairment’ means a ‘disease of the mind’.¹² The M’Naghten elements of the defence were added to the statutory defence without any alteration.¹³ Thus, the changes made by the CMIA to the defence of mental impairment were largely changes in terminology and were not intended to affect the scope of the defence in practice.¹⁴
- 4.15 The defence of mental impairment is set out in section 20 of the CMIA. 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.
- 4.16 The CMIA provides that a person will not know that their conduct is wrong where they are unable to ‘reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong’.¹⁵

8 *Daniel M’Naghten’s Case* (1843) 8 ER 718, 722.

9 Stanley Yeo, ‘Commonwealth and International Perspectives on the Insanity Defence’ (2008) 32 *Criminal Law Journal* 7, 9.

10 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 25.

11 Victoria, *Parliamentary Debates*, Legislative Assembly, 18 September 1997, 187 (Jan Wade, Attorney-General).

12 *R v Sebalj* [2003] VSC 181 (5 June 2003) [14]. In this case Justice Smith ruled that the defence of mental impairment was not open to Sebalj, who was charged with a murder that occurred while he was in a psychotic state following a withdrawal from drugs, because such a psychotic state was ‘drug-induced’ and not a disease of the mind. Sebalj was subsequently found guilty by a jury and convicted of murder and sentenced to a term of imprisonment of 15 years with a non-parole period of 12 years. The sentence was appealed to the Victorian Court of Appeal, which found that the sentence imposed was manifestly excessive having regard to Sebalj’s culpability. His culpability was assessed by the Court of Appeal as being low given his ‘self-induced’ psychosis was brought on by him trying to stop using drugs: see *R v Sebalj* [2006] VSCA 106 (2 May 2006).

13 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 20(1)(a)–(b).

14 Director of Public Prosecutions, *Director’s Policy: The Crimes (Mental Impairment and Unfitness to be Tried) Act 1997—Unfitness to Stand Trial and the Defence of Mental Impairment* (Policy No 21, 2011).

15 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 20(1)(b).

Should mental impairment be defined in the CMIA?

- 4.17 The consultation paper asked questions about how the defence of mental impairment currently operates, and whether ‘mental impairment’ should be defined.

Current definition of mental impairment in Victoria

- 4.18 The term ‘mental impairment’ is not defined under the CMIA. Currently in Victoria, the common law is relied upon in determining what constitutes a mental impairment. In order for the defence of mental impairment to be established, a person must be ‘labouring under such a defect of reason, from *disease of the mind*, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong’ [emphasis added].¹⁶
- 4.19 This position was affirmed by the Victorian Supreme Court in the case of *R v Sebalj* (‘*Sebalj*’),¹⁷ in which it was held that ‘the term “mental impairment” should not be construed as changing the common law but construed as referring to the concept of “a disease of the mind” used in the common law defence of insanity’.¹⁸
- 4.20 In summary, the current requirements to establish the defence of mental impairment under the CMIA are:
- that at the time of the commission of the offending conduct, a person has a mental impairment, characterised as a ‘disease of the mind’, and
 - that mental impairment had at least one of two effects:
 - the person did not know the nature and quality of their conduct, or
 - the person did not know that their conduct was wrong.

The meaning of ‘disease of the mind’ at common law

- 4.21 There has been much debate about which conditions constitute a disease of the mind for the purposes of the mental impairment defence and it has been argued that ‘[l]egal definitions of what constitutes a mental condition in the insanity defence are generally unclear and variable’.¹⁹
- 4.22 The Victorian Parliament Law Reform Committee’s report *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers*, acknowledged there is ambiguity in the meaning of the term ‘mental impairment’ and recommended that the term be defined in legislation.²⁰
- 4.23 Recommendation 33 of that report proposed that the Victorian Government consider introducing legislation to provide a definition of ‘mental impairment’ that encompasses ‘mental illness, intellectual disability, acquired brain injuries and severe personality disorders’ while maintaining separate criteria for determining unfitness to stand trial.²¹

16 *Daniel M’Naghten’s Case* (1843) 8 ER 718, 722.

17 [2003] VSC 181 (5 June 2003).

18 *Ibid* [14].

19 Stephen Allnutt, Anthony Samuels and Colman O’Driscoll, ‘The Insanity Defence: From Wild Beasts to M’Naghten’ (2007) 15(4) *Australasian Psychiatry* 292, 297.

20 Victorian Parliament Law Reform Committee, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (2013) 243.

21 *Ibid*.

'Disease of the mind' and the defence of mental impairment

4.24 The definition of what constitutes mental impairment is a matter of law. Whether an accused suffered from a mental impairment at the relevant time is a matter of fact.²²

4.25 The concept of 'disease of the mind' was outlined in the case of *R v Radford*,²³ and approved in the case of *R v Falconer*²⁴ ('*Falconer*'), where it was stated:

The essential notion appears to be that in order to constitute insanity in the eyes of the law, the malfunction of the mental faculties called 'defect of reason' in the M'Naghten rules, must result from an underlying pathological infirmity of the mind, be it of long or short duration and be it permanent or temporary, which can be properly termed mental illness, as distinct from the reaction of a healthy mind to extraordinary external stimuli.²⁵

4.26 Prior to *Falconer*, two different approaches were employed by the courts to determine what constitutes a 'disease of the mind', described as the 'internal/external test' and the 'recurrence/continuing danger test'.²⁶ These tests focussed on the characteristics of the condition itself. The external/internal test required a mental condition, to be classified as a 'disease of the mind', to have a cause that is internal to the accused, rather than an external cause.²⁷ The recurrence/continuing danger test required a mental condition, to be classified as a 'disease of the mind', to have a tendency to recur.²⁸

4.27 An important distinction made in the 'sound/unsound mind' approach in *Falconer* was that a 'disease of the mind' must result from an *unhealthy mind* reacting to extraordinary external stimuli rather than a *healthy mind* reacting to extraordinary external stimuli. This means that it is not the 'extraordinary external stimuli' itself or whether the condition is permanent, temporary or of long or short duration that determines whether a condition falls within the meaning of 'disease of the mind', but whether there is an 'underlying pathological infirmity of the mind'.²⁹

4.28 An example of how this approach has been applied is demonstrated by looking at cases involving intoxication. Historically at common law, intoxication leading to temporary insanity was regarded as sufficient to establish the defence.³⁰ However, the common law, in cases such as *Falconer*, developed to distinguish between temporary states of mental impairment induced by intoxication (which did not constitute 'insanity' as there was no underlying pathological condition) and underlying diseases of the mind albeit caused by intoxication (which did constitute 'insanity').

4.29 While mental illness clearly falls within the common law meaning of 'disease of the mind' and thus within the scope of the defence of mental impairment, it remains unclear whether other conditions such as an intellectual disability or other cognitive impairment constitute a 'mental impairment'.

22 *R v Falconer* (1990) 171 CLR 30, 60 (Deane and Dawson JJ) (a decision under the Criminal Code (WA)).

23 (1985) 42 SASR 266.

24 (1990) 171 CLR 30, 53–4 (Mason CJ and Brennan and McHugh JJ).

25 (1985) 42 SASR 266, 274 (King CJ).

26 Judicial College of Victoria, *Victorian Criminal Charge Book* (14 May 2014) [8.2.1] <<http://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#19057.htm>>.

27 See, eg, *R v Quick* [1973] QB 910; *R v Radford* (1985) 42 SASR 266, cited in Judicial College of Victoria, above n 26, [8.2.1].

28 See, eg, *R v Carter* [1959] VR 105; *R v Meddings* [1966] VR 306, cited in Judicial College of Victoria, above n 26, [8.2.1].

29 *R v Radford* (1985) 42 SASR 266, 274.

30 *DPP v Beard* [1920] AC 479.

- 4.30 In the consultation paper, the Commission identified examples where conditions have been stated to be ‘diseases of the mind’. They include:³¹
- major mental illnesses such as schizophrenia³²
 - brain injuries, tumours or disorders³³
 - physical diseases that affect the soundness of mental faculties, such as cerebral arteriosclerosis.³⁴
- 4.31 Conditions that have been stated not to be a ‘disease of the mind’ include, for example, concussion from a blow to the head³⁵ or drug-induced psychosis.³⁶ There is a lack of clarity as to whether cases of dissociation and epilepsy constitute a mental impairment.³⁷
- 4.32 Underlying the ‘disease of the mind’ test is an attempt to draw a distinction between conditions that are the product of an unhealthy mind, either caused by natural or external events, and those that are the result that an external cause, either within or outside the control of the person, has on an otherwise healthy mind.
- 4.33 However, this distinction can have disparate outcomes when applied in practice, as demonstrated by *Sebalj*.³⁸ Sebalj was charged with murder committed while he was in a psychotic state that occurred after withdrawal from heroin and amphetamines. A preliminary ruling was sought on the meaning of the term ‘mental impairment’. It was held that the term ‘mental impairment’ should be interpreted as referring to the common law term ‘disease of the mind’. In doing so, Justice Smith had regard to the CMIA provisions, the intention of parliament in introducing the term ‘mental impairment’ in the CMIA and the effect that broadening the term mental impairment to include short-term or transient conditions may have—namely to ‘apply wherever the mind of a person charged with an offence had been adversely impaired to a material degree by alcohol or other drugs’.³⁹ As Sebalj’s psychosis was a ‘temporary’ condition connected with the use of substances—withdrawal from drugs—his mental condition was ‘drug-induced’ and not a disease of the mind. Sebalj was subsequently convicted and sentenced to 15 years’ imprisonment.⁴⁰ After Sebalj’s plea but before being sentenced, he had developed symptoms of schizophrenia.⁴¹

‘Disease of the mind’ and the doctrine of automatism

- 4.34 The common law term ‘disease of the mind’ is also relevant to the doctrine of automatism. Automatism is a legal term that refers to acts committed without volition and ‘implies the total absence of control and direction by the accused’s will’.⁴²
- 4.35 There are two types of automatism:
- sane automatism
 - insane automatism.

31 See Judicial College of Victoria, above n 26, [8.2.1].

32 *R v Falconer* (1990) 171 CLR 30; *R v Radford* (1985) 42 SASR 266.

33 *R v Hughes* (1989) 42 A Crim R 270; *Nolan v R* (Unreported, Court of Criminal Appeal, Fraser and Chesterman JJA and Dutney J, 22 May 1997).

34 *R v Kemp* [1957] 1 QB 399; *R v Radford* (1985) 42 SASR 266.

35 *R v Scott* [1967] VR 276; *R v Wogandt* (1983) 33 A Crim R 31.

36 *R v Sebalj* [2006] VSCA 106 (2 May 2006); *R v Whelan* [2006] VSC 319 (27 April 2006).

37 Some cases of dissociation and epilepsy have been found to constitute a mental impairment while other cases have not. See *R v Falconer* (1990) 171 CLR 30, 61 (Deane and Dawson JJ) and 76 (Toohey J) (a decision made under the Criminal Code (WA) which also relates to voluntariness under the Code).

38 *R v Sebalj* [2006] VSCA 106 (2 May 2006).

39 *R v Sebalj* [2003] VSC 181 (5 June 2003) [9]–[14].

40 *R v Sebalj* [2004] VSC 212 (11 June 2004) (Williams J). The sentence was appealed to the Victorian Court of Appeal (Maxwell P and Vincent JA) which found that the sentence imposed was manifestly excessive having regard to Sebalj’s culpability (assessed by the Court of Appeal as being low given his ‘self-induced’ psychosis was brought on by him trying to stop using drugs): see *R v Sebalj* [2006] VSCA 106 (2 May 2006) [15] (Vincent JA).

41 *R v Sebalj* [2004] VSC 212 (11 June 2004) [2].

42 Judicial College of Victoria, above n 26, [8.2.1], citing *R v Cottle* [1958] NZLR 999; *Bratty v AG for Northern Ireland* [1963] AC 386; *R v King* (2004) 155 ACTR 55; *Williams v R* [1978] Tas SR 98; *R v Milloy* [1993] 1 Qd R 298; *Edwards v Macrae* (1991) 15 MVR 193; *Re AG’s Reference* (No. 2 of 1992) [1994] QB 91; *Maher v Russell* [1993] TASSC 141 (22 November 1993).

- 4.36 The distinction between sane and insane automatism is based on the sound/unsound mind test outlined above at [4.27].⁴³ This distinction has serious implications for the accused because if successful in meeting the requirements of sane automatism, the accused will be wholly acquitted. For an accused who meets the requirements of insane automatism, however, the defence of mental impairment applies. If successful, the accused will be found not guilty because of mental impairment and could be made liable to supervision and placed on a supervision order.
- 4.37 Insane automatism includes mental conditions that result from a 'disease of the mind' and are the reaction of an unsound mind to its own delusions or to external stimuli.
- 4.38 Sane automatism includes conditions solely caused by external stimuli and as such does not result from a 'disease of the mind'.⁴⁴ An underlying infirmity triggered by external stimuli, however, will still be considered a 'disease of the mind' and could thus give rise to a defence of insane automatism.
- 4.39 The sound/unsound mind test under the doctrine of automatism has also resulted in disparate outcomes from a policy point of view. For example, insane automatism has been held to arise where a person is hyperglycaemic due to excessive blood sugar levels because it is considered an underlying infirmity and thus a 'disease of the mind'.⁴⁵ However, where a person is hypoglycaemic due to excessive insulin intake, this is considered to be caused by an external factor, not a 'disease of the mind', and sane automatism applies.⁴⁶

Application of the defence in Victoria under the current definition

- 4.40 Analysis of the 159 cases dealt with under the CMIA in the higher courts from 1 July 2000 to 30 June 2012 suggests that mental illness is the most prevalent form of mental condition raised as a basis for establishing the defence of mental impairment.
- 4.41 Of the 159 cases, judgments were available in 65 cases (40.9 per cent). Of these 65 cases, the defence of mental impairment was raised in 46 cases.⁴⁷
- 4.42 **Table 1** shows the mental conditions in the 46 cases where the defence of mental impairment was raised.

43 *R v Falconer* (1990) 171 CLR 30.

44 Judicial College of Victoria, above n 26, [8.2.1].

45 *R v Hennessy* [1989] 1 WLR 287.

46 *R v Quick* [1973] QB 910.

47 In 18 cases there was no information to indicate whether the defence had been raised and in one case information indicated the defence had not been raised. In eight of the 46 cases where the defence of mental impairment had been raised, unfitness to stand trial had also been raised; of these five were found unfit and three were found fit. The three cases involving intellectual disability or cognitive impairment were among those that involved unfit accused.

Table 1: Mental condition where defence of mental impairment raised, CMIA cases in higher courts, 2000–01 to 2011–12

Mental condition where defence of mental impairment raised	Number
Bipolar affective disorder ⁴⁸	2
Cognitive impairment	1
Intellectual disability	2
Major depressive disorder with psychotic features	1
Psychosis ⁴⁹	17
Schizoaffective disorder	4
Schizophrenia and intellectual disability	1
Not specified	18
Total	46

Source: Sentencing Advisory Council, higher courts sentencing database

The definition of mental impairment in other jurisdictions

- 4.43 In other jurisdictions, the definition of mental impairment includes mental illness, intellectual disability and cognitive impairment while conditions such as personality disorders and those related to the temporary effects of ingesting substances are sometimes specifically excluded from the definition. **Appendix E** contains a comparison of the legislative definition of mental impairment in Australian jurisdictions, along with New Zealand, Scotland, the United Kingdom and Canada. Apart from New South Wales, all other Australian jurisdictions provide some definition of mental impairment.
- 4.44 The Commonwealth and the Australian Capital Territory both adopt the Model Criminal Code, which provides for a definition of mental impairment that includes personality disorders.⁵⁰ The Northern Territory and South Australia also adopt the Model Criminal Code, but do not include personality disorders in the definition of mental impairment.⁵¹
- 4.45 In May 2013, the New South Wales Law Reform Commission released its report *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*.⁵² The report recommends adopting a definition of mental impairment that includes a volitional element. The recommended definition of mental impairment includes but is not limited to the following conditions: mental health disorders (including independent substance-induced mental disorders); cognitive impairments (intellectual disability, borderline intellectual functioning, dementias, acquired brain injury, drug- or alcohol-related brain damage, autism spectrum disorders); but excludes personality disorders.⁵³

48 This includes one case where the condition was bipolar affective disorder and one case where the condition was bipolar disorder.

49 This included the following particular conditions: paranoid schizophrenia (10, of which two were characterised as 'chronic paranoid schizophrenia'), schizophrenia (5, one of which was characterised as 'chronic' schizophrenia), paranoid psychosis (1) and acute paranoid psychosis (1).

50 *Criminal Code Act 1995* (Cth) sch s 7.3(8); *Criminal Code 2002* (ACT) s 27(1).

51 *Criminal Code Act* (NT) sch 1 s 43A; *Criminal Law Consolidation Act 1935* (SA) s 269A.

52 New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*, Report No 138 (2013).

53 Ibid 61–2.

- 4.46 The South Australian Sentencing Advisory Council has also considered this issue and released a discussion paper in July 2013 on the defence of ‘mental incompetence’. The paper asks whether amendments should be made to the definition of mental impairment that is outlined in section 269A of the *Criminal Law Consolidation Act 1935* (SA) and has proposed four possible options.⁵⁴ These include extending the definition of mental impairment beyond impairments resulting from mental illness, intellectual disability or senility, and various options excluding certain conditions in combination with a mental impairment, such as voluntary intoxication and habitual use of intoxicants.⁵⁵

Views in submissions and consultations

Should the CMIA define mental impairment?

- 4.47 The majority view in submissions and consultations was that the term ‘mental impairment’ should be defined in the CMIA. The main reasons provided in support of a definition of mental impairment were the inadequacy or inappropriateness of the current common law phrase ‘disease of the mind’⁵⁶ and to improve consistency in the application of the defence of mental impairment.⁵⁷
- 4.48 Some submissions suggested that the uncertainty as to what constitutes a mental impairment can lead to inconsistencies in the application of the mental impairment defence.⁵⁸ The Australian Clinical Psychology Association supported this view:
- In practice this [mental impairment being undefined] can lead to an inconsistent understanding and unfair application of this term in legal proceedings. ... We would recommend that a statutory definition of mental impairment is included in the legislation to ensure the term is applied appropriately, consistently and fairly. Where terms have been left undefined there is more room for inconsistency, for individual interpretation and application of that term leading to greater inconsistencies and unfairness.⁵⁹
- 4.49 This view was also supported by the Office of Public Prosecutions, which stated that ‘there is considerable uncertainty as to what other conditions, if any, constitute a “disease of the mind” or mental impairment. ... There is therefore inconsistency in the application of the test’.⁶⁰
- 4.50 The Victorian Institute of Forensic Mental Health (Forensicare) did not support the introduction of a definition of mental impairment and was of the view that the current common law formulation of ‘disease of the mind’ was appropriate.⁶¹ Forensicare suggested that a definition would not provide clarity in this area of law and that ‘[s]uch a consideration is complex, multifaceted and must be examined on a case by case basis’.⁶²

54 Sentencing Advisory Council (South Australia), *A Discussion Paper Considering the Operation of Part 8A of the Criminal Law Consolidation Act 1935* (SA), Discussion Paper (2013).

55 Ibid 44–50.

56 Submissions 8 (Office of Public Prosecutions); 10 (Victorian Equal Opportunity and Human Rights Commission); 12 (Progressive Law Network); 20 (Law Institute of Victoria); 21 (Criminal Bar Association).

57 Submission 4 (The Australian Clinical Psychology Association).

58 Submissions 8 (Office of Public Prosecutions); 4 (The Australian Clinical Psychology Association).

59 Submission 4 (The Australian Clinical Psychology Association).

60 Submission 8 (Office of Public Prosecutions).

61 Submission 19 (Forensicare).

62 Ibid.

An inclusive definition of mental impairment

- 4.51 A number of submissions expressed support for the development of a broad and inclusive definition of mental impairment.⁶³ For example, Victoria Legal Aid suggested the following:
- Inserting an inclusive definition in the Act would be consistent with the intention of the Act (which currently contemplates intellectually disabled people and the involvement of disability service providers and the Departments of Health and Human Services) and would reflect clearly how the Act generally operates in practice [citation omitted].⁶⁴
- 4.52 This view was also supported by the Criminal Bar Association, which proposed that any definition of mental impairment should be inclusive and flexible:
- Medicine, psychiatry, and psychology, along with numerous other fields of science, are constantly developing. The Act should permit the law to embrace developments in this respect, with appropriate safeguards. To do otherwise risks the law falling behind, unfairness in an individual case and the justice system coming into disrepute.⁶⁵
- 4.53 In considering how mental impairment should be defined, stakeholders recommended that any definition should not be based on diagnostic criteria, arguing that classification systems such as the *Diagnostic and Statistical Manual of Mental Disorders* (DSM) are subject to change or are not designed for medico-legal purposes.⁶⁶ Clinical diagnoses may be controversial.⁶⁷ Further, ‘mental impairment’ involves a consideration of complex issues concerning related impairments.⁶⁸
- 4.54 The Chief Psychiatrist suggested that, if any definition of mental impairment were to be proposed, emphasis should be placed on the functional consequences of a disorder as opposed to the nature of the disorder itself.⁶⁹ This view was supported in a submission by Jamie Walvisch who argued that ‘it should be made clear that the *cause* of the impairment (for example, whether it is internally or externally caused) is not important – that the test is solely focussed on whether the accused suffered from an abnormal mental state’.⁷⁰

Mental conditions that should be included in the definition

- 4.55 The Office of Public Prosecutions recommended that a definition include ‘all major known conditions (that are not self-induced)’.⁷¹
- 4.56 Victoria Legal Aid proposed an inclusive definition of mental impairment that includes but is not limited to ‘psychiatric illness, intellectual disability and cognitive and neurological impairments’.⁷² This view was supported by the Law Institute of Victoria, which recommended that:

the CMIA provide an extensive definition of mental impairment which includes a wide range of disabilities, including cognitive disabilities such as intellectual disabilities, learning disabilities, acquired brain injuries, and degenerative disabilities as well as psycho-social disabilities. However, we submit that this should not limit the Court’s discretion as to what else might be included in the definition.⁷³

63 Submissions 11 (Jamie Walvisch); 18 (Victoria Legal Aid); 20 (Law Institute of Victoria); 21 (Criminal Bar Association).

64 Submission 18 (Victoria Legal Aid).

65 Submission 21 (Criminal Bar Association).

66 Submissions 11 (Jamie Walvisch); 19 (Forensicare). The American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders* (DSM) is the major accepted diagnostic tool for mental illness and other mental disorders. The fifth edition (DSM-5) was released on 22 May 2013.

67 Consultation 26 (Office of the Chief Psychiatrist and Legal Branch, Department of Health).

68 Submission 19 (Forensicare).

69 Consultation 26 (Office of the Chief Psychiatrist and Legal Branch, Department of Health).

70 Submission 11 (Jamie Walvisch).

71 Submission 8 (Office of Public Prosecutions).

72 Submission 18 (Victoria Legal Aid).

73 Submission 20 (Law Institute of Victoria).

- 4.57 There was support for the inclusion of intellectual disability in a definition of mental impairment.⁷⁴ The Law Institute of Victoria suggested that the common law term ‘disease of the mind’ is inadequate in capturing the range of cognitive impairments.⁷⁵ The Victorian Equal Opportunity and Human Rights Commission shared this view, arguing that a definition that encompasses ‘current understandings of cognitive disabilities (including intellectual, learning, acquired and degenerative disabilities)’ is required.⁷⁶
- 4.58 The Progressive Law Network supported the inclusion of mental illness, intellectual disability, acquired brain injury and severe personality disorder.⁷⁷
- 4.59 Forensicare raised concerns about resources if there was a significant expansion of the conditions currently constituting a ‘disease of the mind’. It argued that ‘[t]he capability of the service system to safely manage large numbers of offenders within current resource levels is an important consideration’.⁷⁸ In addition to not supporting the introduction of a definition, Forensicare did not support the inclusion of personality disorders, acquired brain injuries and substance-induced psychosis disorders in any definition, as their inclusion would significantly strain existing resources.⁷⁹
- 4.60 Consultant forensic psychiatrists shared Forensicare’s concern with respect to the inclusion of personality disorders, with one psychiatrist stating that if the definition of ‘disease of the mind’ was expanded to include personality disorders, it would be hard to find an offender in the state who did not ‘squeeze into this’.⁸⁰ In his submission to the Commission, Associate Professor Andrew Carroll also expressed concerns about ‘net-widening’, particularly in relation to personality disorders:
- I would be very concerned with any expansion into personality disorder: the limits on this are far from clear; a more useful approach would be to specifically exclude cases where the only diagnosable mental disorder is a personality disorder. ... The reality is that any such expansion of the concept of disease of the mind would result in many CMIA patients residing in prisons and/or would result in non-mentally ill patients occupying beds [at] Thomas Embling Hospital, a facility which is ill-equipped to manage severe personality disorder in the absence of mental illness.⁸¹
- 4.61 Associate Professor Carroll also identified the difficulties that can arise in distinguishing cases of self-induced psychotic disorders from drug-induced psychoses:
- There are some boundary issues around drug associated psychoses, particularly for example when people with established psychotic illnesses intentionally abuse substances and therefore become acutely psychotic. It is very difficult to establish clear boundaries in these matters ...⁸²

It was therefore suggested that guidelines would need to be developed if these conditions were to be included in the definition of mental impairment.

74 Submissions 10 (Victorian Equal Opportunity and Human Rights Commission); 18 (Victoria Legal Aid); 20 (Law Institute of Victoria).
Consultation 21 (Consultant psychiatrists, Forensicare).
75 Submission 20 (Law Institute of Victoria).
76 Submission 10 (Victorian Equal Opportunity and Human Rights Commission).
77 Submission 12 (Progressive Law Network).
78 Submission 19 (Forensicare).
79 Ibid.
80 Consultation 21 (Consultant psychiatrists, Forensicare).
81 Submission 6 (Associate Professor Andrew Carroll).
82 Ibid.

The Commission's conclusion

The need to clarify the law

- 4.62 The Commission agrees that the law is unclear about which conditions constitute a 'disease of the mind', and that this may be affecting the consistency of the application of the defence of mental impairment and may result in disparate outcomes.
- 4.63 The Commission acknowledges Forensicare's view that the current approach regarding 'disease of the mind' works well in practice and allows the complexities of each matter to be considered on a case-by-case basis. However, due to the overwhelming support in submissions and consultations for a definition of mental impairment and the Commission's view that a definition will assist to clarify the law, the Commission recommends a definition of mental impairment be introduced into the CMIA.
- 4.64 The proposed definition of mental impairment therefore aims to clarify the law by outlining the types of conditions that are included as a mental impairment and those that are excluded, while ensuring there is flexibility in the definition to allow for consideration of complex or difficult cases. In introducing a definition of mental impairment, the Commission emphasises that the mere presence of a particular condition will not entitle the accused to a finding of not guilty because of mental impairment—the condition must have been present at the time of the offence and be of such severity as to satisfy the operational aspect of the test in terms of its effect on a person's mental functioning and capacity.

A broad and inclusive definition of mental impairment

- 4.65 The Commission is of the view that the best approach in clarifying the law on the meaning of 'mental impairment' is to introduce a broad and inclusive definition that is limited by the operational elements of the defence of mental impairment.
- 4.66 The proposed definition will provide flexibility to include any mental condition (subject to specific exclusions) that has the effect of the accused not knowing the nature and quality of their conduct and/or not knowing their conduct is wrong.
- 4.67 The Commission is of the view that a broad definition will not open the floodgates for people claiming the defence of mental impairment. This is because the scope of the defence will be limited by the high standard required in meeting the operational elements of the defence,⁸³ and the serious consequences of a successful defence in the imposition of an indefinite supervision order.
- 4.68 In its final report on defences to homicide in 2004 the Commission recommended a definition of mental impairment that includes but is not limited to the common law notion of a 'disease of the mind'.⁸⁴ The reasoning for this recommendation was that the 'disease of the mind' formulation did not provide enough flexibility and had resulted in interpretations of the term that were 'unnecessarily narrow.' In doing so, the Commission looked to the purpose of the defence of mental impairment:

If the purpose of the defence is to ensure that people are excused from criminal responsibility when their cognitive functions are so affected that they are unable to understand what they are doing or that it is wrong, then it should not matter what the cause of the particular impairment was.⁸⁵

⁸³ Law Commission (New Zealand), *Mental Impairment Decision-Making and the Insanity Defence*, Report No 120 (2010) 40.

⁸⁴ Victorian Law Reform Commission, *Defences to Homicide*, Final Report No 6 (2004) 217.

⁸⁵ Ibid 216. This is consistent with the principle in *R v O'Connor* where the High Court held that evidence of the 'state of the body and mind of the accused' is admissible in establishing that an accused was incapable of forming the relevant intent to commit an offence: *R v O'Connor* (1980) 146 CLR 64, 87.

- 4.69 The same view underpins the recommendation made in the present report to introduce a statutory definition of mental impairment. The Commission considers that a definition of mental impairment should include but not be limited to the common law notion of a 'disease of the mind'. It is therefore not intended that the conditions currently considered a 'disease of the mind' be excluded from the proposed statutory definition of mental impairment.

Self-induced conditions that are connected with substance use

- 4.70 The Commission is of the view that there are some conditions that should not be included in the definition of mental impairment.
- 4.71 For sound public policy reasons, the Commission supports a definition that distinguishes between two types of conditions that are self-induced and connected with the effect of ingesting substances:
- *Self-induced conditions that result from the temporary effects of ingesting substances*—These conditions should be excluded from the definition of mental impairment. An example of this is a person who ingests alcohol or drugs where the resulting intoxication is temporary and no longer exists once the alcohol or drugs have left the person's system.
 - *Self-induced independent conditions resulting from ingesting substances*—These conditions should be included in the definition of mental impairment. An example of this is a person who several years earlier, chronically abused alcohol, which resulted in an acquired brain injury. This condition should be included in the definition because the acquired brain injury exists independently of the ingestion of substances, and would remain after the person was no longer abusing alcohol. Another example is a person who experiences psychosis after ingesting drugs, where the psychosis is present after the drugs have left the person's system.
- 4.72 To include self-induced conditions that result from the temporary effects of ingesting substances in the definition of mental impairment would dramatically widen the definition in a manner that is inconsistent with its underlying policy. For these conditions, there is no underlying pathology and the impairment is solely referable to the effect of a substance that the accused has self-administered. To include these conditions within the definition would undermine the purpose of the defence by extending it to people who commit offences who are responsible for the temporary impairment of their mental faculties through the ingestion of substances.
- 4.73 The inclusion of self-induced independent conditions resulting from ingesting substances in the definition of mental impairment advances the reasoning outlined in the Commission's 2004 *Defences to Homicide* final report. The Commission continues to hold the view that if a person is suffering from a mental condition that impairs the person's functioning to such an extent that they do not know the nature and quality of what they are doing or whether it is wrong, the fact that the source of that underlying condition is external should not exclude the availability of the defence.⁸⁶ The *Sebalj* case, discussed at [4.33], was provided in the Commission's report on defences to homicide as an example of a case that should be included in the definition.
- 4.74 The Commission acknowledges that these cases can be very complex and in some circumstances it will be difficult to determine whether a person's actions were because of a mental condition or due to the effects of ingesting substances, as many people with a history of mental illness also have a history of substance use.⁸⁷ For example, there may be circumstances where a person started ingesting substances when they were

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Victorian Law Reform Commission, above n 84, 216.
See, eg, Glenn E Hunt et al, 'Psychosocial Interventions for People With Both Severe Mental Illness and Substance Misuse' (2014) 40(1) *Schizophrenia Bulletin* 18; Sarah M Hartz et al, 'Comorbidity of Severe Psychotic Disorders With Measures of Substance Use' (2014) 71(3) *JAMA Psychiatry* 248.

young, subsequently developed psychotic symptoms that remained after the substances had left the person's system, and then started ingesting substances again at the time of committing the conduct constituting the offence. In these circumstances it would be difficult to determine if, at the time of the offending conduct, the accused was suffering from the temporary effects of substance use or a permanent condition connected with previous substance use.

- 4.75 Research has also shown that it is often 'not possible to distinguish substance-induced psychosis from a first-episode psychosis in the context of a primary mental health disorder due to the very high level of comorbidity'.⁸⁸ For example, a person may ingest drugs for the first time and under the influence of the drug experience psychotic symptoms that resolve for a short period, prior to the person developing an independent condition that persists in the absence of further drug use.
- 4.76 Courts will therefore be heavily reliant on expert evidence in difficult cases in applying the definition to the individual circumstances of the case, and conditions would be included or excluded based on the latest expertise in the relevant field. Cases that involve disentangling the temporary effects of substances and ongoing conditions connected with substance use will also require thorough and detailed clinical assessments by experts to ensure a proper evaluation of the applicability of the definition. It has been argued in relation to the law in England and Wales that:

A clinical evaluation that will be of use to the court will require a thorough history of the events, with a special focus on the defendant's account of the event and consumption of intoxicants in the period leading up to the offence. ... It is also essential to thoroughly tease out the history of alcohol and substance misuse.⁸⁹

Recommendation

- 24 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to insert a provision in section 20 of the Act that defines a 'mental impairment' for the purposes of the defence as a condition that 'includes, but is not limited to, mental illness, intellectual disability and cognitive impairment'.

The proposed definition of mental impairment should not include any self-induced temporary conditions resulting from the effects of ingesting substances.

The proposed definition should include self-induced conditions that exist independently of the effect of ingesting substances.

- 4.77 The recommended definition is consistent with the approach recently recommended by the New South Wales Law Reform Commission (NSWLRC), as follows:

The proposed definition of mental health impairment ... includes "substance induced mental disorders" ... [defined as] ongoing mental health impairments such as drug-induced psychoses, but excludes substance abuse disorders (addiction to substances) or the temporary effects of ingesting substances.⁹⁰

88 Dominique Bourget, 'Forensic Considerations of Substance-Induced Psychosis' (2013) 41 *The Journal of American Academy of Psychiatry and the Law* 168, 168.

89 Quazi Haque and Ian Cumming, 'Intoxication and legal defences' (2003) 9 *Advances in Psychiatric Treatment* 144, 150.

90 New South Wales Law Reform Commission, above n 52, 60.

- 4.78 The NSWLRC also noted that such a definition has the same effect as that contained in Commonwealth, Northern Territory and Australian Capital Territory provisions. The definition of mental illness in the *Criminal Code Act 1995* (Cth) excludes conditions that are caused by external stimuli but qualifies this by saying that ‘such a condition may be evidence of a mental illness if it involves some abnormality and is prone to recur’.⁹¹
- 4.79 However, the NSWLRC also noted the concerns that have been recently been expressed in Queensland in distinguishing between temporary and independent states in cases under the *Criminal Code Act 1899* (Qld) where the insanity defence has been raised by accused charged with offences committed under psychosis following the use of amphetamines.⁹²
- 4.80 The proposed definition of mental impairment will accordingly require careful treatment and consideration by Victorian courts if it is implemented. The Commission also considers that the development of guidelines, as suggested in submissions, could assist experts in making assessments and providing reports to the court in light of the Commission’s proposed changes.

Implications of the Commission’s recommendations

- 4.81 While it is beyond the scope of this review, the Commission notes that any changes to the definition of mental impairment may have implications for the doctrine of automatism. As discussed at [4.34]–[4.39], the term ‘disease of the mind’ and the sound/unsound mind test are currently used to distinguish between sane and insane automatism. This distinction will no longer apply if the definition of mental impairment is changed from a disease of the mind to an inclusive definition recommended by the Commission. This may affect the process for distinguishing between cases of sane and insane automatism.
- 4.82 Another possible implication is that a broad and inclusive definition of mental impairment may mean that a condition that was previously classified as sane automatism would now fall within the definition of mental impairment. The effect of this is that an accused who was previously entitled to an acquittal for sane automatism, may now be found not criminally responsible, be declared liable to supervision and be placed on a supervision order under the CMIA.

The test for establishing the defence of mental impairment

- 4.83 The test for establishing the defence of mental impairment is contained in the CMIA, as follows:
- The defence of mental impairment is established for a person charged with an offence if, at the time of engaging in the conduct constituting the offence, the person was suffering from a mental impairment that had the effect that—
- (a) he or she did not know the nature and quality of the conduct; or
- (b) he or she did not know that the conduct was wrong (that is, he or she could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong).⁹³
- 4.84 In the consultation paper, the Commission explained these two limbs of the test for the defence of mental impairment and sought views on how the defence operates in practice. The Commission asked detailed questions on whether the operational elements of the defence should change if a definition of mental impairment were introduced and whether there were issues with the interpretation of the phrase in the second limb of the test that a person ‘reason with a moderate degree of sense and composure’.

91 *Criminal Code Act 1995* (Cth) sch s 7.3(9). See also, *Criminal Code 2002* (ACT) s 27(1); *Criminal Code Act* (NT) sch 1 s 43A.

92 See Russ Scott and William Kingswell, ‘Amphetamines, Psychosis and the Insanity Defence: Disturbing Trends in Queensland’ (2003) 23 *Queensland Lawyer* 151.

93 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 20(1).

The two limbs of the test

- 4.85 The two limbs of the test are known as the ‘operational elements’ of the defence. The first limb of the test focuses on the nature and quality of the act itself, for example, the physical nature of the act or the consequences of the act. This is discussed in more detail in Chapter 7 at [7.123]–[7.128]. In considering the practical operation of the defence, cases in which an accused does not know the nature and quality of their conduct are rare.
- 4.86 It is far more common for the defence of mental impairment to be established on the second limb of the M’Naghten test. This limb relates to the way in which the person processes knowledge about the nature and quality of their conduct, in terms of whether it is wrong.⁹⁴
- 4.87 A study by the South Australian Sentencing Advisory Council estimates approximately 87 per cent of all findings of ‘mental incompetence’ are based on the second limb of the test, that the accused did not know that their conduct was wrong; while 2 per cent of all mental impairment defences are based on both limbs of the test.⁹⁵
- 4.88 This is supported by anecdotal information obtained during consultations, as well as an informal analysis of the 159 cases dealt with under the CMIA in the higher courts from 1 July 2000 to 30 June 2012. There were judgments available in 65 cases (40.9 per cent) from which detailed information about the case could be gleaned. Of these, in 41 cases the accused was found not guilty because of mental impairment. In 18 of these cases there was information to indicate the basis of the finding, and in none of these 18 cases was the finding made on the basis of the first limb alone.⁹⁶

Issues with the second limb of the test—requirement to ‘reason with a moderate degree of sense and composure’

- 4.89 The CMIA outlines the standard to be applied in considering whether the accused knew that their conduct was wrong, and incorporates the phrase ‘that is, he or she could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong’.⁹⁷
- 4.90 The consultation paper outlined the view of the New South Wales Law Reform Commission (NSWLRC) in relation to the Victorian approach to the defence of mental impairment. In particular, the requirement that the person be unable to consider their actions with some degree of composure and reason was questioned, with the NSWLRC suggesting that it is ‘the extinction or impairment of subconscious regulation, not an inability to reason calmly’ that explains the act of the accused.⁹⁸
- 4.91 Despite these comments, in its recent review the NSWLRC recommended retaining both elements of the M’Naghten test. The NSWLRC also recommended the addition of the wording from section 20(1)(b) of the CMIA.⁹⁹ This wording was chosen in preference to defining the test in terms of a person lacking ‘capacity to know’.

⁹⁴ Steven Yannoulidis, *Mental State Defences in Criminal Law* (Ashgate Publishing, 2012) 16.

⁹⁵ Sentencing Advisory Council (South Australia), above n 54, 8. Section 269C of the *Criminal Law Consolidation Act 1935* (SA) also contains a volitional element to the defence and 9% of cases were based on both the volitional element of the test and that the accused did not know the nature and quality of their conduct.

⁹⁶ There was no information on the basis of the finding in 11 cases. In 12 cases, a jury made the finding and its basis was not specified. In 18 cases there was information on the basis of the finding as it was made by a judge under the judge-alone provisions in section 21(4) of the CMIA. In 16 cases the finding was made on the second limb of the test and in two cases the finding was made on both limbs of the test.

⁹⁷ *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 20(1)(b).

⁹⁸ New South Wales Law Reform Commission, above n 3, 68–9.

⁹⁹ Ibid 50–1.

- 4.92 The majority of Australian jurisdictions include a volitional element in the definition of mental impairment.¹⁰⁰ A volitional element adds a requirement to the defence of mental impairment that the accused was unable to control their conduct.¹⁰¹ One of the main arguments against inclusion of a volitional element has been that it is difficult to establish on the evidence that a person was unable to control their conduct.¹⁰²
- 4.93 The NSWLRC recommended inclusion of a volitional element in their defence to be consistent with other Australian jurisdictions, reasoning that it is ‘appropriate to provide for the exculpation of those defendants who, because of cognitive or mental health impairments, genuinely could not control their actions’.¹⁰³
- 4.94 In the Commission’s 2004 *Defences to Homicide* final report, it did not recommend changes to the test for the defence of mental impairment, given the overwhelming view in submissions and consultations that the defence was working well in practice and was ‘well understood and appropriately applied’.¹⁰⁴ In coming to this decision, the Commission also considered that at the time of the review, the CMIA had only been in operation for a relatively short time and that ‘[t]o change the legislation so soon after its introduction without clear evidence of a need to do so would be inappropriate’.¹⁰⁵ The Commission therefore recommended that the Department of Human Services and the Department of Justice monitor the CMIA and continue to assess how the defence was operating in practice.
- 4.95 The Commission’s report also stated that there was not sufficient evidence to recommend the inclusion of a volitional element in the defence. The report outlined that submissions from those involved in the practical operation of the defence argued that the current formulation was sufficiently flexible to allow some of those people who were unable to control their conduct to qualify for the defence, where they also met the other requirements of the test.¹⁰⁶

Views in submissions and consultations

- 4.96 Forensicare recommended there be no change to the operational elements of the defence of mental impairment.¹⁰⁷ While two submissions referred to a volitional element that is part of the defence in other Australian jurisdictions, no one supported the introduction of a volitional element to the defence in Victoria.¹⁰⁸ Forensicare explained that:
- introducing a volitional element into the test is unnecessary and may bring with it its own set of interpretive issues. This is because an accused who commits an offence whilst mentally impaired is often able to control their conduct but, for example, may feel morally compelled to commit the act.¹⁰⁹
- 4.97 One submission argued for the ‘reasons-responsiveness’ approach where an accused should only be provided with a defence where ‘they are not capable of recognising and responding to the reasons that bear on his or her situation’.¹¹⁰

100 See **Appendix E**: Jurisdictional comparison of the mental impairment defence.
101 South Australia, Tasmania, Queensland and Western Australia use a capacity-based knowledge requirement with a volitional element. See *Criminal Law Consolidation Act 1935* (SA) s 269C(c); *Criminal Code Act 1924* (Tas) sch 1 s 16(1)(b); *Criminal Code Act 1899* (Qld) sch 1 s 27(1); *Criminal Code Act Compilation Act 1913* (WA) sch s 27(1).
102 See discussion in Bernadette McSherry, ‘Voluntariness, Intention, and the Defence of Mental Disorder: Toward a Rational Approach’ (2003) 21 *Behavioural Sciences and the Law* 581, 593–4.
103 New South Wales Law Reform Commission, above n 52, 69.
104 Victorian Law Reform Commission, above n 84, 212.
105 Ibid 213.
106 Ibid 211.
107 Submission 19 (Forensicare).
108 Submissions 11 (Jamie Walvisch); 19 (Forensicare).
109 Submission 19 (Forensicare).
110 Submission 11 (Jamie Walvisch).

- 4.98 In relation to the second element of the defence, the consultation paper asked whether the phrase ‘reason with a moderate degree of sense and composure’ required clarification. While this was not an issue identified by members of the legal sector, clinicians were generally of the view that clarification is required as there is no common understanding of the meaning of ‘moderate degree of sense and composure’.¹¹¹
- 4.99 A number of consultant forensic psychiatrists also raised concerns during a consultation about the meaning of the phrase ‘moderate degree of sense and composure’.¹¹² One participant commented that ‘[m]ost people are not acting with a moderate degree of sense and composure. There is a real problem with those words.’ Another participant said that ‘[t]he wording is essentially meaningless’. A third participant questioned whether there would be a consensus around the table of clinicians as to the meaning of the term, stating that ‘[i]t is very subjective’ and that ‘the level of agreement on the meaning around the table would not be high’. As one participant explained, ‘[r]easonable is a very subjective judgment from an expert’s view.’
- 4.100 Associate Professor Andrew Carroll also questioned the subjectivity of the term ‘moderate degree of sense and composure’, arguing that:
- The problem of course with the term ‘moderate degree of sense and composure’ is that there is very poor interrater reliability as to how ‘moderate’ is measured. In practice, this addition to the [M’Naghten] criteria can be used to argue for those who lack impulse control for any reason. Thus far, this has not resulted in any greater number of problematic cases but the vagueness of this term is surely undesirable.¹¹³
- 4.101 One person in consultations questioned whether any modification to this phrase would unnecessarily limit the defence. They noted that if the words ‘moderate degree of sense and composure’ were removed, many people would not be able to establish the mental impairment defence.¹¹⁴

The Commission’s conclusion

- 4.102 To establish whether an accused knows that their conduct is wrong, they must have understood it was wrong according to the principles of the reasonable person¹¹⁵ or be aware that reasonable people would ‘disapprove as wrong the actions he is performing’.¹¹⁶ While the test is focussed on what reasonable people would consider as wrong, rather than what is legally or morally wrong,¹¹⁷ the comprehension of a person ‘as to whether [their] actions were morally or legally wrong is not irrelevant to the evaluative task’.¹¹⁸

111 Submissions 19 (Forensicare); 6 (Associate Professor Andrew Carroll). Consultation 21 (Consultant psychiatrists, Forensicare).
 112 Consultation 21 (Consultant psychiatrists, Forensicare).
 113 Submission 6 (Associate Professor Andrew Carroll).
 114 Consultation 21 (Consultant psychiatrists, Forensicare).
 115 *Stapleton v The Queen* (1952) 86 CLR 358.
 116 *R v White* (2003) 7 VR 442, 451.
 117 *Ibid.*
 118 *Kosian v The Queen* [2013] VSCA 357 (6 December 2013) [67].

- 4.103 In the recent decision of *Kosian v The Queen*¹¹⁹ (*'Kosian'*), a bench of the Victorian Court of Appeal¹²⁰ observed that section 20(1) requires an 'evaluation ... of how the [mental impairment] affected the offender's reasoning capacity, his understanding of what would be "wrong" and whether that understanding accorded with reasonable standards'.¹²¹ The issue in *Kosian* was whether an accused's awareness about whether reasonable persons would consider his or her actions wrong can be informed by his or her capacity to appreciate the legal and moral consequences of his actions, a proposition that the Court of Appeal accepted.¹²² Whether evidence to the latter effect is relevant will turn on whether it gives insight into the former: *Kosian* 'regarded himself as morally justified in killing the two victims, and assumed that his actions would be vindicated after a period of time'.¹²³
- 4.104 In considering what is meant by the term 'to reason with a moderate degree of sense and composure', the clinicians who were involved as expert witnesses in *Kosian* referred to 'reasoning capacity',¹²⁴ 'thinking capacity'¹²⁵ or explained that the accused is unable to 'think rationally'.¹²⁶ For example, in its judgment, the Court of Appeal referred to the evidence provided in re-examination, in which one of the experts was asked the question and responded as follows:
- What is it about this man that prevented him from reasoning with a moderate degree of sense and composure about the wrongness of his act as perceived by reasonable people? ... The simple answer to that is that he's suffering from a mental illness called schizophrenia and we know that his thinking capacity is impaired simply because he's prone to these deluded ideas. By definition, he can't think rationally.¹²⁷
- 4.105 The Commission agrees that being able to 'reason with a moderate degree of sense and composure' is about a person's ability to think in a rational way about whether reasonable people would perceive their conduct to be wrong.
- 4.106 While the Commission has decided against amending the criteria for unfitness to stand trial to include a measure of 'rationality' in decision making or performing certain functions, the Commission's view is that it is appropriate to use this term in this different context. The focus of the test for the defence of mental impairment is on an accused's capacity to have an awareness of their own behaviour, either in assessing its physical nature and consequences and/or in terms of assessing whether other 'reasonable' people would consider it to be wrong. The use of the word rational in regard to this second limb of the test is appropriate, as it is consistent with the standard actually being applied by experts in assessing an accused's ability to reason with the requisite standard of sense and composure about how reasonable people would view their behaviour. In light of the input received about the subjectivity of the current terms 'reasonable' and 'moderate' and lack of clarity of the phrase, the Commission considers that the concept of rationality will assist in this context.
- 4.107 The Commission does not recommend any changes to the essential elements of the two limbs of the mental impairment defence but recommends changes to the test for assessing whether a person knows their conduct is wrong.
- 4.108 The Commission agrees with the view expressed by clinicians in submissions and consultations that the phrase 'to reason with a moderate degree of sense and composure' requires clarification. The Commission's recommendation therefore seeks to clarify the meaning of the second limb of the defence of mental impairment only.

119 [2013] VSCA 357 (6 December 2013).

120 Redlich and Coghlan JJA and Dixon AJA.

121 *Kosian v The Queen* [2013] VSCA 357 (6 December 2013) [64] (Redlich JA, Coghlan JA and Dixon AJA agreeing).

122 Ibid [67].

123 Ibid [68].

124 Ibid [30].

125 Ibid [33].

126 Ibid. See also, *R v Fitchett* [2008] VSC 258 (18 July 2008) [25].

127 *Kosian v The Queen* [2013] VSCA 357 (6 December 2013) [33].

Recommendation

- 25 Section 20(1)(b) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to replace ‘that is, he or she could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong’ with ‘that is, he or she did not have the capacity to think rationally about whether the conduct, as perceived by reasonable people, was wrong’.

Application of the defence of mental impairment in the Children’s Court

- 4.109 In the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* and the *Children’s Court of Victoria: supplementary consultation paper* (‘the supplementary consultation paper’), the Commission asked about the applicability of the defence of mental impairment to young people and, in particular, how the law of *doli incapax* and the defence of mental impairment should interact in practice in establishing the *mens rea* for young people. In considering whether mental impairment should be defined as it relates to young people, the Commission sought views on how particular mental conditions affect young people and how this should be factored into the question of a possible definition of mental impairment for young people.

The doctrine of *doli incapax*

- 4.110 In Victoria, children under the age of 10 years are *doli incapax* (incapable of crime).
- 4.111 The *Children, Youth and Families Act 2005* (Vic) (‘CYFA’) provides that it is conclusively presumed that a child under the age of 10 years cannot commit an offence.¹²⁸
- 4.112 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.¹²⁹
- 4.113 Young people between 10 and 14 years of age are presumed to be *doli incapax*, but the presumption is subject to rebuttal.¹³⁰ Although abolished in England,¹³¹ the presumption has been strongly affirmed in Victoria, notably by the Court of Appeal in *R v ALH*.¹³²
- 4.114 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 crime.¹³³

128 *Children, Youth and Families Act 2005* (Vic) s 344.

129 *Ibid* s 3(1).

130 *R v M* (1977) 16 SASR 589.

131 *Crime and Disorder Act 1998* (UK) c 37, s 34.

132 [2003] VSCA 129 (4 September 2003).

133 *R v JA* (2007) 161 ACTR 1, 12.

- 4.115 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*,¹³⁴ where the presumption was reframed as an extension of *mens rea*:

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.¹³⁵

The defence of mental impairment and young people

- 4.116 In the Children's Court, the defence of mental impairment may be raised in relation to offences within the Children's Court jurisdiction.¹³⁶ The defence uses the same statutory test that applies in the higher courts.¹³⁷

Approaches in other jurisdictions

- 4.117 In most other jurisdictions, the defence of mental impairment is the same for both adults and children when applied in the higher courts.¹³⁸ Concerns have been expressed that the defence of mental impairment does not adequately take into account mental health conditions that affect young people.¹³⁹ Detecting mental illness in young people can be problematic, as the symptoms are often still developing and treatment history may be limited or non-existent.¹⁴⁰ There is also some confusion about the interplay between the defence of mental impairment and *doli incapax*.¹⁴¹ There is no publicly available data on the prevalence of the mental impairment defence for children; however, anecdotal evidence suggests that the defence of mental impairment is only used rarely for children in Victoria.
- 4.118 The Law Commission of England and Wales is currently conducting a review of the defence of mental impairment. In its discussion paper, the Law Commission summarised the view of stakeholders that the test for the defence of mental impairment should be the same for children.¹⁴²
- 4.119 The Law Commission has also suggested that further consideration be given to developing a new defence of developmental immaturity.¹⁴³ This defence would retain the same requirements of the test for the defence of mental impairment in relation to capacity but it would not require a recognised medical condition. Instead, something such as a learning disability that the accused may grow out of could be used to qualify for the defence.¹⁴⁴ The creation of this defence is designed to address the problems faced by many young people who do not necessarily have a diagnosed mental impairment. This defence would not necessarily be restricted to people under the age of 18 years.¹⁴⁵

134 [2003] VSCA 129 (4 September 2003).

135 Ibid [74].

136 *Children, Youth and Families Act 2005* (Vic) s 528(1); *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 5(1). The Children's Court has jurisdiction over summary offences and all indictable offences, except seven death-related offences, which must be heard and determined in the Supreme Court. In certain circumstances, indictable offences can be determined in the County Court, where the accused young person (or their parents in some situations) objects to a summary hearing, or a magistrate considers there to be 'exceptional circumstances'. See Victorian Law Reform Commission, *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 and the Children's Court of Victoria, Supplementary Consultation Paper No 19* (2013) 7–8.

137 *Children, Youth and Families Act 2005* (Vic) s 528(1); *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 5(1).

138 This is the case in New South Wales, Queensland, New Zealand, the United Kingdom and the Netherlands. Canada also has the same test for adults and children, but minor changes can be made as required by the circumstance, see *Youth Criminal Justice Act*, SC 2002, c 1, s 141(1) (Canada).

139 See, eg, Submission 28 (The Australian Clinical Psychology Association).

140 Jodie O'Leary, Suzie O'Toole and Bruce D Watt, 'Exploring Juvenile Fitness for Trial in Queensland' (2013) 20(6) *Psychiatry, Psychology and Law* 853, 860–1.

141 Victorian Law Reform Commission, above n 136, 28; *R v ALH* [2003] VSCA 129 (4 September 2003).

142 Law Commission (England and Wales), *Criminal Liability: Insanity and Automatism*, Discussion Paper (2013) 70.

143 Ibid 191.

144 Ibid 190.

145 Ibid 189.

In its previous review of the defence of diminished responsibility, the Law Commission recommended that developmental immaturity be introduced as a special category of the defence.¹⁴⁶ The government rejected this recommendation.¹⁴⁷

- 4.120 A defence of developmental immaturity would arguably be of more relevance in the United Kingdom because the doctrine of *doli incapax* has been abolished.¹⁴⁸ However, while individuals aged under 14 years of age would be more likely to use the test, it could still be used by those aged 15 years and over.
- 4.121 Also relevant to the debate of these issues in the United Kingdom is the particular political climate following the James Bulger case. This is evidenced by the reporting in the local media of the public opposition to reforms that would reduce the criminal responsibility of children.¹⁴⁹

Views in submissions and consultations

- 4.122 There was a recognition of *doli incapax* as a separate inquiry to the defence of mental impairment.¹⁵⁰ In light of this and the scope of the review, the Commission does not propose any changes to that area of the law.
- 4.123 The majority view in submissions and consultations on the supplementary terms of reference was similar to the views put forward on the terms of reference, demonstrating support for a definition of mental impairment to provide clarity in the law. The Criminal Bar Association also supported having the same definition of mental impairment for both adults and young people.¹⁵¹
- 4.124 The Victorian Equal Opportunity and Human Rights Commission explained that in applying the definition or the defence of mental impairment, the developmental stage of the young person must be taken into account:

The formulation of any definition as it relates to children and young people must take into account that cognitive and mental health impairments in children and young people may differ from those of adults because young people's cognitive abilities are still developing or it may be that a mental illness is emerging.¹⁵²

- 4.125 The expertise of the person conducting the assessment was stated in submissions as being crucial to ensuring the defence is applied appropriately to young people. The Australian Clinical Psychology Association argued that:

Children are developing beings and as such it is important to understand the social, cognitive, emotional, behavioural and educational development of the child in the context of their family as well as in their broader social environment. Variability in the development of each of these areas is greater the younger the age of the child and all areas impact on the child's ability to function regardless of their intellectual capacity.

We suggest that professionals with expertise in child development, for example, clinical psychologists, clinical neuropsychologists and child psychiatrists should be called upon to assess these areas to determine the severity of functional impairment.¹⁵³

146 Ibid 186.

147 Ibid.

148 *Crime and Disorder Act 1998* (UK) c 37, s 34. See also Law Commission (England and Wales), *Criminal Liability: Insanity and Automatism*, Discussion Paper (2013) 191.

149 'Calls to raise age of criminal responsibility rejected', *BBC News* (online), 13 March 2010 <<http://news.bbc.co.uk/2/hi/uk/8565619.stm>>.
150 Submissions 26 (Youthlaw); 27 (Victoria Legal Aid); 31 (Australian Psychological Society); 33 (Commission for Children and Young People). Victoria Legal Aid, the Australian Psychological Society and the Commission for Children and Young People supported *doli incapax* and the mental impairment defence being approached as two separate inquiries. However, the Australian Psychological Society noted that *doli incapax* is currently overly reliant on chronological age.

151 Submission 25 (Criminal Bar Association).

152 Submission 29 (Victorian Equal Opportunity and Human Rights Commission).

153 Submission 28 (The Australian Clinical Psychology Association).

- 4.126 In considering the complexity in assessing young people with a mental impairment, one judge of the County Court of Victoria was of the view that flexibility in the definition of mental impairment is paramount.¹⁵⁴ The Australian Psychological Society was also of the view that a flexible definition of mental impairment is important, arguing that:

Even if some conditions are incorporated into a definition of mental impairment, the determination of mental impairment in young people is complex and will need to be considered on a case-by-case basis.¹⁵⁵

- 4.127 Most submissions and consultations did not express a view on whether changes should be made to the operational elements of the defence of mental impairment. However, one clinician raised concerns about the applicability of the phrase ‘reason with a moderate degree of sense and composure’ contained in section 20(1)(b) of the CMIA. Dr Adam Deacon was of the view that:

A young person with intellectual disability could arguably have less capacity to self-regulate. ... There is also a group of adolescents who have suffered severe abuse resulting in an inability to reason with a moderate degree of sense and composure. ... a child’s ability to reason with a moderate degree of sense and composure is reduced (compared to adults). Their moral responsibility is still developing. The phrase ‘moderate degree of sense and composure’ can be very difficult to interpret in many cases, even in cases of psychosis.¹⁵⁶

The Commission’s conclusion

- 4.128 The Commission acknowledges the view expressed in submissions and consultations that in applying the defence of mental impairment to young people, the developmental stage of the young person must be taken into consideration.
- 4.129 Many of the views raised in relation to young people about a need for flexibility in applying the defence of mental impairment, were also raised in relation to applying the defence to adults.
- 4.130 The Commission’s recommendations regarding the defence of mental impairment for adults are intended to allow for the flexible application of the defence. A broad definition of mental impairment will take into account a range of conditions that may qualify for the defence, and clarification as to the meaning of the second limb of the defence will address the concern raised in relation to the application of the phrase ‘reason with a moderate degree of sense and composure’ to young people.

Recommendation

- 26 Recommendations 24 and 25 to introduce a definition of mental impairment and make changes to the second limb of the mental impairment defence in the higher courts should apply in the Children’s Court by adding equivalent provisions into the *Children, Youth and Families Act 2005* (Vic).

154 Consultation 46 (County Court of Victoria—judges).
155 Submission 31 (Australian Psychological Society).
156 Consultation 52 (Dr Adam Deacon).

PART III APPLICATION OF THE CMIA IN VICTORIAN COURTS

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5. Application of the CMIA in the Magistrates' Court

Introduction

- 5.1 The terms of reference ask the Commission to consider whether the application of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ('CMIA') should be further extended to the Magistrates' Court. This includes consideration of the following questions:
- 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 accused¹ if they are found not guilty because of a mental impairment
 - if the Magistrates' Court is permitted to make additional orders, whether this should be limited to indictable offences that are triable summarily or extended to also include certain summary offences.
- 5.2 In the *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997: consultation paper* ('the consultation paper'), the Commission discussed these issues and asked whether the CMIA should be extended to apply in the Magistrates' Court and if so to what extent.
- 5.3 This chapter provides an overview of the Commission's findings regarding the current application of the CMIA in the Magistrates' Court's jurisdiction, including the views expressed in submissions and consultations concerning the limitations of the CMIA's application. It was evident from submissions and consultations that the limited application of the CMIA results in a gap in the system in which the CMIA could operate. The issues caused by this gap can only be addressed with extension of the Magistrates' Court's jurisdiction. Closing this gap would result in a system that is more just, more effective and more consistent with the principles that underlie the CMIA.

1

A person appearing in the summary jurisdiction on a criminal charge is usually referred to as a defendant in the summary jurisdiction and is only referred to as an accused if they are committed or indicted for trial in a higher court. However, in this report the term 'accused' is used to describe a person who has been charged with a criminal offence, irrespective of the jurisdiction. This has been done for consistency, to avoid confusion and to be consistent with Victorian legislation that applies across all jurisdictions and uses the term 'accused', for example the *Criminal Procedure Act 2009* (Vic).

- 5.4 The recommendations the Commission makes in this chapter provide a legislative framework for the CMLA's operation in the Magistrates' Court. The chapter explains the reasoning behind the Commission's recommendations to:
- allow the Magistrates' Court to determine unfitness to stand trial and criminal responsibility following a finding of unfitness
 - give the Magistrates' Court the power to make limited supervision orders following a finding of not guilty because of mental impairment² or a finding that the accused committed the offence charged.³
- 5.5 The Commission considers that these recommendations provide for a model that not only overcomes the issues identified, but suits the specific qualities of the Magistrates' Court's jurisdiction.

The Magistrates' Court's jurisdiction and criminal procedure

- 5.6 The Magistrates' Court is Victoria's principal court of summary jurisdiction.⁴ In its criminal jurisdiction, the Magistrates' Court has the power to:
- hear and determine all summary offences
 - hear and determine all indictable offences triable summarily⁵
 - conduct committal proceedings into indictable offences.⁶
- 5.7 Summary offences are more minor offences that are heard by a magistrate without a jury. Being drunk in a public place, using obscene or threatening language in public and damaging property are examples of summary offences.
- 5.8 Indictable offences are more serious offences. They attract higher maximum penalties, and are usually triable before a judge and a jury. However, magistrates can hear and determine indictable offences that are triable summarily. Indictable offences that are triable summarily can range from recklessly causing serious injury to assault with intent to rape and aggravated burglary.⁷
- 5.9 Committal proceedings are a preliminary examination to determine whether the case against the accused is sufficient to warrant the accused being directed to stand trial before the Supreme Court or County Court.⁸ A committal proceeding is conducted when an accused has been charged with an indictable offence and may be conducted when an accused is charged with an indictable offence triable summarily.
- 5.10 The *Criminal Procedure Act 2009* (Vic) sets out the test for committing the accused for trial (whether the evidence is of sufficient weight to support a conviction for the offence charged).⁹ Upon determination of a committal proceeding, a magistrate may either direct that the accused stand trial and order that they be remanded in custody until trial or granted bail, or the magistrate may discharge the accused.¹⁰

2 The Commission has recommended in Chapter 9 of this report replacing the finding of 'not guilty because of mental impairment' with the accused's 'conduct is proved but not criminally responsible because of mental impairment': see Recommendation 69.

3 The Commission has recommended in Chapter 9 of this report replacing the finding in a special hearing of 'committed the offence charged' with the accused's 'conduct is proved on the evidence available': see Recommendation 68.

4 Richard Fox, *Victorian Criminal Procedure: State and Federal Law* (Monash Law Book Co-operative Ltd, 13th ed, 2010) 94.

5 For a list of the main state indictable offences triable summarily, see *Criminal Procedure Act 2009* (Vic) s 28, sch 2.

6 *Magistrates' Court Act 1989* (Vic) s 25(1).

7 Aggravated burglary is burglary with a firearm, weapon or explosive or anything that has the appearance of a firearm or explosive. The Magistrates' Court can hear matters involving aggravated burglary if the offence involves an intent to steal property of not more than \$100,000 in value. See *Crimes Act 1958* (Vic) s 77; *Criminal Procedure Act 2009* (Vic) sch 2 cl 4.

8 Fox, above n 4, 99.

9 *Criminal Procedure Act 2009* (Vic) s 141(4).

10 *Magistrates' Court Act 1989* (Vic) s 25(1)(c).

- 5.11 When a criminal proceeding commences, the matter is allocated to either the summary stream or the committal stream. If the offence is an indictable offence that may be heard and determined summarily, regardless of where the matter is listed (in the summary stream or committal stream), the court may offer a summary hearing of the charge or either party may apply for one at any time before the court determines whether to commit the accused for trial. The Criminal Procedure Act outlines the criteria that have to be satisfied for the court to hear and determine an indictable offence summarily.¹¹ These are that the accused consents to a summary hearing and the court considers that the charge is appropriate to be determined summarily having regard to the matters in section 29(2) of the Criminal Procedure Act.

Current application of the CMIA in the Magistrates' Court

Unfitness to stand trial

- 5.12 The CMIA does not give the Magistrates' Court the power to determine unfitness to stand trial. In *CL (A Minor) v Lee*,¹² the trial judge held that under the current CMIA provisions the Magistrates' Court lacks jurisdiction to determine unfitness. The Victorian Court of Appeal affirmed this decision in *CL, A Minor (by his Litigation Guardian) v Director of Public Prosecutions (on behalf of Lee)*.¹³ These cases are discussed in more detail in the consultation paper.¹⁴
- 5.13 When a person is charged with an indictable offence (including an indictable offence triable summarily) and there is an issue raised regarding their unfitness to stand trial, in order for the matter to proceed, it must be committed to a higher court for an investigation of unfitness by a jury. If the issue of unfitness is raised in relation to a summary offence, the matter must be discontinued.¹⁵
- 5.14 The Australian Human Rights Commission observed relatively recently that the issue of unfitness to stand trial in the summary jurisdiction is an issue which is 'neglected or given little attention'.¹⁶

The defence of mental impairment

- 5.15 In relation to the defence of mental impairment, the CMIA provides that the defence of mental impairment applies to summary offences and to indictable offences heard and determined summarily.¹⁷ This allows the defence to be relied on in the Magistrates' Court as part of the determination of the criminal responsibility of an accused for an offence. 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.¹⁸ The Magistrates' Court therefore has no power to make orders in relation to people found not guilty because of mental impairment.¹⁹

11 *Criminal Procedure Act 2009* (Vic) s 29.

12 [2010] 29 VR 570.

13 [2011] VSCA 227 (5 August 2011).

14 Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, Consultation Paper No 17 (2013) 118. Section 528 of the *Children, Youth and Families Act 2005* (Vic) 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 in the Children's Court in the same way that it does in the Magistrates' Court. In *CL*, the trial judge found that the Children's Court did not have the jurisdiction to determine whether a young person is unfit to stand trial partly because the Magistrates' Court had no such jurisdiction. Chapter 6 discusses the Commission's recommended approach to the application of the CMIA to the Children's Court.

15 Victorian Parliament Law Reform Committee, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (2013) 231.

16 Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies* (2014) 27.

17 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 5(1).

18 *Ibid* s 5(2).

19 The mental impairment defence also applies in the Children's Court because of section 528 of the *Children, Youth and Families Act 2005* (Vic). Chapter 6 discusses the Commission's recommended approach to the application of the CMIA in the Children's Court.

Issues caused by the limited application of the CMIA in the Magistrates' Court

- 5.16 The consultation paper identified a number of possible issues concerning the limited application of the CMIA in the Magistrates' Court.²⁰
- 5.17 The Commission's consultations, submissions received and the Commission's independent research confirmed the existence of these issues and a number of others. The following section describes these issues in more detail.

Lack of power to determine unfitness to stand trial

Encourages 'artificial decision making'

- 5.18 The current system places pressure on the parties who work within it to take steps to avoid its undesirable outcomes. This leads to what the Commission calls 'artificial decision making', which can take a number of forms documented below.

Committing an accused to a higher court

- 5.19 The lack of a process in the Magistrates' Court to determine unfitness to stand trial means that sometimes the only reason a magistrate would not grant summary jurisdiction under the Criminal Procedure Act is because only the County Court has the power to empanel a jury to determine the issue.²¹ This is the case even if the offence in the matter is of a level of seriousness that would typically be heard and determined in the Magistrates' Court. If the magistrate does not grant summary jurisdiction due to a lack of power to determine unfitness, and the criteria to commit the accused for trial under the Criminal Procedure Act are satisfied,²² the accused would be committed to the County Court. Knowing this, prosecutors may withdraw charges to avoid the matter having to proceed by way of committal and transfer to a higher court.²³

The pressure to plead guilty

- 5.20 A number of people consulted noted that it can be a preferable outcome for an accused to plead guilty and receive a definite sentence in the Magistrates' Court (with their mental condition considered in sentencing) rather than to rely on their unfitness to stand trial and risk the onerous process and supervision regime in the higher courts.²⁴
- 5.21 It was also suggested in consultations that lawyers can feel pressured to help their client 'over the line' in circumstances where there is some evidence to suggest there may be issues concerning their client's fitness to stand trial but it is not unequivocally clear whether these exist; for example, where their client may be borderline unfit or where they may be fluctuating in and out of fitness over a period of time.²⁵ Lawyers may also 'hold back' from making enquiries about their client's unfitness to avoid being in a position where they are ethically bound to pursue a course that may result in adverse legal consequences for their client.²⁶

20 Victorian Law Reform Commission, above n 14, 119–20, 126.

21 Section 29(1) of the *Criminal Procedure Act 2009* (Vic) sets out the criteria for determining when an indictable offence may be heard and determined summarily.

22 *Criminal Procedure Act 2009* (Vic) s 141(4).

23 Consultation 3 (Villamanta Disability Rights Legal Service).

24 Consultations 47 (Magistrates' Court roundtable); 25 (Victoria Legal Aid—criminal lawyers).

25 Consultations 13 (Mental Health Court Liaison Service officer); 25 (Victoria Legal Aid—criminal lawyers).

26 Consultation 25 (Victoria Legal Aid—criminal lawyers).

- 5.22 Submissions and consultations have also indicated that an accused might choose or be encouraged to plead guilty when they are unfit to stand trial.²⁷ In its submission, the Office of Public Advocate observed that this happens because the procedures are 'onerous and not commensurate with the offence'.²⁸
- 5.23 A Mental Health Court Liaison Service officer provided the Commission with two examples where the accused were likely to have been unfit to stand trial, but pleaded guilty because the County Court process would have been too stressful for them and their carers.²⁹ The officer was of the view that the need for a process to deal with unfitness in the Magistrates' Court was especially compelling in these cases. Unlike the higher courts, proceedings are less formal in the Magistrates' Court—for example, magistrates and lawyers do not wear wigs or robes.³⁰ Juries do not form a part of Magistrates' Court proceedings.
- 5.24 The reported practices in relation to accused who may be unfit to stand trial are concerning for a number of reasons. An accused who pleads guilty even when they are unfit to stand trial could receive a recorded criminal conviction and an unsuitable punishment.³¹ If an accused continues to have multiple encounters with the criminal justice system, with their unfitness going undetected, their criminal history is more likely to result in a prison sentence.³² This could also be inconsistent with the principles that underlie the CMIA, particularly that of fairness to an accused and the principle that a person should not enter a plea or be tried for an offence unless they are mentally fit to stand trial.
- 5.25 The pressure to plead guilty was said to result in the 'criminalisation of the CMIA cohort'.³³

Lack of judicial oversight and consistency in decision making

- 5.26 The current system is dependent on prosecutorial discretion and the individual decisions of lawyers. The lack of guidelines or judicial oversight results in a process that has been described as 'ad hoc'.³⁴
- 5.27 When a question of unfitness to stand trial is raised, police prosecutors must exercise their prosecutorial discretion and determine whether to withdraw the charge or whether the matter should be tried in a higher court. The Commission was informed that Victoria Police prosecutors have adopted the Director of Public Prosecution's guidelines on prosecutorial discretion.³⁵ In exercising prosecutorial discretion, police prosecutors may also seek advice from the Office of Public Prosecutions.³⁶ The key guiding principle applied by police prosecutors in exercising this discretion is community safety. Other factors include the prospects of securing a conviction and the views of the victim. In the Commission's consultations, some police prosecutors also indicated that in applying this discretion, factors such as whether the accused may be unfit to stand trial or have a mental impairment were also relevant.³⁷ It was suggested that the approach taken by police prosecutors on these issues varied.³⁸ Examples were given of the 'repeat Mars bar thief', where charges are withdrawn, and an accused who may be lighting fires, where prosecutors pursue the charge.³⁹

27 Submissions 18 (Victoria Legal Aid); 30 (Victoria Police). Consultations 18 (Goulburn Valley Area Mental Health Service); 25 (Victoria Legal Aid—criminal lawyers); 8 (Latrobe Community Mental Health Service).
28 Submission 14 (Office of the Public Advocate).
29 Consultation 13 (Mental Health Court Liaison Service officer).
30 *Magistrates' Court Act 1989* (Vic) s 125(2).
31 Betheli O'Carroll, 'Intellectual Disabilities and the Determination of Fitness to Plead in the Magistrates' Courts' (2013) 37(1) *Criminal Law Journal* 51, 52.
32 Ibid.
33 Submission 21 (Criminal Bar Association).
34 Consultation 27 (Victoria Police—police prosecutors).
35 Director of Public Prosecutions, *Director's Policy on the Prosecutorial Discretion* (Policy No 2, 2014).
36 Consultation 27 (Victoria Police—police prosecutors).
37 Ibid.
38 Consultations 25 (Victoria Legal Aid—criminal lawyers); 27 (Victoria Police—police prosecutors).
39 Consultation 27 (Victoria Police—police prosecutors).

- 5.28 As discussed above, the course the accused takes is also very reliant on the advice they receive from their lawyer on whether to plead guilty or to rely on unfitness to stand trial.
- 5.29 The strong reliance on prosecutorial discretion, without clear guidance on how to apply the discretion specifically in matters under the CMIA, and the different approaches of lawyers, without judicial involvement at an earlier stage, creates a risk that outcomes will diverge on an inappropriate basis.

Inefficiency of the process

- 5.30 The Victorian Parliament Law Reform Committee observed that the current requirement that investigations into unfitness to stand trial be referred from the court in which the issue was raised to another court causes considerable inefficiencies and lengthens the process.⁴⁰ The current process in relation to unfitness requires the committal hearing of the matter, transfer to the County Court and the empanelling of two juries: one to determine whether the accused is unfit to stand trial, and a second to determine whether the accused committed the offence (if they are found unfit to stand trial). Further, the current process uses resources in the higher courts even though the offence is one that comes within the jurisdiction of the Magistrates' Court.
- 5.31 Submissions and consultations that addressed this issue confirmed that the current process was lengthy. Aside from the inefficiency, the length of the process can be difficult for both victims and accused. The Commission was given examples of cases that took two years to resolve and accused who were unfit to stand trial being held on remand in prison for periods longer than the sentence they would have served for the offence.⁴¹ The delay caused by the Magistrates' Court's lack of power to deal with unfitness is a key factor underpinning Recommendation 7 in Chapter 2 to extend the jurisdiction of the CMIA into that court, as well as into the Children's Court.

The lack of outcome

The effect on community safety

- 5.32 If a person charged with a summary offence (as opposed to an indictable offence triable summarily) is unfit to stand trial, proceedings involving that person must be discontinued in the Magistrates' Court. The Magistrates' Court lacks the power to impose a therapeutic order that ensures the accused receives services and treatment appropriate to their mental condition or to put in place supervision to protect the community. This is the case even when the accused is charged with many summary offences and may pose a risk of re-offending, which raises issues of community safety.⁴² The lack of a finding in the Magistrates' Court also prevents the making of ancillary orders and other consequences aimed at protecting the community (such as a licence disqualification following an offence involving dangerous driving).⁴³

The effect on accused and victims

- 5.33 The lack of a therapeutic and supervisory outcome, particularly for summary offences, means that the accused's mental condition is not addressed,⁴⁴ leading to a risk of further offending, and the possibility that the person will find themselves in the Magistrate' Court again and cycle through the system.⁴⁵ There is also no resolution from the legal system for victims of crime.⁴⁶

40 Victorian Parliament Law Reform Committee, above n 15, 235.

41 Consultations 27 (Victoria Police—police prosecutors); 24 (County Court of Victoria—judges); 7 (Morwell Magistrates' Court).

42 Office of Public Prosecutions, Submission No 20 to Victorian Parliament Law Reform Committee, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers*, 9 September 2011, 4. Submission 12 (Progressive Law Network). Consultation 19 (Forensic Clinical Specialists).

43 Consultation 27 (Victoria Police—police prosecutors).

44 Submissions 12 (Progressive Law Network); 20 (Law Institute of Victoria). Consultation 19 (Forensic Clinical Specialists).

45 Consultation 11 (Melbourne Magistrates' Court).

46 Consultation 27 (Victoria Police—police prosecutors).

Unfairness to the accused

- 5.34 The lack of jurisdiction in the Magistrates' Court to determine unfitness to stand trial is inconsistent with the principles that underlie the CMIA. The current system does not operate 'justly', and is even discriminatory towards accused with a mental illness, intellectual disability or other cognitive impairment who may be unfit. This group of accused, because of their mental illness, intellectual disability or other cognitive impairment, do not have the same right as other accused to have their matter heard in a lower jurisdiction.⁴⁷ One lawyer observed in a consultation with the Commission that these offences are treated more seriously because of the mental condition of the accused.⁴⁸

Providing a power to determine unfitness to stand trial

Views in submissions and consultations

- 5.35 Most submissions and consultations that addressed this subject supported an extension of the process for determining unfitness to stand trial to the Magistrates' Court to respond to the issues outlined above.⁴⁹
- 5.36 Some stakeholders, however, thought that the CMIA regime was not suited to the Magistrates' Court.⁵⁰ One reason for this was the incompatibility of the complexity of the CMIA regime with the pressure on magistrates to dispose of cases quickly.⁵¹ Another concern was the lack of resources to enable the court to deal with such hearings.
- 5.37 Other barriers identified included the expertise of people who practise in that jurisdiction, including lawyers and magistrates.⁵² Some magistrates thought that an extension of the CMIA could only be effective if there were adequate resources, specialised training for magistrates, specialised court staff and a specialised list to manage these matters.⁵³

The Commission's conclusion

- 5.38 It is clear that the lack of a process under the current law for accused who may be unfit to stand trial in the Magistrates' Court causes significant issues. The Commission agrees that steps need to be taken to remedy the inefficiencies in the system, the divergent approaches taken by those who work within it, and the unsatisfactory and often unfair results for accused, victims and the community.
- 5.39 In the Commission's view, it is a futile exercise for police to charge a person only to be forced to withdraw the matter, or for a person to plead guilty only to receive an ineffective sanction. There needs to be a more effective system that will give accused the opportunity to break a cycle of interaction with the criminal justice system, enable resolution of matters for victims of crime and bring about lasting outcomes in terms of community safety.
- 5.40 The Commission also finds the tendency for accused in this jurisdiction to plead guilty when they are probably unfit to do so particularly concerning. Having inappropriate incentives to plead guilty compromises the fairness of the process and calls into question the accuracy of the pleas entered in the Magistrates' Court in such cases.

47 Submission 12 (Progressive Law Network). Consultation 25 (Victoria Legal Aid—criminal lawyers).

48 Consultation 25 (Victoria Legal Aid—criminal lawyers).

49 Submissions 8 (Office of Public Prosecutions); 12 (Progressive Law Network); 18 (Victoria Legal Aid); 21 (Criminal Bar Association); 30 (Victoria Police). Consultations 18 (Goulburn Valley Area Mental Health Service); 20 (Geelong Magistrates' Court); 25 (Victoria Legal Aid—criminal lawyers); 27 (Victoria Police—police prosecutors); 24 (County Court of Victoria—judges); 47 (Magistrates' Court roundtable). Consultations 11 (Melbourne Magistrates' Court); 16 (Shepparton Magistrates' Court).

50 Consultation 16 (Shepparton Magistrates' Court).

51 Consultations 16 (Shepparton Magistrates' Court); 26 (Office of the Chief Psychiatrist and Legal Branch, Department of Health); 28 (Senior Practitioner—Disability Practice Leader, Office of Professional Practice, Department of Human Services); 7 (Morwell Magistrates' Court).

52 Consultation 7 (Morwell Magistrates' Court).

- 5.41 In the Commission's view, if a particular offence can be heard and determined in the Magistrates' Court, magistrates should also be able to make the decisions necessary for that offence to be determined, including deciding the issue of unfitness to stand trial. The Commission considers that this is the best option to address the issues outlined above.
- 5.42 The Commission understands the concerns raised in some submissions and consultations about the limitations that currently exist for the Magistrates' Court to adopt a process to determine unfitness to stand trial effectively. The Commission therefore predicates its recommendations in this area on a number of requirements concerning resources, expertise and services discussed further at [5.170]–[5.216] below. As discussed in the consultation paper, the Australian Capital Territory, South Australia, Tasmania and Western Australia allow magistrates to determine the issue of unfitness to stand trial.⁵⁴ Further, at a lower court level in Victoria, members in the guardianship list at the Victorian Civil and Administrative Tribunal often make determinations of capacity. The Magistrates' Court in Victoria could similarly build the resources and skills to do this.

Lack of power to make orders following a finding of not guilty because of mental impairment

Encourages 'artificial decision making'

- 5.43 As with the Magistrates' Court's lack of jurisdiction to determine unfitness to stand trial, the Commission found evidence of 'artificial decision making' by parties brought about by the court's lack of power to impose orders after findings of not guilty because of mental impairment.

Committing an accused to a higher court

- 5.44 One of the factors relevant to a magistrate's determination of whether to grant summary jurisdiction is 'the adequacy of the sentencing orders available to the court'.⁵⁵ A magistrate may be less inclined to grant summary jurisdiction if they regard a discharge, and the absence of any power to impose an order, to be inadequate after a finding of not guilty because of mental impairment. This may be the case even though the type of offence would allow it to be heard and determined summarily. This would place the matter in the committal stream and if the committal criteria in the Criminal Procedure Act were satisfied, the accused would be committed for trial in the County Court.⁵⁶
- 5.45 Police prosecutors are more likely to oppose summary jurisdiction for indictable offences triable summarily where the defence of mental impairment is raised because a discharge is the only option in the summary jurisdiction.⁵⁷ Some stakeholders also observed that charges may be laid for indictable offences instead of (or in addition to) more appropriate summary offences so that the matter is then unable to be determined in the Magistrates' Court.⁵⁸

Not relying on the defence of mental impairment

- 5.46 To avoid the onerous process and supervision regime in the higher courts, lawyers often decide not to rely on the defence of mental impairment in the Magistrates' Court, in the hope of having their client's mental condition considered in sentencing.⁵⁹ The Criminal Bar Association observed:

⁵⁴ O'Carroll, above n 31, 60.

⁵⁵ *Criminal Procedure Act 2009* (Vic) s 29(2)(b).

⁵⁶ *Ibid* s 141(4).

⁵⁷ Submissions 18 (Victoria Legal Aid); 20 (Law Institute of Victoria); 21 (Criminal Bar Association). Consultation 16 (Shepparton Magistrates' Court).

⁵⁸ Submissions 18 (Victoria Legal Aid); 20 (Law Institute of Victoria). Consultation 24 (County Court of Victoria—judges).

⁵⁹ Consultations 25 (Victoria Legal Aid—criminal lawyers); 16 (Shepparton Magistrates' Court).

The fear of CMIA proceedings, their delay, costs and the perception of onerous outcomes militates against them being pursued. This coupled with the attraction of a lenient sentence (under *Verdins*) is often overwhelming. This often results in Court outcomes that do not reflect real criminality – and in some cases are effectively discriminatory and unjust.⁶⁰

- 5.47 Victoria Legal Aid provided the Commission with the following case study (an abridged version is presented here):

Case Study: Tom

Tom has paranoid schizophrenia. In a paranoid state, Tom was throwing empty beer bottles at people who passed by his house which is on a busy street. Police were called and Tom was arrested for causing criminal damage ...

A report was obtained indicating a defence of mental impairment. In response police charged Tom with additional charges and applied to have the matter dealt with in the committal stream. ... despite a defence being open to him, Tom ended up pleading to one charge of criminal damage.⁶¹

- 5.48 As with the issue of unfitness to stand trial, pleading guilty may result in a conviction, meaning the person will have a criminal history and it becomes less likely that they will be able to credibly rely on the defence of mental impairment in subsequent matters.⁶² Pleading guilty when there may be a legitimate mental impairment defence also exposes an accused to a risk of being sentenced. This would be inappropriate and contrary to the principle of legitimate punishment, one of the principles that underpins the CMIA. It states that a person should not be held criminally responsible and punished for an offence if they are not morally blameworthy for their behaviour. If the sentence imposed is one of imprisonment, this would result in the person being detained in a prison, which is an inappropriate place for a person who has a legitimate mental impairment defence, as they may continue to have the underlying condition that gave rise to the defence, for example, a mental illness or an intellectual disability.⁶³ Placement of such vulnerable people in the prison environment may worsen their condition and expose them to risks of harm from other prisoners. Prisoners who are experiencing mental illness can be transferred to Thomas Embling Hospital as security patients; however, there are limited beds for this cohort.

The lack of outcome

The effect on community safety

- 5.49 The discharge of a person found not guilty because of mental impairment compromises community safety. Without treatment or supervision, the offending behaviour of some accused could escalate and ultimately lead to more serious consequences for the accused and the community.⁶⁴

60 Submission 21 (Criminal Bar Association).

61 Submission 18 (Victoria Legal Aid).

62 Submission 21 (Criminal Bar Association).

63 It is well recognised that there is a high prevalence of mental illness and cognitive impairment in the prison population: see, eg, Office of the Public Advocate, *Breaking the Cycle: Using Advocacy-Based Referrals to Assist People with Disabilities in the Criminal Justice System* (2012) <<http://www.publicadvocate.vic.gov.au/research/255/>>; Australian Institute of Health and Welfare, *Australia's Health 2012* (Australia's Health series no 13, Canberra, 2012) 131 <<http://www.aihw.gov.au/publication-detail?id=10737422172>>. Existing services and facilities in prison for people with mental illness or cognitive impairment include the Marlborough Unit and psychosocial rehabilitation unit at Port Philip Prison and the Acute Assessment Unit at the Melbourne Assessment Prison. A new medium-secure prison is being built in Victoria—the Ravenhall Prison Project—that comprises a 1000-bed medium security prison, including 75 dedicated forensic mental health beds. Operation is planned to commence in 2017: see Department of Justice (Victoria), *Ravenhall Prison Project* (25 April 2014) Corrections, Prisons & Parole <<http://www.corrections.vic.gov.au/home/prison/ravenhall+prison+project.shtml>>.

64 Victorian Law Reform Commission, *People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care*, Report No 4 (2003) 123. Submission 17 (Name withheld). Consultations 27 (Victoria Police—police prosecutors); 20 (Geelong Magistrates' Court).

- 5.50 In consultations the Commission was given examples of situations where it was worrying to discharge the accused without any supervision.⁶⁵ Victoria Police noted in its submission:
- This is concerning from a community safety perspective. For example, a person with dangerous driving offences may be discharged, and continue driving dangerously until the next occasion that they are identified, placing other road users at ongoing risk.⁶⁶
- 5.51 Similar concerns to those discussed at [5.32] regarding ancillary orders were also raised in relation to the requirement that a person be discharged after a finding of not guilty because of mental impairment.⁶⁷

The effect on the accused and victims

- 5.52 As a discharge follows a finding of not guilty because of mental impairment in the Magistrates' Court, the court has no power to make an order to address the mental illness, intellectual disability or other cognitive impairment or ensure the person is supervised to address any risk they may pose to the community.⁶⁸
- 5.53 As was observed at [5.33] in relation to the lack of power in the Magistrates' Court to determine unfitness to stand trial, victims may also feel that a matter has not been properly resolved if the prosecution makes a decision to withdraw a charge for an offence because it will only end in a discharge.

Providing a power to make orders following a finding of not guilty because of mental impairment

Views in submissions and consultations

- 5.54 There was almost unanimous support from those who addressed this issue to give the Magistrates' Court the power to make orders following a finding of not guilty because of mental impairment.⁶⁹

The Commission's conclusion

- 5.55 The Community Development Committee, which developed most of the policy underlying the CMIA in 1995, did not give magistrates the power to make orders in relation to people found not guilty because of mental impairment because it considered that offences heard in the Magistrates' Court were less serious and therefore did not warrant the kind of treatment and supervision that would be required by someone who committed a more serious offence. The Committee expressed doubt that the supervision regime proposed (that was subsequently adopted by the CMIA) would be suitable for people charged with summary offences. The Community Development Committee also envisaged that such people would receive assistance through psychiatric or intellectual disability services or pre-trial diversion, recognising that there would need to be legislative change before a true pre-trial diversionary process could operate in Victoria.⁷⁰
- 5.56 In the Commission's view these reasons, while justified at the time the CMIA came into effect, now have significantly less force. First, the 'safety net' that the Community Development Committee envisaged (that is, that people who were found not guilty because of mental impairment in the Magistrates' Court would receive psychiatric or intellectual disability services or be diverted at a pre-trial stage) has not eventuated.

65 Consultations 20 (Geelong Magistrates' Court); 27 (Victoria Police—police prosecutors).

66 Submission 30 (Victoria Police).

67 Consultation 27 (Victoria Police—police prosecutors).

68 Submissions 17 (Name withheld); 20 (Law Institute of Victoria). Consultations 18 (Goulburn Valley Area Mental Health Service); 20 (Geelong Magistrates' Court).

69 Submissions 17 (Name withheld); 12 (Progressive Law Network); 8 (Office of Public Prosecutions); 18 (Victoria Legal Aid); 21 (Criminal Bar Association); 20 (Law Institute of Victoria); 30 (Victoria Police). A magistrate in Shepparton did not agree with this approach: consultation 16 (Shepparton Magistrates' Court).

70 Victorian Parliament Community Development Committee, *Inquiry into Persons Detained at the Governor's Pleasure* (1995) 159, 161.

- 5.57 Second, the offences that can be determined at the summary level that the Community Development Committee referred to have since increased in number and seriousness. The jurisdiction of the Magistrates' Court now includes a number of serious offences that previously could only be heard in the higher courts. Making a threat to kill, stalking, assault with intent to rape and aggravated burglary are some examples of offences that can be very serious and are indictable offences that can be determined summarily. In addition, the use of the CMIA has changed. Under the 'Governor's pleasure' system, the defence of mental impairment was largely raised as a defence for the most serious crimes such as murder. Now it is used for a wider range of offences including less serious offences that can be dealt with in the Magistrates' Court.
- 5.58 Third, the CMIA can apply to the Magistrates' Court without transferring across the supervision regime in the higher courts. It is possible, and indeed preferable, to design a scheme that suits the level of risk associated with the lower level of offending that can be dealt with in the Magistrates' Court and is not as onerous as the scheme that applies in the higher courts.
- 5.59 The Victorian Parliament Law Reform Committee, whose recommendations the Commission is asked to consider, recommended that the Victorian Government consider amending the CMIA to allow investigations into an accused's unfitness to stand trial in the Magistrates' Court and Children's Court.⁷¹
- 5.60 In light of the issues raised in submissions and consultations and the reasons outlined above, the Commission considers that it is necessary to give magistrates the power to make orders following a finding of not guilty because of mental impairment. Giving magistrates this power will avoid the need to work around the deficiencies in the system and instead provide a permanent solution to the issues. As with the recommendation to introduce a process to determine unfitness to stand trial, giving magistrates a power to make orders following a finding of not guilty because of mental impairment will result in a more consistent approach and better outcomes for accused, victims and the community.
- 5.61 The Commission notes that in its 2003 *Report on People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care*, the Commission did not recommend that the CMIA be extended to the Magistrates' Court.⁷² At the time, the Commission was of the view that this approach could result in supervision orders being made in relation to people who have been charged with minor offences. Since then, the Magistrates' Court has started to deal with progressively more serious offences that the Commission considers justifies a reconsideration of this recommendation.

Recommendation

- 27 Parts 1–6 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to provide for the Magistrates' Court to:
- (a) determine whether a person is unfit to stand trial
 - (b) conduct special hearings after a finding of unfitness, and
 - (c) make orders following a finding that the person is not criminally responsible because of mental impairment or that the person's conduct has been proved on the evidence available (but the person is unfit to stand trial).

The Commission's approach to developing a model for the Magistrates' Court

- 5.62 Submissions, consultations and research undertaken by the Commission indicated that any model in the Magistrates' Court should take the following factors into account:
- The model needs to be suited to the Magistrates' Court's operation where the conduct of proceedings is very practical, flexible and expeditious, given its large workload.⁷³
 - The model should not impose an onerous supervision regime, but take into account the risk associated with the lower level of offending in the Magistrates' Court's jurisdiction.⁷⁴
 - The Magistrates' Court sits in 54 different locations around Victoria.⁷⁵ The model must therefore be able to work in metropolitan and regional areas.
 - The model must be able to effectively link up with expert assessments and area mental health and disability services.
- 5.63 In the following section the Commission sets out the legislative framework it recommends to extend the application of the CMIA in the Magistrates' Court. The following section details:
- the process that should apply when a question of unfitness to stand trial is raised in the Magistrates' Court's jurisdiction, including the different process that should apply when the question of unfitness is raised in a committal proceeding
 - the process of determining criminal responsibility following a finding of unfitness
 - the power to make orders following a finding of not guilty because of mental impairment
 - the offences or type of matters the CMIA should apply to
 - the orders the Commission recommends should be available in the Magistrates' Court.
- 5.64 In making its recommendations, the Commission has focussed on recommending the key provisions required to extend the application of the CMIA in the Magistrates' Court. There will be a significant number of consequential amendments and provisions that will need to be drafted in order to establish the operation of the CMIA processes recommended below in the Magistrates' Court. In Chapter 2, the Commission recommends that a working party be introduced to implement the proposed reforms, should they be adopted by the Victorian Government, to ensure that any legislation drafted to implement the Commission's recommendations includes any additional provisions from the CMIA as it currently applies to the higher courts.

73 The majority of criminal cases in Victoria come before the Magistrates' Court. In 2012–13, the Magistrates' Court finalised 188,537 criminal matters. This contrasts with the 2,386 criminal matters finalised in the County Court and the 94 criminal matters finalised in the Supreme Court in the same year. However, these statistics reflect the seriousness and complexity of the criminal matters heard in the higher courts, the longer time it takes to finalise a criminal matter (for example, jury trials) in those jurisdictions and fewer judicial officers. See Magistrates' Court of Victoria, *Annual Report 2012/13* (2013) 3; County Court of Victoria, *2012–2013 Annual Report* (2013) 2; Supreme Court of Victoria, *2012–13 Annual Report* (2013) 36.

74 In 2012–13, the top 10 most common charges in the Magistrates' Court were: theft, drive vehicle unregistered in toll zone (City Link), drive whilst disqualified, suspended or cancelled, exceed speed limit, unlawful assault, have exceeded prescribed concentration of alcohol whilst driving, contravene family violence intervention order, obtain property by deception, intentionally/recklessly causing injury and possession of a drug of dependence: Magistrates' Court of Victoria, above n 73, 82.

75 These numbers are correct as at 30 June 2013. See Magistrates' Court of Victoria, above n 73, 1.

Prevalence of indictable offences triable summarily under the CMIA

- 5.65 As part of its approach to develop a model for the CMIA in the Magistrates' Court, the Commission has had regard to the prevalence of indictable offences triable summarily in CMIA cases.
- 5.66 Analysis of the 159 cases dealt with in the higher courts under the CMIA from 2000–01 to 2011–12 indicated that 59 (37.1 per cent) were determined in the County Court and involved a principal offence (or a form of that offence)⁷⁶ that was an indictable offence triable summarily. This comprises 52.6 per cent of the 112 cases that were determined in the County Court. Therefore, half of cases over the 12-year period from 2000–01 to 2011–12 that proceeded under the CMIA provisions in the County Court could have been heard and determined in the Magistrates' Court, had there been the power for the court to deal with unfitness or make orders following a finding of not guilty because of mental impairment.
- 5.67 The most common offences were: indecent act with a child under 16 years (11), intentionally causing injury (8), recklessly causing serious injury (8), reckless conduct endangering life (5) and arson (4). A full list of the offences is in **Table 7** in **Appendix D**.
- 5.68 If the jurisdiction of the Magistrates' Court were to be extended and the court did have the power to deal with unfitness or impose orders after findings under the CMIA, these cases would not necessarily proceed in the summary jurisdiction. There may be other reasons a magistrate may not grant summary jurisdiction under the Criminal Procedure Act, for example:
- the seriousness of the offence, including the nature of the offence and the complexity of proceedings for determining the charge
 - the adequacy of the orders available to the court
 - whether a co-accused is charged with the same offence.⁷⁷
- 5.69 However, the data indicates the possible effect of the introduction of the power to deal with the question of unfitness to stand trial and to make orders following a finding of not guilty because of mental impairment, as well as the findings that can be made after a finding of unfitness.

Process when a question of unfitness to stand trial is raised in the Magistrates' Court

Options considered by the Commission

- 5.70 In the consultation paper, the Commission sought views on how any process for determining unfitness to stand trial should function, should the power to determine unfitness be extended into the Magistrates' Court. A variety of suggestions were made:
- the provision of a power to determine unfitness in some or all Magistrates' Courts
 - the provision of a power to divert matters where unfitness is raised
 - utilisation of the Mental Health Court Liaison Service (MHCLS)
 - the creation of a centralised and specialised list for CMIA matters
 - adaptation of the Assessment and Referral Court (ARC) List that currently operates in the Magistrates' Court.

⁷⁶ In relation to some offences, whether or not the particular offence is indictable triable summarily depends on the value of the damage caused or property stolen or the particular level of intention associated with the commission of an offence. See **Appendix D** for more detail of the categorisation of indictable offences triable summarily.

⁷⁷ *Criminal Procedure Act 2009* (Vic) ss 29(2)(a)–(c).

- 5.71 Based on the suggestions and views from submissions and consultations and further research conducted during the consultation period, the Commission developed and considered two main options for reform to address a situation where the question of unfitness to stand trial is raised in the Magistrates' Court.
- *Option 1*—The first option, suggested in a number of submissions and consultations, involves giving the Magistrates' Court a broad discretionary power to 'divert' people with a mental illness, intellectual disability or other cognitive impairment out of the criminal justice system.⁷⁸ It involves a redirection to the civil mental health or disability system when the question of unfitness to stand trial is raised, with no determination of unfitness or criminal responsibility by the magistrate. This option is based on section 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW). The aim of the first option is to link the accused to the services they need in an expeditious way.
 - *Option 2*—The second option, also supported in submissions and consultations, adapts the process for investigating unfitness to stand trial in the higher courts for the Magistrates' Court. It involves a determination of unfitness and criminal responsibility by a magistrate. The second option is adapted so that it is more compatible with the way proceedings are conducted in the Magistrates' Court, the existence of the committal process and the level of offending in that jurisdiction.
- 5.72 The Commission tested variations of these two options in consultations. They were also the subject of a roundtable discussion with police prosecutors, lawyers and service providers.
- 5.73 In testing these options, the Commission found a lack of support for Option 1 for the following reasons:
- This option may result in inconsistent approaches between magistrates. For example, the discretionary nature of the power to divert an accused out of the criminal justice system, when applied by different magistrates, could lead to differences in outcomes for people charged with the same offence.⁷⁹ Further, magistrates are not required to exercise the power, which may result in a tendency to rely on existing practices, such as transferring matters to a higher court for a determination of unfitness, rather than this proposed new process.⁸⁰
 - Requiring a person to engage in treatment or services could be seen as unfair when there has been no determination of their criminal responsibility and the accused may have a valid defence that will acquit them.⁸¹
 - If the option were to be limited to people who could engage voluntarily, making an order enabling voluntary treatment or engagement with services is somewhat counterintuitive. The process will only capture people who are able to meet the criteria for compulsory treatment in the civil system but there will be others who do not fall into these categories even though they may be a danger to public safety. Further, people who are unfit to stand trial may be less likely to be able to engage voluntarily because of the severity of their mental illness, intellectual disability or other cognitive impairment.⁸²
 - This option may be unsatisfactory for victims.⁸³ It also prevents ancillary orders, such as a suspension of a driver's licence, being made, which may have implications for community safety.⁸⁴

78 Submission 21 (Criminal Bar Association). Consultations 25 (Victoria Legal Aid—criminal lawyers); 11 (Melbourne Magistrates' Court); 26 (Office of the Chief Psychiatrist and Legal Branch, Department of Health).

79 Consultation 16 (Shepparton Magistrates' Court).

80 Consultation 47 (Magistrates' Court roundtable).

81 Ibid.

82 Advisory committee (meeting 2a).

83 Consultation 47 (Magistrates' Court roundtable).

84 Ibid.

- There is a risk that anyone with a mental illness, intellectual disability or other cognitive impairment, even when they fall short of being unfit, would attempt to use this process, causing the system to overload.⁸⁵

5.74 Option 2 received greater support in the roundtable. This option addressed most of the deficiencies of the first option. Requiring a magistrate to investigate unfitness will ensure a more consistent approach between magistrates and the process will cover all people who are unfit, not just those who are able to engage voluntarily with services or who meet the criteria for compulsory treatment in the civil system. Although Option 2 would involve more stages and potentially more adjournments with longer timeframes than Option 1, these disadvantages were thought to be manageable.⁸⁶ The model proposed by the Commission is therefore based on the second option.

Recommended option—*Option 2*

- 5.75 The Commission recommends that a process based on Option 2 be introduced for the Magistrates' Court to deal with matters where a question of unfitness to stand trial is raised.
- 5.76 The recommendation introduces a process detailed in **Figures 2 and 3**⁸⁷ that is adapted from the process that currently applies in the higher courts and is tailored to the Magistrates' Court. It can operate within the two streams in the Magistrates' Court—the summary stream (**Figure 2**) and committal stream (**Figure 3**). The power to determine unfitness to stand trial is framed as arising only once jurisdiction has been determined and there has been a grant of jurisdiction to allow the indictable offence triable summarily to be dealt with as a summary matter. In doing so, it seeks to preserve the committal process and require that for matters in the committal stream, the committal process be completed before the question of unfitness is determined. This is consistent with the current approach for matters that are required to be transferred to the higher courts for determination and also ensures that if there is a possibility of committal, the evidence can be assessed and a finding made by the magistrate as to whether the matter should proceed prior to issues of unfitness to stand trial and criminal responsibility being determined.
- 5.77 In making its recommendations, the Commission seeks to establish a process for the magistrate to do one of the following when a person has been charged with a summary offence or an indictable offence triable summarily (and summary jurisdiction has been granted):
- determine, on proper evidence, whether an accused is unfit to stand trial and then proceed to determine their criminal responsibility, or
 - having regard to particular factors, discharge the accused without a determination of unfitness and criminal responsibility where appropriate.
- 5.78 This approach seeks to give magistrates flexibility in dealing with cases where unfitness to stand trial is raised, and to either exercise appropriate discretion to direct the person away from the criminal justice system, or proceed down the CMIA pathway as modified for application in the Magistrates' Court.
- 5.79 The recommendation aims to achieve the following:
- bring matters where the question of unfitness to stand trial is raised into the oversight of a magistrate
 - promote consistency in decision making and avoid 'artificial decision making'⁸⁸

⁸⁵ Ibid.

⁸⁶ Consultation 47 (Magistrates' Court roundtable). Advisory committee (meeting 2a).

⁸⁷ **Figures 2 and 3** include the process for determining criminal responsibility and the orders recommended by the Commission to be available after findings under the CMIA of not criminally responsible because of mental impairment and conduct proved on the evidence available (but unfit to stand trial).

⁸⁸ See discussion at [5.18]–[5.25] and [5.43]–[5.48].

- allow a more efficient, flexible and less formal process in the Magistrates' Court and avoid the need for a matter to go through committal and transfer to a higher court for a determination of unfitness
- give an accused who may be unfit the options and benefits that a person who is fit would be entitled to
- provide meaningful outcomes for accused, victims and the community.

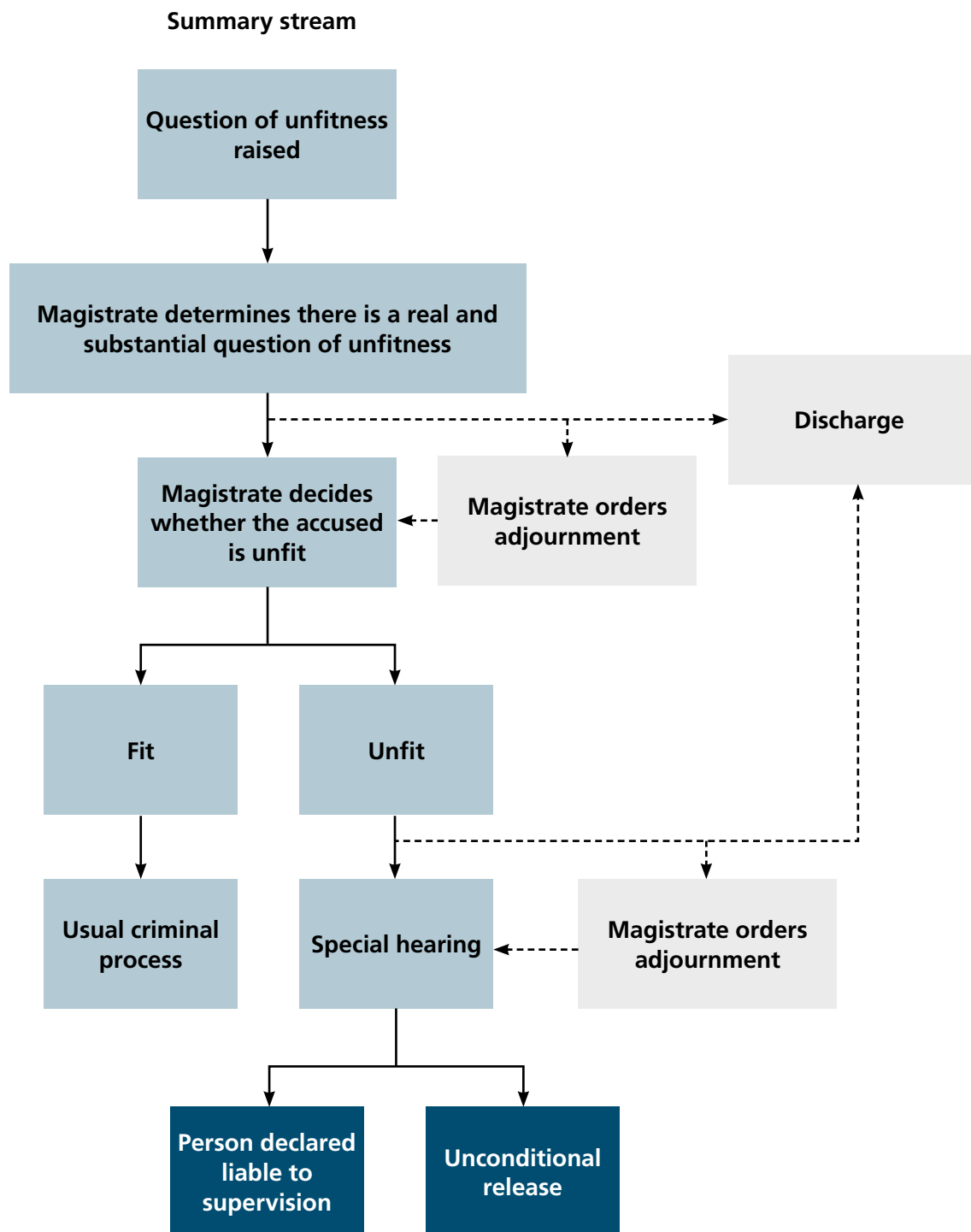


Figure 2: Flow chart of recommended process for unfitness to stand trial in the Magistrates' Court—summary stream

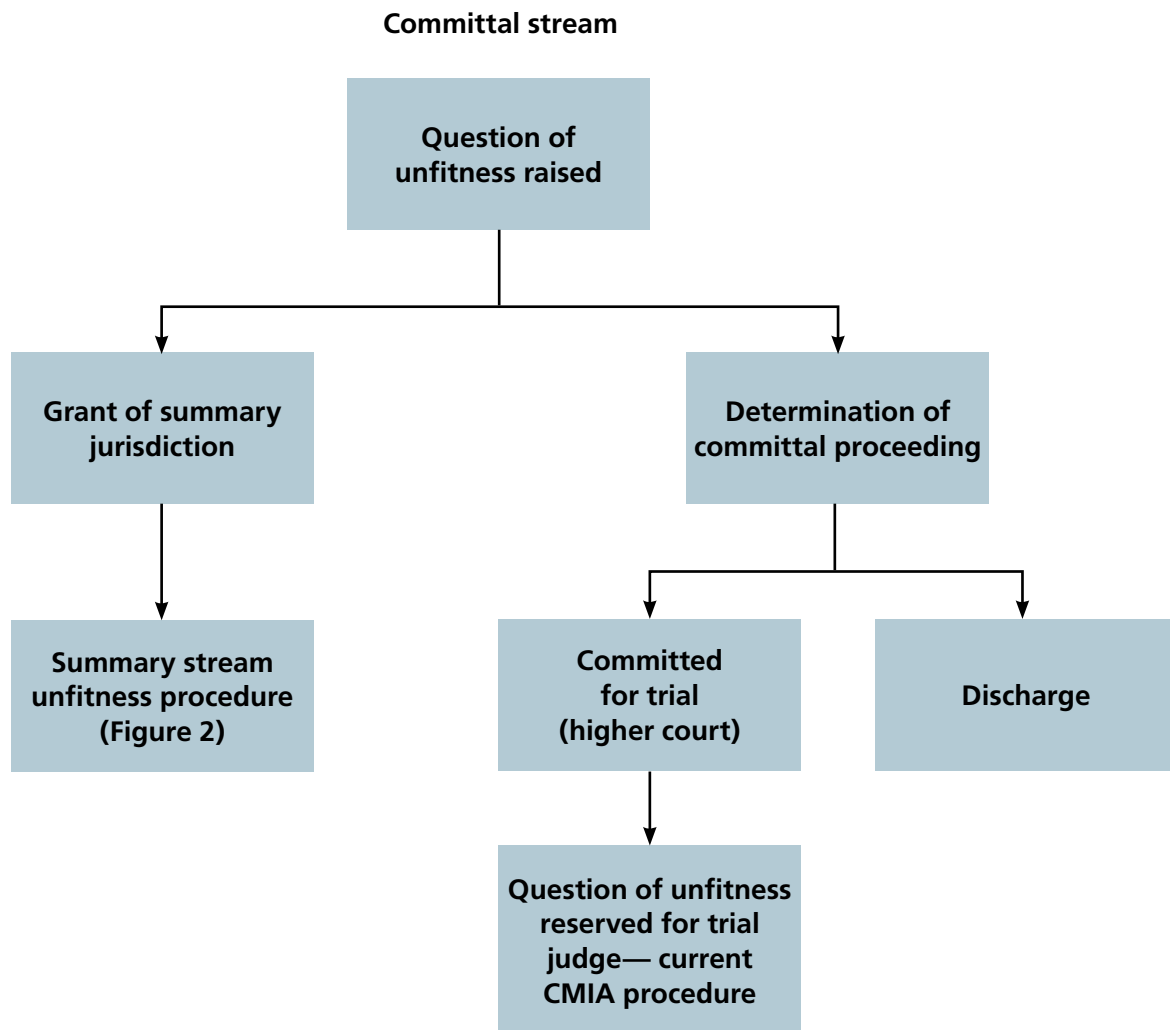


Figure 3: Flow chart of recommended process for unfitness to stand trial in the Magistrates' Court—committal stream

Recommendation

- 28 New provisions should be inserted into the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) to create the following process if the question of unfitness arises in a proceeding in the Magistrates' Court for a summary offence or an indictable offence triable summarily:
- (a) In the Magistrates' Court, the question of the accused's unfitness to stand trial is to be determined on the balance of probabilities by a magistrate.
 - (b) When the question of unfitness to stand trial is raised during the course of proceedings in the summary stream (or where summary jurisdiction has been granted), the magistrate must determine whether there is a real and substantial question as to the unfitness of the accused.

Recommendation cont'd

- (c) If the magistrate determines there is a real and substantial question as to the unfitness of the accused, the magistrate must either:
 - (i) conduct an investigation into the unfitness of the accused to stand trial within three months from the magistrate's determination that there is a real and substantial question as to unfitness, or
 - (ii) make an order under paragraph (m).
- (d) If the magistrate finds the accused unfit to stand trial, the magistrate must either:
 - (i) proceed to hold a special hearing of the charge within three months, or
 - (ii) adjourn the matter under paragraph (l), or
 - (iii) make an order under paragraph (m).
- (e) The special hearing should be conducted as nearly as possible as if it were a summary hearing.
- (f) If the magistrate finds the accused fit to stand trial before the special hearing, the proceeding should be resumed in accordance with usual criminal procedures.
- (g) For the purposes of paragraphs (b) and (c), if the magistrate considers that it is in the interests of justice to do so, the magistrate may order that the accused undergo an examination by a registered medical practitioner or registered psychologist and that the results of the examination be put before the court.
- (h) Notwithstanding paragraphs (a)–(f), if the question of the accused's unfitness to stand trial arises in a matter in the committal stream, the committal proceeding must be completed.
- (i) If the accused is committed for trial, the question of the accused's unfitness to stand trial must be reserved for consideration by the trial judge.
- (j) If the accused is not committed for trial, and the matter is to be heard summarily, the question of the accused's unfitness must be investigated by the magistrate in accordance with paragraphs (a)–(f).
- (k) At any time before the investigation into unfitness to stand trial, the magistrate may extend the three-month period in paragraph (c) for a further period not exceeding three months. The three-month period may be extended more than once, provided the magistrate conducts the unfitness investigation within 12 months of the determination that there is a real and substantial question as to the unfitness of the accused.
- (l) If the magistrate finds the accused unfit to stand trial but considers that the accused is likely to become fit within a period of 12 months, the magistrate may adjourn the matter for the period by the end of which the accused is likely to be fit to stand trial. The magistrate may extend the period of adjournment for a further period, but the total period of adjournment from the first finding of unfitness must not exceed 12 months.

Recommendation cont'd

- (m) At any time during the course of proceedings in the summary stream (or where summary jurisdiction has been granted), after the magistrate determines there is a real and substantial question as to the unfitness of the accused, and before the special hearing, the magistrate may discharge the accused with or without conditions if the magistrate considers:
 - (i) that the accused does not pose an unacceptable risk of causing physical or psychological harm to another person or other people generally as a result of the discharge, and
 - (ii) the accused is receiving treatment, support or services in the community.

A 'real and substantial question' regarding unfitness to stand trial (paragraphs a and b)

- 5.80 The Commission recommends that in the Magistrates' Court, the question of the accused's unfitness to stand trial should be determined on the balance of probabilities by a magistrate. This is the same standard of proof that applies in the higher courts.
- 5.81 The Commission recommends that when the question of unfitness to stand trial is raised during the course of proceedings, the magistrate must determine whether there is a 'real and substantial question' regarding the accused's unfitness. This is also in line with the process for investigating unfitness in the higher courts. Bringing the recommendations into line with what occurs in the higher courts will give magistrates the benefit of any precedent that exists on the subject and any precedent that may develop in the future. This requirement will also prevent triggering this process in circumstances where the question of unfitness has been raised with no legitimate basis.⁸⁹ The Commission anticipates that parties will have to provide evidence of the accused's mental condition to raise a real and substantial question regarding their unfitness.

Investigation into unfitness to stand trial (paragraph c)

- 5.82 The Commission recommends that if the magistrate determines there is a real and substantial question regarding the accused's unfitness to stand trial, the Magistrates' Court must conduct an investigation into unfitness. This investigation should occur within a period of three months after the magistrate determines there is a real and substantial question regarding the accused's unfitness, consistent with the approach in the higher courts.
- 5.83 The power to deal with unfitness in the Magistrates' Court is designed to operate only in those matters in the summary stream—that is, matters involving an indictable offence triable summarily where summary jurisdiction has been granted, or matters involving a summary offence. When a question of unfitness arises, the magistrate *must* deal with the issue of unfitness, but has a discretion as to whether they deal with it by proceeding to determine unfitness or by discharging the person without such a determination.

- 5.84 Providing for a discretion to deal with the issue of unfitness could result in inconsistent approaches between magistrates and a continuing reliance on existing practices, such as transferring matters to a higher court. Under the Commission's recommendations there will be some scope to transfer a matter to a higher court, but this will be tied to the criteria for granting summary jurisdiction and the committal criteria. These criteria are discussed later in this chapter.⁹⁰

Special hearing (paragraphs d–f)

- 5.85 The Commission recommends that if the accused is found unfit to stand trial, the Magistrates' Court must hold a special hearing within three months to determine whether the accused's conduct was proved on the evidence available, consistent with the timeline in the higher courts. In practice, however, the magistrate may choose to determine unfitness and hold the special hearing in a single hearing. The special hearing should be conducted as nearly as possible to a summary hearing.⁹¹ If the magistrate finds the accused fit, a special hearing is not conducted and the proceeding is resumed in accordance with the usual criminal procedure in the Magistrates' Court.

Building in flexibility—power to adjourn (paragraphs k and l)

- 5.86 The Commission recommends that the Magistrates' Court have the flexibility to adjourn proceedings in appropriate cases to enable an accused to 'become fit', and if this occurs, to then deal with the accused using ordinary Magistrates' Court processes. The need for flexibility and the opportunity for adjournments to be built into the system was emphasised, as these factors were important to provide the accused with the opportunity to stabilise and have their fitness restored.⁹² This is consistent with the recommendations made in Chapter 3 to 'optimise' the fitness of accused.⁹³ Although the Magistrates' Court already has a general power to adjourn proceedings⁹⁴ and this already happens in practice in the Magistrates' Court when the question of unfitness is raised, it is desirable to link the power to adjourn specifically to CMIA matters.
- 5.87 The Commission recommends that there be a power to adjourn a matter at two key stages in the process:
- prior to an investigation and determination of unfitness to stand trial
 - after a determination of unfitness and prior to a special hearing.

Power to adjourn prior to an investigation and determination of unfitness to stand trial

- 5.88 In paragraph c of Recommendation 28 above, the Commission recommends that a magistrate should be required to conduct an investigation into the unfitness of an accused within three months of determining that there is a real and substantial question of unfitness.
- 5.89 In paragraph k of Recommendation 28, there is provision for this period to be extended. The Commission recommends that at any time after the magistrate determines there is a real and substantial question concerning the unfitness of the accused, but before the special hearing, the magistrate may extend the three-month period referred to in paragraph c for a further three months. The Commission recommends that this three-month period be able to be extended more than once, provided the investigation into unfitness is conducted within 12 months of the determination that there is a real and substantial question as to the unfitness of the accused.

⁹⁰ Forensicare and the Criminal Bar Association were against a discretion. The Office of Public Prosecutions (OPP) said that there may be circumstances in which the investigation should proceed in a higher court.

⁹¹ Submissions 19 (Forensicare); 8 (Office of Public Prosecutions).

⁹² See, eg, consultations 25 (Victoria Legal Aid—criminal lawyers); 27 (Victoria Police—police prosecutors).

⁹³ See Recommendations 18–21.

⁹⁴ *Criminal Procedure Act 2009* (Vic) s 331.

- 5.90 In the higher courts an investigation into unfitness to stand trial must be conducted within three months of the committal. This period is renewable indefinitely. The Commission considers that while there may be good reasons for the period to be renewable indefinitely in the higher courts (for example, because it takes longer to obtain a court date), it is desirable to cap it at 12 months in the Magistrates' Court. This is consistent with the quicker resolution of matters in that jurisdiction and to avoid the accused being held for long periods of time in relation to offences that are less serious than those ordinarily determined in the higher courts.

Power to adjourn after a determination of unfitness and prior to a special hearing

- 5.91 In paragraph l of Recommendation 28, the Commission recommends that if the magistrate finds the accused unfit to stand trial but determines that they are likely to become fit within 12 months, they may adjourn the matter for a period by the end of which they consider the accused is likely to be fit to stand trial. A limit of 12 months is consistent with the period allowed in the higher courts for an accused to become fit.
- 5.92 In adjourning the matter, the magistrate could refer the accused to the Court Integrated Services Program (CISP) or the Mental Health Court Liaison Service (MHCLS) officer who could provide linkages to treatment and services. In Chapter 3, the Commission makes recommendations on the use of education and treatment during the adjournment period to optimise a person's fitness to stand trial.⁹⁵ These recommendations could also apply to the Magistrates' Court.

Building in flexibility—power to discharge (paragraph m)

- 5.93 A feature of the process in the Magistrates' Court that does not apply in the higher courts is paragraph m of Recommendation 28—the provision of a power for the magistrate to discharge an accused at any time after it has been determined that there is a real and substantial question of unfitness, but before the special hearing.
- 5.94 Option 1, discussed earlier, was developed based on approaches in New South Wales and the Commonwealth. In both jurisdictions, magistrates do not have provisions enabling summary courts to determine unfitness to stand trial.⁹⁶ However, both jurisdictions provide summary courts with limited discretionary powers to adjourn proceedings, grant bail, dismiss proceedings and discharge the accused or make any other appropriate order in relation to accused who have a mental illness or intellectual or developmental disability.⁹⁷
- 5.95 The disadvantages of this approach, and Option 1 in particular, outlined at [5.73], resulted in the Commission recommending a process based on Option 2. While there was little support in consultations for the adaptation of the power to order a 'diversion' or to make orders for treatment or services without determinations of unfitness, the inclusion of a limited discretionary power to discharge an accused and direct them away from the CMIA pathway in particular circumstances was supported as part of the model in the Magistrates' Court.
- 5.96 A number of stakeholders supported the inclusion of this discretion, expressing the view that it was important to retain flexibility by having the option of not proceeding with charges in particular circumstances. This was seen as important so that accused were not picked up by the CMIA pathway and made subject to compulsory treatment or services where it was considered unnecessary or inappropriate having regard to the risk posed to

⁹⁵ See Recommendations 20 and 21.

⁹⁶ Section 4 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) states that Part 2 of that legislation, which provides a process for determining fitness to stand trial, only applies to criminal proceedings in the Supreme Court (including criminal proceedings within the summary jurisdiction of the Supreme Court) and the District Court. Section 20B of the *Crimes Act 1914* (Cth) provides that if the issue of fitness to stand trial is raised in a committal, the magistrate must refer the proceedings to the court to which the proceedings would have been referred had the person been committed for trial.

⁹⁷ *Mental Health (Forensic Provisions) Act 1990* (NSW) s 32; *Crimes Act 1914* (Cth) s 20BQ(1). See O'Carroll, above n 31, 60.

the community and the person's need for treatment or services.⁹⁸ This may be appropriate where the offending behaviour is such that the risk posed to the community is low, where the accused's condition has stabilised and there are appropriate supports in place for the person in the community, and there is no need for supervision of the accused under the CMIA.

- 5.97 In effect this recommendation seeks to replicate what already occurs in practice. That is, the prosecution can withdraw charges where unfitness is raised and the offence is such that the prosecutor considers it appropriate to withdraw charges. However, under the proposed model the issue is brought within the oversight of a magistrate. This enables the matter to be dealt with in a more consistent manner in accordance with the specific principles underpinning the CMIA, rather than standard factors relevant to the exercise of the prosecutorial discretion.

The process in committals (paragraphs h–j)

- 5.98 This chapter has so far discussed the Commission's recommendation in relation to the summary stream. The Commission recommends that where a matter is in the committal stream, the committal proceeding should be completed.
- 5.99 If there is a determination of the committal proceeding, and the accused is committed for trial, the question of unfitness to stand trial is reserved for determination by the trial judge in the jurisdiction to which the person is committed. If at the determination of the committal proceeding, the accused is not committed for trial, the court must discharge the accused.
- 5.100 Prior to the determination of the committal proceeding, if the court grants summary jurisdiction, the question of the accused's unfitness should be investigated by a magistrate in accordance with the procedures the Commission recommends for the summary stream.
- 5.101 A separate procedure in the committal stream will give accused the benefit of a discharge, while ensuring that matters that should be heard in a higher jurisdiction can proceed through the committal process and be transferred in accordance with the usual procedures. As noted in the consultation paper, similar powers exist in the Australian Capital Territory,⁹⁹ South Australia¹⁰⁰ and Tasmania.¹⁰¹

The power to order an independent expert assessment (paragraph g)

- 5.102 Submissions and consultations indicated that it was important that magistrates have a power to order an independent expert assessment of unfitness to stand trial for a number of reasons:
- A court-ordered report could be viewed as more impartial, negating the need for two expert reports.¹⁰² It could also avoid unnecessary delay in obtaining reports.¹⁰³
 - Court-ordered reports could also address any inequality in resources, which now results in some accused being able to afford expert reports, while others cannot.¹⁰⁴ It will avoid situations where accused plead guilty because they cannot afford a report.¹⁰⁵

98 Consultation 47 (Magistrates' Court roundtable).

99 *Crimes Act 1900* (ACT) s 314(2).

100 *Criminal Law Consolidation Act 1935* (SA) s 269J.

101 *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 10(2).

102 Consultation 47 (Magistrates' Court roundtable).

103 Consultations 27 (Victoria Police—police prosecutors); 47 (Magistrates' Court roundtable).

104 Consultation 27 (Victoria Police—police prosecutors).

105 Submission 30 (Victoria Police).

- 5.103 The Commission agrees with these views and recommends that magistrates have the power to order an independent expert assessment of unfitness to stand trial. This can assist magistrates in determining whether there is a real and substantial question as to the accused's unfitness, and in conducting any subsequent investigation into unfitness.
- 5.104 The Commission proposes that this power be discretionary, and that the magistrate only order a report if it is in the interests of justice. Making the power discretionary attempts to strike a balance between ensuring that the court can access quality expert reports if needed, while avoiding parties relying on the court to order expert reports in every case. The 'interests of justice' test is the same test that a judge in a higher court must apply in requiring an accused to undergo an expert assessment.

Establishing a list to manage matters involving unfitness to stand trial

- 5.105 In making its recommendation on the Magistrates' Court, the Commission is not recommending an extension of the Assessment and Referral Court (ARC) List to manage these matters, or the establishment of a specialised list to deal with matters where unfitness is raised.
- 5.106 While the value of the ARC List was widely acknowledged, the Commission does not recommend an extension of this list for accused who may be unfit to stand trial.¹⁰⁶ Stakeholders indicated that this option could be resource-intensive and time-consuming.¹⁰⁷ The ARC List, in its current form, relies on the accused's consent to enter the list, is based on an acceptance of wrongdoing and is dependent on their ability to engage in the program.¹⁰⁸ These requirements may be problematic for people who are unfit to stand trial. Further, the list may be difficult to operate outside Melbourne.¹⁰⁹
- 5.107 A number of stakeholders suggested that matters concerning unfitness to stand trial could be managed in a 'fitness list',¹¹⁰ or even a centralised 'fitness list' in Melbourne.¹¹¹ Others thought that it would not be necessary to have a list in a regional court.¹¹²
- 5.108 On balance, the Commission considers that it is best to leave it to the courts to determine how to operationalise the Commission's recommendations. Implementation of the recommendations will depend largely on the individual courts' resources and location. However, the Commission would advise against a centralised list in Melbourne, which the Commission considers would be difficult to implement. As a Mental Health Court Liaison Service (MHCLS) officer observed:

The life stories of the clients are really complicated. Once one factors in multiple court dates, assessments and geographical distance, such an arrangement could be unmanageable. Further, Melbourne may not be able to engage as closely with the services in regional areas. Often mental health and disability services will 'come to the party' because they have close relationships and connections with the court and have proximity in terms of location. With a centralised court, these connections may be diluted.¹¹³

¹⁰⁶ The *Courts and Other Justice Legislation Amendment Act 2013* (Vic) extended the jurisdiction of the Assessment and Referral Court List in the Magistrates' Court (i.e. the offence-based restrictions were removed).

¹⁰⁷ Submission 30 (Victoria Police). Consultations 11 (Melbourne Magistrates' Court); 16 (Shepparton Magistrates' Court).

¹⁰⁸ Submissions 20 (Law Institute of Victoria); 6 (Associate Professor Andrew Carroll); 30 (Victoria Police). Consultation 11 (Melbourne Magistrates' Court).

¹⁰⁹ Submission 30 (Victoria Police).

¹¹⁰ Submissions 21 (Criminal Bar Association); 30 (Victoria Police); 18 (Victoria Legal Aid). Consultation 25 (Victoria Legal Aid—criminal lawyers).

¹¹¹ Consultations 47 (Magistrates' Court roundtable); 7 (Morwell Magistrates' Court).

¹¹² Consultation 20 (Geelong Magistrates' Court).

¹¹³ Consultation 13 (Mental Health Court Liaison Service officer).

Linkages between the Magistrates' Court and the civil system

5.109 The Mental Health Court Liaison Service (MHCLS) is a court-based assessment and advice service provided by the Victorian Institute of Forensic Mental Health (Forensicare) (in metropolitan areas) and area mental health services (in rural and regional areas). The main role of the MHCLS is to provide mental state assessments and advice regarding the management and needs of accused, and if necessary, referring people to area mental health services for treatment and case management. The MHCLS sometimes undertakes assessments for the purpose of determining whether an accused is unfit to stand trial. The MHCLS currently operates in seven metropolitan Magistrates' Courts and five regional courts.

Views in submissions and consultations

5.110 The Commission received positive feedback on the MHCLS. MHCLS officers, who were described as a 'fabulous resource', were seen as being of considerable assistance in facilitating links between the court and area mental health and disability services.¹¹⁴

5.111 However, it was also noted that the focus of the MHCLS was primarily on links with mental health services and not disability services.¹¹⁵ In the Commission's consultation with the Office of the Senior Practitioner and the Disability Practice Leader (Office of Professional Practice, Department of Human Services), it was noted that courts used to have a disability liaison service, but that this service no longer existed.¹¹⁶

5.112 It was suggested that the expansion of the MHCLS, if the CMIA was implemented in the Magistrates' Court, would assist in supporting the operation of the CMIA in that jurisdiction.¹¹⁷

The Commission's conclusion

5.113 In the Commission's view the MHCLS should be extended to a greater number of Magistrates' Courts in Victoria. Further, the Commission considers that such an extension should also involve the resourcing and provision of disability liaison services, in addition to mental health liaison services.

5.114 The extension of the MHCLS will support the Commission's recommendations to expand the operation of the CMIA in the Magistrates' Court. In particular, the MHCLS could:

- provide magistrates with information that could assist them in determining whether there is a real and substantial question as to the unfitness of the accused—MHCLS officers often have access to mental health or disability records which can indicate the history of an accused's mental condition¹¹⁸
- assist the court in liaising with experts if the court orders that the accused undergo an expert examination
- link the accused to treatment, support or services in the community to help them become fit to stand trial or to facilitate their discharge (provided the accused does not also pose an unacceptable risk of physical or psychological harm to other people)
- coordinate the reports and information to be provided to the court when deciding whether to declare a person liable to supervision or whether a supervision order should be custodial or non-custodial.

114 Consultations 16 (Shepparton Magistrates' Court); 3 (Villamanta Disability Rights Legal Service); 20 (Geelong Magistrates' Court).

115 Consultation 3 (Villamanta Disability Rights Legal Service).

116 Consultation 28 (Senior Practitioner—Disability Practice Leader, Office of Professional Practice, Department of Human Services).

117 Consultation 26 (Office of the Chief Psychiatrist and Legal Branch, Department of Health).

118 Consultation 16 (Shepparton Magistrates' Court).

Recommendation

- 29 The Mental Health Court Liaison Service (MHCLS) should be extended and this extension resourced. The extension of the service should include the provision of disability liaison services, in addition to mental health liaison services.

The power to make orders following CMIA findings in the Magistrates' Court

- 5.115 In the consultation paper, the Commission asked for views on whether the Magistrates' Court should have the power to make orders in relation to people found not guilty because of mental impairment. The Commission also sought views on the options for expanding the orders in the Magistrates' Court if the court was provided with the jurisdiction to make orders in addition to a discharge.
- 5.116 The Commission identified the following orders as possible options for consideration in the consultation paper:
- orders under the CMIA supervision regime—time-limited custodial and non-custodial supervision orders adapted to the Magistrates' Court
 - orders under the *Sentencing Act 1991* (Vic)—for offenders with a mental illness¹¹⁹ or offenders with an intellectual disability¹²⁰
 - orders under the civil mental health and disability system
 - processes potentially available in the Magistrates' Court, including the ARC List, CISP, MHCLS and diversion
 - the development of new orders and processes specific to the Magistrates' Court.¹²¹
- 5.117 This section details the Commission's approach to providing a power to the Magistrates' Court to make orders following a finding of not guilty because of mental impairment. It addresses the following three aspects of the Commission's approach to introducing orders into the Magistrates' Courts under the CMIA:
- whether there should be a power to make orders
 - whether the power should be limited to indictable offences triable summarily or also include summary offences
 - what orders should be available following a finding under the CMIA in the Magistrates' Court.

Whether there should be a power to make orders

- 5.118 Section 5(2) of the CMIA currently provides:
- 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.
- 5.119 As identified at [5.54], there was almost unanimous support from stakeholders who addressed the issue in submissions and consultations for the provision of a power for the Magistrates' Court to impose orders following a finding of not guilty because of mental impairment.

119 These included the following orders under Part 5 of the *Sentencing Act 1991* (Vic): assessment order; diagnosis, assessment and treatment order; restricted involuntary treatment order and hospital security order.

120 These included the following orders under the *Sentencing Act 1991* (Vic): justice plan condition and residential treatment order.
121 See Victorian Law Reform Commission, above n 14, 128–33.

- 5.120 Introducing a power to make orders following a finding of not guilty because of mental impairment in the Magistrates' Court requires an amendment to the CMIA. This would provide the Magistrates' Court with the power to declare the accused liable to supervision or order that the accused be released unconditionally following a finding of not guilty because of mental impairment and following findings made under the unfitness and special hearing process in Recommendation 28.
- 5.121 The decision to unconditionally release a person may be appropriate particularly where the offences charged are less serious in nature, and where the person no longer poses a risk to the community, and the magistrate is satisfied that there are existing supports in the community for the person.¹²² The factors that the Commission sees as relevant to decision making under this recommendation are discussed below at [5.146]–[5.153].
- 5.122 In the terms of reference, the issue of orders was framed solely in relation to whether there should be additional orders following a finding of not guilty because of mental impairment. As the Commission has made recommendations to introduce a process for the Magistrates' Court to determine unfitness to stand trial and criminal responsibility following a finding of unfitness (Recommendation 28), the Commission has formed the view that the same orders should also be available following findings under this proposed new process.

Recommendation

- 30 Section 5(2) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to provide that if the Magistrates' Court finds a person not criminally responsible because of mental impairment or that conduct has been proved on the evidence available (but the accused is unfit to stand trial), the Magistrates' Court may:

- (a) declare the person liable to supervision, or
- (b) order that the person be released unconditionally.

In deciding whether to declare the person liable to supervision or to unconditionally release the person, the Magistrates' Court must have regard to whether the person would pose an unacceptable risk of causing physical or psychological harm to another person or other people generally.

Whether orders should be limited to certain offences

- 5.123 The terms of reference ask the Commission to consider whether any expansion of orders a magistrate can make should be limited to indictable offences that are heard and determined summarily or also include certain summary offences. The Commission therefore considered whether magistrates should have the power to make orders following a finding under the CMIA in relation to all offences, or whether there are some offences which should not come under the Magistrates' Court's jurisdiction.

- 5.124 During consultations, the Commission discussed options for the application of the CMIA in the Magistrates' Court to particular offences:
- indictable offences triable summarily¹²³
 - offences of a certain maximum penalty
 - violent offences or sex offences that can be heard and determined in that jurisdiction¹²⁴
 - offences that can be heard and determined in that jurisdiction that have implications for the safety of the public
 - all offences that can be heard and determined in that jurisdiction.
- 5.125 There were mixed views in submissions and consultations on the appropriate extent of the CMIA's application in the Magistrates' Court. Some thought that the CMIA process and powers should cover all offences that magistrates would typically determine (all matters that can be heard summarily).¹²⁵ Some suggested that accused who were involved in summary or relatively low level offending should be discharged.¹²⁶
- 5.126 At the Commission's roundtable meeting on the Magistrates' Court, most participants preferred a model where the CMIA applies to all offences that can be heard and determined in that jurisdiction. Most participants thought that there was a need for summary offences to come under the CMIA because some summary offences, such as those involving dangerous driving, could have significant implications for community safety.¹²⁷ A summary offence could cause more risk to the community than an indictable offence triable summarily (for example, a property offence).¹²⁸ It was noted that the fact that an offence is a summary offence is not necessarily reflective of the risk the person poses to the community.
- 5.127 Any other way of drawing a jurisdictional limit using categories of offence could be problematic and exclude offences that risk community safety. For example, using the maximum penalty fails to distinguish between the actual level of harm risked to the community in the particular case. Further, attempting to categorise offences by a particular level or type of harm can be a very difficult exercise.
- 5.128 The Commission therefore recommends that the power of the Magistrates' Court to make orders following findings under the CMIA apply to both summary offences and indictable offences triable summarily. This includes an order to declare a person liable to supervision or unconditionally release a person following a CMIA finding and an order for the supervision of a person declared liable to supervision.
- 5.129 More broadly, the Commission considered whether the application of the CMIA in the Magistrates' Court should be limited to matters where the issue of unfitness to stand trial or the defence of mental impairment is uncontested between the parties. Participants at the Commission's Magistrates' Court roundtable generally agreed that it would be fairer for the same options to be available to all accused, whether the matter is contested or not.¹²⁹ The Commission does not recommend limiting the Magistrates' Court's jurisdiction in this way.

123 Obscene exposure, dangerous driving and contravention of a family violence intervention order are examples of summary offences.

124 Making a threat to kill, a common offence committed by people with a mental illness, is excluded as a violent offence.

125 See, eg, submissions 18 (Victoria Legal Aid); 19 (Forensicare); 8 (Office of Public Prosecutions); 21 (Criminal Bar Association). Consultation 47 (Magistrates' Court roundtable).

126 See, eg, submissions 18 (Victoria Legal Aid); 21 (Criminal Bar Association).

127 Consultation 27 (Victoria Police—police prosecutors).

128 Consultation 47 (Magistrates' Court roundtable).

129 Ibid.

Recommendation

- 31 The power to declare a person liable to supervision and make orders for supervision or to unconditionally release a person following a finding under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should apply to both summary offences and indictable offences triable summarily where summary jurisdiction has been granted.

What orders should be available

- 5.130 Extending the CMIA to the Magistrates' Court prompts an examination of what orders should be made available to magistrates following a finding that the accused committed the offence charged in a special hearing or a finding of not guilty because of mental impairment.
- 5.131 In the consultation paper, the Commission considered a number of orders that could be introduced in the Magistrates' Court. These are summarised above at [5.116]. Submissions and consultations overwhelmingly supported the adaptation of current supervision orders (to a limited supervision order) in the Magistrates' Court.

Civil and criminal orders

- 5.132 There was also support for powers to make a civil mental health or disability order under the *Mental Health Act 1986* (Vic), as at 1 July 2014 the *Mental Health Act 2014* (Vic) ('MHA 2014'),¹³⁰ or the *Disability Act 2006* (Vic), or a referral to the Office of the Senior Practitioner (Department of Human Services) or the Office of the Chief Psychiatrist (Department of Health) to consider the imposition of a civil order.¹³¹
- 5.133 The Commission concludes that magistrates should not have a power to impose a civil order or to refer the matter to the Office of the Senior Practitioner or the Office of the Chief Psychiatrist. Consultations and participants at the roundtable indicated that a person who would require an order under the CMIA would not necessarily meet the criteria for a civil mental health or disability order.¹³² The Commission considers that making such a recommendation could risk accused being placed on civil orders where it is inappropriate, or result in situations where a person needs to be subject to supervision but does not satisfy the civil criteria.¹³³ It was also suggested that if the magistrate decides that a less restrictive order could be made, they could refer the accused for an assessment of their suitability for treatment and services under the civil system.¹³⁴ However, similar concerns were raised about the referral of a person by a criminal court for assessment for compulsory treatment under the civil system.¹³⁵

130 The *Mental Health Act 2014* (Vic) replaced the *Mental Health Act 1986* (Vic) on 1 July 2014: see Chapter 1 n 14.

131 Submission 18 (Victoria Legal Aid).

132 Consultation 18 (Goulburn Valley Area Mental Health Service).

133 For example, a person can only be admitted to a residential treatment facility under section 152(1) of the *Disability Act 2006* (Vic) if a number of criteria are met, including that 'the residential treatment facility can provide services for the treatment of the person with a disability and that treatment is suitable for that person'. Not all people with an intellectual disability would be amenable to the treatment provided by a residential treatment facility.

134 Submission 18 (Victoria Legal Aid).

135 Consultation 47 (Magistrates' Court roundtable).

- 5.134 Many stakeholders expressed frustration regarding the infrequent use of the orders available under the Sentencing Act for offenders with a mental illness. The infrequent use of these orders was often attributed to a general reluctance of the civil mental health system to engage with clients from the criminal justice system. This was said to function as a barrier for people in the criminal justice system to accessing the civil mental health system. Stakeholders identified a number of factors that underpin this reluctance, including cultural reasons, a lack of appropriate facilities for forensic clients, the risk that can be posed to other patients in the civil system and a lack of resources. Although it was acknowledged that not all civil mental health services were reluctant to take forensic clients, overall the experience of stakeholders was that these sentencing orders are infrequently used and are effectively ‘empty orders’.¹³⁶ One magistrate noted that in the majority of cases, when the court requested an assessment of a person as to their suitability for treatment or services, the person was assessed as not suitable.¹³⁷
- 5.135 The Commission is mindful of not creating further ‘empty orders’ or orders that result in the forensic population being ‘squeezed’ into the civil population. In the Commission’s view, if a person requires supervision, they should be placed on a CMIA order instead of a civil system order. The Commission has made recommendations to build linkages between criminal and civil systems to support these CMIA orders, including:
- an extension of the Mental Health Court Liaison Service (MHCLS) (this chapter)
 - requiring the court to consider whether the person is receiving treatment or services in the civil system (Chapter 10)
 - supporting the development of workforce strategies to increase the capacity of the general mental health and disability sector to undertake forensic mental health and disability work (Chapter 11).

Two-year custodial and non-custodial supervision orders

- 5.136 In the Commission’s view, custodial and non-custodial supervision orders of a maximum of two years should be available in the Magistrates’ Court. Given the level of offending usually dealt with in the Magistrates’ Court, and the corresponding risk to the community, it is important to avoid drawing up a rigorous supervision regime for these offences. An indefinite supervision order is inappropriate for the offences that can be heard and determined summarily in the Magistrates’ Court. It could result in further artificial decision making where accused have the incentive to plead guilty when they could legitimately come under the CMIA.
- 5.137 A period of two years was also the period suggested by some stakeholders and at the Commission’s roundtable on the Magistrates’ Court.¹³⁸ This is consistent with the maximum term of imprisonment that the Magistrates’ Court may impose for a single summary offence or indictable offence triable summarily.¹³⁹ The Commission therefore considers that a fixed period of two years is appropriate. A treatment or support plan could be attached to the supervision order.

136 Submission 19 (Forensicare). Consultations 11 (Melbourne Magistrates’ Court); 13 (Mental Health Court Liaison Service officer); 25 (Victoria Legal Aid—criminal lawyers).

137 Consultation 11 (Melbourne Magistrates’ Court).

138 Submission 18 (Victoria Legal Aid). Consultations 16 (Shepparton Magistrates’ Court); 47 (Magistrates’ Court roundtable).

139 *Sentencing Act 1991* (Vic) ss 113, 113A.

- 5.138 The main difficulty of having a two-year order is that the person may still need treatment or services when the order lapses.¹⁴⁰ The Commission acknowledges that this is a possibility with a limited order. However, the Magistrates' Court can still transfer matters involving indictable offences triable summarily to a higher court, which could act as a safety net for matters that may require a longer order. The suitability of the orders available should be factored into the decision regarding summary jurisdiction, such that if the magistrate considers that a two-year supervision order is not appropriate in the case, summary jurisdiction should be refused and if the matter passes the committal stage, it would be transferred to the County Court for determination. The Commission does not consider that an order of longer than two years would be appropriate for summary offences.
- 5.139 The Commission sought views in its roundtable on the Magistrates' Court on whether a supervision order should be limited to non-custodial orders in the Magistrates' Court. Based on feedback received, the Commission has formed the view that it is necessary for custodial supervision orders to be available in the Magistrates' Court. As discussed earlier, there may be some offences triable summarily that would require a custodial option to protect the safety of the community. Further, if the Magistrates' Court did not have the power to impose custodial supervision orders, more matters may be required to go through the committal process and transferred to a higher court so that a custodial order can be imposed.

Recommendation

- 32 Section 5(2) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to provide that if the Magistrates' Court declares that a person is liable to supervision:
- (a) the court must make either of the following supervision orders in respect of the person:
 - (i) a custodial supervision order, or
 - (ii) a non-custodial supervision order; and
 - (b) the court must set a fixed term of the supervision order of two years, at the end of which the supervision order lapses.

Review of supervision orders

- 5.140 The Commission recommends that there should be a liberty to apply for a supervision order to be reviewed at any time after a period of six months after imposition of the order. The Commission considers this is necessary so that a person is not placed on a custodial supervision order for two years without the prospect of review. The Commission considered including fixed review periods but concluded that as this would result in reviews being undertaken even in cases where they are not needed, it was not appropriate.

Recommendation

- 33 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to provide:
- (a) The person subject to the order or the person having the custody, care, control or supervision of that person has the right to apply to the court for a variation of the order (in the case of a custodial supervision order) or a variation or revocation of the order (in the case of a non-custodial supervision order) during the term set by the Magistrates' Court.
 - (b) In a review conducted under paragraph (a), the court must either:
 - (i) confirm the order
 - (ii) vary the conditions of the order
 - (iii) for a custodial supervision order, vary the order to a non-custodial supervision order, or
 - (iv) for a non-custodial supervision order, vary the order to a custodial supervision order or revoke the order.

Lapsing of supervision orders

- 5.141 The effect of these recommendations is to create a regime whereby a custodial supervision order or a non-custodial supervision order may be imposed with no mandated review periods. The Commission has provided a right for the person subject to the order or a person responsible for their supervision to apply for a review of the order to ensure that where circumstances change during the period of the order, the order may be reviewed and varied if necessary. The Commission's intention is that the order will lapse once the two-year period has ended.
- 5.142 If there are continuing concerns about the person's mental condition or their risk of causing harm, the Commission's view is that regard should be had to whether the person should be made subject to an order under the civil system, provided by the MHA 2014¹⁴¹ (or the Disability Act). This approach is consistent with the principle of least restriction and the recommendations made throughout this report that there should be more awareness and regard paid to whether a person is receiving services in the civil system that address their risk and needs. The recommendations are aimed at creating a system of supervision in the Magistrates' Court where the level of restriction is more consistent with the lower level of risk to community safety in summary matters. In the Commission's view, if there are concerns in a particular matter about a two-year custodial supervision order being imposed, this would provide good reason for a magistrate not to grant summary jurisdiction and for the matter to be transferred to the County Court. Once a finding is made, a custodial supervision order can be imposed that provides the more rigorous and staggered regime of release.

- 5.143 This reasoning is also based on an analysis of the orders imposed in the 159 cases determined in the County Court under the CMIA from 1 July 2000 to 30 June 2012 in cases involving adults and indictable offences triable summarily. The Commission has identified that there were 59 cases (37.1 per cent of all cases determined in the higher courts) that could have been determined in the Magistrates' Court if it had jurisdiction under the CMIA, comprising half of the 112 matters determined in the County Court. In the great majority of these cases (48 cases, 81.6 per cent), the court imposed a non-custodial supervision order.¹⁴²
- 5.144 More detailed examination of the offence distribution by order type (see **Table 7** in **Appendix D**) illustrates the nature and seriousness of the offences that could have been dealt with in the Magistrates' Court and where supervision could have been imposed:
- Custodial supervision orders were imposed in cases where the principal offence was intentionally causing injury, recklessly causing serious injury and reckless conduct endangering life.
 - Non-custodial supervision orders were imposed for a range of different offences, including sexual offences, assaults and property offences, including minor offences such as theft and theft of a motor vehicle.
- 5.145 In some, but not all, of the cases involving indictable offences triable summarily, judgments were available which gave more information about the nature of such cases and the people requiring supervision. For example, of the 11 cases where the principal offence was indecent act with a child under 16, seven resulted in a non-custodial supervision order and four in an unconditional release. A common feature of these cases was that the person charged with the offence was unfit to stand trial, commonly due to an intellectual disability. In four cases, the offences were historical offences and, at the time the offences were charged, the person was elderly and had dementia. This contrasts with the features of the cases where the principal offence was an offence of violence or endangerment. Where such information was available in these cases, the issue was more commonly the defence of mental impairment, rather than unfitness to stand trial.

Application of higher court provisions to the Magistrates' Court

Factors relevant to decision making in relation to orders

- 5.146 The Commission's recommendations introduce a number of decisions to be made by the Magistrates' Court after a person has been made subject to a finding under the CMIA—a finding of not guilty because of mental impairment or one of having committed the offence charged (after being found unfit to stand trial). These decisions include whether to:
- declare a person liable to supervision or unconditionally release the person
 - impose a custodial supervision order or a non-custodial supervision order
 - confirm the order
 - vary the conditions of any order
 - vary a custodial order to a non-custodial supervision order (and vice versa)
 - revoke a non-custodial supervision order.

- 5.147 The overarching principle under the CMIA as it operates in the higher courts is contained in section 39 of the CMIA. The provision states that in making decisions to make, vary or revoke a supervision order, to remand a person in custody or in relation to granting or revoking extended leave, a court is to apply the following principle:
- restrictions on a person's freedom and personal autonomy must be kept to the minimum consistent with the safety of the community.¹⁴³
- 5.148 In Chapter 2, the Commission recommends that this principle apply to all decision makers under the CMIA.
- 5.149 Currently, once a person has been declared liable to supervision in the higher courts, the choice between a custodial supervision order and non-custodial supervision order, and the decision to vary or revoke an order, are subject to a number of factors set out in section 40 of the CMIA, such as the nature of the person's mental impairment or other condition or disability.
- 5.150 Section 40 also contains a number of relevant provisions that a court must comply with prior to releasing a person unconditionally or reducing the level of supervision to which a person is subject. This includes the court:
- obtaining a report on the person's mental condition under section 41 of the CMIA
 - obtaining a report from the person responsible for supervising the person
 - being satisfied that the person's family members and the victim of the offence have been given reasonable notice of the hearing at which the release or reduction is proposed to be ordered
 - considering any reports from the family members or victim.¹⁴⁴
- 5.151 Under the CMIA as it currently operates, there is also a requirement that the court request a 'certificate of available services' if it is considering a supervision order committing a person to custody or making any other order to place a person in custody or for the person to receive treatment or services under the CMIA. These must be provided by either the Department of Human Services or Department of Health, depending on the underlying mental condition of the accused.
- 5.152 In Chapter 9, the Commission recommends improvements to the procedure concerning the report on the person's mental condition under section 41 of the CMIA and the certificate of available services. In Chapter 10, the Commission makes recommendations to modify the factors to which a court must have regard in section 40 of the CMIA.
- 5.153 The Commission has formed the view that the same key features of the CMIA as it operates in the higher courts (subject to the Commission's recommendations in Chapter 10) should apply to decision making in relation to CMIA orders in the Magistrates' Court. These include those described above and other relevant provisions in the following sections of the CMIA:
- sections 39 and 40(1)–(3) on the principles and factors relevant to decision making
 - section 42 providing for a court report from family members and victims
 - a section 47 certificate.

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Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) s 39.
Ibid ss 40(2)(a)–(d). Other subsections relate to extended leave and are not relevant for the purposes of the application in the Magistrates' Court.

Recommendation

- 34 Part 6 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), including sections 40, 41 and 42, should apply to the Magistrates' Court's consideration of whether to make, vary or revoke a supervision order.

Managing breaches of supervision orders in the Magistrates' Court

- 5.154 The CMIA outlines processes for managing a person who has breached their supervision order.¹⁴⁵ These processes are described in more detail in Chapter 11. The Commission also makes recommendations in Chapter 11 to provide greater flexibility in managing breaches of supervision orders under the CMIA. The Commission considers that the processes for breaches in the CMIA, amended to adopt Recommendations 99 and 100 in Chapter 11, will be broad enough to manage breaches of supervision orders in the Magistrates' Court. The Commission therefore proposes that breaches of supervision orders in the Magistrates' Court be dealt with in this way.

Division of jurisdiction

Criteria for granting summary jurisdiction

- 5.155 Under the Criminal Procedure Act, in deciding whether an indictable offence that can be determined summarily should remain in the summary jurisdiction, the magistrate must consider a number of factors. These are:
- the seriousness of the offence
 - the adequacy of sentences available to the court
 - whether a co-accused is charged with the same offence
 - any other matter that the court considers relevant.¹⁴⁶
- 5.156 The Commission recommends that these criteria be amended so that the magistrate is required, in matters where there is a real and substantial question of unfitness, to have regard to the statutory principles recommended by the Commission to be introduced in the CMIA.
- 5.157 This is consistent with the Commission's view that there should be a specialised approach to those who come under the CMIA and the need to promote therapeutic outcomes and avoid unreasonable delay for this group of people.

Recommendation

- 35 Section 29(2) of the *Criminal Procedure Act 2009* (Vic) should be amended to introduce a requirement that in deciding whether the Magistrates' Court may hear and determine summarily a charge for an indictable offence, if there is a real and substantial question of unfitness to stand trial, the court is to have regard to the statement of principles for decision makers in Recommendation 3.

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Ibid ss 29–30B.
Criminal Procedure Act 2009 (Vic) s 29.

Consenting to summary jurisdiction

- 5.158 Under section 29 of the Criminal Procedure Act, the accused must ‘consent’ to a summary hearing of a charge for an indictable offence. This requirement would need to be adapted if the CMIA is to apply in the Magistrates’ Court because an accused who is unfit to stand trial may not be able to ‘consent’ to a summary hearing.
- 5.159 In the Commission’s view, the court should be empowered to waive the requirement that an accused consent to the summary hearing of a charge for an indictable offence where the accused is unable to ‘consent’ to a summary hearing, or where the legal practitioner appearing for the accused cannot obtain instructions on whether the accused consents.

Recommendation

- 36 Section 29 of the *Criminal Procedure Act 2009* (Vic) should be amended so that the Magistrates’ Court may waive the requirement that an accused consent to the summary hearing of a charge for an indictable offence if satisfied that:
- (a) the accused is unable to consent to a summary hearing or the legal practitioner appearing for the accused is unable to obtain instructions on whether the accused consents to a summary hearing, and
 - (b) there is a real and substantial question of the accused’s unfitness.

Committal process

Conduct of committal proceedings where issues of unfitness to stand trial and the defence of mental impairment are raised

- 5.160 A committal proceeding has a number of purposes.¹⁴⁷ Its main purpose is to determine whether there is evidence of sufficient weight to support a conviction of the offence charged. This is a means of ‘filtering’ out unwarranted prosecutions and ensuring that there is a good reason for proceeding in the case. A committal proceeding also provides an early opportunity to discharge a person where the prosecution case is inadequate.¹⁴⁸ Another purpose is to encourage the early entry of a guilty plea.¹⁴⁹ A question of an accused’s unfitness to stand trial or a question as to whether an accused can establish the defence of mental impairment may be relevant to the conduct of committals in different ways.
- 5.161 Under current law in Victoria, the possibility of a mental impairment defence may be relevant to the decision to commit. A magistrate is permitted to make a preliminary assessment of whether the accused is not guilty because of mental impairment. Evidence of mental impairment may be relevant to the magistrate’s assessment of whether the prosecution has provided sufficient evidence of the mental element for the offence charged.¹⁵⁰

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Ibid s 97.
Fox, above n 4, 222.
Ibid.
Keighran v Lowndes (1997) 138 FLR 448; *R v Hawkins* (1994) 179 CLR 500.

- 5.162 In contrast, under the current law in Victoria, the possibility that the accused may be unfit to stand trial does not appear to be taken into account. This is despite the reality that an issue of unfitness to stand trial will have implications for an accused's ability to participate in a committal proceeding. For example, they may not be capable of instructing their lawyer for the purpose of testing any evidence or to provide their version of the facts in defence of the charge. The Commission has formed the view that it is important to acknowledge the relevance of this issue to the conduct of the committal proceeding.
- 5.163 The Commission recommends that the current committal criteria be amended so that magistrates consider the statutory principles the Commission recommends for the CMIA. This is consistent with the Commission's view that there should be a specialised approach to those who come under the CMIA and the need to promote therapeutic outcomes and avoid unreasonable delay for this group of people.

Recommendation

- 37** Section 141 of the *Criminal Procedure Act 2009* (Vic) should be amended to require that if there is a real and substantial question of unfitness to stand trial, the court is to have regard to the statement of principles for decision makers in Recommendation 3 in conducting committal proceedings.

Requirement to plead

- 5.164 If the question of unfitness to stand trial arises in a committal proceeding, the CMIA provides that the committal proceeding must be completed in accordance with the Criminal Procedure Act.¹⁵¹ This in turn means that the magistrate must ask the accused whether they plead guilty or not guilty.¹⁵²
- 5.165 An accused who is unfit to stand trial could be, by definition, unable to enter a plea of guilty or not guilty. Despite this, the Criminal Procedure Act does not contain any guidance on how to modify committal proceedings where a question of unfitness has been raised.¹⁵³
- 5.166 In its report on the justice system and people with an intellectual disability, the Victorian Parliament Law Reform Committee noted that the lack of a procedure specifically for accused who may be unfit to stand trial has resulted in magistrates adopting different procedures to commit an accused to trial where the question of unfitness may be in issue.¹⁵⁴ The Victorian Parliament Law Reform Committee recommended the adoption of a uniform committal procedure when the Magistrates' Court considers unfitness.¹⁵⁵
- 5.167 There was support in submissions for introducing a uniform committal procedure in the Magistrates' Court.¹⁵⁶ Some submissions noted that the current process may be unfair and may require the accused to do something they may be incapable of doing.¹⁵⁷
- 5.168 In the Commission's view the Criminal Procedure Act should contain guidance on how to modify committal proceedings where a question of unfitness to stand trial has been raised to avoid unfairness and inconsistent approaches in committing an accused to a higher court.

151 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 8(1)(a).

152 *Criminal Procedure Act 2009* (Vic) s 144(1)(a).

153 Victorian Parliament Law Reform Committee, above n 15, 235.

154 Ibid 235–6.

155 Ibid.

156 Submissions 8 (Office of Public Prosecutions); 10 (Victorian Equal Opportunity and Human Rights Commission); 11 (Jamie Walvisch); 20 (Law Institute of Victoria).

157 Submissions 10 (Victorian Equal Opportunity and Human Rights Commission); 11 (Jamie Walvisch).

- 5.169 It was also argued in one submission that a failure to enter a guilty plea at the committal stage in such cases is not to be taken into account in sentencing. It is only once an accused has recovered their fitness to stand trial that the 'earliest opportunity' to plead guilty should be seen to arise.¹⁵⁸ The Commission supports this view.

Recommendation

- 38** If there is a real and substantial question as to the accused's unfitness to stand trial in a committal proceeding, the committal proceeding must be completed without the accused entering a plea. The committal proceeding must otherwise be completed in accordance with Chapter 4 of the *Criminal Procedure Act 2009* (Vic).

Implementing a workable model—cost implications

- 5.170 The Magistrates' Court provides a forum to determine CMIA matters in a way that is more flexible, expeditious and less intimidating than having the matter determined in a higher court. The Magistrates' Court is also able to take a more flexible approach to accused who come under the CMIA because of its less formal processes and approach to dealing with a large caseload involving matters of lower level offending in its jurisdiction. Introducing flexibility into the CMIA regime, by extending its application to the Magistrates' Court, will enable a more appropriate balancing of the principles underlying the CMIA, in particular community protection, treatment and recovery. There are many good reasons from a policy and practice perspective for the CMIA to apply to a greater extent in the Magistrates' Court—documented in detail in this chapter—that have been influential in the Commission's recommendations.
- 5.171 As required in the terms of reference, the Commission has also had regard to the cost implications of its recommendations to extend the application of the CMIA in the Magistrates' Court.
- 5.172 Extending the application of the CMIA in the Magistrates' Court will require appropriate and sufficient resources. Resources will be required for the set up and ongoing support of the processes and procedures in the Magistrates' Court. Resource needs could encompass more personnel, court listing time and an expansion of the services available to support aspects of the process, such as expert reports and treatment and supervision services and facilities.
- 5.173 However, the extension of the CMIA in the Magistrates' Court could result in significant cost savings in two key areas:
- Costs associated with court hearings to determine criminal matters in the Magistrates' Court could be lower than in the County Court, in particular the costs associated with the involvement of a jury in the higher courts.¹⁵⁹
 - Costs associated with the outcomes proposed to be available in the Magistrates' Court could be lower. This would apply in particular to the power to discharge at any stage prior to a determination of criminal responsibility (Recommendation 28(m)) and the introduction of fixed-term supervision orders in the Magistrates' Court (Recommendation 32), compared to costs under the regime in the County Court which requires a choice between unconditional release or the imposition of an indefinite supervision order.¹⁶⁰

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Submission 11 (Jamie Walvisch).

Submission 8 (Office of Public Prosecutions).

In practice, however, the majority of people placed on orders of indefinite length are not indefinitely detained and are subject to detention for less than an indefinite period.

Cost implication modelling work by the University of Melbourne

- 5.174 To enable an accurate estimate of the cost implications in these two areas, the Commission engaged the services of consultants at the Melbourne School of Population and Global Health, University of Melbourne¹⁶¹ to model and analyse the possible costs of its recommendations concerning the application of the CMIA to the Magistrates' Court and Children's Court. The work was conducted in two stages:
- First, a scoping and feasibility study to see whether the recommended changes and their cost impact could be modelled¹⁶² given the available data.¹⁶³
 - Second, analysis to estimate the cost implications of the recommendations extending the application of the CMIA in the Magistrates' Court and Children's Court.
- 5.175 The University of Melbourne provided the Commission with a report¹⁶⁴ that documented the methodology and results of the modelling exercise. The Commission has drawn from the report in considering the cost implications in this area of proposed reform.

Cost of hearing CMIA matters in the Magistrates' Court instead of the County Court

- 5.176 The Commission recommends that new processes and procedures be created in the Magistrates' Court to:
- determine unfitness to stand trial and criminal responsibility in a special hearing following a finding of unfitness
 - make orders following findings of not criminally responsible because of mental impairment and that conduct has been proved on the evidence available (but the accused is unfit to stand trial).
- 5.177 Under the recommended process and procedures, it will be possible for matters that come within the Magistrates' Court jurisdiction—those involving summary offences and/or indictable offences triable summarily—where issues of unfitness and the defence of mental impairment are raised to remain in the summary jurisdiction for determination. Therefore, the Commission's recommendations provide an alternative to the requirement that matters go through committal and transfer to the County Court due to a lack of power to determine unfitness and the lack of power to make orders.

¹⁶¹ Professor Philip Clarke, Centre for Health Policy, Programs and Economics, Associate Professor Stuart Kinner, Principal Research Fellow, Justice Health, Centre for Mental Health and Centre for Health Policy and Alex Avery, Research Assistant, Centre for Health Policy.

¹⁶² Models were generated of the current process under the CMIA in the Magistrates' Court and County Court when an issue of unfitness and/or defence of mental impairment is raised and of the proposed process under the Commission's recommendations to extend the application of the CMIA in the Magistrates' Court. In developing the proposed models, a distribution of cases was applied in which unfitness to stand trial and the defence of mental impairment were raised. The distribution was derived from data available on the prevalence of these issues and the same distribution was applied to the current model. Effectively this provided an underlying assumption that changing the court process would have no 'net widening' effect, which may not hold true in practice as is discussed at [5.189]–[5.195].

¹⁶³ Data provided to the University of Melbourne for the analysis was collected by the Victorian Law Reform Commission from the County Court, Children's Court, Magistrates' Court, the OPP, Victoria Legal Aid, Victoria Police, Forensicare, Department of Health, Department of Human Services, Children's Court Clinic and Sentencing Advisory Council.

¹⁶⁴ Alex Avery, Philip Clarke and Stuart Kinner (The University of Melbourne), *Modelling the Economic Costs of Implementing a Magistrate-based Determination of Fitness to Stand Trial and Mental Impairment: Final Report* (commissioned by the Victorian Law Reform Commission) (2014) [unpublished].

Methodology

- 5.178 In order to compare the costs of hearing CMIA matters in the County Court and hearing CMIA matters in the Magistrates' Court, models of the relevant processes were developed using 'decision trees' to map the key stages under the current law and under the changes to the law recommended by the Commission. The key cost drivers under each model were identified and available information on costs and distribution of cases were put into the model. The modelling used a technique known as 'Markov modelling', which enables the time taken at each stage in the decision tree to be assessed. A technique called 'first order Monte Carlo simulation'¹⁶⁵ was used to estimate and run the distribution of cases through each model, with an assessment of the variability of outcomes within the dataset.¹⁶⁶
- 5.179 For some parts of the decision trees, the Commission was not able to obtain quantitative cost data and information required to estimate distribution, which increased the variance of the outcomes. This was factored into the modelling exercise. In Chapter 2, the Commission has recommended that there be improvements to data collection in matters involving issues of unfitness or the defence of mental impairment (see Recommendations 1 and 2). The absence of routine data collection was noted by the University of Melbourne in its report to the Commission.¹⁶⁷

Results

- 5.180 Overall, the results indicate that extending the application of the CMIA in the Magistrates' Court will reduce the cost to the justice system through a reduction in procedural costs for court hearings.
- 5.181 The analysis of the distribution of cost outcomes in the current model for adults charged with an indictable offence triable summarily in the Magistrates' Court and County Court indicated that there were two cost outcomes that were more likely than others:
- \$69,572, occurring in 31.4 per cent of cases
 - \$25,238, occurring in 28.0 per cent of cases.¹⁶⁸
- 5.182 The analysis of the distribution of costs under the proposed model for adults charged with an indictable offence triable summarily in the Magistrates' Court and County Court produced two cost outcomes that were more likely than others:
- \$27,613, occurring in 33.2 per cent of cases
 - \$15,286, occurring in 29.8 per cent of cases.
- 5.183 In a comparison of the two models, the most likely path in the current adult model would cost an estimated \$69,572, compared with the most likely path in the proposed adult model, at a cost of \$27,613—representing a cost saving of \$41,959 per case.
- 5.184 A comparison of the overall mean costs of the current and proposed models for adults charged with an indictable offence triable summarily in the Magistrates' Court and County Court showed that there is an average cost saving of \$26,037 for each matter that can be heard in the Magistrates' Court instead of the County Court. The minimum cost saving is \$637 and the maximum cost saving is \$80,274. **Table 2** shows the cost comparisons of current and proposed models.

165 This technique employs one thousand 'random walks' through each model to capture any potential, however unlikely, outcome. Mean values are produced with a standard deviation, which is a measure of variability within the dataset. The likelihood of each pathway being taken was determined from data on the operation of the CMIA and a number of fixed assumptions.

166 Avery, Clarke and Kinner, above n 164, 12.

167 Ibid 13.

168 In a 'normal' distribution, one would expect the result of a thousand 'random walks' through the model to cluster around the average result, with very few data points to exist at the minimum and maximum range of values. As each pathway through the current adult model results in a different resultant cost, a non-normal distribution is to be expected.

Table 2: Cost comparison between current and proposed models for adults charged with indictable offences triable summarily under the CMIA

Value	Cost current model	Cost proposed model	Cost saving under proposed model
Mean	\$44,339	\$18,302	\$26,037
Standard deviation	\$27,183	\$7,956	\$19,227
Median	\$52,990	\$17,212	\$35,778
Minimum	\$5,521	\$4,884	\$637
Maximum	\$107,887	\$27,613	\$80,274

- 5.185 The large decrease in the mean cost associated with the proposed model can be attributed to the following:
- lower personnel costs in the Magistrates' Court compared with the County Court
 - lower costs for prosecution services (Victoria Police instead of Office of Public Prosecutions)
 - removal of costs associated with a jury in the County Court¹⁶⁹
 - removal of fees payable to Victoria Legal Aid and prosecutions for committal hearings
 - removal of rental costs incurred by the County Court.¹⁷⁰
- 5.186 Analysis of the cases heard under the CMIA over a 12-year period from 2000–01 to 2011–12¹⁷¹ indicated that there were 59 matters dealt with in the County Court that involved indictable offences triable summarily, and therefore came within the jurisdiction of the Magistrates' Court.¹⁷² If summary jurisdiction had been granted in these cases and the proposed model had been available for them to be heard and determined in the Magistrates' Court, the 59 cases represent an estimated collective cost saving to the justice system of over \$1.5 million from court proceedings alone.

169 See discussion in Chapter 7 at [7.52]–[7.75] for a detailed examination of the costs associated with jury involvement in hearings under the CMIA.

170 The County Court building is privately owned so there are significant rental costs associated with the use of court rooms that do not exist for the Magistrates' Court.

171 Data provided by the Sentencing Advisory Council, higher courts sentencing database.

172 See discussion earlier in this chapter at [5.65]–[5.69] and in Chapter 2 at [2.56]–[2.58].

Cost of supervision and treatment on custodial supervision orders

- 5.187 Using data provided by Forensicare on the cost to provide custodial supervision and treatment to a forensic patient in Thomas Embling Hospital,¹⁷³ the modelling exercise also provided an estimation of the cost differences for supervision under the proposed two-year supervision orders in the Magistrates' Court. Data published in a study¹⁷⁴ on detention lengths under the CMIA was used to identify the mean length of detention on a custodial supervision order until varied to a non-custodial supervision order.¹⁷⁵ This was used as an indication of how long people spend on average on an indefinite order imposed in the higher courts. The cost of providing supervision and treatment to people detained for that period was compared with the cost of providing the same supervision and treatment when detained for two years. It was estimated that a reduction to a maximum of a two-year custodial supervision order in the proposed model would result in mean cost savings per person of approximately \$1,900,000.
- 5.188 This estimate is only applicable to people supervised by Forensicare under the CMIA and does not apply to the cost for supervision and treatment of people supervised by the Department of Human Services, for which there is no information available on costs for supervision.

The potential to widen the net

- 5.189 The Commission's recommendations may provide an incentive for accused to go down the CMIA pathway, where there was a previous disincentive. The availability of a process to determine unfitness to stand trial and a limited term supervision order in the Magistrates' Court could result in more lawyers advising their clients to rely on the CMIA.¹⁷⁶ Prosecutors may pursue charges more often if discharges or discontinuances (following a finding of not guilty because of mental impairment, or where a question of unfitness is raised in relation to a summary offence) are no longer the only option, particularly in relation to summary offences.¹⁷⁷
- 5.190 There is a lack of data available on how many people could be drawn into the CMIA cohort if the CMIA were extended to the Magistrates' Court. It is unclear how many times a question of unfitness is raised in the Magistrates' Court in relation to a matter that can be heard there. There is also a lack of data on how often matters are discontinued because the question of unfitness is raised. There is a lack of data on the frequency of discharges following a finding of not guilty because of mental impairment.
- 5.191 The Commission was informed in consultations that, currently, unfitness matters arise infrequently before magistrates in relation to summary matters.¹⁷⁸ While the defence of mental impairment arises more frequently, this is also relatively infrequent.¹⁷⁹ It is clear, however, that Mental Health Court Liaison Service (MHCLS) officers, prosecutors and lawyers encounter potential unfitness or mental impairment cases more frequently than these cases reach court.¹⁸⁰

173 Forensicare advised the Commission that it costs \$588.83 per day (approximately \$214,923 per year). This figure was calculated over a one-year period from February 2013 to February 2014 and includes all the direct inpatient costs at the hospital, including clinical services provided by other agencies and non-medical services. It does not include an allocation for the indirect costs of running the hospital, such as the clinical and corporate management and support. The figure provided is an average produced from the total costs across the number of patients the hospital can accommodate. It does not take account of the different costs between units depending on their staffing models and programs and does not distinguish between the legal status of individual forensic patients and their leave requirements.

174 Data published in a study on 146 CMIA cases involving people found not guilty because of mental impairment, from the commencement of the CMIA to mid-2006 (including people transitioned from the Governor's pleasure regime): Janet Ruffles, *The Management of Forensic Patients in Victoria: The More Things Change, The More They Remain the Same* (PhD Thesis, Monash University, 2010) 133.

175 The sample for this data was 24 people found not guilty because of mental impairment, from the commencement of the CMIA to mid-2006 (including people transitioned over from the Governor's pleasure regime). This does not include people only found unfit to stand trial, but is limited to people found not guilty because of mental impairment involving a range of offences and circumstances: see further Ruffles, above n 174, 111–32.

176 Consultation 47 (Magistrates' Court roundtable).

177 Ibid.

178 Consultations 20 (Geelong Magistrates' Court); 16 (Shepparton Magistrates' Court).

179 Consultations 20 (Geelong Magistrates' Court); 16 (Shepparton Magistrates' Court); 7 (Morwell Magistrates' Court).

180 Consultations 13 (Mental Health Court Liaison Service officer); 27 (Victoria Police—police prosecutors).

- 5.192 While not the focus of the modelling exercise, the University of Melbourne report also included calculations of the predicted cost implications of varying degrees of ‘net widening’. It was concluded that as the proposed model provides substantive cost savings per case, any increase in overall operating costs for the justice system would primarily result from the effect of widening the net. It is not expected that the cost of cases in the proposed model would exceed the maximum costs in the current model.
- 5.193 Furthermore, reducing the length of detention in custodial facilities under custodial supervision orders to a fixed maximum of two years would enable a substantial cost saving, even if a ‘net widening’ effect were to occur.
- 5.194 It was estimated that, given the cost savings for mean court hearing costs in the adult model (\$18,302 for the proposed model compared to \$44,332 for the current model), any ‘net widening’ effect would need to exceed 240 per cent (assuming no difference to distribution) before additional costs to the court system would be incurred.
- 5.195 The Commission also notes the point advanced in Victoria Police’s submission that if recidivist offending is reduced by the ability of the Magistrates’ Court to provide a more appropriate and expedient response in cases involving unfitness to stand trial and the defence of mental impairment, this may ultimately reduce the number of CMIA matters.

Other resource requirements to support the model in the Magistrates’ Court

- 5.196 In submissions and consultations, it was suggested that a workable model in the Magistrates’ Court could also affect resourcing in a number of other areas.

Education and training needs

- 5.197 This was identified as a need for prosecutors, lawyers and magistrates to develop an expertise in CMIA matters, particularly in investigations of unfitness to stand trial, which will be a new area of practice in the summary jurisdiction. The Commission was informed that staff who work in the Magistrates’ Court already informally assess whether an accused has the mental capacity to participate in a criminal proceeding.¹⁸¹ However, it will be necessary to develop specific expertise on CMIA matters. The Commission has made a number of recommendations to address this (see Recommendations 10–13).

Increasing demands on court personnel and services

- 5.198 It was identified that an extension of the Magistrates’ Court’s jurisdiction will result in more cases being heard in the court. The sources of this were identified as either:
- matters involving indictable offences triable summarily that are no longer required to be transferred to the County Court, or
 - summary offences involving issues of unfitness to stand trial or mental impairment being raised under the CMIA where ordinarily the charges may be withdrawn or a guilty plea entered.
- 5.199 It was noted that magistrates would need more time to determine a CMIA matter compared to a routine matter. Therefore, it would be important to ensure that additional funding is available to enable the Magistrates’ Court to implement the change.¹⁸²
- 5.200 Prosecutors may need more time to prepare for these matters and would need to attend court for longer periods of time.¹⁸³ There are also cost implications for frontline police if there is a need to call witnesses more often.¹⁸⁴

181 Submission 30 (Victoria Police). Consultation 11 (Melbourne Magistrates’ Court).
 182 Submission 17 (Name withheld). Consultation 7 (Morwell Magistrates’ Court).
 183 Submission 30 (Victoria Police).
 184 Consultation 27 (Victoria Police—police prosecutors).

- 5.201 It was also identified that there could be increasing demands on the Mental Health Court Liaison Service (MHCLS), provided by Forensicare. Currently this operates out of the Melbourne Magistrates' Court and a number of regional and rural courts.¹⁸⁵ The Commission has recommended that this service be expanded and the expansion adequately resourced, along with the introduction of disability liaison services in courts.¹⁸⁶
- 5.202 This recommendation to expand and extend the Mental Health Court Liaison Service (MHCLS) will have cost implications. Forensicare informed the Commission that the 2013–14 budget for the 4.5 FTE (full time equivalent) MHCLS staff in metropolitan courts is \$533,672. This includes employment costs, training, and infrastructure/equipment such as printers, phone, internet, stationery and costs related to staff being remotely located (that is, in a court). All MHCLS officer positions are classified and staff members are all employed at RPN4 or Allied Health 3 levels.¹⁸⁷ The Commission does not have any information on the cost of the regional MHCLS positions; but it is noted that the positions in regional courts are half-time.

Expert reports and the capacity of experts to conduct assessments

- 5.203 It was noted that the expansion of the CMIA may require additional funding for expert assessments, including dedicated funding for out-of-custody reports¹⁸⁸ as well as resources to build the capacity of experts to assess unfitness to stand trial, particularly in regional areas.¹⁸⁹
- 5.204 There are different arrangements for court reports depending on whether the person is in custody or on bail and whether the report is ordered by the court or requested by the Office of Public Prosecutions (OPP).
- 5.205 Justice Health funds court-ordered reports when a person is in custody and the Department of Health funds court-ordered reports when a person is on bail.¹⁹⁰ Court-ordered reports are infrequent.¹⁹¹ Reports requested by the OPP are funded separately under an agreement between Forensicare and the Department of Justice which commenced at the beginning of 2012.¹⁹²
- 5.206 In consultations, Victoria Police prosecutors informed the Commission that Victoria Police currently does not have the funding to obtain expert reports under CMIA matters, but in some cases it may seek an assessment of a defence report (not an assessment of the person) by a forensic medical officer at the Victorian Institute of Forensic Medicine (VIFM).¹⁹³ If the CMIA is expanded, there is a clear need for additional resources for the funding of such reports, in the absence of a court-ordered report, to ensure police prosecutors have adequate information where issues of unfitness to stand trial or the defence of mental impairment are raised. This is so they have a proper basis for decision making in the exercise of their prosecutorial functions.

185 See [5.109].

186 See Recommendation 29.

187 The Department of Justice provides funding of \$121,221 for the full-time Sunshine position, on a year-to-year basis. The other 3.5 FTE (full time equivalent) are funded ongoing by the Department of Health through the overall budget allocation to Forensicare. This only includes direct service costs and does not include any allocation for the indirect corporate and clinical management costs which are provided by Forensicare for all of its programs and funded from its Department of Health block funding.

188 Out-of-custody reports are produced while a person is on bail.

189 Submission 19 (Forensicare). Consultations 18 (Goulburn Valley Area Mental Health Service); 21 (Consultant psychiatrists, Forensicare); 39 (Justice Health).

190 Consultation 39 (Justice Health).

191 Data provided by Forensicare on report requests by the OPP in 2012–13 and the first two quarters of 2013–14: in the second quarter of 2013–14 (October to December 2013), three psychiatric reports on unfitness for people in custody were ordered by the County Court.

192 Prior to this, Forensicare's practice was to cap the number of reports completed in response to such requests due to a lack of specific funding for such work.

193 Consultation 27 (Victoria Police—police prosecutors).

- 5.207 Information publicly available on the fees payable by Victoria Legal Aid for expert reports and court attendance by psychologists and psychiatrists provides an indication of the costs of expert reports and attendance in court by experts to give evidence on unfitness to stand trial or on whether there is a basis for the defence of mental impairment. These costs are set out in **Table 3**.¹⁹⁴

Table 3: Fees payable for expert reports and court attendances by psychologists and psychiatrists for CMIA issues in criminal matters

Service provided	Psychologist	Psychiatrist
Report for mental impairment defence or unfitness to stand trial	\$885	\$885
Attendance at metropolitan court	\$414	\$504
Attendance at regional court	\$587	\$669

Note: attendance at court fee is for a half-day and includes travel.

Availability and access to treatment and services

- 5.208 If there is no overall increase in the number of matters heard under the CMIA, but merely a shift of some of the matters from the County Court to the Magistrates' Court, there may not be a need for additional resources for the treatment and services that support the supervision of people on CMIA orders. There may, in fact, be a reduction in demand on such resources under the regime proposed for the length of supervision orders in the Magistrates' Court. For example, a person placed on an indefinite order (with five-year progress reviews as recommended in Chapter 10 in Recommendation 84) in the County Court for an offence of theft, would, if dealt with in the Magistrates' Court, be placed on a two-year supervision order. Under the Magistrates' Court regime, resources for supervision and treatment would be required for two years, whereas under the current County Court regime such resources would be required for a longer period—possibly indefinitely, if the person did not progress through the stages of release under the supervision system and have their order revoked. The estimated cost implications of this are discussed above at [5.187]–[5.188].
- 5.209 Recommendations made by the Commission, such as those made in Chapter 3 to optimise an accused's fitness to stand trial, may affect treatment and supervision resources. Accordingly, more resources may be needed to provide intervention geared towards restoring fitness to stand trial, such as the use of inpatient beds. There would also be a need to increase acute inpatient services or community-based care.
- 5.210 Another issue relevant to the availability of resources is the feedback the Commission received in relation to orders that existed under Part 5 of the Sentencing Act for convicted offenders whom the court considers to be mentally ill.¹⁹⁵ In a number of consultations, the Commission was informed that these orders were ineffective because there are insufficient services for the people who could be on those orders.¹⁹⁶ The reported underuse of Sentencing Act orders is due in part to reluctance of area mental health services to accept forensic clients and to a lack of forensic expertise.¹⁹⁷

¹⁹⁴ Victoria Legal Aid, *VLA Handbook for Lawyers*, 24 (Payments made to lawyers and service providers, Disbursements, Table 5: Expert reports and court attendances by psychologists and psychiatrists in criminal matters) (13 January 2014) <<http://handbook.vla.vic.gov.au/handbook/1058.htm>>.

¹⁹⁵ These comprised the following orders: assessment order (section 90); diagnosis, assessment and treatment order (section 91); restricted involuntary treatment orders (section 93); hospital security order (section 93A). As of 1 July 2014, these have been replaced by new orders introduced by the *Mental Health Act 2014* (Vic) as follows: court assessment order (section 90); court secure treatment order (section 94A).

¹⁹⁶ Consultations 11 (Melbourne Magistrates' Court); 13 (Mental Health Court Liaison Service officer); 25 (Victoria Legal Aid—criminal lawyers).

¹⁹⁷ Submission 19 (Forensicare). Consultations 13 (Mental Health Court Liaison Service officer); 25 (Victoria Legal Aid—criminal lawyers).

- 5.211 It is important to address this reluctance by building the forensic capacity of area mental health services and by improving links to these services. The Commission notes that this is the aim of the Forensic Clinical Specialist Program run by Forensicare and supports the continuation and expansion of such initiatives; however, there is no such equivalent initiative for Disability Services. In Chapter 11, the Commission recommends the Department of Health and Department of Human Services develop workforce strategies to increase the capacity of the general mental health and disability sector to undertake forensic mental health and disability work (see Recommendation 101).

Cost implication of appeals

- 5.212 If there is an increase in the number of matters heard and determined under the CMIA in the Magistrates' Court, there could be more appeals from the Magistrates' Court to the County Court. In Chapter 9, the Commission recommends that appeal rights be introduced so that a person can appeal a finding and a supervision order made in the Magistrates' Court to the County Court.
- 5.213 As discussed in Chapter 9 at [9.199]–[9.203], such appeals are heard *de novo*, meaning they are conducted as a rehearing of the matter, rather than a review of the initial decision. Any increase in such appeals will have a cost implication for the County Court and parties involved in appeal proceedings. The Commission does not have any information on the costs associated with *de novo* appeals.

The Commission's conclusion

- 5.214 The Commission's recommendation to extend the application of the CMIA in the Magistrates' Court will require an injection of resources into the Magistrates' Court and surrounding supporting services, such as prosecution services and expert reports. However, there will be significant cost savings produced by the availability of a cheaper and expedient process in the Magistrates' Court to determine matters where unfitness to stand trial or the defence of mental impairment is raised.
- 5.215 Therefore, the cost implication can be properly characterised as one of 'resource shifting'—whereby the demand for resources is shifted from one court to another, producing cost savings in the conduct of court proceedings and length of supervision—rather than increasing the overall demand and requiring additional resources. The cost savings of the Commission's proposed process for dealing with matters under the CMIA in the Magistrates' Court demonstrate that there would need to be a significant increase in the number of people who make use of these new processes before the cost savings were diminished.
- 5.216 Extending the application of the CMIA in the Magistrates' Court supports the principles underpinning the CMIA. By intervening early and providing a therapeutic and least restrictive approach, it is more likely that the system can address the conditions underlying unfitness to stand trial and offending and prevent further harm to the community. There is increasing recognition of the benefits that can be gained by early intervention, not only from the perspective of costs saved to government, but from the perspective of a person's well-being and diversion from criminogenic pathways in the criminal justice system.¹⁹⁸ The Commission's support for this approach is underpinned by the recommendations made in this chapter.

198 Ruth McCausland et al, *People with Mental Health Disorders and Cognitive Impairment in the Criminal Justice System: Cost-benefit Analysis of Early Support and Diversion* (2013) 9. See also Carolyn Mason and Walter Robb, Queensland Advocacy Incorporated) *Pathways for People with a Disability in the Criminal Justice System: Using a Benefit Cost Analysis to Reframe the Approach to Policies and Programs* (2007); Anna Page, Revolving Doors Agency, *Counting the Cost: the Financial Impact of Supporting Women with Multiple Needs in the Criminal Justice System* (2011).

A specialised approach to the application of the CMIA in the Children's Court

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6. A specialised approach to the application of the CMIA in the Children's Court

Introduction

- 6.1 The supplementary terms of reference (page xiv) ask the Commission to consider whether the application of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ('CMIA') should be further extended to the Children's Court of Victoria (the Children's Court). In particular, the Commission has been asked to consider:
- the Court of Appeal decision in *CL, A Minor (by his Litigation Guardian) v Director of Public Prosecutions (on behalf of Lee)*¹
 - whether the process for determining fitness to stand trial in the CMIA 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 regard to the Magistrates' Court
 - what orders should be available in the Children's Court on a finding of unfitness or mental impairment
 - whether the current jurisdiction of the Children's Court should apply, so that it 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.
- 6.2 In the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 and the Children's Court of Victoria: supplementary consultation paper* ('the supplementary consultation paper'), the Commission sought feedback on the issues raised by the supplementary terms of reference. In addition, the Commission asked for input on:
- the principles and rights that should apply to young people² who raise unfitness to stand trial and/or the defence of mental impairment
 - the issues caused by the current application of the CMIA in the Children's Court
 - whether the CMIA should be extended to apply further in the Children's Court, and
 - the appropriate extent of any expansion and approach to be taken in relation to young people under the CMIA.

¹ [2011] VSCA 227 (5 August 2011).

² The term 'young people' is used as a general term in this report 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.

- 6.3 This chapter focuses on recommendations to give effect to the extension of the CMIA's application to young people in the Children's Court and the higher courts. As with the Commission's findings on the application of the CMIA in the Magistrates' Court, detailed in Chapter 5, it was evident from submissions and consultations that the limited application of the CMIA results in a gap in the CMIA's operation in relation to young people. Closing this gap, by extending the CMIA, would result in a system that is more just, effective and consistent with the principles that underlie the CMIA, and significantly, would result in a more appropriate response to the complexities of cases under the CMIA involving young people.
- 6.4 The recommendations made in this chapter provide a legislative framework for the CMIA's operation in the Children's Court, in specialised provisions in the *Children, Youth and Families Act 2005* (Vic) ('CYFA'). The chapter explains the model and the reasoning behind the Commission's recommendations to:
- allow the Children's Court to determine unfitness to stand trial and criminal responsibility following a finding of unfitness
 - give the Children's Court the power to make fixed-term therapeutic supervision orders following a finding of not guilty because of mental impairment³ or a finding that the accused committed the offence charged⁴
 - develop a specialised approach and model for the operation of CMIA processes in the Children's Court, including the introduction of a new 'assessment order' together with a case worker program to optimise the fitness of young people and encourage a diversionary approach
 - provide a regime for the making, review and variation of therapeutic supervision orders in the Children's Court
 - identify the requirements for supervision and the need for a specialised youth forensic facility and services to support the extension of the CMIA to young people.
- 6.5 Other recommendations that relate to young people are covered in earlier chapters. Chapter 2 sets out the statutory principles that the Commission considers should be applied by decision makers in relation to young people and Chapters 3 and 4 include a discussion of the criteria for the test for unfitness and the defence of mental impairment respectively as they relate to young people.

The specialist jurisdiction of the Children's Court

- 6.6 The Children's Court is a specialist court operating under the authority of the 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'.⁵
- 6.7 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.⁶
- 6.8 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'.⁷

3 The Commission has recommended in Chapter 9 of this report replacing the finding of 'not guilty because of mental impairment' with the accused's 'conduct is proved but not criminally responsible because of mental impairment': see Recommendation 69.

4 The Commission has recommended in Chapter 9 of this report replacing the finding in a special hearing of 'committed the offence charged' with the accused's 'conduct is proved on the evidence available': see Recommendation 68.

5 *Children, Youth and Families Act 2005* (Vic) ss 1(c)–(d).

6 *Ibid* s 528(1).

7 Peter Power, Children's Court of Victoria, *Court Overview* (Research Paper No 2, 30 July 2013) 2.1.

- 6.9 The Court is presided over by the President—a County Court judge appointed by the Governor in Council⁸—and magistrates. When appointing magistrates to the Children’s Court, the President must have regard to their experience in child welfare matters.⁹
- 6.10 The Court is divided into the family, criminal and Koori (criminal) divisions, as well as the neighbourhood justice division.¹⁰ The Criminal Division of the Children’s Court has jurisdiction to hear and determine summarily all summary offences and indictable offences charged against young people, except seven indictable offences that result in death.¹¹ A matter involving an indictable offence may be transferred from the Children’s Court to a higher court if the young person (or in some situations, their parents) objects to a summary hearing¹² or if the Court considers that there are ‘exceptional circumstances’ which justify a hearing in the higher courts.¹³
- 6.11 Section 534 of the CYFA provides that reports of proceedings in the Children’s Court must not (except in limited circumstances) contain any particulars likely to lead to the identification of a child or other party or a witness before the Children’s Court. This report, and this chapter in particular, are expressed in conformity with that important provision.

Current application of the CMIA in the Children’s Court

Unfitness to stand trial

- 6.12 Currently, the Children’s Court does not have jurisdiction to determine whether a young person is unfit to stand trial or make orders following a finding of not guilty because of mental impairment.
- 6.13 The Court of Appeal in the case of *CL, A Minor (by his Litigation Guardian) v Director of Public Prosecutions (on behalf of Lee)*¹⁴ (*‘CL on appeal’*) confirmed the decision by the Supreme Court,¹⁵ that the Children’s Court does not have jurisdiction to determine unfitness. If a real and substantial question of unfitness arises in the Children’s Court, the Court must direct the young person to be tried in the higher courts.
- 6.14 As stated above at [6.1], in considering whether the application of the CMIA should be further extended to the Children’s Court, the supplementary terms of reference ask the Commission to have regard to the Court of Appeal decision in *CL on appeal*. The case is outlined below.

The case of CL

- 6.15 CL, a child, had been charged with numerous serious offences and appeared before the Criminal Division of the Children’s Court. A question of CL’s unfitness to stand trial arose.¹⁶ The magistrate concluded that as there was some doubt as to whether the Children’s Court has the power to determine the matter and there were ‘exceptional circumstances’, the matter should proceed by way of committal proceeding to the County Court. CL, by a litigation guardian (CL’s mother), sought judicial review in the Supreme Court of Victoria of that decision.¹⁷ In *CL (A Minor) v Lee (‘CL at trial’)*,¹⁸ the Supreme Court held that the Children’s Court did not have jurisdiction to hear and determine the question of unfitness to plead. Leave to appeal from that decision was sought.

8 *Children, Youth and Families Act 2005* (Vic) s 508(2).

9 *Ibid* s 507(2).

10 *Ibid* s 504(3).

11 *Ibid* ss 516(1)(a)–(b).

12 *Ibid* ss 356(3)(a), 356(4).

13 *Ibid* s 356(3)(a). See discussion at [6.60]–[6.62].

14 [2011] VSCA 227 (5 August 2011).

15 *CL (A Minor) v Lee* (2010) 29 VR 570.

16 The issue of CL’s fitness to stand trial was raised by CL’s counsel after ‘lengthy and exhaustive testing’ by a clinical neuropsychologist. CL was also assessed by a forensic psychologist: *DPP v CL* (Unreported, County Court of Victoria, Judge Lacava, 14 May 2012) [9].

17 *CL (A Minor) v Lee* (2010) 29 VR 570.

18 *Ibid*.

- 6.16 The Victorian Court of Appeal¹⁹ refused leave to appeal, holding that the decision of the Supreme Court was not in error.²⁰ Acting Justice of Appeal Sifris delivered the primary judgment, in which Chief Justice Warren agreed, stating:
- When 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.²¹
- 6.17 As outlined in the supplementary consultation paper,²² the 2010 decision of *CL at trial* sets out the reasons, affirmed by the Victorian Court of Appeal,²³ why the Children’s Court does not have jurisdiction to determine matters of unfitness.²⁴
- 6.18 Subsequent to the Court of Appeal decision to confirm that the Children’s Court did not have the power to determine unfitness, CL was committed to the County Court for an investigation of unfitness to stand trial by a jury. The jury found CL fit to stand trial and the matter resolved by way of guilty pleas to a number but not all of the charges.²⁵ CL was sentenced to a youth supervision order of 12 months.²⁶

The defence of mental impairment

- 6.19 In relation to the defence of mental impairment, the CMIA provides for the defence to apply to summary offences and to indictable offences heard and determined summarily in the Magistrates’ Court.²⁷ 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.²⁸ The Magistrates’ Court therefore has no power to make orders in relation to people found not guilty because of mental impairment.²⁹
- 6.20 The Children’s Court has all the ‘powers and authorities’ that the Magistrates’ Court has in relation to all matters over which it has jurisdiction.³⁰ The CMIA therefore applies in the Children’s Court in the same way that it does in the Magistrates’ Court. This means that while the defence of mental impairment can be relied on in the Children’s Court as part of the determination of criminal responsibility of an accused for an offence, the court does not have the power to make orders in relation to people found not guilty because of mental impairment.

¹⁹ Chief Justice Warren and Acting Justice of Appeal Sifris constituting a two-judge Court of Appeal.

²⁰ *CL, A Minor (by his Litigation Guardian) v Director of Public Prosecutions (on behalf of Lee)* [2011] VSCA 227 (5 August 2011).

²¹ *Ibid* [41].

²² Victorian Law Reform Commission, *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 and the Children’s Court of Victoria*, Supplementary Consultation Paper No 19 (2013) 21.

²³ *CL, A Minor (by his Litigation Guardian) v Director of Public Prosecutions (on behalf of Lee)* [2011] VSCA 227 (5 August 2011).

²⁴ *CL (A Minor) v Lee* (2010) 29 VR 570.

²⁵ See Chapter 2 at [2.187] and n 135.

²⁶ *DPP v CL* (Unreported, County Court of Victoria, Judge Lacava, 14 May 2012) [36].

²⁷ *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 5(1).

²⁸ *Ibid* s 5(2).

²⁹ This is because of section 528 of the *Children, Youth and Families Act 2005* (Vic) which provides that the Children’s Court has the same powers as the Magistrates’ Court.

³⁰ *Children, Youth and Families Act 2005* (Vic) s 528.

The need for a specialised approach for young people

Young people in the criminal justice system

- 6.21 Young people involved in the criminal justice system typically experience a range of complex issues. Of the young people in custody in Victoria in 2012–13:
- 35 per cent had mental health issues
 - 64 per cent were victims/survivors of abuse, trauma or neglect
 - 89 per cent had alcohol or drug abuse related to their offending
 - 27 per cent had a history of self-harm or suicidal ideation
 - 27 per cent presented with issues concerning their intellectual functioning
 - 9 per cent were registered with Disability Services.³¹
- 6.22 A recent study considering bail and remand for young people found that young people involved in the criminal justice system have complex needs, including substance use issues, physical and mental health issues, intellectual and cognitive disabilities, incomplete education and complex family issues.³² The study concluded:
- This finding is also consistent with a body of existing research that demonstrated that young people in contact with the criminal justice system—especially those entrenched in the most serious end of the system—are far more likely to have a constellation of these complex problems than other young people.³³
- 6.23 The Youth Parole Board and Youth Residential Services explain the issues faced by young people with a disability in the criminal justice system as follows:
- Young people with a disability are a particularly vulnerable group within the criminal justice system ... Failure to identify an appropriate response to the distinct needs of young people with a disability can result in poor outcomes that have ongoing consequences such as repeated contact with the criminal justice system.³⁴
- 6.24 Young people in the criminal justice system may also face a range of mental health conditions such as anxiety, depression, schizophrenia and other psychotic disorders.³⁵

Young people with mental conditions in the criminal justice system

- 6.25 These studies show that young people with a mental illness or other cognitive impairment are particularly vulnerable to involvement in the criminal justice system.
- 6.26 The Department of Human Services (DHS) informed the Commission that young people with a disability presenting in court with unfitness to plead issues are at an elevated risk of involvement with Child Protection and the criminal justice system and that many of these young people 'already have established relationships with DHS or are involved in a DHS program'.³⁶ To recognise that a joined-up response to such dual clients is required there are established protocols within DHS to support a collaborative practice between Child Protection, Youth Justice and Disability Services.³⁷

31 Youth Parole Board and Youth Residential Board Victoria, *Annual Report 2012–13* (2013) 13.

32 Kelly Richards and Lauren Renshaw, Australian Institute of Criminology, *Bail and Remand for Young People in Australia: A National Research Project*, Research and Public Policy Series No 125 (2013) 98–9.

33 Ibid.

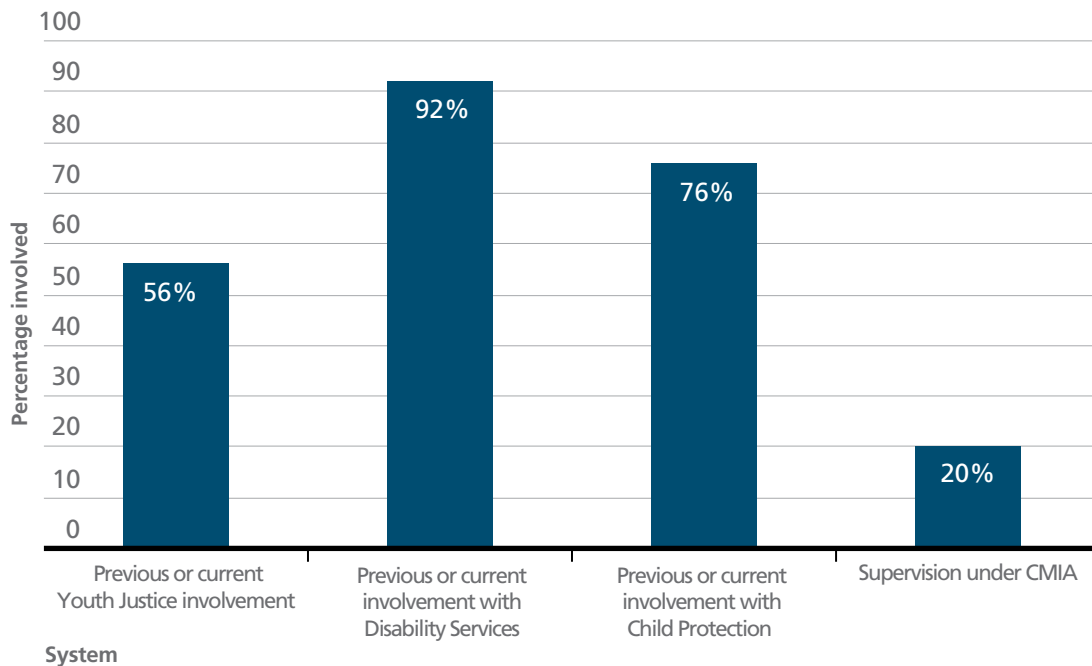
34 Youth Parole Board and Youth Residential Board Victoria, above n 31, 14.

35 Ibid.

36 Consultation 53 (Head Office (Youth Justice, Forensic Disability, Child Protection and Senior Practitioner), Department of Human Services).

37 Ibid.

- 6.27 Approximate information provided to the Commission³⁸ on recent cases involving young people who had been involved in the CMIA process also illustrated the high level of contact across a range of system levels by such young people. **Figure 4** shows the proportions of the 25 young people in the dataset who had previous or current involvement across four system levels.



Source: Office of Public Prosecutions; Department of Human Services

Figure 4: Previous or current involvement with system by young people in the dataset, by percentage

- 6.28 The patterns of involvement outlined above were also evident in case examples provided to the Commission by DHS of young people who had been involved in CMIA proceedings. These case examples demonstrated that young people with a mental condition in the criminal justice system are dealing with complex issues such as domestic violence, abuse and neglect, post-traumatic stress and attachment disorders and often have both a mental illness and an intellectual or cognitive disability. As such, this group of young people often have complicated histories of contact with a range of government services as outlined above.

38

De-identified data provided by the Department of Human Services (DHS), and collated by the Office of Public Prosecutions (OPP) and DHS. The information was initially collated by the OPP to identify the cases where it had been asked to provide advice regarding the jurisdiction of matters involving young people and the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (approximately 21 matters). DHS added to the data by identifying four additional matters and documenting the known previous or current involvement with its programs. See **Appendix D** for an explanation of the data sources and methodology.

Offending behaviour of young people

- 6.29 A study looking at the role of the Children's Court across Australia found that the needs and problems of young people involved in the criminal justice system are becoming increasingly complex:

Study participants across Australia reported that, relative to a decade ago, the court now served a much more challenging clientele. While the children, young people and families who appear in court remain highly socio-economically disadvantaged and marginalised, what is 'new' is the complexity of their problems and needs and, in Victoria and NSW, the increase in clients from a refugee background. Alcohol and drug abuse, domestic violence, mental health problems and, indeed, prior involvement with the child protection system, are now common among the child protection jurisdiction. Young offenders manifest similar problems and have increasingly engaged in serious (i.e. violent) criminal activity.³⁹

- 6.30 One study that examined the types of offences committed by young offenders with an intellectual disability, found that they tend to commit crimes against people more often than offenders without an intellectual disability.⁴⁰ A possible explanation for this finding suggested in the study was that young people with an intellectual disability often experience anger and aggression.⁴¹
- 6.31 Approximate information provided to the Commission⁴² on 25 cases of young people involved in the CMIA process indicated that the alleged offences tended to be property, injury or sex offences. There were six cases where the offences included both property⁴³ and injury⁴⁴ offences and a further six cases where the offences were property offences.⁴⁵ Eleven cases involved sexual offences.⁴⁶

Issues caused by the limited application of the CMIA in the Children's Court

- 6.32 In the supplementary consultation paper, the Commission outlined the issues that had already been identified concerning the limited application of the CMIA in the Magistrates' Court and asked whether these issues also applied in the Children's Court, and whether there were further specific issues that existed in the Children's Court. The Commission asked for views as to whether the Children's Court's jurisdiction should be extended and if so, how any extension should be provided.

Lack of power to determine unfitness to stand trial

- 6.33 During consultations on the terms of reference, issues were raised about the lack of power to determine unfitness in the Magistrates' Court. These are detailed in Chapter 5 at [5.18]–[5.34].
- 6.34 In consultations on the supplementary terms of reference, these issues were also identified to exist in the Children's Court. Particular concerns were that there is no 'outcome' for the person in terms of treatment or intervention, the offending behaviour related to the person's mental illness, intellectual disability or other cognitive impairment is not addressed, and issues may arise in relation to the safety of the community, once the person is released.

39 Allan Borowski, 'Whither Australia's Children's Courts? Findings of the National Assessment of Australia's Children's Courts' (2013) 46(2) *Australian & New Zealand Journal of Criminology* 268, 280.

40 Jessica Asscher, Claudia E van der Put and Geert Jan J M Stams, 'Differences between Juvenile Offenders with and without Intellectual Disability in Offense Type and Risk Factors' (2012) 33(6) *Research in Developmental Disabilities* 1905, 1909.

41 Ibid.

42 De-identified data provided by DHS (collated by the OPP and DHS): see **Appendix D**.

43 These included armed robbery, attempted arson, intentionally causing bushfire, criminal damage and theft.

44 These included assaults, threats to kill and injury offences.

45 These included intentionally causing bushfire, robbery, theft and criminal damage.

46 These included offences such as rape, indecent assaults, sexual penetration of a child under 16 years and indecent act with a child under 16 years.

Lack of power to make orders following a finding of not guilty because of mental impairment

- 6.35 Consultations on the terms of reference also identified issues with the requirement in the Magistrates' Court to discharge an accused following a finding of not guilty because of mental impairment. These are detailed in Chapter 5 at [5.43]–[5.53].
- 6.36 The Commission found that the issues related to the lack of jurisdiction in the Magistrates' Court were also prevalent among young people appearing in the Children's Court because of the lack of jurisdiction to determine unfitness or make orders following a finding of not guilty because of mental impairment.
- 6.37 The court in *CL at trial* noted that the lack of jurisdiction in the Children's Court to determine unfitness was unsatisfactory and made recommendations to address this, which were endorsed by the Court of Appeal.⁴⁷ The judge in *CL at trial* recommended that the CMIA be amended to provide the Children's Court with the jurisdiction to deal with issues of unfitness to stand trial.⁴⁸

Effects of lack of powers on cases involving young people

- 6.38 Approximate information provided to the Commission on 25 cases⁴⁹ involving young people where issues of unfitness to stand trial or the defence of mental impairment were raised demonstrates the effect of the limited powers of the Children's Court to deal with unfitness and the defence of mental impairment.
- 6.39 In 13 cases, the issue was one of unfitness to stand trial, in two cases there were issues of unfitness and the mental impairment defence and one case related solely to the mental impairment defence. Almost half of the matters where issues of unfitness were raised did not ultimately proceed under the CMIA provisions. **Table 10 in Appendix D** shows that of the 13 cases where the issue of unfitness was raised, six cases proceeded to a determination of unfitness. The remaining seven were resolved by guilty pleas, transfer back to the Children's Court, dismissal of charges or had not been finalised.
- 6.40 All the offences were either summary offences or indictable offences able to be heard within the criminal jurisdiction of the Children's Court.⁵⁰ Sixteen of the 25 cases were transferred to the County Court.⁵¹
- 6.41 As detailed in **Table 9 in Appendix D**, almost all matters where unfitness was raised (either separately or in conjunction with the defence of mental impairment) were transferred to the County Court.⁵² The one case where only the defence of mental impairment was raised was not transferred.
- 6.42 Of the 16 cases that were transferred from the Children's Court to the County Court, four young people were found unfit and were placed on a non-custodial supervision order (all were 18 years or over when the order was imposed) and one young person was found unfit and the court was awaiting a certificate of available services. **Table 11 in Appendix D** details the outcomes in the remaining cases according to whether they were uplifted to the County Court.

47 *CL (A Minor) v Lee* (2010) 29 VR 570, 588–90; *CL, A Minor (by his Litigation Guardian) v Director of Public Prosecutions (on behalf of Lee)* [2011] VSCA 227 (5 August 2011) [51].

48 *CL (A Minor) v Lee* (2010) 29 VR 570, 589.

49 De-identified data provided by DHS (collated by the OPP and DHS): see **Appendix D**.

50 See [6.10] and [6.60]–[6.67].

51 In three cases, there was no information available about whether the matter was transferred and in a further six cases the matter was not transferred (in five of these cases charges were withdrawn or dismissed).

52 This excludes one matter where unfitness was raised where there was no information about whether the matter was transferred to the County Court.

Extending the jurisdiction of the Children's Court

Approach in other jurisdictions

- 6.43 Children's Courts in the Australian Capital Territory, Western Australia, South Australia and Tasmania have the power to determine unfitness.⁵³ In Queensland, the Children's Court may determine unfitness in relation to indictable offences only.⁵⁴ In the Northern Territory, there is no power to determine unfitness, so the charges must be dismissed or the young person diverted into treatment.⁵⁵
- 6.44 With the exceptions of Queensland and the Northern Territory, courts in 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.⁵⁶

Views in submissions and consultations

- 6.45 The majority of submissions and consultations were supportive of extending the jurisdiction of the Children's Court to determine unfitness.⁵⁷ The reasons for extending the jurisdiction of the Children's Court were both to address concerns about the inappropriateness of these matters having to go through the committal process and be transferred to the higher courts and to address the 'artificial decision making' that occurs without transparency and judicial oversight.⁵⁸
- 6.46 The Victorian Equal Opportunity and Human Rights Commission argued that young people with a mental impairment do not have the same right as other young people to have their matter heard in the specialist jurisdiction of the Children's Court:

The current process under the CMIA where children and young people with the additional vulnerability of a mental condition are removed from this specialist jurisdiction where a question of unfitness is raised conflicts with children's rights. Namely, the right to a criminal procedure that takes into account his or her age and potentially also with the human right of children to such protection as is required in his or her best interests by reason of being a child. This process also potentially conflicts with the right of every person to enjoy their human rights without discrimination and with the fundamental principle 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'.⁵⁹

- 6.47 Victoria Legal Aid explained that under the current CMIA regime, practitioners avoid raising unfitness or the defence of mental impairment and that 'judicial officers try to creatively negotiate appropriate solutions for the accused external to the CMIA'.⁶⁰
- 6.48 The Criminal Bar Association agreed with this view, arguing that leaving the therapeutic jurisdiction of the Children's Court often means that parties involved have to resort to solutions outside the criminal justice system to reach a good outcome for the young person, where lawyers and police try 'to find pragmatic resolutions of matters' to avoid the matter being committed to the higher courts.⁶¹ Approaching matters in this way was said to be time-consuming, inconsistent and lacking the benefit of judicial oversight and transparency.⁶²

53 *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 4, pt 3; *Criminal Law Consolidation Act 1935* (SA) pt 8A div 3; *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 4, pt 2; *Crimes Act 1900* (ACT) s 310.

54 See *Mental Health Act 2000* (Qld) s 256; *R v AAM*; *Ex parte Attorney-General of Queensland* [2010] QCA 305 (5 November 2010) [7]–[9].

55 *Mental Health and Related Services Act* (NT) s 77.

56 New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion*, Final Report No 135 (2012) 359.

57 See, eg, Submission 33 (Commission for Children and Young People). Consultations 54 (Dr Katinka Morton); 46 (County Court of Victoria—judges).

58 Submissions 27 (Victoria Legal Aid); 33 (Commission for Children and Young People); 25 (Criminal Bar Association).

59 Submission 29 (Victorian Equal Opportunity and Human Rights Commission).

60 Submission 27 (Victoria Legal Aid).

61 Submission 25 (Criminal Bar Association).

62 Ibid.

- 6.49 The Commission for Children and Young People agreed that inconsistent decision making can result from engaging in ‘artificial decision making’ in the absence of judicial oversight.⁶³ It was also argued that a lack of outcome in the Children’s Court means the young person does not have the benefit of early and therapeutic interventions that ‘benefit all parties [by] providing improved protection of the community’.⁶⁴
- 6.50 Inconsistency in decision making can result from a lack of guidance, such as in the exercise of prosecutorial discretion, which is critically important when applied to young people who need to understand the link between offending behaviour and consequences including therapeutic intervention.⁶⁵
- 6.51 One submission argued that ‘the lack of resources available for assessment and optimisation of fitness for young people consequently discriminates against young people on the basis of their age’.⁶⁶ This view was supported by the Victorian Equal Opportunity and Human Rights Commission who argued that providing an equivalent process to a special hearing in the Children’s Court is required to meet human rights requirements, and suggested that section 522 may provide some assistance:

Section 25(3) of the Charter states the right of children to ‘a procedure that takes account of his or her age.’ Consistently with this right, if special hearings do apply in the Children’s Court the procedural requirements in section 522 of the CYFA, or procedural requirements equivalent to those, should apply to make such hearings appropriate for young people.⁶⁷

The Commission’s conclusion

- 6.52 In Chapter 5, the Commission recommended an extension of the CMIA to the Magistrates’ Court to remedy the inefficiencies in the system, the divergent approaches taken by those who work within it and the unsatisfactory and often unfair results for accused, victims and the community. The Commission is of the view that the Children’s Court should similarly be given an express power in the CYFA to determine unfitness, conduct special hearings to determine criminal responsibility after a finding of unfitness and make orders following findings of unfitness and the defence of mental impairment. The reasoning provided in support of the recommendations in Chapter 5 also applies in relation to the Children’s Court.⁶⁸
- 6.53 Additionally, in light of the information available to the Commission that issues of unfitness to stand trial are more common than issues of mental impairment among young people and are largely underpinned by intellectual disability (see [2.33] in Chapter 2), it is particularly important to provide the power to the Children’s Court to determine unfitness. This will avoid young people being dealt with in the County Court and will enable the issues of unfitness to be dealt with more appropriately and expeditiously in the specialised jurisdiction of the Children’s Court.
- 6.54 The Commission considers that the CYFA is the most appropriate legislation to incorporate the power to determine unfitness and expand the powers to make orders, given its specialised approach to dealing with young people in criminal proceedings.
- 6.55 The Commission is of the view that the jurisdiction of the Children’s Court should not be extended unless a youth forensic facility is established to provide treatment and supervision to young people subject to CMIA hearings (see further [6.208]–[6.249]).

63 Submission 33 (Commission for Children and Young People).

64 Ibid.

65 Ibid.

66 Consultation 54 (Dr Katinka Morton).

67 Submission 29 (Victorian Equal Opportunity and Human Rights Commission).

68 See Chapter 5 at [5.38]–[5.42] and [5.55]–[5.61].

Recommendations

39 The *Children, Youth and Families Act 2005* (Vic) should be amended to provide for the Children's Court to:

- (a) determine whether a young person is unfit to stand trial
- (b) conduct special hearings after a finding of unfitness, and
- (c) make orders following a finding that the young person is not criminally responsible because of mental impairment or that the young person's conduct has been proved on the evidence available (but the young person is unfit to stand trial).

The amendments should be provided for in a new part in Chapter 5 of the *Children, Youth and Families Act 2005* (Vic).

40 Recommendation 39 should be implemented in conjunction with Recommendation 49 to establish a youth forensic facility in Victoria to provide for the assessment, treatment and supervision of young people in relation to unfitness to stand trial and the defence of mental impairment.

6.56 The Commission is of the view that the establishment of a youth forensic facility is required for the successful implementation of the recommendation to extend the application of the CMIA to the Children's Court.

Criminal jurisdiction of the Children's Court

6.57 The supplementary terms of reference ask the Commission to consider whether the current criminal jurisdiction of the Children's Court should apply when unfitness to stand trial or the defence of mental impairment is raised.

6.58 Given the special vulnerability of young people with mental conditions such as a mental illness or intellectual disability, consideration of this issue raises questions about whether young people with mental conditions should be dealt with in the higher courts in any circumstance.

6.59 In its supplementary consultation paper, the Commission sought views on whether any changes were required to the current criminal jurisdiction of the Children's Court if the application of the CMIA were to be further extended in the Children's Court. In particular, the Commission sought views on:

- whether all indictable and summary offences (excluding death-related offences and 'exceptional circumstances') should be dealt with in the Children's Court when mental impairment or unfitness is an issue, and
- what factors should be considered in deciding whether a matter should proceed via committal and transfer to higher courts where unfitness or the defence of mental impairment is raised.

Embrative jurisdiction of the Children's Court

- 6.60 Where a young person is charged with an indictable offence (other than a death-related offence), the matter may be committed from the Children's Court to a higher court—either the Supreme Court or County Court. This may occur when the young person (or their parents, in some situations)⁶⁹ objects to a summary hearing,⁷⁰ or where the judge decides that 'exceptional circumstances'⁷¹ justify a hearing by judge and jury in the higher courts.⁷²
- 6.61 In *D (a Child) v White*,⁷³ Justice Nathan stated that as the Children's Court has an 'embrative' jurisdiction relating to children, reasons to transfer a matter must be 'special; not matters of convenience or to avoid difficulties'⁷⁴ and that 'special' in the statutory form means 'very unusual'.⁷⁵ This was approved and furthered by Justice Cummins in *A Child v A Magistrate of the Children's Court*,⁷⁶ in which he added that 'exceptional' in the statutory form means 'very unusual', and that construction of the legislation as a 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'.⁷⁷
- 6.62 Justice Vincent described the legislative scheme relating to young people 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.⁷⁸

Conduct of committal proceedings

- 6.63 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 young person.⁷⁹ The court must then provide reasons for choosing not to determine the matter summarily.⁸⁰
- 6.64 The Children's Court is provided with two possible outcomes following such a committal hearing:
- discharging the young person
 - directing the young person to be tried in the higher courts,⁸¹ either remanded in custody or bailed until that time.⁸²
- 6.65 The procedure to be followed in a committal proceeding is found in the *Criminal Procedure Act 2009* (Vic).⁸³

69 *Children, Youth and Families Act 2005* (Vic) s 356(4).

70 *Ibid* s 356(3)(a).

71 Or 'special reason', as the standard was expressed in the *Children's Court Act 1973* (Vic) s 15(3).

72 *Children, Youth and Families Act 2005* (Vic) s 356(3)(b).

73 [1988] VR 87. This case considered s 15(3) of the *Children's Court Act 1973* (Vic), equivalent to the current ss 356(3)–(4) of the *Children, Youth and Families Act 2005* (Vic).

74 *D (a Child) v White* [1988] VR 87, 93.

75 *Ibid* 91.

76 [1992] VSC 58 (24 February 1992).

77 *Ibid* [6].

78 *DL (A Minor by his Litigation Guardian) v A Magistrate of the Children's Court* (Unreported, Supreme Court of Victoria, Vincent J, 9 August 1994) [4].

79 *Criminal Procedure Act 2009* (Vic) ss 141(4)(b)–(c), 142(1)(b).

80 *Children, Youth and Families Act 2005* (Vic) s 356(3).

81 The Director of Public Prosecutions decides to which higher court the person is to be committed for trial: Director of Public Prosecutions, *Director's Policy on the Prosecutorial Discretion* (Policy No 2, 2014).

82 *Children, Youth and Families Act 2005* (Vic) ss 516(1)(c)(i)–(ii).

83 *Criminal Procedure Act 2009* (Vic) ss 129–140.

Offences excluded from jurisdiction

- 6.66 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.
- 6.67 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 an accused who is a young person, or was a child 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 committal to the Supreme Court or County Court.

Views in submissions and consultations

Retaining the current jurisdiction of the Children's Court

- 6.68 Consultations supported retaining the current jurisdiction of the Children's Court but participants were of the view that matters involving mental impairment or unfitness should be dealt with in the Children's Court where possible.⁸⁴
- 6.69 One participant in a consultation with the President and magistrates of the Children's Court in Melbourne was of the opinion that it was beneficial for vulnerable young people to have their matter dealt with in the Children's Court because the Children's Court has the capacity to hear these cases, the approach it takes is appropriate and there were advantages in relation to time, cost and the environment.⁸⁵

The exceptional circumstances criteria

- 6.70 Some submissions supported the application of the exceptional circumstances criteria in CMIA matters to determine which matters are dealt with in the higher courts.⁸⁶ However, other stakeholders felt that the seriousness of the offence was not an appropriate factor to be considered in determining the jurisdiction of matters where issues of unfitness or the mental impairment defence is raised.
- 6.71 It was suggested in a consultation with the President and magistrates of the Children's Court in Melbourne that while there is a need to consider exceptional circumstances in some cases, summary and indictable offences often must be dealt with together in this jurisdiction and it was therefore important that both types of offence remain within the jurisdiction of the Children's Court in relation to these matters.⁸⁷

84 Consultations 46 (County Court of Victoria—judges); 48 (Children's Court—President and magistrates, Melbourne).
85 Consultation 48 (Children's Court—President and magistrates, Melbourne).
86 Submissions 25 (Criminal Bar Association); 24 (Office of Public Prosecutions).
87 Consultation 48 (Children's Court—President and magistrates, Melbourne).

- 6.72 The Office of Public Prosecutions considered that the seriousness of the offence, community protection and the adequacy of the dispositions available in the Children's Court should be factors taken into account in considering when a matter should proceed by way of committal and transfer to a higher court.⁸⁸ The Victorian Equal Opportunity and Human Rights Commission supported this view. However, it proposed that the human rights of the young person should also be considered in relation to their best interests and the right to a fair trial, including the right to expeditious and age-appropriate proceedings.⁸⁹
- 6.73 In a consultation with judges of the County Court, however, it was suggested that there is a need to 'look beyond the charge and the nature of offending' given the differences between offending behaviour in young people and adults.⁹⁰ One judge provided the example of the offence of armed robbery, explaining that in the County Court, this charge tended to relate to the use of guns and knives in a robbery, whereas in the Children's Court, it would be more likely to relate to young people robbing other young people with a pocket knife.⁹¹

Expertise of the Melbourne Children's Court

- 6.74 Two consultations raised the issue that regional courts may not have the capacity given their current workloads to adopt a specialised approach in the Children's Court to CMIA cases.⁹² In a consultation meeting with the President and magistrates of the Children's Court, it was proposed that this issue could be addressed if regional courts could transfer cases to the Melbourne Children's Court which has the scope and ability to undertake this work.⁹³ It was also suggested in consultations that if all special hearings took place in Melbourne, the young person would benefit from the specialised approach of the Children's Court that is not always available in regional areas.⁹⁴
- 6.75 It was also suggested in a consultation with judges of the County Court of Victoria that where experts agree that the young person is unfit, a regional magistrate could dispose of the matter with only matters requiring a special hearing being transferred to the Melbourne Children's Court.⁹⁵
- 6.76 Another participant in the meeting with judges of the County Court supported the view that resources and expertise are required in dealing with these matters, but suggested that given the relative infrequency of CMIA matters, magistrates from the Melbourne Children's Court could be sent to regional areas to conduct special hearings.⁹⁶

The Commission's conclusion

- 6.77 The Commission recognises the vulnerability of young people with a mental condition in the criminal justice system and the specialist jurisdiction of the Children's Court. It is therefore of the view that all matters involving young people should be managed as far as possible using the principles and processes available in the Children's Court and that if 'a real and substantial question of fitness' has been raised, the court should consider keeping the matter within the specialist jurisdiction of the Children's Court.

88 Submission 24 (Office of Public Prosecutions).

89 Submission 29 (Victorian Equal Opportunity and Human Rights Commission).

90 Consultation 46 (County Court of Victoria—judges).

91 Ibid.

92 Consultations 48 (Children's Court—President and magistrates, Melbourne); 46 (County Court of Victoria—judges).

93 Consultation 48 (Children's Court—President and magistrates, Melbourne).

94 Consultations 45 (Youthlaw); 48 (Children's Court—President and magistrates, Melbourne).

95 Consultation 46 (County Court of Victoria—judges).

96 Ibid.

- 6.78 Given the expertise and specialist services that are being proposed as part of the model for the CMIA in the Children's Court and measures to optimise fitness, the Commission proposes that wherever the question of unfitness or the defence of mental impairment is raised, the matter should be transferred to and heard in the Melbourne Children's Court. The purpose of this recommendation is to concentrate the expertise in applying the principles and processes, and the services supporting the proposed model in the Children's Court.
- 6.79 Accordingly, the Commission makes three recommendations to preserve the current criminal jurisdiction of the Children's Court in CMIA matters and ensure matters regarding unfitness to stand trial are given specific consideration in decisions regarding the committal of young people.
- 6.80 The Commission proposes that the model initially be adopted in the Melbourne Children's Court, with the possibility of extending its operation to regional courts following a review after implementation (see Recommendation 14).

Recommendations

- 41 The current criminal jurisdiction of the Children's Court should apply, so that all summary and indictable matters currently within the jurisdiction of the Children's Court should continue to be heard in the Children's Court where unfitness to stand trial or the defence of mental impairment is raised.
- 42 Any matter over which the Children's Court has jurisdiction where unfitness to stand trial or the defence of mental impairment is raised should be transferred to and dealt with in the Melbourne Children's Court.
- 43 The exceptional circumstances criteria in section 356(3) of the *Children, Youth and Families Act 2005* (Vic) should include consideration of whether a matter should remain in the Children's Court jurisdiction where 'there is a real and substantial question of unfitness to stand trial'.

The Commission's approach to developing a model for the Children's Court

- 6.81 The supplementary terms of reference ask the Commission to consider whether the process for determining unfitness to stand trial in the CMIA should be adapted for application in the Children's Court. The Commission was also asked to consider, in relation to unfitness 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 regard to the Magistrates' Court.
- 6.82 In the following section, the Commission sets out the model it recommends to extend the application of the CMIA in the Children's Court.

6.83 The following section details:

- the creation of a presumption in favour of diverting young people who raise issues of unfitness to stand trial or the defence of mental impairment from the criminal justice system
- the process that should apply when a question of unfitness to stand trial is raised in the Children's Court jurisdiction
- processes to give effect to the presumption of a diversionary approach
- processes to 'optimise fitness'—through the creation of an 'assessment order'
- the process of determining criminal responsibility following a finding of unfitness to stand trial
- the power to make orders following a finding of not criminally responsible or following a special hearing
- the orders the Commission recommends to be available in the Children's Court.

6.84 Changes to the criteria for unfitness and the processes to optimise fitness (see Recommendations 15–21 in Chapter 3), and the definition of mental impairment and the test for establishing the defence of mental impairment (see Recommendations 24 and 25 in Chapter 4), will also apply in the Children's Court.

6.85 The process for determining unfitness and criminal responsibility in the Magistrates' Court is outlined in Chapter 5. The Commission is proposing a different process to apply in the Children's Court.

Prevalence of indictable offences involving young people

6.86 As part of its approach to developing a model for the CMIA in the Children's Court, the Commission has had regard to the prevalence of cases under the CMIA involving young people charged with indictable offences.

6.87 Nine of the 11 people who were dealt with in the higher courts under the CMIA from 2000–01 to 2011–12 who were aged under 21 years had been charged with offences that were within the jurisdiction of the Children's Court (non-death-related indictable offences).⁹⁷ Given the time that matters take to proceed and be heard in the higher courts (discussed at [2.39]), it can be assumed that most if not all nine cases involved an accused who was under 18 at the time of the offence. If so, these cases would have come within the criminal jurisdiction of the Children's Court. Overall, they comprise 5.7 per cent of the 159 cases dealt with in the higher courts and 8 per cent of the 112 matters dealt with in the County Court. This provides some indication of the number of cases that could have been dealt with in the Children's Court had it the power to deal with unfitness or impose orders after a finding of not guilty because of mental impairment.

A diversionary approach for young people

6.88 In the supplementary consultation paper, the Commission sought views on whether a program should be introduced in the Children's Court to divert young people away from the criminal justice system where unfitness or the defence of mental impairment is raised.

6.89 The Commission asked whether a diversion program should be introduced in the Children's Court and in particular, what eligibility factors should be considered and how a diversion program should interact with other powers that may be recommended to deal with unfitness and the defence of mental impairment in the Children's Court.

Diversion programs for young people in Victoria

- 6.90 There is currently no formal diversion program for young people appearing in the Children’s Court in Victoria. However, both Victoria Legal Aid and the Sentencing Advisory Council have supported the introduction of diversion options for young people in Victoria:
- Victoria Legal Aid’s 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 benefits of diversion for young people.⁹⁸
 - The Victorian Sentencing Advisory Council has stated that ‘the absence of a comprehensive state-wide diversion program for young people can lead to inequitable outcomes and possibly also to net-widening in certain areas’.⁹⁹
- 6.91 The New South Wales Law Reform Commission has recently published an extensive report on diversion in the criminal justice system where it was argued that:
- The 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.¹⁰⁰

Views in submissions and consultations

Support for a diversionary focus

- 6.92 There was strong support in submissions and consultations for a diversionary focus in any approach to extend the application of the CMIA in the Children’s Court, and for the view that young people should be diverted away from the criminal justice system wherever possible.¹⁰¹ One participant in a consultation with judges of the County Court stated that there should be a ‘legislative preference’ for young people to remain in the community to receive treatment, support and supervision prior to considering custodial options.¹⁰²
- 6.93 Victoria Legal Aid highlighted the importance of both the court process and the potential outcomes for young people being ‘appropriately diversionary and therapeutic in nature’ and consistent with the objectives of the CYFA.¹⁰³
- 6.94 The Criminal Bar Association argued that formal criminal proceedings should always be the last resort and that courts should have ‘broad diversionary powers to adjourn matters and allow appropriate therapeutic intervention with a view to ultimately dismissing matters’.¹⁰⁴ The Criminal Bar Association was of the view that formal proceedings ‘should only be pursued where diversion has failed (through non-compliance or reoffending) or is inappropriate for other reasons (eg. the seriousness of the offending)’.¹⁰⁵
- 6.95 One participant in the Commission’s roundtable with legal practitioners on the Children’s Court argued that diversion is a useful method in avoiding delays in proceedings and delivering good outcomes.¹⁰⁶

98 Victoria Legal Aid, Submission to the Department of Justice on ‘Improving Diversion for Young People in Victoria’, September 2012.
99 Sentencing Advisory Council, *Sentencing Children and Young People in Victoria* (2012) 28.
100 New South Wales Law Reform Commission, above n 56, 368.
101 Submissions 27 (Victoria Legal Aid); 25 (Criminal Bar Association); 33 (Commission for Children and Young People); 28 (The Australian Clinical Psychology Association); 30 (Victoria Police). Consultations 46 (County Court of Victoria—judges); 51 (Children’s Court roundtable—legal practitioners).
102 Consultation 46 (County Court of Victoria—judges).
103 Submission 27 (Victoria Legal Aid).
104 Submission 25 (Criminal Bar Association).
105 Ibid.
106 Consultation 51 (Children’s Court roundtable—legal practitioners).

Eligibility criteria

- 6.96 In considering eligibility criteria for a diversionary program in the Children's Court, some submissions proposed the seriousness of the offence as the main factor to be taken into consideration.¹⁰⁷
- 6.97 The Office of Public Prosecutions agreed that diversionary options should be considered and that criteria for diversion could include consideration of the seriousness of the offence, the need to protect the community and the rehabilitation of the young person.¹⁰⁸
- 6.98 The Commission for Children and Young People argued that the eligibility criteria for participation in a diversionary program should be wide. However, it raised concerns about the requirements for participation being realistic so that a young person is able to comply with them and that programs meet the cultural and geographical needs of participants:
- It has also been argued that for Indigenous offenders especially, having a focus on illicit drugs misses that the major issue is alcohol ... This example demonstrates the importance of the program being tailored to respond to the actual needs of the young people concerned. Those young people from CALD and refugee or asylum seeker backgrounds will similarly require programs that are culturally appropriate with suitably trained staff. It is also important that consideration is given to how young people from rural and remote areas will be able to effectively participate in the program given the paucity of services in many areas.¹⁰⁹
- 6.99 The Australian Clinical Psychological Association highlighted the need for any diversion program to focus on the rehabilitative needs of the young person:
- For children and young people an educational [program] which addresses ...
A language impairment or learning disorder and allows them to re-enter the education system would be advantageous. Income and accommodation support, pre-employment training and employment services should also be investigated and made available if possible.¹¹⁰
- 6.100 One participant in the Commission's clinician roundtable consultation on the Children's Court stressed the importance of addressing the underlying causes of the young person's behaviour in a diversion program:
- A child with a standard clinical history in this area cannot live at home, has drug and alcohol issues, and may resort to theft to support those activities. The provision of structure, stable housing and attachments cost money—that is where the functional problem lies. If those structures are in place then all the other behaviour would ameliorate.
- 6.101 In a consultation with representatives of Victoria Police, early detection and engagement in treatment were considered as a means of protecting the community:
- Obtaining/accessing treatment may be the best outcome for the child and for the protection and safety of the community—incarceration is really only contemplated when all other options are exhausted. This makes for a less formal and more co-operative jurisdiction—both sides become slightly more flexible as they are working towards a 'common purpose'.¹¹¹

107 Submissions 25 (Criminal Bar Association); 24 (Office of Public Prosecutions).

108 Submission 24 (Office of Public Prosecutions).

109 Submission 33 (Commission for Children and Young People).

110 Submission 28 (The Australian Clinical Psychology Association).

111 Consultation 44 (Victoria Police—Children's Court police prosecutor and policy staff).

The Commission's conclusion

- 6.102 As discussed at [6.21], there are multiple layers of vulnerability faced by young people who come into contact with the criminal justice system. Young people who are likely to come under the CMIA regime may be dealing with a mental illness, intellectual disability, other cognitive impairment, drug and alcohol use, language and communication difficulties, developmental issues, emotional irregularity, backgrounds of trauma and contact with the child protection system.¹¹²
- 6.103 In many cases, factors in the life of a young person may be responsible for their offending behaviour and therefore programs that address these underlying issues have been found to reduce reoffending. As one study argued, '[t]he broader service system is required to identify and respond to a series of risk and protective factors if young people's criminal and other risky behaviours are to be curbed, and if more positive and sustainable outcomes are to be achieved [citation omitted]'.¹¹³
- 6.104 The Commission agrees that young people with a mental illness or other cognitive impairment require a special response from the criminal justice system. Unlike adults, the brains of young people have not fully matured.¹¹⁴ This can result in problems with impulse control and social behaviour on the one hand, while potentially providing a higher capacity for rehabilitation on the other.¹¹⁵
- 6.105 It has also been found that young people 'grow out' of crime with offending rates peaking in late adolescence and declining in early adulthood.¹¹⁶ 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'.¹¹⁷
- 6.106 Further, there is evidence to suggest that custodial settings themselves may contribute to recidivism in young people. Research has indicated that the effects of institutionalisation can lead young people to reoffend:
- It has also been shown that when incarcerated for long periods of time; young people may experience institutionalisation (a decreasing ability to live independently), poor self-concept, and have less developed psycho-social maturity ... Finally, young people can strengthen criminal social networks and be socialised into deeper criminal lifestyles.¹¹⁸
- 6.107 Accordingly, the Commission supports the principle that young people who appear in the criminal justice system and raise issues of unfitness to stand trial or the defence of mental impairment should be diverted away from the criminal justice system and where appropriate, a diversion program should support a young person to remain in the community.
- 6.108 The Commission therefore recommends the introduction of statutory principles in the CYFA to support this diversionary approach under the proposed extension of the powers of the Children's Court under the CMIA.

112 See, eg, the statistical snapshot contained in Youth Parole Board and Youth Residential Board Victoria, *Annual Report 2012–13* (2013) 13.
 113 Tim Moore, Morag McArthur and Vicky Saunders, 'Young People Talk about Transitioning from Youth Detention to the Community: Making Good' (2013) 66(3) *Australian Social Work* 328, 329.
 114 Eraka Bath and Joan Gerring, 'National Trends in Juvenile Competency to Stand Trial' (2014) 53(3) *Journal of the American Academy of Child & Adolescent Psychiatry* 265, 266–7.
 115 New South Wales Law Reform Commission, above n 56, 367–8.
 116 Richards and Renshaw, *Australian Institute of Criminology*, above n 32, 2.
 117 *Ibid* 5.
 118 Moore, McArthur and Saunders, above n 113, 329.

Recommendation

- 44 The *Children, Youth and Families Act 2005* (Vic) should be amended to require that in matters in the Children's Court involving young people where unfitness or the defence of mental impairment is raised there are presumptions in favour of:
- (a) diverting the young person from the criminal justice system, and
 - (b) the young person's treatment and support taking place in the community.

- 6.109 This presumption is to be exercised in the context of the statutory principles recommended in Recommendations 4 and 5 in Chapter 2 to apply to young people under the CMIA and is supported by the proposed process for determining unfitness and criminal responsibility in the Children's Court as set out below.

Process when a question of unfitness to stand trial is raised in the Children's Court

Current process for determining unfitness

- 6.110 As discussed in Chapter 3, the criteria for determining whether a person is unfit to stand trial are outlined in section 6 of the CMIA. Where the question of unfitness is raised, the matter 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.
- 6.111 There is currently no process for determining unfitness to stand trial in the Children's Court. 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' provision in section 356(3) of the CYFA to order that a young person be tried in the higher courts in cases involving indictable matters where the issue of unfitness is raised. 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.

Current process for determining criminal responsibility after a finding of unfitness

- 6.112 A special hearing as currently provided for in the CMIA is a means of determining the criminal responsibility of a person who has been found unfit to stand trial. The process for conducting a special hearing is outlined in Chapter 9.
- 6.113 There is currently no jurisdiction to conduct special hearings in the Children's Court. As part of the usual criminal process in the Children's Court, the Court must take steps to ensure the young person understands the 'nature and implications of the proceedings' and is allowed to 'participate fully in proceedings'. These requirements are contained in section 522 of the CYFA.

- 6.114 In recognition of the fact that any young person may have difficulties in understanding and participating in proceedings because of their stage of development, the judge or magistrate must undertake an assessment for all young people coming before the Children’s Court, not just those with a mental condition. In doing so, the magistrate must necessarily consider and form a view about the capacity of all young people in the criminal jurisdiction to understand and participate in proceedings.
- 6.115 The Commission sought views on whether procedural modifications would be required to make hearings appropriate for young people if special hearings were to apply in the Children’s Court.

Processes involving young people in the higher courts

- 6.116 Aside from the seven excluded offences listed above at [6.66], the Children’s Court must generally determine all matters involving summary and other indictable offences relating to people who are young people, 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 transferred to the Supreme Court or County Court (see [5.6]–[5.11] on the committal process).
- 6.117 Currently, where matters involving young people are transferred to the higher courts, the CMIA processes apply. Difficulties are associated with trying young people in the higher courts given that the courtroom environment can be intimidating and the processes confusing. This is even more so for young people who may be unfit.
- 6.118 The inappropriateness of the formal setting of a higher court in matters involving vulnerable young people and the need for support and modifications to proceedings was an issue discussed in the case of *CL at trial*. While not binding, the court 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 support measures that should be implemented by higher courts when conducting trials involving young people.¹¹⁹ These measures have now been incorporated into a new Practice Direction in the United Kingdom on the treatment of vulnerable defendants and 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.¹²⁰
- 6.119 This was endorsed by Acting Justice of Appeal Sifris with whose judgment Chief Justice Warren agreed, in the Court of Appeal in *CL on appeal*.¹²¹

119 *CL (A Minor) v Lee* (2010) 29 VR 570, 590.

120 This Practice Direction was incorporated into the one Practice Direction applying in the Crown and Magistrates’ Courts in the United Kingdom. See Crown Court and Magistrates’ Courts (UK), *Practice Direction—Part III.30: Further Practice Directions Applying in The Crown Court and Magistrates’ Courts – Criminal Procedure Rules, Treatment of Vulnerable Defendants* (19 April 2013) <<http://www.justice.gov.uk/courts/procedure-rules/criminal/practice-direction/part3>>.

121 *CL, A Minor (by his Litigation Guardian) v Director of Public Prosecutions (on behalf of Lee)* [2011] VSCA 227 (5 August 2011) [51].

Views in submissions and consultations

Process for determining unfitness in the Children's Court

- 6.120 In a meeting with judges of the County Court it was proposed that in matters where the issue of unfitness is raised and the young person is charged with a summary offence, the matter should be withdrawn either through a determination of unfitness or through agreement between the parties.¹²²

Process for determining criminal responsibility in a special hearing in the Children's Court

- 6.121 A participant in a meeting with the President and magistrates of the Children's Court in Melbourne advised that section 522 of the CYFA contained provisions that were tantamount to a special hearing and that introducing special hearings into the Children's Court 'wouldn't change much' as these processes are already provided for in the system.¹²³
- 6.122 The Australian Clinical Psychology Association suggested that something more than the requirements of section 522 would be required in conducting special hearings in the Children's Court. The Australian Clinical Psychology Association argued that the young person's level of language and cognition must be taken into account in conducting special hearings. It submitted that to communicate effectively with young people, there is a need to:
- have [a] basic understanding of their development especially their language and cognitive development. This will allow us to understand their thinking and language capabilities and ask developmentally appropriate questions. Logic dictates that if children are to be treated fairly, then the court must accommodate itself to their level of cognition and communication.¹²⁴
- 6.123 The Commission for Children and Young People agreed with this view, expressing reservations about the applicability of the participation requirement in section 522. It submitted:
- If special hearings were to apply in the Children's Court, it would seem that section 522 of the Children, *Youth and Families Act 2005*, would provide a process for managing such matters. However, the requirement that the child be allowed to participate fully may need to be modified to 'the child participate to the extent that he/she is capable of' given that in special hearings for cases involving adult defendants, the accused person is not expected to participate in the hearing.¹²⁵
- 6.124 In considering the timeframes that might apply in a special hearing process in the Children's Court, it was suggested that a 12-month adjournment as is currently specified under the CMIA would be too long for young people 'in terms of delivering a therapeutic response [as] early assistance is required'.¹²⁶ A participant in a meeting with the President and magistrates of the Children's Court in Melbourne raised developmental issues in relation to timeframes for special hearings with young people, stating that a 'complicating issue' is that young people may develop the capacity with time.¹²⁷

122 Consultation 46 (County Court of Victoria—judges).
 123 Consultation 48 (Children's Court—President and magistrates, Melbourne).
 124 Submission 28 (The Australian Clinical Psychology Association).
 125 Submission 33 (Commission for Children and Young People).
 126 Consultation 48 (Children's Court—President and magistrates, Melbourne).
 127 Ibid.

- 6.125 The Commission for Children and Young People also raised concerns about timeframes in the process of conducting a special hearing where delays may impact on the assessment process:

As young people are continually developing, significant changes can occur within shorter timeframes, making an assessment report compiled a few months earlier potentially no longer relevant. The generation of multiple reports given this scenario may represent systems abuse of the young person, raise issues of 'test fatigue' and impact upon test reliability, and reduce the efficacy of treatment given a lack of timely commencement and an inappropriate use of scarce therapeutic resources.¹²⁸

- 6.126 Two groups in submissions and consultations were of the view that a special hearing should be able to be conducted in the Children's Court by magistrate alone.¹²⁹

Processes involving young people in the higher courts

- 6.127 Where a matter is transferred to the higher courts under the exceptional circumstances criteria or as one of the seven death-related offences, one judge consulted by the Commission was supportive of these superior courts adopting special processes for young people, saying:

In the superior courts there is a need for special processes for children in matters under the CMIA and the measures that were talked about in *CL*, such as not wearing wigs or robes. The need for such support measures only arises in unusual circumstances in respect of very serious crimes. However, there are cases where modifications have been made to the process for the benefit of the accused.¹³⁰

- 6.128 The judge gave an example of a case involving a child who had been committed to a higher court. Counsel was instructed not to robe and the child sat with their social workers in the court who were attending as support people, as the child did not have contact with their parents. The process was run in an informal way, similar to that run in Children's Court.¹³¹

The Commission's conclusion

- 6.129 The Commission is of the view that greater flexibility is required in the ways in which young people who may be unfit or have a mental impairment are managed in criminal proceedings in the Children's Court. The current process requiring a young person to be committed to the higher courts where the issue of unfitness is raised is inconsistent with the principles underlying the CMIA and is not in line with current research that supports the use of diversion programs and a specialised approach to young people in the criminal justice system.
- 6.130 Under the proposed model for the application of the CMIA, the Children's Court will have the discretion to impose the following outcomes at various stages in the process:
- make an 'assessment order'
 - adjourn the matter for voluntary referral to a case worker program
 - discharge the matter after voluntary referral or assessment order
 - unconditionally release or declare a young person liable to supervision after a finding
 - impose a custodial or non-custodial therapeutic supervision order.

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Submission 33 (Commission for Children and Young People).
Submission 25 (Criminal Bar Association). Consultation 46 (County Court of Victoria—judges).
Consultation 46 (County Court of Victoria—judges).
Ibid.

6.131 The following recommendations are made to support the proposed approach in the model detailed in **Figure 5** below.

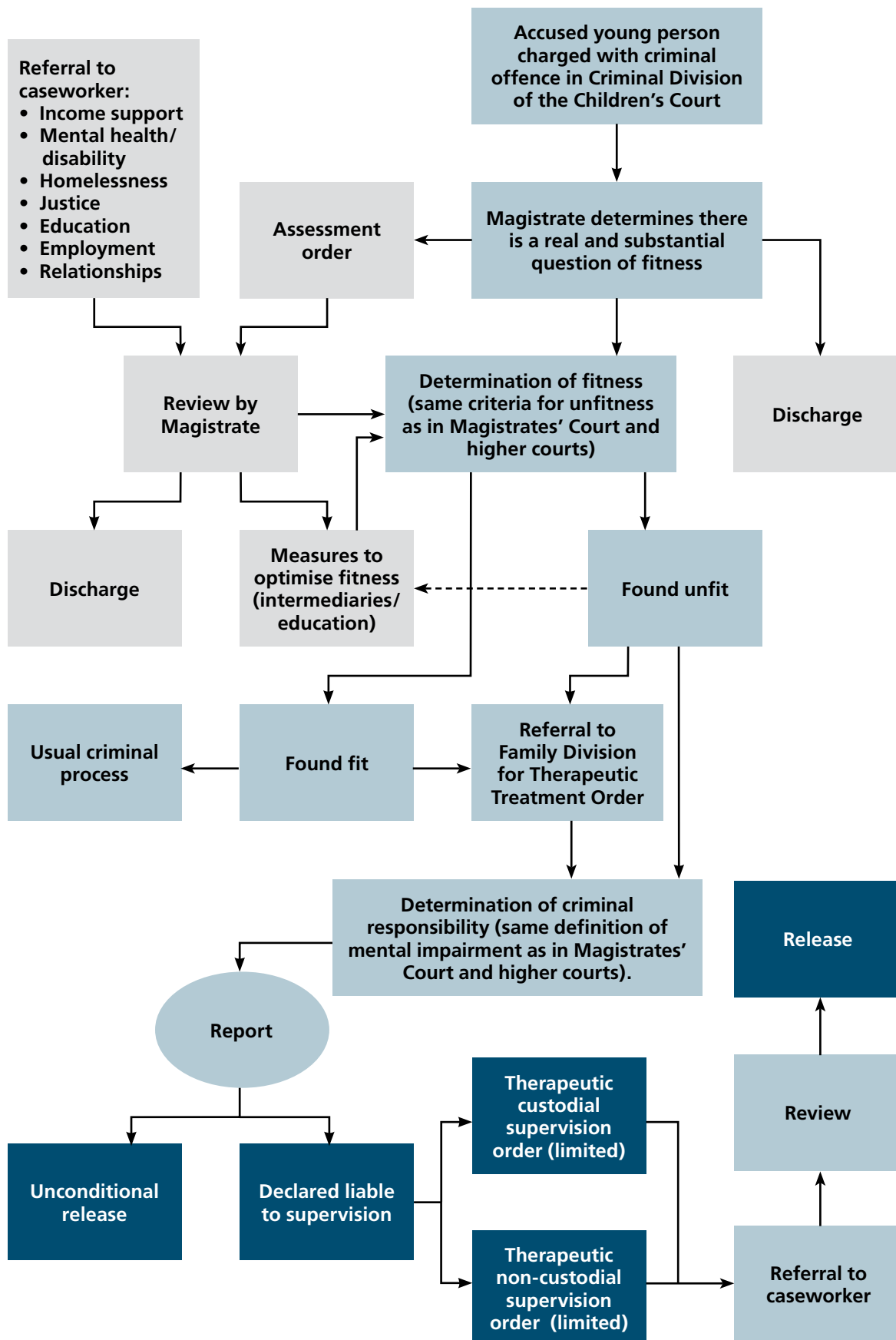


Figure 5: Proposed model for determining unfitness in the Children's Court under an extension of the CMIA

Recommendations

- 45 New provisions should be inserted into the *Children, Youth and Families Act 2005* (Vic) to create the following process to apply if the question of unfitness arises in a proceeding in the Children's Court for a summary offence or an indictable offence within the court's jurisdiction:
- (a) In the Children's Court, the question of the accused's unfitness to stand trial is to be determined on the balance of probabilities by the President or a magistrate.
 - (b) When the question of unfitness to stand trial is raised during the course of proceedings for an offence within the jurisdiction of the Children's Court, the President or a magistrate must determine whether there is a real and substantial question as to the unfitness of the accused.
 - (c) If the President or a magistrate determines that there is a real and substantial question as to the unfitness of the accused, they must either:
 - (i) conduct an investigation into the unfitness of the accused to stand trial, without unnecessary delay and as soon as is practicably possible within three months from the determination that there is a real and substantial question as to unfitness, or
 - (ii) make an order under paragraph (f).
 - (d) Upon determining there is a real and substantial question of unfitness to stand trial and for the purposes of paragraphs (c) and (e), if the President or magistrate considers it is in the interests of justice to do so, they may make an 'assessment order' for the accused to undergo a multi-disciplinary examination by accredited clinicians, at least one of whom must be a registered medical practitioner, as to:
 - (i) whether the accused is unfit to stand trial
 - (ii) whether the accused is likely to become fit within a particular period and what measures (education or treatment) would assist to restore the accused's fitness in that period, and
 - (iii) whether the accused is suitable for a voluntary referral to a case worker for treatment, services and support.
 - (e) Upon consideration of the assessment order, the President or a magistrate must:
 - (i) proceed to determine unfitness
 - (ii) adjourn the matter for a specified period to optimise the accused's fitness (with recommended measures to optimise fitness), or
 - (iii) adjourn the matter for a specified period for a voluntary referral to an established case worker program.
 - (f) At any time during the course of proceedings, after the President or a magistrate determines there is a real and substantial question as to the unfitness of the accused, and before the special hearing, the President or magistrate may discharge the accused with or without conditions if they consider:

Recommendations cont'd

- (i) that the accused does not pose an unacceptable risk of causing physical or psychological harm to another person or other people generally as a result of the discharge, and
 - (ii) the accused is receiving treatment, support or services in the community.
 - (g) For the purposes of paragraph (e), the Children's Court may adjourn a matter as many times as required within a 12-month period. In considering adjournments, delay to the accused should be minimised and the court should take a proactive approach to judicial management in the specialist jurisdiction of the Children's Court. The overall period of adjournments must not exceed 12 months.
 - (h) If the Children's Court finds an accused fit to stand trial before the special hearing, the proceedings should be resumed in accordance with the usual criminal procedures.
 - (i) If the Children's Court finds a person unfit to stand trial, it must either:
 - (i) proceed to hold a special hearing as soon as practicable within a period of three months
 - (ii) adjourn the matter for a specified period for a voluntary referral to an established case worker program, or
 - (iii) adjourn the matter for a referral for a Therapeutic Treatment Order.
 - (j) A special hearing must be conducted as nearly as possible as if it were a criminal procedure in the Children's Court, including the relevant provisions in section 16(2) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).
 - (k) Notwithstanding paragraphs (a)–(j), if the question of an accused's unfitness to stand trial arises in a matter that involves an offence that is excluded from the Children's Court jurisdiction or in a committal proceeding, the committal proceeding must be completed.
 - (l) If the accused is committed for trial, the question of the accused's unfitness must be reserved for consideration by the trial judge.
 - (m) If the accused is not committed for trial, and the matter is to be heard in the Children's Court, the question of the accused's unfitness must be investigated by the President or a magistrate in accordance with paragraphs (a)–(j).
- 46 To support the assessment order, a case worker program should be implemented and resourced.
- 47 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to specify that as far as possible, proceedings in the Magistrates' Court, County Court and Supreme Court involving young people who raise unfitness and the defence of mental impairment should be conducted in accordance with applicable principles and approaches in the *Children, Youth and Families Act 2005* (Vic).

Diversion under the proposed model in the Children's Court

- 6.132 Under the proposed model, where 'a real and substantial question of unfitness' is raised in the Children's Court, the court may:
- make an assessment order
 - proceed straight to a determination of unfitness.
- 6.133 If the court makes an assessment order, a multi-disciplinary team that includes psychiatrists, psychologists, neuropsychologists, speech pathologists and other health and medical professionals should assess the young person and identify any action that could be taken to address factors that may have contributed to the young person's offending behaviour.
- 6.134 A requirement of an assessment order would be that a report be provided to the court upon completion and that it:
- assess whether the young person is unfit to stand trial using the criteria for unfitness (outlined in Chapter 3 at [3.69]–[3.105])
 - make recommendations about support measures to optimise the young person's fitness (outlined in Chapter 3 at [3.106]–[3.143])
 - identify the young person's needs in terms of treatment and support services (for example, income support, homelessness, education, employment).
- 6.135 The purpose of ordering an assessment is to provide the President or magistrate of the Children's Court with information that will enable them to make a decision about whether the young person should be diverted from the justice system or be discharged before proceeding to a determination of criminal responsibility.
- 6.136 An assessment order should not be made solely to obtain an unfitness report for a young person. An assessment order should be only contemplated in circumstances where it is considered that the young person requires support to either optimise fitness or address their offending behaviour.
- 6.137 Under the model, the magistrate would review the report and would then have the following options:
- proceed to a determination of unfitness, or
 - refer the young person to a voluntary case worker program, or
 - refer the person for treatment, services or an education program to optimise fitness, or
 - discharge the young person.
- 6.138 This process will create a diversion program for matters involving unfitness to stand trial and the defence of mental impairment in the Children's Court where the charges are adjourned to allow an opportunity to deal with the issues underlying the offending through the case worker program, or to work with the young person to optimise their fitness through an education program or treatment. This process is meant to serve these purposes:
- enable a proper assessment to occur in a stable environment (in a suitable youth forensic secure facility as is recommended later in this chapter)
 - provide an opportunity to address the factors underlying the alleged offending behaviour
 - provide an opportunity to access measures to optimise a young person's fitness
 - where appropriate, divert the young person away from the criminal justice system and 'CMIA pathway'.

- 6.139 The diversion program should be voluntary and should link the person with a dedicated case worker. The program may involve engaging the person in treatment, linking the person with disability supports, assisting the young person to find accommodation or employment and providing supports for the young person to continue or start education or employment. The case worker may also link the young person with income support services or services to help them form stable relationships in the community.
- 6.140 The young person could also be diverted to an education program as outlined in Recommendation 20 in Chapter 3, in order to optimise fitness where this is recommended in the report obtained following an assessment order.
- 6.141 Following referral to the case worker program, the young person would come before the magistrate in the Children's Court, who can then decide whether to:
- discharge the young person
 - refer the person for support measures to optimise fitness, or
 - proceed to a determination of unfitness.

Determination of unfitness

- 6.142 Where the person has engaged in treatment, services or an education program to optimise fitness, they will then proceed to a determination of unfitness. The criteria for determining unfitness are outlined in Chapter 3 and include a consideration of the developmental stage of the young person.
- 6.143 The same processes regarding an investigation of unfitness as outlined in the CMIA should apply in the Children's Court, with the exception that findings will be made by a magistrate or the President.
- 6.144 As in the higher courts, there is no limit on the number of times a magistrate or the President may adjourn proceedings to refer the young person for measures to optimise fitness but the overall period of adjournment must not exceed 12 months. In adjourning proceedings, however, the magistrate or the President in the Children's Court must consider the impact of delays on young people and take a proactive approach to judicial management in prioritising these cases. Adjournments must be consistent with the statutory principle outlined in this chapter to minimise delays in proceedings for young people.
- 6.145 In determining if the young person is unfit to stand trial, a magistrate or the President may:
- find the young person unfit and refer them for support measures to optimise fitness, or
 - find the young person unfit and refer them to the Family Division of the Children's Court for a Therapeutic Treatment Order (under Part 4.8, Division 3 of the CYFA), or
 - find the young person unfit and proceed to a determination of criminal responsibility in a special hearing in the Children's Court, or
 - find the young person fit and proceed to a determination of criminal responsibility in the Children's Court under the usual criminal processes in Part 5 of the CYFA, or
 - find the young person fit and refer them to the Family Division of the Children's Court for a Therapeutic Treatment Order (under Part 4.8, Division 3 of the CYFA).

Special hearings in the Children's Court

- 6.146 Section 16(2) of the CMIA relating to special hearings will also apply in the Children's Court.
- 6.147 If a magistrate finds a young person unfit to stand trial, a special hearing must be conducted within three months and should be conducted as nearly as possible as if it were a criminal procedure in the Children's Court.
- 6.148 The requirement to consider measures to optimise an accused's participation in proceedings as discussed at [3.123]– [3.126] in Chapter 3 should also apply to young people in the Children's Court, as far as possible. The Children's Court has expertise in allowing young people to 'participate fully in proceedings' given the requirements in section 522 of the CYFA. Recommendation 18 in Chapter 3 regarding optimising participation will support the operation of section 522.
- 6.149 Following a special hearing, the court may make a finding of:
- not guilty of the offence charged
 - the accused's conduct is proved but not criminally responsible because of mental impairment, or
 - the accused's conduct is proved on the evidence available.

Special hearings involving young people in the higher courts

- 6.150 Where matters involving young people are transferred to the higher courts under the exceptional circumstances criteria or as a death-related offence, the higher courts should conduct proceedings using the same principles and processes wherever possible.
- 6.151 A young person should be subject to the same specialised approach in the higher courts that is available in the Children's Court. However, the higher courts will have a wider range of orders available that would be appropriate for the more serious types of offences.

The process in committals

- 6.152 As with the recommendation made in relation to the Magistrates' Court, the Commission recommends that where a matter is an offence that is excluded from the Children's Court jurisdiction or in a committal proceeding, the committal proceeding should be completed. A separate procedure for committals will give the young person the benefit of a discharge, while ensuring that matters that should be heard in a higher jurisdiction can proceed through the committal process and be transferred in accordance with the usual procedures. The Commission's recommendations in relation to committals in Chapter 5 (Recommendations 37 and 38) should also apply in the Children's Court.
- 6.153 If there is a determination of the committal proceeding, and the young person is committed for trial, the question of unfitness to stand trial is reserved for determination by the trial judge in the jurisdiction to which the person is committed. If at the determination of the committal proceeding, the accused is not committed for trial, the court must discharge the young person.
- 6.154 Prior to the determination of the committal proceeding, if the court determines that the matter should be tried in the Children's Court, the question of the young person's unfitness should be investigated by the President or a magistrate in the Children's Court.

Outcomes and orders in the Children's Court

- 6.155 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 considered.
- 6.156 The process that follows particular findings in the unfitness and mental impairment process and the orders available under the CMIA process in the Supreme Court and County Court are outlined in Chapter 9.
- 6.157 As explained at [6.19], 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.

Indefinite orders and young people

- 6.158 A supervision order under the CMIA is an indefinite order.¹³² This means that the person can be subject to the order for an indefinite period, possibly for the rest of their life. Given the different principles that apply in the Children's Court in dealing with young people, it is important to avoid creating a regime which lacks the flexibility to set an appropriate timeframe for an order to apply.

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

- 6.159 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 that range from 6–18 months in duration.¹³³
- 6.160 Custodial orders require a conviction and are imposed for a maximum period of three years. They include:
- a youth residential order (10–14-year-olds)¹³⁴
 - a youth justice centre order (15–20-year-olds).¹³⁵
- 6.161 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.¹³⁶
- 6.162 The Commission sought views on whether the Children's Court should be given the power to make orders following findings in relation to unfitness and the defence of mental impairment. In particular, the Commission asked what orders should be available in both the Children's Court and in the higher courts when a matter is transferred under the exceptional circumstances provision or as one of the seven death-related offences' described at [6.66].
- 6.163 The Commission also questioned the suitability of indefinite supervision orders for young people in the supplementary consultation paper.

¹³² *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 27(1).

¹³³ *Children, Youth and Families Act 2005* (Vic) ss 360(e)–(g). Good behaviour bonds, fines and youth supervision orders may also be made with a conviction.

¹³⁴ *Ibid* ss 360(1)(i), 410.

¹³⁵ *Ibid* ss 360(1)(j), 412.

¹³⁶ *Ibid* ss 360(1)(h), 397.

Therapeutic treatment order

- 6.164 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.¹³⁷ A therapeutic treatment order requires the young person to participate in an appropriate therapeutic treatment program.¹³⁸ It remains in force for a period of up to 12 months to ensure the young person's access to or attendance at the program.¹³⁹
- 6.165 Where a young person has participated in a therapeutic treatment program as part of the conditions of the order, the Children's Court is required to discharge the young person without any further hearing of the related criminal proceedings.¹⁴⁰

Views in submissions and consultations

Concerns about indefinite orders

- 6.166 The majority of submissions did not support the imposition of indefinite orders for young people.¹⁴¹ One clinician expressed concern about subjecting young people to indefinite supervision orders, stating that limited supervision orders with more frequent reviews are more likely to ensure that young people remain engaged.¹⁴²
- 6.167 Liberty Victoria supported this view arguing that they do 'not see any circumstance where it would be appropriate for a young person to be placed on an indefinite order'.¹⁴³ The Criminal Bar Association agreed with this view, stating that indefinite orders for young people would create a disincentive to raising the issue of unfitness or mental impairment and imposing such orders on young people with a mental condition would 'fundamentally violate the overriding aims of the Children's Court, particularly the minimisation of stigma'.¹⁴⁴
- 6.168 The Victorian Equal Opportunity and Human Rights Commission considered that the use of indefinite orders for young people could not be justified under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Charter') as a necessary limitation on their human rights:
- the indefinite nature of an order is contrary to the therapeutic aim of the process. The Commission considers that an indefinite order could limit a number of human rights protected in the Charter ... The Commission does not consider the limitations on these rights resulting from imposing an indefinite order on a child or young person could be justified as necessary or reasonable in accordance with section 7(2) of the Charter.¹⁴⁵
- 6.169 The Commission for Children and Young People agreed with this view, arguing that indefinite orders do not take into account the continual development of the young person:
- Making young people subject to indefinite orders means that the orders will not be responsive to the changing nature and needs of the young person for support and supervision. Indefinite orders may also have a detrimental effect, given their nature, on the recovery of young people subject to the CMIA, as the young person may come to believe that there is no goal for them to work towards, thus undermining the therapeutic aim of the process.¹⁴⁶

137 Ibid s 244(a).

138 Ibid s 249(1).

139 Ibid ss 248, 250.

140 Ibid s 354(4).

141 Submissions 29 (Victorian Equal Opportunity and Human Rights Commission); 32 (Liberty Victoria); 26 (Youthlaw). Consultations 54 (Dr Katinka Morton); 52 (Dr Adam Deacon).

142 Consultation 54 (Dr Katinka Morton).

143 Submission 32 (Liberty Victoria).

144 Submission 25 (Criminal Bar Association).

145 Submission 29 (Victorian Equal Opportunity and Human Rights Commission).

146 Submission 33 (Commission for Children and Young People).

- 6.170 The Commission for Children and Young People also raised the issue of the message indefinite orders may send to victims and their families and the community, that ‘there is no prospect for improvement for them’.¹⁴⁷

Support for limited supervision orders

- 6.171 One participant in a meeting with judges of the County Court of Victoria considered that a limited supervision order may be an appropriate option in certain circumstances. Their view was that where an accused is unfit to stand trial and charged with summary offences, the charges could be withdrawn or dismissed, and that for unfit accused charged with indictable offences, the ‘response should depend on the seriousness of the offence’. It was proposed that for less serious indictable offences, options could include dismissing the charges or diversion and that for serious indictable offences, a time-limited non-custodial supervision order could be imposed. It was suggested that such an order could be reviewed every six months until the young person is 21 years of age.¹⁴⁸
- 6.172 One participant in a meeting with the President and magistrates of the Children’s Court highlighted the importance of a magistrate having a range of options to take into account the wide jurisdiction of the Children’s Court.¹⁴⁹ It was suggested that a ‘whole new framework of therapeutic orders’ is required as magistrates in the Children’s Court currently do not have sufficient powers at their disposal to provide appropriate supervision and therapeutic supports.¹⁵⁰
- 6.173 Youthlaw supported this view, arguing for a flexible approach in relation to orders and that young people could be engaged in intensive supervision and support through a range of options, from unconditional discharges to limited non-custodial supervision orders.¹⁵¹

Decision-making principles

- 6.174 The Victorian Equal Opportunity and Human Rights Commission considered the decision-making principles that may apply when considering the appropriate order for a young person under the CMIA:
- Taking into account the differences between sentencing a young offender and deciding on the disposition of a young offender under the CMIA, it may be appropriate that the Court is directed to be guided by certain decision-making principles, such as the decision-making principles in Part 1.2 of the CYFA, or to take certain matters into account, such as those matters the Children’s Court currently takes into account ‘in determining which sentence to impose on a child’ in section 362 of the CYFA.¹⁵²
- 6.175 Clinicians in a roundtable consultation considered there is a place for a treatment component to supervision orders, advising that the Therapeutic Treatment Order was quite useful and suggested this as a possible model to be adapted for use with young people under the CMIA.¹⁵³ It was suggested at the clinician roundtable that the model developed in the Children’s Court should incorporate the current Therapeutic Treatment Order to allow young people to be referred for these orders, where appropriate.¹⁵⁴

147 Ibid.
 148 Consultation 46 (County Court of Victoria—judges).
 149 Consultation 48 (Children’s Court—President and magistrates, Melbourne).
 150 Ibid.
 151 Consultation 45 (Youthlaw).
 152 Submission 29 (Victorian Equal Opportunity and Human Rights Commission).
 153 Consultation 55 (Children’s Court roundtable—clinicians).
 154 Ibid.

- 6.176 Some submissions also expressed support for the model underpinning the Therapeutic Treatment Orders in the process. The Criminal Bar Association suggested that magistrates could adjourn proceedings prior to a finding of guilt and impose something similar to a Therapeutic Treatment Order.¹⁵⁵ It was suggested that this would allow the charges to be withdrawn or discharged upon successful completion of the conditions of the order. Victoria Police submitted that the adoption of a process similar to the Therapeutic Treatment Order ‘may assist in avoiding placing vulnerable children through a contested matter’.¹⁵⁶ Victoria Police gave an example of the ‘AWARE’ treatment program but noted that service providers face resourcing challenges which can impact on outcomes for some children.¹⁵⁷

The Commission’s conclusion

- 6.177 The Commission is of the view that the indefinite supervision regime that currently exists under the CMIA is inappropriate for matters in the Children’s Court. Applying the current CMIA regime in the Children’s Court would have a detrimental effect to the recovery of young people and would be contrary to the therapeutic aim of the process.
- 6.178 The Commission therefore recommends that the orders available under the CMIA in the Children’s Court should be subject to a time limit, and that there should be an emphasis on the young person remaining in the community where possible. For summary offences, the possibility of discharging the young person should be considered, where appropriate.
- 6.179 There is no discretion regarding jurisdiction for the seven death-related offences and where ‘exceptional circumstances’ exist and in such cases the Children’s Court must commit the young person to trial in the higher courts. This process would still be available for matters that might warrant a more restrictive order that may be imposed in the higher courts.
- 6.180 The Commission proposes that similar criteria to sections 39 and 40 in the CMIA should apply in the Children’s Court in decisions regarding the making, reviewing and variation of orders as set out in **Appendix G**. The exercise of this discretion will also be underpinned by the set of statutory principles for young people recommended to apply to decision makers in Chapter 2 in Recommendations 3, 4 and 5.
- 6.181 The Commission also recommends that an equivalent provision to sections 41 and 42 of the CMIA for providing for court reports be incorporated into the CYFA.

Recommendation

- 48 New provisions should be inserted into the *Children, Youth and Families Act 2005* (Vic) to create the following regime for the imposition of orders:
- (a) Upon a finding that an accused is not criminally responsible because of mental impairment or that conduct has been proved on the evidence available (but the accused is unfit to stand trial) in the Children’s Court, the court must:
 - (i) declare the young person liable to supervision, or
 - (ii) order that the young person be released unconditionally.

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Submission 25 (Criminal Bar Association).
Submission 30 (Victoria Police).
Ibid.

Recommendation cont'd

- (b) A young person is to be unconditionally released unless the court is satisfied that they pose an unacceptable risk of causing physical or psychological harm to another person or other people generally.
- (c) If the court declares a young person to be liable for supervision, it must impose a 'therapeutic supervision order'. The court must make either:
 - (i) a custodial therapeutic supervision order, or
 - (ii) a non-custodial therapeutic supervision order.
- (d) If the court imposes a therapeutic supervision order, it must set a fixed term of the therapeutic supervision order of two years with a progress review to be set for every six months. The order can be revoked at any time and there should be a presumption that the order will be made less restrictive at each review.
- (e) The person subject to the order or the person having the custody, care, control or supervision of that person may apply to the court for a variation of the order (in the case of a custodial therapeutic supervision order) or a variation or revocation of the order (in the case of a non-custodial therapeutic supervision order) during the term set by the Children's Court.
- (f) On application under paragraph (e), the court must either:
 - (i) confirm the order
 - (ii) vary the conditions of the order
 - (iii) for a custodial therapeutic supervision order, vary the order to a non-custodial therapeutic supervision order, or revoke the order, or
 - (iv) for a non-custodial therapeutic supervision order, vary the order to custodial therapeutic supervision order, or revoke the order.
- (g) Part 6 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), including sections 40, 41 and 42, should apply to the Children's Court's consideration of whether to act on an assessment order or to make, vary or revoke a therapeutic supervision order.

Process for making orders in the Children's Court

- 6.182 Where the Children's Court makes a finding of 'conduct proved but not criminally responsible because of mental impairment' or 'conduct proved on the evidence available', the Court may make the young person liable to supervision or make an order for unconditional release.

- 6.183 Part 6 of the CMIA contains relevant provisions that a court must comply with prior to releasing a person unconditionally, declaring a person liable to supervision or reducing the level of supervision to which a person is subject. In Chapter 10, the Commission makes recommendations to improve the principles in section 40 and the procedures in Part 6 concerning the report on the person's mental condition in section 41 of the CMIA and the certificate of available services. The Commission has formed the view that the same key features of the CMIA as it operates in the higher courts (subject to the Commission's recommendations in Chapter 10) should apply to decision making in relation to CMIA orders in the Children's Court.
- 6.184 After a finding that the young person is not criminally responsible because of mental impairment or that their conduct has been proved on the evidence available, a court report, certificate of available services and a victim and family member report (where one is made) should be provided to the Children's Court. After considering the report, the Court may make either of the following orders:
- unconditional release
 - therapeutic supervision order (custodial or non-custodial).
- 6.185 Given the importance of the principle that restrictions on the young person's freedom and personal autonomy should be the minimum consistent with the safety of the community, there should be a presumption in favour of unconditional release unless the Court is satisfied that the young person poses an unacceptable risk of harm to the community.
- 6.186 A therapeutic supervision order will be for a fixed term of two years, with a progress review every six months.
- 6.187 In deciding whether to make, vary or revoke a therapeutic supervision order, the magistrate would consider a range of issues outlined above that qualify the principle of least restriction for the young person with the need for community protection.
- 6.188 Once a young person is under a therapeutic supervision order, the arrangements for supervision under the proposed model will depend on whether the Commission's recommendations to establish a case worker program and a youth forensic facility (Recommendations 46 and 49) are adopted and implemented. The Commission considers that it would be desirable for a case worker model to underpin the approach to supervision of young people under a therapeutic supervision order. Accordingly, there may be options to combine the two initiatives, so that the case worker program is established as part of, or in connection with, the youth forensic facility, and so be based on a multi-disciplinary approach.
- 6.189 The model of supervision under therapeutic supervision orders should operate in the same way as the case worker program recommended to be established as a diversionary option under the model. It should operate by assessing the needs of the young person and linking them with supports and services in the community. This process supports the principle of gradual reintegration and aims to ensure that the young person develops relationships and supports in the community to address the factors that may have contributed to their offending behaviour.
- 6.190 Another purpose of the case worker program is to minimise the effects of institutionalisation on young people in custody by empowering them to become self-reliant with appropriate supports in the community.
- 6.191 The young person will be reviewed every six months, with a presumption of release at each review. The therapeutic supervision order will expire after two years and the young person will be released.

Managing breaches of supervision orders in the Children's Court

- 6.192 The CMIA outlines processes for managing a person who has breached their supervision order.¹⁵⁸ These processes are described in more detail in Chapter 11. The Commission also makes recommendations in Chapter 11 to provide greater flexibility in managing breaches of supervision orders under the CMIA. The Commission considers that the processes for breaches in the CMIA, amended to adopt Recommendation 99 in Chapter 11, will be sufficiently broad for managing breaches of supervision orders in the Children's Court. The Commission therefore proposes that breaches of supervision orders in the Children's Court be dealt with in this way. Consideration will need to be given to the implementation of these provisions and to whether there should be any variation in approach once the model of care and the requirements for service delivery, supervision arrangements and management of young people subject to the CMIA, in conjunction with a youth forensic facility, have been developed as proposed by the Commission in Recommendations 49 and 50 below.

Supervision of young people

Treatment pathway

- 6.193 Provision of services to young people involved in the criminal justice system can be complex, and young people may be receiving services from or have a history with different government departments or agencies.
- 6.194 As discussed at [6.26], many young people in the criminal justice system are also involved in the child protection system. Where a young person is involved in both services, senior practitioners from Youth Justice and Child Protection in the Department of Human Services (DHS) must 'agree and document the rationale for the decision on which program will hold primary case management'.¹⁵⁹
- 6.195 Young people in the criminal justice system may also be a client of Disability Services, which provides supports and services for young people who are six years of age and over with intellectual, physical, sensory and multiple disabilities, neurological impairments and acquired brain injury.¹⁶⁰
- 6.196 Where young people in the criminal justice system are receiving services from a range of agencies with several case managers, it is important to identify which service has primary responsibility for the young person's treatment and care:
- A young person involved with Child Protection, Youth Justice and Disability Services will have allocated workers with each service. The primary case manager must always be identified at the outset. For 'dual order' clients, case management responsibility will as a rule sit with Child Protection unless there are extraordinary circumstances.¹⁶¹
- 6.197 Currently there is limited recognition of co-morbidity between mental health problems and substance abuse problems in juvenile offenders.¹⁶² As a result, there may be poor coordination between the agencies responsible for providing different services in prison.¹⁶³ This may, however, be addressed by DHS's new integrated human services model.¹⁶⁴

158 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 29–30B.

159 Department of Human Services, *Protocol between Child Protection and Youth Justice* (September 2013) 3.

160 Ibid 10.

161 Ibid 11.

162 Stephen L Stathis et al, 'Challenges in Establishing Adolescent Forensic Mental Health Services Within Australian Youth Detention Centres' (2013) 20(6) *Psychiatry, Psychology and Law* 899.

163 Ibid.

164 Department of Human Services, *Services Connect: Better Services for Victorians in Need* (2013) 3.

- 6.198 Research has indicated that stable case management is crucial in providing services to young people in custody:

Stable case management that provides the case worker as a secure base for the young person during his custodial sentence helps to mitigate the stresses experienced as a result of incarceration. The objective of case management is the tailoring or adaptation of services to meet the needs of each offender in an individual case plan. It facilitates interagency cooperation to assist with the provision of a seamless service between each client between conviction, discharge, and post discharge re-integration.¹⁶⁵

- 6.199 Accessing mental health programs in the community can be difficult for offending youth because many programs do not deal with offending behaviour.¹⁶⁶ Young people in the criminal justice system are often in most need of mental health services, yet as one study explains, those with the most complex needs are often excluded from services:

Young people with complex needs require specific services in the community. While a small proportion of young people with highly complex needs repeatedly cycle through the youth justice system ... it is precisely this group that is most frequently excluded from services and programs that might address their criminogenic and other needs. Stakeholders interviewed for this research repeatedly raised concerns that mainstream services that should assist young people to remain in the community on bail often exclude particular groups of young people with complex histories and needs—such as those who are very young, those with histories of violence and/or those who are ‘clients’ of statutory child protection agencies.¹⁶⁷

- 6.200 The Youth Parole Board and Residential Services Annual Report explains that mental health treatment can reduce reoffending and that these young people should be provided with access to treatment.¹⁶⁸
- 6.201 The supplementary consultation paper asked whether a treatment pathway for young people should differ from that for adults under the CMIA.

Views in submissions and consultations

- 6.202 The Criminal Bar Association proposed a treatment system that is ‘youth specific’:

Treatment pathways for young people should be tailored to take into account their youth, stage of development and the particular illness/impairment from which they suffer. In our experience young people are often best treated by youth specific services in relation to numerous issues, including their mental health. It may be that a youth forensic mental health service needs to exist as part of Forensicare, or alongside it, to monitor young people under the Act.¹⁶⁹

- 6.203 The Criminal Bar Association also proposed that orders should focus on connecting young people with mental health or disability services and suggested that the ‘supervisory experience of Youth Justice can be used in conjunction with the impairment-specific agency, depending on the needs of the young person and the circumstances of the offending’.¹⁷⁰

165 Dianna T Kenny ‘Young Offenders with an Intellectual Disability in the Criminal Justice System’ (2012) 24(5) *Judicial Officers Bulletin* 35, 38.
166 Ibid.
167 Richards and Renshaw, Australian Institute of Criminology, above n 32, 99.
168 Youth Parole Board and Youth Residential Board Victoria, above n 31, 14.
169 Submission 25 (Criminal Bar Association).
170 Ibid.

- 6.204 The need to provide timely treatment services was also raised as an issue in providing services to young people:

In the specific context of CMIA matters, young people in the CMIA process may need access to care, which makes it especially crucial for the trial to occur as quickly as possible so that any necessary intervention can be decided upon and taken. Timely access to necessary assessment and care is crucial.¹⁷¹

- 6.205 However, while timely access to treatment is crucial, as one participant in a clinician roundtable meeting argued, ensuring enough time is allocated for treatment is equally important in providing treatment services to young people. An example was provided of practice in Europe, where the system provides ‘for greater period of time for things to happen’ and it was suggested that six months is too short a period to address some of the issues with young people in this cohort.¹⁷²

The Commission’s conclusion

- 6.206 The Commission is of the view that the establishment of a case worker program to which young people can be diverted under Recommendations 45(e) and 46 will assist in providing stable case management for these vulnerable young people.
- 6.207 The Commission supports the establishment of a graduated treatment pathway for young people with a mental condition. The successful establishment of a treatment pathway is dependent, however, on the availability of timely, accessible and appropriate services and facilities that provide specialist treatment and care for the youth forensic population. These issues are discussed in the following section.

Facilities and services

Services for young people in the criminal justice system in Victoria

- 6.208 Youth Justice is responsible for the statutory supervision of young people in Victoria. 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 (15–20-year-old males).
- 6.209 In Victoria, there is no dedicated secure forensic mental health or disability facility for children. Thomas Embling Hospital is a high-secure facility for mentally ill patients but it is specifically for adults. The only facility for the detention of young people in the criminal justice system is the Youth Justice Precinct at Parkville, operated by the Department of Human Services (DHS).¹⁷³
- 6.210 Child and adolescent mental health services or child and youth mental health services provide voluntary and compulsory mental health services in the civil system. However, none of these services are secure. DHS provides voluntary and compulsory care to young people with an intellectual disability, but there is limited dedicated specialist accommodation in the community for young people with a disability.
- 6.211 Based on their assessed risks and needs, young people identified as vulnerable, who may have an intellectual disability or mental condition, can reside in a specialised residential unit. A disability liaison position is established at the Youth Justice Centre to support the care and treatment of children and young people assessed as having an intellectual disability.¹⁷⁴

171 Submission 29 (Victorian Equal Opportunity and Human Rights Commission).

172 Consultation 55 (Children’s Court roundtable—clinicians).

173 There is a dedicated residential unit and a disability liaison position at the Youth Justice Centre: consultation 53 (Head Office (Youth Justice, Forensic Disability, Child Protection and Senior Practitioner), Department of Human Services).

174 Consultation 53 (Head Office (Youth Justice, Forensic Disability, Child Protection and Senior Practitioner), Department of Human Services).

- 6.212 In 2010, the Victorian Ombudsman released *Investigations into conditions at the Melbourne Youth Justice Precinct*. This report identified that there is no facility comparable to Thomas Embling Hospital for young offenders who have a mental illness 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'.¹⁷⁵ It was therefore recommended that the Department of Human Services:

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.¹⁷⁶

- 6.213 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'.¹⁷⁷
- 6.214 It has been demonstrated that the stable environment in prison can improve the mental health of some juveniles, especially if they were previously in dysfunctional homes or homeless.¹⁷⁸

Approach in other jurisdictions

- 6.215 New South Wales has the only dedicated high-secure mental health facility for adolescent forensic patients in Australia.¹⁷⁹ This facility is located as one unit within the Malabar Forensic Mental Health Hospital.
- 6.216 In the United Kingdom there are seven different adolescent-specific medium-secure mental health facilities located throughout the country.¹⁸⁰ The local health departments run these facilities. The facilities tend to have slightly different focuses so individuals can be matched to the best facility for their treatment.¹⁸¹
- 6.217 Children in the United Kingdom who are found to be unfit to be tried or not guilty by reason of mental impairment are detained in these facilities.¹⁸² The facilities are also open to youth currently under the civil mental health system. In order for these individuals to be admitted they must pose a risk to the community and have exhibited specified types of risky behaviour in the past, even if that behaviour has not been proved in a court.¹⁸³

View in submissions and consultations

- 6.218 The majority view in submissions and consultations was that an appropriate facility should be created to meet the needs of young people with a mental impairment.¹⁸⁴ Common themes emerged about the facilities and services available for young people affected by the CMIA.

175 Victorian Ombudsman, *Whistleblowers Protection Act 2001: Investigation into Conditions at the Melbourne Youth Justice Precinct* (2010) 13.
176 Ibid 71.
177 Ibid.
178 Stathis et al, above n 162, 902.
179 Justice Health, *Forensic Health*, <<http://www.justicehealth.nsw.gov.au/about-us/our-services/forensic-mental-health-youth-services>>.
180 NHS England, *2013/2014 NHS Standard Contract for Secure Forensic Mental Health Service For Young People* (2013) 18 <<http://www.england.nhs.uk/wp-content/uploads/2013/06/c11-sec-forensic-mh-young.pdf>>.
181 Ibid.
182 Ibid 10.
183 Ibid.
184 See, eg, consultations 48 (Children's Court—President and magistrates, Melbourne); 46 (County Court of Victoria—judges); 55 (Children's Court roundtable—clinicians); 52 (Dr Adam Deacon).

A lack of appropriate facilities and services for young people under the CMIA

- 6.219 The President and magistrates of the Children’s Court were supportive of extending the jurisdiction of the Children’s Court to determine unfitness; however, they stressed that this ‘should not happen without an appropriate supervision and treatment system to support it, which is currently lacking’. It was said:

While it is critical that there are changes to the law, an inadequate response to what happens in terms of service delivery would be disastrous. It is clear that the Children’s Court should be doing CMIA work but it needs to be clarified what happens at the very end of the process.¹⁸⁵

- 6.220 This view was also expressed by a judge of the County Court who stated that the ‘lack of dedicated facility for young people with CMIA issues under custodial supervision orders’ was a ‘major issue’.¹⁸⁶ While acknowledging the need for young people to remain in the community wherever possible, another judge of the County Court stated that ‘where a custodial order is necessary, there should be a special facility for children’.¹⁸⁷

- 6.221 The urgency of need for a specialised facility for young people with a mental condition was highlighted by one participant in the clinician roundtable meeting, who argued that there is currently nowhere to contain young people with ‘seriously flawed backgrounds’ and while the numbers are not large, there is a small group of young people ‘that need to be catered for and who have never been catered for’.¹⁸⁸

- 6.222 Dr Adam Deacon, an experienced clinician in this area, advised the Commission that while adults with a mental illness in prison can be transferred to Thomas Embling Hospital, there is no facility to manage a young person in custody with mental health issues.¹⁸⁹

- 6.223 The Commission for Children and Young People argued that there is a ‘glaring gap’ in custodial services for young people who are experiencing mental illness as identified in the 2010 Ombudsman’s report, and that this:

has very serious implications for the mental health and wellbeing, and future development of all the young people concerned, as the behaviour of those with serious mental health issues can heavily impact on those around them as well as themselves. In addition to this lack of appropriate facilities distorting the type of order that the judiciary are able to make, we know that young people are unable to receive treatment in a timely manner and are likely to develop more severe and more prolonged difficulties that are more complex to treat effectively, and that custody itself can lead to an exacerbation of mental ill health.¹⁹⁰

- 6.224 The lack of available treatment facilities was also raised as an issue for young people in relation to optimising fitness.¹⁹¹ One clinician identified that while there is a need for beds in mental health facilities to optimise fitness for young people, the resource requirements are ‘multi modal and include acute psychiatric treatment facilities not currently available in Victoria’.¹⁹²

185 Consultation 48 (Children’s Court—President and magistrates, Melbourne).

186 Consultation 46 (County Court of Victoria—judges).

187 Ibid.

188 Consultation 55 (Children’s Court roundtable—clinicians).

189 Consultation 52 (Dr Adam Deacon).

190 Submission 33 (Commission for Children and Young People).

191 Consultation 54 (Dr Katinka Morton).

192 Ibid.

Difficulties and barriers to accessing mainstream mental health and disability services

- 6.225 Another theme to emerge from submissions and consultations, similar to that expressed in the adult system, was the difficulties for young people in the forensic population to access mental health and disability services in the civil system.
- 6.226 A key barrier identified was that mainstream mental health services often do not have the capacity or expertise to meet the needs of young people with a mental illness in the criminal justice system.
- 6.227 As one participant in the clinician roundtable explained, not all services would feel well equipped to deal with this ‘niche cohort’ of young people who are a ‘very specific group’ and Child and Adolescent Mental Health Services do not address criminogenic factors and are built around particular presentations and particular illnesses.¹⁹³
- 6.228 Another participant in the clinician roundtable highlighted the difficulties in placing a young person with a mental impairment and an offending history in a child and adolescent mental health facility where other vulnerable young people are unwell, explaining that many young women in the facility would have experienced sexual abuse and it is therefore inappropriate to place someone who has committed sexual offences in the same unit.¹⁹⁴ Many young people under the CMIA have ‘aggressive or problematic behaviour’ and while the Child and Adolescent Mental Health Services may not be able to meet their needs, it may also be unsuitable for other young people to be in the same facility as young people under the CMIA.¹⁹⁵
- 6.229 Another clinician supported this view, arguing that it is almost impossible for a young person in custody to access mainstream mental health services, which results in the young person being risk-managed within a unit at the Parkville Youth Justice Centre.¹⁹⁶ It was explained that a further difficulty is that clinicians often have to ring several hospitals until they can find one that will take the young person as the triage system will generally exclude people who did not live in Melbourne or have no address because they are not within the catchment area of the service.¹⁹⁷
- 6.230 As with the Youth Justice Centre, it was argued that it is difficult to maintain a therapeutic environment for a young person in custody at a child and adolescent mental health service given the length of stay, as the young person is often moved back to custody as soon as their mental state improves, and they often ‘cycle through the system’.¹⁹⁸ It was also highlighted that it would be good for these young people to be in an environment where ‘they can learn to improve’, as young people can learn bad habits from others in a residential facility.¹⁹⁹
- 6.231 The difficulties in accessing mental health treatment for young people in custody were attributed to:
- insufficient beds
 - a lack of understanding by the hospitals or service providers that the custody environment is inappropriate for a young person
 - reluctance to take people from the forensic system
 - insufficient training of mainstream mental health clinicians so that they feel uncomfortable with forensic clients

193 Consultation 55 (Children’s Court roundtable—clinicians).

194 Ibid.

195 Ibid.

196 Consultation 52 (Dr Adam Deacon).

197 Ibid.

198 Ibid.

199 Ibid.

- logistical barriers to obtaining a bed (for example, the requirement that the young person be supervised by Youth Justice staff while in hospital)
- the distinction made between mental health issues and behavioural issues—Child and Adolescent Mental Health Services (CAMHS) and Child and Youth Mental Health Services (CYHMS) will manage mental health issues but will not deal with what they consider to be behavioural issues, particularly if the behaviour involves offending
- the types of conditions that can be admitted (for example, a young person could have a psychotic illness but not meet the criteria for schizophrenia).²⁰⁰

6.232 The Commission was informed that there is also a lack of facilities in the disability sector, with ‘no residential options for children within disability services’.²⁰¹

A new facility to address the current gap in facilities and services

6.233 While there was a range of views expressed about the most suitable type of facility, it was argued that the Youth Justice Centre at Parkville was not appropriate for young people who may come under the CMIA.²⁰²

6.234 There was general and strong support for the creation of a separate new custodial facility. Two submissions were supportive of a new facility, but were opposed to it being co-located with the Parkville Youth Justice Centre. One clinician highlighted the difference in approach taken by the Youth Justice Centre at Parkville and argued that co-location of a facility for young people with a mental condition was not appropriate and that the service should be distinguished from units in which referrals are based on ‘custodial management concerns’ rather than on psychiatric illness.²⁰³ Another clinician supported this view, stating that the facilities at the Youth Justice Centre in Parkville were inadequate for young people within the CMIA cohort and the culture at the Youth Justice Centre was ‘correctional’ rather than therapeutic.²⁰⁴

6.235 It was estimated in consultations that the numbers in this cohort are small. However, uncertainty as to the possible demand was also expressed. The Commission was informed in a consultation with DHS that the number of young people who might come under the CMIA provisions is unknown.²⁰⁵ An experienced child psychiatrist argued that the number of young people who require a ‘therapeutic environment’ in a custodial setting is currently underestimated, stating that there are approximately 5–10 young people on average per day in the Parkville Youth Justice Centre who would benefit from being treated in a therapeutic environment, ‘but this could arguably include many more’.²⁰⁶

6.236 In a meeting with judges of the County Court, diverse views were expressed about the most appropriate location of a specialist facility for young people.²⁰⁷ One judge suggested that a version of Thomas Embling Hospital for young people should be established whereas another judge suggested that existing facilities could be suitable for some of the young people that came under the CMIA, providing the example of the ‘residential facility that exists for young sex offenders that operates on a three-year stepped process’.²⁰⁸

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Ibid.
Consultation 55 (Children’s Court roundtable—clinicians).
Consultations 54 (Dr Katinka Morton); 52 (Dr Adam Deacon).
Consultation 54 (Dr Katinka Morton).
Consultation 52 (Dr Adam Deacon).
Consultation 53 (Head Office (Youth Justice, Forensic Disability, Child Protection and Senior Practitioner), Department of Human Services).
Consultation 52 (Dr Adam Deacon).
Consultation 46 (County Court of Victoria—judges).
Ibid.

The approach that should underpin the new facility

- 6.237 The Commission was advised that many young people who may come under the CMIA are also in the child protection system. A participant in the Commission's clinician roundtable said:

We want to avoid the child protection model where they are subject to multiple case workers—it is highly destabilising ... It's about establishing reparative relationships for the child.²⁰⁹

- 6.238 The impact that a background of trauma can have on a young person was considered to be of major relevance in developing ways to deal with young offenders. One clinician consulted by the Commission stated that:

Trauma has a profound effect on children. It has a significant influence on their functioning and there is an organic element to it ... Approximately a third of young people in DHS's care would be 'trauma children' who are low functioning. A number would be unfit if they committed offences.²¹⁰

- 6.239 The Australian Clinical Psychology Association explained that trauma can arise from 'multiple disruptions in primary care, such as emergency placements, voluntary/involuntary foster care/residential care, kinship care, or significant disruption in primary care' and that there is 'a link between exposure to early trauma, [post-traumatic stress disorder] and offending behaviours in children and young people'.²¹¹

- 6.240 One clinician in the roundtable meeting on the Children's Court explained that the model underlying therapeutic residential accommodation considers that children who have experienced trauma need to have reparative relationships established to enable them to experience attachment and trust.²¹² This view was supported by another clinician at the roundtable meeting who stated that the aim of the youth justice system should be to establish reparative relationships for the young person.²¹³ It was argued that subjecting young people to multiple case workers is 'highly destabilising' and in creating a specialised youth justice facility, 'the person doing the assessments should form stable attachments [with the young person] together with qualified workers who can withstand those volatile environments to form parallel attachments'.

- 6.241 The Commission for Children and Young People supported a gradualist approach in providing treatment to young people, stating that:

[w]hilst young people may be able to adapt more quickly, they need extensive support to navigate a treatment pathway to counter the destabilizing effects of adolescent development combined with an emerging mental illness or cognitive impairment. Young people in these circumstances have challenges in dealing with stigma, potentially not accepting that they need treatment and/or believing that they do not have an impairment, and may be transitioning from high dependency services to those offering lower support. Development of a formal treatment pathway for young people also ensures that there are not service gaps, service demand issues are apparent and that integrated and coordinated services are being offered.²¹⁴

- 6.242 The Commission was informed in a consultation with staff of DHS that practice advice could be developed by the department about supervision for the cohort of young people who would be subject to CMIA orders. It was further noted that the model for supervision should consider the dynamic developmental needs of young people.²¹⁵

209 Consultation 55 (Children's Court roundtable—clinicians).

210 Consultation 52 (Dr Adam Deacon).

211 Submission 28 (The Australian Clinical Psychology Association).

212 Consultation 55 (Children's Court roundtable—clinicians).

213 Ibid.

214 Submission 33 (Commission for Children and Young People).

215 Consultation 53 (Head Office (Youth Justice, Forensic Disability, Child Protection and Senior Practitioner), Department of Human Services).

- 6.243 Specific suggestions were made as to what model could be used to develop a new facility for the supervision and treatment of young people under the CMIA, including:
- Hurstbridge Farm²¹⁶—a therapeutic residential facility for young people ‘who have been traumatised and suffered disrupted attachment’.²¹⁷ The therapeutic care model ‘includes the farm environment, additional training of staff, a trauma and attachment-informed model and a therapeutic specialist’.²¹⁸
 - Facilities in the United Kingdom and New South Wales²¹⁹—for example, the Forensic Hospital in New South Wales provides a 16-bed adolescent unit and Ardenleigh in Birmingham, the United Kingdom, is a 20-bed medium-secure inpatient treatment facility for young people up to the age of 19 years.

The Commission’s conclusion

- 6.244 The Commission is of the view that there is a need for a youth forensic unit in Victoria. It is unacceptable that young people with a mental illness, intellectual disability or other cognitive impairment are being detained in custodial facilities that are not appropriate for meeting the needs of this vulnerable group of young people.
- 6.245 The Commission acknowledges that there are significant cost implications in its recommendation. While the Commission is mindful of this, it is not in a position to cost such a facility, given the variables involved, such as the location of the facility, the number of beds required, the needs of the patients/residents and the security requirements. Another unknown variable is the extent to which work to develop the facility can be combined with work to implement the case worker program recommended by the Commission, discussed at [6.282]–[6.283]. However, the Commission emphasises that the development of a youth forensic facility is necessary to provide a secure and therapeutic environment in which assessments can be conducted, and young people can undertake treatment and services to optimise fitness and receive treatment and services while under supervision under the CMIA. The facility is recommended on the basis that it would provide an appropriate place for vulnerable young people with a mental condition to receive treatment and services in custody, while ensuring the safety of the community is protected consistent with the underlying principles of the CMIA. The development of a youth forensic facility therefore underpins all of the recommendations made in this chapter.
- 6.246 The Commission also acknowledges the need for a therapeutic environment for young people who have experienced trauma to allow them to establish reparative relationships and to experience attachment and trust. These specialised services cannot be provided in the existing youth justice facility. The Commission is of the view that the impact of trauma must be addressed, given the link between trauma and offending and reoffending behaviour in young people. Addressing trauma in vulnerable young people will seek to reduce reoffending and provide greater protection for the community.
- 6.247 The outcomes in CMIA cases that have involved young people suggest that the demand for the youth forensic facility for the purpose of supervision on CMIA orders may be lower than it is for adults. However, modelling of the facility should also take into account the demand for accommodation for assessments of unfitness (under the Commission’s proposed ‘assessment order’) and for treatment and services to optimise the fitness of young people under the model proposed by the Commission.

216 Consultation 55 (Children’s Court roundtable—clinicians).

217 Annette Jackson, *Literature review: Young People at High Risk of Sexual Exploitation, Absconding, and Other Significant Harms* (Berry Street Childhood Institute, 2014) 64.

218 Ibid.

219 Consultation 52 (Dr Adam Deacon).

- 6.248 This cohort of young people has complex needs and the Commission considers that any recommendation on an appropriate facility will require a multi-disciplinary analysis that is beyond the scope of this reference. It is therefore proposed that a multi-disciplinary team develop a model of care, including service delivery, supervision arrangements and management requirements for a youth forensic facility.

Recommendations

- 49 A multi-disciplinary youth forensic facility should be established in Victoria.
- 50 The Victorian Government should commission a multi-disciplinary team to develop a model of care to identify and develop the requirements for service delivery, supervision arrangements, management and operation of the youth forensic facility.

- 6.249 Work commissioned to develop the model of care for the basis of the youth justice facility should include consideration of the extent to which the facility could cater for young people subject to the CMIA who are not 'children' within the meaning of the CYFA (that is under 18 years) but are under 21 years at the time the order is imposed and are particularly vulnerable. The Commission's view is that a model similar to the 'dual track'²²⁰ approach available under sentencing of young offenders in Victoria is desirable.

Implementing a workable model—cost implications

- 6.250 The Children's Court provides a forum to determine CMIA matters in a way that is more flexible, expeditious and less intimidating than having the matter determined in a higher court. Furthermore, the Children's Court's embracive and specialist jurisdiction should be preferred in all matters within its jurisdiction involving young people in CMIA matters, given their heightened vulnerability. Like the Magistrates' Court, the Children's Court has the ability to conduct proceedings in a flexible manner and use a less formal approach for young accused who come under the CMIA.
- 6.251 The Commission considers that the extension of the CMIA to the Children's Court will ensure that the CMIA operates in a way that is more flexible and appropriate, having regard to the specific needs and risks of young people who come under the regime. Broadening the powers of the Children's Court under the CMIA will enable a more appropriate balancing of the principles underlying the CMIA, in particular community protection, treatment and recovery, applied within the specialised approach proposed by the Commission for young people, in determining the most appropriate outcome.
- 6.252 As has been observed by the Commission in relation to the Magistrates' Court, there are many good reasons from a policy and practice perspective for the CMIA to apply to a greater extent in the Children's Court. These are documented in detail in this chapter and have been influential in the Commission's recommendations.
- 6.253 As required in the terms of reference, the Commission has also had regard to the cost implications of its recommendations to extend the application of the CMIA in the Children's Court.

220 Under this system, section 889 of the *Sentencing Act 1991* (Vic) provides that adult courts can sentence 'young offenders' (aged under 21 years at the time of sentencing) in particular circumstances to serve their custodial sentence in a youth detention centre as a direct alternative to a sentence of imprisonment. The dual track system also allows the Youth Residential Board and Youth Parole Board to transfer young offenders between youth residential and youth justice centres and prison.

- 6.254 Extending the application of the CMIA in the Children's Court will require appropriate and sufficient resources. As with the Magistrates' Court, resources will be required for the set up and ongoing support of the processes and procedures, as well as more personnel, court listing time and an expansion of the services available to support aspects of the process, such as expert reports and the creation of treatment and supervision services and facilities (under Recommendations 49 and 50 to establish a youth forensic unit and develop an underpinning model of care).
- 6.255 However, the two key areas identified as producing cost savings through the creation of new processes in the Magistrates' Court also apply to the Children's Court:
- Costs associated with court hearings to determine criminal matters would be lower in the Children's Court compared to the County Court, in particular the costs associated with the involvement of a jury in the higher courts.
 - Costs associated with the outcomes proposed in the Children's Court would be lower, in particular the power to discharge at any stage after a real and substantial question of unfitness has been established and prior to a determination of criminal responsibility (Recommendation 45(f)) and the introduction of fixed-term supervision orders in the Children's Court (Recommendation 48), compared to the regime in the County Court which requires a choice between unconditional release or the imposition of an indefinite supervision order.²²¹

Cost implication modelling work by the University of Melbourne

- 6.256 To enable an accurate estimate to be made of the cost implications in the two areas at [6.255], the Commission engaged the services of consultants at the Melbourne School of Population and Global Health, University of Melbourne²²² to model and analyse the cost implications of its recommendations in relation to the further application of the CMIA to the Magistrates' Court and Children's Court. The scope of the work and methodology is described in Chapter 5 at [5.174] and [5.178]–[5.179].
- 6.257 The University of Melbourne provided the Commission with a report²²³ that documented the methodology and results of the modelling exercise. The Commission has drawn from the report in considering the cost implications in this area of proposed reform.

Cost of hearing CMIA matters in the Children's Court instead of the County Court

- 6.258 The Commission's recommendations to create new processes and procedures in the Children's Court support the power to:
- determine unfitness to stand trial and criminal responsibility in a special hearing following a finding of unfitness
 - make orders following findings of not criminally responsible because of mental impairment and that conduct has been proved on the evidence available (but the accused is unfit to stand trial).

²²¹ In practice, however, the majority of people placed on indefinite length orders are not indefinitely detained and are subject to detention for a less than indefinite period.

²²² Professor Philip Clarke, Centre for Health Policy, Programs and Economics, Associate Professor Stuart Kinner, Principal Research Fellow, Justice Health, Centre for Mental Health and Centre for Health Policy and Alex Avery, Research Assistant, Centre for Health Policy.

²²³ Alex Avery, Philip Clarke and Stuart Kinner (The University of Melbourne), *Modelling the Economic Costs of Implementing a Magistrate-based Determination of Fitness to Stand Trial and Mental Impairment: Final Report* (commissioned by the Victorian Law Reform Commission) (2014) [unpublished].

- 6.259 Under the proposed process and procedures, it will be possible for matters that come within the Children’s Court jurisdiction—those involving accused under the age of 18 years at the time of the offence charged with summary offences and/or all indictable offences (except for the seven death-related offences outside of the Children’s Court jurisdiction)—where issues of unfitness and the defence of mental impairment are raised to remain in the summary jurisdiction for determination. Therefore, the Commission’s recommendations provide an alternative to the requirement that matters go through the committal process and be transferred to the County Court due to a lack of power to determine unfitness and the lack of power to make orders.

Results

- 6.260 Overall, the results indicate that extending the application of the CMIA in the Children’s Court will reduce the cost to the justice system through a reduction in procedural costs for court hearings.
- 6.261 The analysis of the distribution of cost outcomes in the current model for young people charged with an indictable offence as a child in the Children’s Court and County Court indicated that there were two cost outcomes that were more likely than others:
- \$52,802 occurring in 27.0 per cent of cases
 - \$24,498 occurring in 24.8 per cent of cases.²²⁴
- 6.262 The analysis of the distribution of costs under the proposed model for young people charged with an indictable offence as a child in the Children’s Court and County Court produced two cost outcomes that were more likely than others:
- \$10,240 occurring in 34.6 per cent of cases
 - \$26,931 occurring in 27.6 per cent of cases.
- 6.263 Comparing the two models, the most likely path in the current model for young people would cost an estimated \$52,802, while the most likely path in the proposed model would cost an estimated \$10,240—representing a cost saving of \$42,562 per case.
- 6.264 A comparison of the overall mean costs of the current and proposed models for young people charged with an indictable offence triable in the Children’s Court and County Court shows that there is an average cost saving of \$32,930 for each matter that can be heard in the Children’s Court instead of the County Court. The minimum cost saving is \$17,913²²⁵ and the maximum cost saving is \$80,769. The costs between the two models on various points of comparison are set out in **Table 4**.

224 In a ‘normal’ distribution, one would expect the result of a thousand ‘random walks’ through the model to cluster around the average result, with very few data points to exist outside the minimum and maximum range of values. As each pathway through the current adult model results in a different cost, a non-normal distribution is to be expected.

225 It is noted that the difference in the minimum cost between the current and proposed models for young people is significantly larger than the difference in minimum cost for the adult models. While lower minimum costs were theoretically possible, the likelihood of such an outcome was so small (due to compounding small probabilities), that the results of such an outcome were not captured in the simulations.

Table 4: Cost comparison between current and proposed models for young people charged as children with indictable offences triable in the Children’s Court under the CMIA

Value	Cost current model	Cost proposed model	Cost saving under proposed model
Mean	\$48,674	\$15,744	\$32,930
Standard deviation	\$4,884	\$2,589	\$2,295
Median	\$52,802	\$17,552	\$35,250
Minimum	\$24,498	\$6,585	\$17,913
Maximum	\$107,699	\$26,930	\$80,769

- 6.265 The large decrease in the mean cost associated with the proposed model can be attributed to the following:
- lower personnel costs in the Children’s Court compared with the County Court
 - lower costs for prosecution services (Victoria Police instead of the Office of Public Prosecutions)
 - removal of costs associated with a jury in the County Court²²⁶
 - removal of fees payable to Victoria Legal Aid and the prosecutions costs for committal hearings, and
 - removal of rental costs incurred by the County Court.²²⁷
- 6.266 Analysis of the cases heard under the CMIA over a 12-year period from 2000–01 to 2011–12²²⁸ indicated that there were nine cases dealt with in the County Court that could have been dealt with under the proposed model had it been available. In these nine cases the accused were aged under 21 years and had been charged with offences that were within the jurisdiction of the Children’s Court (non-death-related indictable offences). Given the time that matters take to proceed and be heard in the higher courts, it can be assumed that most if not all nine cases involved an accused who was under 18 at the time of the offence. If so, these cases would have come within the criminal jurisdiction of the Children’s Court.²²⁹ If jurisdiction had been granted for these cases to be determined in the Children’s Court and the proposed model had been available for them to be heard and determined in the Children’s Court, the nine cases represent an estimated collective cost saving of over \$380,000 to the justice system from court proceedings alone.

Cost of supervision and treatment on custodial supervision orders

- 6.267 Due to a lack of information about the current cost of supervision and treatment for young people under the CMIA, it was not possible to estimate the cost implications of the Commission’s proposal to introduce fixed-term therapeutic supervision orders in the Children’s Court.

226 See discussion in Chapter 7 at [7.52]–[7.75] for a detailed examination of the costs associated with jury involvement in hearings under the CMIA.

227 The County Court building is privately owned and so there are significant rental costs associated with the use of courtrooms that do not exist for the Magistrates’ Court.

228 Data provided by the Sentencing Advisory Council, higher courts sentencing database: see **Table 8** in **Appendix D**.

229 See Chapter 2 at [2.39].

- 6.268 Currently, young people who are subject to a custodial supervision order under the CMIA would be detained in the only custodial facility for children in Victoria: Parkville Youth Justice Centre. The average cost per day, per young person subject to detention-based supervision in Victoria in 2012–13 was \$1,109.69 (approximately \$405,037 per year).²³⁰ A reduction in the time for supervision and treatment under an indefinite order imposed on a young person in the higher courts and a two-year order would produce a corresponding reduction in cost for that particular case, albeit an unquantifiable reduction.
- 6.269 There will be obvious cost implications of the Commission's recommendation to establish a youth forensic facility (Recommendation 49) and for work to develop a model of care for service delivery requirements, supervision arrangements, management and operation of such a facility (Recommendation 50). It was suggested in submissions and consultations that the demand for such a facility may be small, although some people were uncertain as to the possible demand.
- 6.270 The outcomes in the cases that have involved young people in CMIA matters indicate that a small number of young people have been ultimately placed on custodial supervision orders under the current operation of the CMIA:
- One of the nine cases determined in the County Court from 2000–01 to 2011–12 that involved young people aged under 21 years and that the Commission identified as cases which could have been determined in the Children's Court, involved the imposition of a custodial supervision order for armed robbery.²³¹ However, three people aged under 21 years were placed on custodial supervision orders in CMIA matters determined in the Supreme Court.²³²
 - None of the approximately 25 cases identified by the Department of Human Services and Office of Public Prosecutions to involve young people raising issues of unfitness and the defence of mental impairment, resulted in the imposition of a custodial supervision order. Four young people (all of whom were 18 years or over when the order was imposed) dealt with in the County Court were ultimately placed on a non-custodial supervision order and one young person was found unfit and the court was awaiting a certificate of available services.²³³
- 6.271 This suggests that the number of cases involving young people that may call for a custodial supervision order is likely to be small, compared with adults. However, the outcomes in these cases may have been a product of 'artificial decision making' whereby decisions were made to impose non-custodial supervision orders due to a lack of appropriate custodial facilities for young people.
- 6.272 The Commission considers that further scoping of the demand for such a facility ought to be included in the work done under Recommendation 50 to develop a model of care and requirements for the facility.
- 6.273 The Commission acknowledges that even if it is established that demand is relatively low and such a facility would require a small number of beds, the establishment and running of such a facility represents a significant resource investment. Given the number of unknown variables, the Commission has not attempted to undertake an assessment of its cost implications.

230 Steering Committee for the Review of Government Service Provision, *Report on Government Services 2014* (2014) Table 16A.24.
 231 Data provided by the Sentencing Advisory Council, higher courts sentencing database: see **Table 8** in **Appendix D**.
 232 Data provided by the Sentencing Advisory Council, higher courts sentencing database: see **Table 5** in **Appendix D**.
 233 De-identified data provided by DHS (collated by the OPP and DHS): see **Table 11** in **Appendix D**.

The potential to widen the net

- 6.274 The Commission's recommendations to create new processes and orders in the Children's Court under the CMIA may provide an incentive for accused to go down the CMIA pathway, where there was a previous disincentive. The same factors that were noted in relation to the Magistrates' Court apply in the Children's Court to the availability of a process to determine unfitness to stand trial and a limited term supervision order in the Children's Court. It could result in more lawyers advising their client to rely on the CMIA. Prosecutors may pursue charges more often if discharges or discontinuances (following a finding of not guilty because of mental impairment, or where a question of unfitness is raised in relation to a summary offence) are no longer the only option, particularly in relation to summary offences.
- 6.275 There is a lack of data available on how many young people could potentially be drawn into the CMIA cohort if the CMIA was extended to the Children's Court. It is unclear how many times a question of unfitness is raised in the Children's Court in relation to a matter that can be heard there. There is also a lack of data on how often a matter is discontinued because the question of unfitness is raised. There is a lack of data on the frequency of discharges following a finding of not guilty because of mental impairment.
- 6.276 It is clear from information available in relation to young people who have been subject to CMIA processes that unfitness to stand trial is more likely to be raised as an issue than the defence of mental impairment.²³⁴ However, overall, cases where issues of unfitness to stand trial have been raised represent a small proportion of the young people appearing in the Children's Court. For example, in the Children's Court, in 2012–13, there were four referrals for an assessment of unfitness (of a total 262 criminal referrals).²³⁵
- 6.277 Similarly to the observation made in the Magistrates' Court, it is clear, however, that prosecutors and lawyers encounter potential unfitness or mental impairment cases more frequently than these cases reach court.²³⁶
- 6.278 As discussed at [5.192] in relation to the extension of the CMIA in the Magistrates' Court, the analysis by the University of Melbourne suggested that as the proposed model provides substantive cost savings per case, any increase in overall operating costs for the justice system would primarily result from a 'net-widening' effect. It is not expected that the cost of cases in the proposed model would exceed the maximum costs in the current model.
- 6.279 It was estimated that, given the cost savings for mean court processing costs in the adult model (\$15,744 for the proposed model compared to \$48,674 for the current model), any net-widening effect would need to exceed 380 per cent (assuming no difference to distribution) before additional costs to the court system would be incurred.
- 6.280 The Commission also notes Victoria Police's submission that if recidivist offending is reduced by the ability of the Magistrates' Court to provide a more appropriate and expedient response in cases involving unfitness to stand trial and the defence of mental impairment, this may ultimately reduce the number of CMIA matters. This observation is equally applicable to the Children's Court.

234 De-identified data provided by DHS, collated by the OPP and DHS: see **Appendix D**.

235 The Children's Court Clinic also provided information for 2009–10, which indicated that of the 337 youth criminal referrals, six young people were referred state-wide for fitness to plead.

236 Consultations 51 (Children's Court roundtable—legal practitioners); 44 (Victoria Police—Children's Court police prosecutor and policy staff).

Other resource requirements to support the model in the Children's Court

Increases to existing resources

- 6.281 As identified in relation to the Magistrates' Court, change may be required in several areas to ensure a workable model in the Children's Court:
- education and training needs as a result of a new area of practice under the CMIA in the Children's Court (addressed by Recommendations 10–13)
 - increasing demands on court personnel, court listings and services and prosecution services through an increase in the number of matters being heard in the Children's Court that would no longer be required to be heard in the County Court or that may not have proceeded under the CMIA (see [5.198]–[5.202])
 - additional funding for expert reports and resources to increase the capacity of experts to conduct assessments.²³⁷ The need for funding of reports sought by Victoria Police, in the absence of a court-ordered report, identified in relation to the Magistrates' Court at [5.206] also applies in this context. If the CMIA is to be expanded, it is important that police prosecutors have adequate information where issues of unfitness to stand trial or the defence of mental impairment are raised, to enable a proper basis for decision making in the exercise of their prosecutorial functions.
 - cost implications of *de novo* appeals to the County Court if there is an increase in the number of matters heard and determined under the CMIA in the Children's Court (see Chapter 5 at [5.212]–[5.213] and Chapter 9 at [9.199]–[9.203]).

Establishment of the case worker program

- 6.282 A key difference between the models proposed for the Children's Court and the Magistrates' Court is the establishment of a case worker program in the Children's Court to which a person who raises the issue of unfitness to stand trial could be diverted (Recommendations 45 and 46 discussed at [6.132]–[6.141]). The Commission notes that resources will be required to implement and operate this program. However, the resource requirements could be streamlined by combining the work to implement this recommendation with the work to implement Recommendations 49 and 50 to establish a youth forensic facility. In particular, there may be options to combine the two initiatives, so that the case worker program is established as part of, or in connection with the youth forensic facility, and accordingly is based on a multi-disciplinary approach.
- 6.283 Further, the Commission notes that the investment of resources in this program, together with the youth forensic facility, could result in cost savings under the diversionary approach underpinning the model in the Children's Court. The Commission's recommendations to divert young people who raise issues of unfitness to stand trial or the defence of mental impairment from the criminal justice system, or if they cannot be diverted, to provide appropriate and early intervention to optimise their fitness, could result in a reduction in the demand for supervision and treatment of young people by way of therapeutic supervision orders.

237

Assessments are conducted by the Children's Court Clinic, as well as private practitioners. The Children's Court Clinic advised that as at 28 Feb 2014, the fee paid to a consultant practitioner for a criminal report ordered by the Children's Court is \$686.34. Given that almost all matters involving young people charged with offences as children are legally aided, the fees payable for expert reports and court attendances by psychologists and psychiatrists are also relevant: see Chapter 5 at [5.207].

The Commission's conclusion

- 6.284 Similarly to the Magistrates' Court, to a large extent the cost implications of the Commission's recommendations can be properly characterised as one of 'resource shifting'—whereby the demand for resources is shifted from one court to another producing cost savings in the conduct of court proceedings and length of supervision—rather than increasing the overall demand and requiring additional resources. The costs savings of the Commission's proposed process for dealing with matters under the CMIA in the Children's Court demonstrate that there would need to be a significant 'net widening' of people who make use of these new processes before the costs savings were diminished.
- 6.285 In addition to resource shifting, the Commission's recommendations to establish a case worker program and a youth forensic facility to support the extension of the CMIA in the Children's Court will require additional resources in implementation and operation.
- 6.286 However, the Commission considers that the benefits to young people charged with offences, victims of crime and the community—ensuring there is an appropriate, humane and safe facility for young people with multiple and complex needs dealt with under the CMIA—outweigh the implementation and operational costs that will be incurred. Further, there is now significant research that shows that 'early investment of support for people with mental health disorders and cognitive impairment can dramatically increase the person's well-being, divert them from prison, and provide savings to the government over an individual's lifetime'.²³⁸ The case for early investment is even stronger in relation to young people who are still developing cognitively and forming attachments and therefore especially vulnerable to institutionalisation and criminogenic pathways.

238 Ruth McCausland et al, *People with Mental Health Disorders and Cognitive Impairment in the Criminal Justice System: Cost-benefit Analysis of Early Support and Diversion* (2013) 9. See also Carolyn Mason and Walter Robb, Queensland Advocacy Incorporated, *Pathways for People with a Disability in the Criminal Justice System: Using a Benefit Cost Analysis to Reframe the Approach to Policies and Programs* (2007); Anna Page, Revolving Doors Agency, *Counting the Cost: the Financial Impact of Supporting Women with Multiple Needs in the Criminal Justice System* (2011).

Juries under the CMIA in the higher courts

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7. Juries under the CMIA in the higher courts

Introduction

- 7.1 Juries are a central part of proceedings under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ('CMIA'):
- Juries determine whether an accused is unfit to stand trial.
 - Where an accused has been found fit to stand trial, or where there is no issue about their unfitness, juries determine their criminal responsibility. This may include a determination that the accused is not guilty because of mental impairment.
 - Where an accused is unfit to stand trial, juries determine their criminal responsibility in a special hearing, and make a finding that the accused is not guilty of the offence charged, is not guilty of the offence charged because of mental impairment¹ or that the accused (who has been found unfit to stand trial) committed the offence charged.²
- 7.2 The CMIA, however, also provides for a process where a trial judge may replace the jury as the decision maker in determining whether the accused is not guilty because of mental impairment. Under section 21(4) of the CMIA, if the prosecution and defence agree that the proposed evidence establishes the defence of mental impairment, the trial judge may hear the evidence. If satisfied that the evidence establishes the defence of mental impairment, the trial judge may direct that a verdict of not guilty because of mental impairment be recorded.³ If the trial judge is not so satisfied, the accused must be tried by a jury.⁴
- 7.3 Jury involvement in proceedings under the CMIA gives rise to an obligation on judges to direct the jury about the law in order to assist the jury in reaching its decision in each of the inquiries listed above. Judges must give these 'jury directions' on the findings available to a jury in a special hearing, on how the jury is to approach the defence of mental impairment when it is raised as a defence and on the consequences of a finding of not guilty because of mental impairment.

1 The Commission has recommended in Chapter 9 of this report replacing the finding of 'not guilty because of mental impairment' with the accused's 'conduct is proved but not criminally responsible because of mental impairment': see Recommendation 69.

2 The Commission has recommended in Chapter 9 of this report replacing the finding in a special hearing of 'committed the offence charged' with the accused's 'conduct is proved on the evidence available': see Recommendation 68.

3 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 21(4)(a).

4 *Ibid* s 21(4)(b).

- 7.4 The terms of reference specifically ask the Commission to consider whether the process for determining fitness to stand trial can be improved and whether legislative clarification is required on 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. In this chapter, the Commission examines these specific issues and the role of the jury and jury directions in CMIA proceedings in the higher courts more broadly.
- 7.5 The Commission has drawn the following conclusions on the procedures involving juries under the CMIA:
- The Commission has formed the view that unfitness to stand trial is a pre-trial issue, consistent with the fact that the role of the jury has, over time, become limited to determining criminal responsibility in non-CMIA trials. The Commission therefore recommends that a judge or magistrate determine investigations into unfitness.
 - In the Commission's view, criminal responsibility should be determined by a jury in all CMIA matters, for accused who are fit to stand trial and unfit to stand trial. This serves to benefit the accused, victims and the community. The Commission recommends that the process where a trial judge may replace the jury as the decision maker in determining whether the accused is not guilty because of mental impairment should be abolished.
 - The Commission acknowledges the importance of clear and comprehensible jury directions to ensure that the jury applies the law to the facts of the case and to protect the accused's right to a fair trial. The Commission recommends improvements to jury directions under the CMIA that are consistent with recent legislative reforms to jury directions in Victoria.

Investigations into unfitness to stand trial

- 7.6 Under the CMIA, a jury determines the question of unfitness to stand trial in an investigation presided over by a judge.⁵ In its *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997: consultation paper* ('the consultation paper'), the Commission considered whether there should be some reduction in or removal of the jury's role in determining unfitness. In particular, the Commission asked whether it is necessary to have a jury determine the question of unfitness in particular circumstances, such as where the prosecution and defence are in agreement that an accused is unfit, or in all cases.

A judge-alone procedure where the prosecution and defence are in agreement

- 7.7 In cases where the prosecution and the defence agree on the unfitness of an accused (based on expert reports), a jury is nonetheless empanelled to hear evidence that the accused is unfit and to make a formal finding of fitness or unfitness. The process has been criticised for several reasons, including that it can leave jurors feeling confused about their role in the process, it takes up the time of the jurors and the court and it depletes the jury pool without justification.
- 7.8 The Victorian Parliament Law Reform Committee recommended that the Victorian Government consider amending the CMIA to allow the trial judge to investigate an accused's unfitness to stand trial, without a need for a jury.⁶ The Committee expressed support for this process to apply where both the prosecution and the defence agree that the accused is unfit.⁷

⁵ Ibid s 8(2).

⁶ Victorian Parliament Law Reform Committee, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (2013) 228, Recommendation 28.

⁷ Ibid 227.

- 7.9 The Victorian Parliament Law Reform Committee observed that the requirement to conduct unfitness investigations before a jury may place an unnecessary burden on the community and could exacerbate the stress and anxiety that accused with intellectual disability or other cognitive impairment ordinarily experience when in court. It outlined the main arguments for removing the requirement that the investigation into an accused's unfitness to stand trial be conducted before a jury:
- unfitness investigations primarily involve technical matters that are more suitable to be heard by a judge alone
 - an unfitness hearing is not designed to be adversarial—no decisions are made about the person's criminal responsibility
 - a judge hearing evidence alone may be quicker, less formal and less confusing or stressful for a person with an intellectual disability or other cognitive impairment.⁸

A judge-alone procedure in all cases

- 7.10 More broadly, some have questioned the need for a jury at all in the investigation of unfitness to stand trial, even where the prosecution and the defence do not agree. In England and Wales, the requirement that a jury decide whether a person is unfit to stand trial was based on the *Criminal Lunatics Act 1800*. In recent decades, however, recommendations have been made that the trial judge be able to determine the issue. The Butler Committee in its *Report of the Committee on Mentally Abnormal Offenders* said:
- Insofar as the question is whether the trial should proceed, juries are not normally involved in a decision of this sort. ... A decision of the issue by the judge would be more expeditious than trial by jury, and this is of some importance where the decision has to be made in the middle of the trial.⁹
- 7.11 Similarly, Lord Justice Auld in his *Review of the Criminal Courts of England and Wales* observed in relation to the issue of unfitness to plead (as it is referred to in that jurisdiction):
- It is difficult to see what a jury can bring to the determination of the issue that a judge cannot. He decides similar questions determinative of whether there should be a trial, for example, whether a defendant is physically or mentally fit to stand or continue trial in applications to stay the prosecution or for discharge of the defendant [citation omitted].¹⁰
- 7.12 England and Wales as a jurisdiction has since dispensed with the requirement for a jury in determinations of unfitness to stand trial.¹¹

8 Ibid.

9 Home Office and Department of Health and Social Security, *Report of the Committee on Mentally Abnormal Offenders*, Cmnd 6244 (1975) [10.22] ('Butler Report').

10 Lord Justice Auld, *Review of the Criminal Courts of England and Wales: A Report* (2001) 217.

11 In 2004, the *Criminal Procedure (Insanity) Act 1964* (UK) c 84 was amended so that section 4(5) now states that the court determines the question of fitness to be tried, without a jury.

Views in submissions and consultations

- 7.13 Nearly all submissions that addressed this issue and the majority of those consulted supported a process where a judge determines unfitness to stand trial if the parties agree that the accused is unfit.¹² Those stakeholders in favour of this process made the following arguments:
- The jury does not have a real role where the parties agree that the accused is unfit to stand trial.¹³
 - A judge-alone procedure would be more practical and expeditious.¹⁴ The current process incurs unnecessary costs.¹⁵ Introducing this new process would justifiably reduce costs.¹⁶
 - A judge-alone procedure would be less stressful for the accused during the investigation and during the period leading up to the investigation.¹⁷ In one case an accused with an intellectual disability and in the early stages of dementia was held in remand for 371 days before being found unfit.¹⁸
 - The complexity of the medico-legal evidence may not be appropriate for jurors.¹⁹ Further, the jury directions on the multiple criteria for unfitness are complex.²⁰
- 7.14 There was also support for removing the jury's role entirely, even where the parties are not in agreement, in investigations of unfitness to stand trial.²¹ Those who supported this option noted that:
- Unfitness is a pre-trial issue. Pre-trial issues are usually determined by a judge.²²
 - A judge-alone procedure will be more transparent as both parties will have the benefit of the judge's reasons.²³
 - In a judge-alone procedure, judges would have greater capacity to modify the proceeding to meet the needs of the accused, for example, by taking breaks.²⁴
- 7.15 However, others thought that the role of the jury should not be limited in this way. Two submissions said that a judge-alone procedure should only occur if the accused chooses it.²⁵ The Victorian Institute of Forensic Mental Health (Forensicare) submitted that where there is disagreement about the accused's unfitness, the jury should resolve the issue of unfitness.²⁶ One submission suggested a 'Mental Health Court' model if the role of the jury in investigations of unfitness to stand trial is to be changed.²⁷
- 7.16 There were also some concerns raised in a consultation about the effect on victims of varying the level of jury involvement in the process.²⁸

12 Submissions 21 (Criminal Bar Association); 19 (Forensicare); 12 (Progressive Law Network); 11 (Jamie Walvisch); 8 (Office of Public Prosecutions); 18 (Victoria Legal Aid). Consultations 24 (County Court of Victoria—judges); 11 (Melbourne Magistrates' Court); 16 (Shepparton Magistrates' Court); 3 (Villamanta Disability Rights Legal Service). Concerns were expressed by some individuals, including a Supreme Court judge. The Progressive Law Network suggested that a judge should be required to seek the agreement of two registered medical practitioners.

13 Submission 19 (Forensicare). Consultations 21 (Consultant psychiatrists, Forensicare); 23 (Supreme Court of Victoria—judges); 24 (County Court of Victoria—judges).

14 Consultation 16 (Shepparton Magistrates' Court).

15 Consultations 24 (County Court of Victoria—judges); 3 (Villamanta Disability Rights Legal Service).

16 Submissions 18 (Victoria Legal Aid); 21 (Criminal Bar Association).

17 Submissions 12 (Progressive Law Network); 18 (Victoria Legal Aid); 19 (Forensicare).

18 Jane Lee, 'Imprisonment of Intellectually Disabled Man "Embarrassing"', *The Age* (Melbourne), 23 February 2013, 5.

19 Consultation 3 (Villamanta Disability Rights Legal Service).

20 Submission 11 (Jamie Walvisch).

21 Submission 8 (Office of Public Prosecutions). Consultations 24 (County Court of Victoria—judges); 41 (Supreme Court of Victoria—judge).

22 Consultation 24 (County Court of Victoria—judges).

23 Consultation 41 (Supreme Court of Victoria—judge).

24 Ibid.

25 Submissions 11 (Jamie Walvisch); 18 (Victoria Legal Aid).

26 Submission 19 (Forensicare).

27 Submission 6 (Associate Professor Andrew Carroll).

28 Consultation 23 (Supreme Court of Victoria—judges).

- 7.17 The Commission's advisory committee had mixed views on the appropriate extent of jury involvement in investigations of unfitness to stand trial. Some members noted the importance of jury involvement for the community, especially in high profile cases, and victims.²⁹ A view was also expressed that juries gave the process more rigour. However, other members were of the view that unfitness is a pre-trial issue which should be determined by a judge.³⁰ These members believed that judges were more able to deal with the evidence involved in investigations of unfitness and a judge-alone procedure would be more efficient and could decrease the stress on the accused.³¹

The Commission's conclusion

- 7.18 The Commission has considered views on the Victorian Parliament Law Reform Committee's recommendation for a judge-alone procedure to investigate unfitness to stand trial. The Commission has also considered views on the approach in other Australian jurisdictions and England and Wales, where a judge may determine an accused's unfitness to stand trial.³²
- 7.19 In the Commission's view, unfitness to stand trial should be determined by a judge, or a magistrate, in all cases. While submissions and consultations pointed to many benefits of a judge-alone procedure, including cost savings and the avoidance of stress to the accused, the Commission's conclusion is based on the nature of the investigation into unfitness to stand trial. The Commission has found that the role of the jury has, over time, become limited to determining criminal responsibility in a trial. Investigations into unfitness to stand trial involve a pre-trial issue that need not be determined by a jury, as opposed to a determination of criminal responsibility.

The narrowing role of the jury

- 7.20 In relation to the determination of pre-trial issues, juries have historically been involved in determining whether to indict and commit a person to trial. Until 2009, such a process existed under the *Crimes Act 1958* (Vic).³³ The process was first introduced in 1864, at which time the Attorney-General held the ultimate prosecutorial discretion, and the process functioned to avoid 'leav[ing] the prosecution of justice substantially to men subject to the influence of the prevailing political party'.³⁴ In 2009, the *Criminal Procedure Act 2009* (Vic) abolished the grand jury procedure, resulting in the prosecution of an indictable offence being decided solely by the Director of Public Prosecutions.³⁵
- 7.21 The jury's role in determining pre-trial issues has also changed in decisions concerning special pleas. An accused may enter a special plea in addition to a plea of not guilty in some circumstances.³⁶ Previously, judges would empanel a jury to determine a special plea.³⁷ However, as the Judicial College of Victoria notes, with the development of the common law, a special plea can be interpreted as a question of law to be determined by a judge.³⁸

29 Advisory committee (meeting 1).

30 Advisory committee (meeting 2a).

31 Ibid.

32 In Australia, courts in Tasmania and the Northern Territory have the power to dispense with an investigation into unfitness to stand trial and record that the accused is unfit if both the prosecution and defence agree. In New South Wales, Queensland, Western Australia and South Australia, a trial judge or a specialist division of the court determines the question of unfitness to stand trial. In South Australia this process can be dispensed with if the prosecution and the defence agree. See *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 19; *Criminal Code Act* (NT) s 43T(1); *Mental Health (Forensic Provisions) Act 1990* (NSW) s 11; *Mental Health Act 2000* (Qld) s 270; *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 12; *Criminal Law Consolidation Act 1935* (SA) ss 269M, 269N.

33 *Crimes Act 1958* (Vic) s 354. Any person could apply to bring another person before a grand jury to determine whether a person charged with an indictable offence should be put on trial (if a magistrate did not commit the accused for trial following a committal hearing, or if the Director of Public Prosecutions did not present the accused for trial following a committal).

34 Department of Justice, *Criminal Procedure Act 2009 Legislative Guide* (2010) 234; Elise Histed, 'The Introduction and Use of the Grand Jury in Victoria' (1987) 8(2) *Journal of Legal History* 167.

35 *Criminal Procedure Act 2009* (Vic) s 253; Department of Justice, *Criminal Procedure Act 2009 Legislative Guide* (2010) 168.

36 These circumstances include when they have been lawfully convicted or acquitted of the offence charged in the indictment, when the accused denies that he or she is the person named on the indictment, or when they have the benefit of a pardon in respect of the offence charged. See *Criminal Procedure Act 2009* (Vic) ss 218, 220.

37 Judicial College of Victoria, *Victorian Criminal Proceedings Manual* (3 August 2009) <<http://www.judicialcollege.vic.edu.au/eManuals/VCPM/index.htm#27654.htm>>, citing *R v Worland* [1964] VR 607; *R v Gamble; Ex parte Cleary* [1947] VLR 491; *R v Coughlan* (1976) 63 Cr App R 33; *R v Clarkson* [1987] VR 962.

38 Ibid, citing *Winsor v The Queen* (1866) LR 1 QB 289; *R v Snow* (1915) 21 ALR 382.

- 7.22 The CMIA process of investigating unfitness to stand trial appears to be the only other instance in a criminal proceeding where the jury determines an issue other than criminal responsibility. The requirement for a jury is a 'historical survival from the days when prisoners were subjected to "peine forte et dure"', a method that is no longer practised.³⁹

Other considerations

- 7.23 Prosecutorial discretion now lies with an independent Director of Public Prosecutions,⁴⁰ diminishing the need for a jury to act as a safeguard against politically motivated prosecutions. The Commission concludes therefore, like the decision to indict an accused and the determination of special pleas, that investigations into unfitness to stand trial should be similarly determined by a judge.
- 7.24 While the Commission notes the concerns expressed in consultations regarding the interests of the community and victims, the Commission considers that these interests can be accommodated within a judge-alone process. Further and significantly, a jury will make the ultimate determination of criminal responsibility. The Commission also does not consider that a judge-alone process would be less rigorous than a process involving a jury. In any case, there is currently a right for an accused to seek leave to appeal against a finding of unfitness by a jury.⁴¹ The Commission's recommendation in Chapter 9 to introduce a right of appeal for an accused who has been found fit to stand trial or 'fit to plead guilty' also acts as a safeguard under the proposed judge-alone procedure for the determination of unfitness.
- 7.25 Also relevant to consideration of this issue are the Commission's recommendations in Chapter 3 to introduce additional requirements into the criteria for unfitness to stand trial⁴² and to introduce a 'fitness to plead guilty' test, where an accused can be found fit to plead guilty if they satisfy certain criteria.⁴³ These recommendations introduce a range of additional requirements for nuanced pre-trial decision making, a task which in the Commission's view is more appropriate to be conducted by a judge. An equivalent example is the decision a judge is required to make about the capacity of a witness to give evidence if they are under a particular age or have a cognitive or communication impairment.⁴⁴
- 7.26 The Commission's recommendation aims to:
- limit the role of the jury in CMIA matters to criminal responsibility and not pre-trial issues, consistent with other criminal hearings
 - reduce the stress or anxiety due to the presence of the jury that may be experienced by an accused, who may have disordered or impaired mental processes at the time of the hearing
 - expedite the unfitness to stand trial process
 - increase the efficiency of the court process by freeing up court resources and the jury pool for the determination of criminal responsibility.

39 Butler Report, above n 9, [10.22]. The phrase translates to 'strong and hard suffering' and was a practice carried out on people who were found by a jury to be 'mute by malice', that is, they had failed to enter a plea out of choice rather than a genuine inability to enter a plea ('mute by visitation of God'). The practice involved a person being starved and gradually crushed under increasing weights, in attempt to force them to plead, or until they died.

40 Department of Justice, above n 34, 234.

41 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 14A(a).

42 See Recommendations 15, 17 and 18.

43 See Recommendation 16.

44 See *Criminal Procedure Act 2009* (Vic) s 369.

Recommendation

- 51 Section 7(3) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to provide that the question of a person's fitness to stand trial is to be determined on the balance of probabilities by a judge or a magistrate.

Determining the defence of mental impairment

- 7.27 As discussed at [7.2], under section 21(4) of the CMIA, if the prosecution and defence agree that the evidence establishes the defence of mental impairment, the trial judge may hear the evidence and, if satisfied that the evidence establishes the defence, may direct the recording of a verdict of not guilty because of mental impairment. This procedure was introduced several years after the introduction of the CMIA, based on the Commission's recommendation in its *Defences to Homicide* reference.⁴⁵
- 7.28 The following section considers:
- whether any changes should be made to the existing judge-alone procedure under section 21 in ordinary criminal trials
 - whether a new process should be introduced to make the existing judge-alone procedure available to someone who has been found unfit to stand trial, in place of a special hearing.

The defence of mental impairment in an ordinary criminal trial

- 7.29 In the consultation paper the Commission sought feedback on whether the judge-alone procedure in section 21 of the CMIA was operating well in practice for people who were fit to stand trial. The Commission asked whether any changes should be made to the current process.

Views in submissions and consultations

- 7.30 The Commission found support for a judge-alone procedure to determine the defence of mental impairment in place of an ordinary criminal trial. This support was underpinned by the following views in submissions and consultations:
- When the parties and the psychiatrists agree that the evidence establishes the defence of mental impairment, the jury process can become 'artificial' or a 'formality'.⁴⁶
 - The current process, which allows a judge-alone determination, is appropriate.⁴⁷
 - A judge may be better able to determine the issue given their experience instead of requiring a jury to assimilate and understand very complex material in a short space of time.⁴⁸
- 7.31 The importance of considering the perspective of victims in a process based on the consent of the parties was also noted.⁴⁹

45 Victorian Law Reform Commission, *Defences to Homicide*, Final Report No 6 (2004) Recommendation 43. See the second reading speech for the Crimes (Homicide) Bill 2005 (Vic): Victoria, *Parliamentary Debates*, Legislative Assembly, 6 October 2005, 1353 (Rob Hulls, Attorney-General).

46 Consultations 1 (Consumer Advisory Group (CAG), Thomas Embling Hospital); 23 (Supreme Court of Victoria—judges); 41 (Supreme Court of Victoria—judge).

47 Submissions 11 (Jamie Walvisch); 18 (Victoria Legal Aid); 8 (Office of Public Prosecutions).

48 Submission 4 (The Australian Clinical Psychology Association).

49 Consultation 23 (Supreme Court of Victoria—judges).

The Commission's conclusion

- 7.32 The Commission has had regard to the benefits associated with the existing judge-alone procedure, the support for it in submissions and consultations and the absence of problems concerning its practical operation. The Commission also acknowledges that where the prosecution and defence agree that the evidence establishes the mental impairment defence, it is unlikely that the jury will arrive at a different conclusion. Further, a jury's decision that a person has not established the defence can be overturned on appeal if the evidence is such that no reasonable jury could have made that decision.⁵⁰
- 7.33 However, in the Commission's view these factors do not overcome the importance of jury involvement in the determination of criminal responsibility in CMIA matters. As the Commission noted in its jury directions reference, 'the jury system is and continues to be the best way to determine guilt'.⁵¹ This is particularly true in CMIA matters which often involve the occurrence of a serious event that has profound and lasting consequences for the accused, victims and the community. The Commission considers that this calls for the direct involvement of the community, in the form of the jury, in determining criminal responsibility.
- 7.34 For the community, trial by jury serves as 'the community's guarantee of sound administration of criminal justice'.⁵² As Justice Deane observed in *Brown v The Queen*, the institution of trial by jury is for 'the benefit of the community as a whole as well as for the benefit of the particular accused'.⁵³ The Commission sees substantial value in the public examination of these matters. Further, the involvement of the jury requires the presentation of the evidence and the issues in a case in a way that is comprehensible to the accused, victims and the community.⁵⁴ Exposure of this kind serves a significant public and educative function. There is still a lack of awareness and understanding of people with mental conditions; a process involving a jury can help the parties involved, and the public, to understand why the law deals differently with people who come under the CMIA.
- 7.35 For the accused, the jury provides an additional layer of protection of their rights. Requiring the parties to put their positions to the court before a group of independent members of the community provides for a more rigorous process and a form of salutary control over the determination of criminal responsibility.
- 7.36 CMIA processes can also be particularly difficult for victims and their families. As the Director of Public Prosecutions, John Champion SC noted:

The often violent nature of the offending in this area, coupled with the acceptance of the mental illness of the accused person, too frequently leaves victims and their families feeling that the offending behaviour has in some way, been excused. Being found not guilty of a crime due to mental impairment, and the imposition of non-custodial supervision orders in particular, can be difficult outcomes for victims and their relatives and families to comprehend, and accept. My own experience shows that this difficulty often extends to the general community.⁵⁵

50 *Kosian v The Queen* [2013] VSCA 357 (6 December 2013) [72], [76]. See also *R v Oye* [2014] 1 Cr App R 11 where the United Kingdom's Court of Criminal Appeal substituted the jury's verdict of guilty with a verdict of not guilty by reason of insanity. It could not see a safe and rational basis for departing from the unchallenged psychiatric evidence and the Crown's acceptance of the psychiatric evidence.

51 Victorian Law Reform Commission, *Jury Directions*, Consultation Paper No 6 (2008) 20.

52 *Brown v The Queen* (1986) 160 CLR 171, 197.

53 *Ibid* 201.

54 *Kingswell v The Queen* (1985) 159 CLR 264, 301 (Deane J).

55 John Champion SC (DPP), 'Launch of Prosecuting Mental Impairment Matters' (Speech delivered at the launch of the Prosecuting Mental Impairment Matters publication, Melbourne, Wednesday 28 November 2012).

- 7.37 The Commission considers that the determination of criminal responsibility by a jury provides a greater level of acknowledgment to victims and their families of the harm that they have experienced. The importance of acknowledgment of victims and their family members is not diminished in cases where an accused has been found under the law not to be criminally responsible due to a finding of not guilty because of mental impairment. The Commission recognises the importance of victims and their families witnessing the process of the hearing, and listening to the psychiatric or psychological evidence and the reasons for dealing with the accused within the forensic mental health or disability system rather than the prison system.⁵⁶ In the Commission's view, this will promote the acceptance and understanding of the finding of not guilty because of mental impairment and its underlying causes, such as a mental illness, intellectual disability or other cognitive impairment.
- 7.38 Finally, although there has been a slight trend in Victoria towards reducing the role of the jury in the determination of criminal responsibility (for example, through the introduction of direct acquittals and the increasing number of indictable offences triable summarily), the jury continues to play a paramount role in determining criminal responsibility in this jurisdiction.
- 7.39 The Commission acknowledges that the change it recommends here reverses its recommendation in the 2004 *Defences to Homicide* final report where the Commission observed that the jury's role in a process where the prosecution and defence agree that the evidence establishes the defence of mental impairment was perfunctory and ceremonial.⁵⁷ In light of the reasons outlined above, the Commission no longer holds this view. Further, the Commission considers that any sense of artificiality in the process will be avoided by a proper explanation by the judge to the jury of their role and the reason for the special nature of the process.
- 7.40 The Commission accordingly recommends that the process under section 21 of the CMIA be abolished and that the CMIA should not provide for an exception to a jury determining criminal responsibility (regardless of whether prosecution and defence agree that the evidence establishes the defence of mental impairment).

Recommendation

- 52 A jury should determine criminal responsibility in all criminal trials in the higher courts under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic). Section 21(4) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be abolished.

- 7.41 An exception to this is the determination of criminal responsibility by a judicial officer (either by a magistrate in the Magistrates' Court or Children's Court or by the President of the Children's Court) where the defence of mental impairment is raised, currently provided for in the CMIA.⁵⁸ The Commission considers this to be an appropriate exception consistent with the general exception that is made to the requirement for a jury in cases where jurisdiction is granted for summary determination in the Magistrates' Court or determination within the specialist jurisdiction of the Children's Court.

⁵⁶ Victorian Law Reform Commission, above n 45, 230.

⁵⁷ Ibid 229–31.

⁵⁸ *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 5(1).

The defence of mental impairment following a finding of unfitness to stand trial

- 7.42 In the consultation paper the Commission discussed the uncertainty concerning whether, following a finding of unfitness to stand trial:
- the CMIA permits a judge-alone procedure⁵⁹ to determine whether the defence of mental impairment has been established, or
 - the CMIA requires a special hearing to be conducted before a jury in all circumstances.
- 7.43 Since the consultation paper was published, the Court of Appeal handed down its decision in *SM v The Queen*⁶⁰ ('SM'). An issue in *SM* was whether the judge-alone procedure in section 21 is available under the requirement in section 16 that a special hearing 'be conducted as nearly as possible as if it were a criminal trial' to which the *Juries Act 2000* (Vic) was applicable. The majority found that it was not and it was held that a judge-alone procedure could not follow a finding of unfitness to stand trial based on a current reading of the legislation.⁶¹ As the law stands, after *SM*, a jury must be empanelled to deliver a verdict in a special hearing and a judge-alone determination of criminal responsibility under the CMIA is not open following a finding of unfitness.
- 7.44 However, the question of whether a judge-alone procedure should be available to an accused who has been found unfit is open for consideration by the Commission. This question is relevant to the question of whether improvements can be made to the unfitness to stand trial process, as well as the requirement to ensure that the operation of the CMIA balances effectiveness with the need to be just and consistent with the underlying principle of the right to a fair trial.
- 7.45 In the consultation paper the Commission considered justifications for allowing a judge to determine the defence of mental impairment in place of a special hearing before a jury. For example, a judge-alone hearing may be less stressful or distressing for an accused or their family members.⁶² The Commission also considered arguments against allowing a judge-alone procedure. For example, a person who has been found unfit to stand trial may not be able to instruct their lawyer to agree to the matter being determined by a judge rather than a jury.⁶³

Views in submissions and consultations

- 7.46 Submissions and consultations that addressed this topic were divided in their views.⁶⁴ Those who were in support of a judge-alone process in place of a special hearing (where the prosecution and defence agree that the evidence establishes the defence of mental impairment) noted that:
- There is little utility or benefit in court and jury resources being allocated to a special hearing in these circumstances.⁶⁵ A judge-alone procedure would avoid the delay, inconvenience and expense of a special hearing.⁶⁶

59 The consultation paper referred to this type of hearing as a 'consent' mental impairment hearing based on the terminology used by stakeholders consulted in preliminary consultations. The Commission now thinks that the process is better characterised as a 'judge-alone' process rather than a 'consent' process. The Court of Appeal also refers to the process as a 'judge-alone' process in the decision of *SM v The Queen* [2013] VSCA 342 (28 November 2013).

60 VSCA 342 (28 November 2013).

61 Ibid [84]–[91] (Weinberg JA); [164], [168]–[169] (Tate JA).

62 Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, Consultation Paper No 17 (2013) 90.

63 *DPP v Watson* [2013] VSC 245 (7 May 2013) [3].

64 For: submissions 8 (Office of Public Prosecutions); 18 (Victoria Legal Aid); 21 (Criminal Bar Association); 11 (Jamie Walvisch). Consultation 41 (Supreme Court of Victoria—judge). Against: submissions 10 (Victorian Equal Opportunity and Human Rights Commission); 19 (Forensicare).

65 Submission 18 (Victoria Legal Aid).

66 Submissions 11 (Jamie Walvisch); 21 (Criminal Bar Association).

- The court is able to determine the accused's criminal responsibility in a robust manner.⁶⁷
- A judge-alone process would avoid putting the parties through the stress of a special hearing.⁶⁸

7.47 Those stakeholders who did not support a judge-alone process argued that a person who is unfit to stand trial cannot instruct their lawyer to agree to proceed by judge alone.⁶⁹ The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) submitted that this type of 'substituted decision-making' is potentially inconsistent with a person's right to the equal protection and equal benefit of the law in the *Charter of Human Rights and Responsibilities Act 2006* (Vic).⁷⁰ The VEOHRC also referred to Article 12 of the *Convention on the Rights of Persons with Disabilities*, which requires that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person.⁷¹

The Commission's conclusion

7.48 As with the determination of the defence of mental impairment in ordinary trials, the Commission is of the view that the same considerations apply in the determination of criminal responsibility of people found unfit to stand trial. Determinations of criminal responsibility in these circumstances should also be conducted by a jury.

7.49 In addition, the Commission notes the difficulty in lawyers obtaining instructions from a client who is unfit to stand trial to agree to a matter being determined by a judge. Although an accused will have to go through a special hearing, despite the parties involved thinking that the best course of action is a judge-alone procedure, the Commission considers that this is necessary to protect the rights of the accused. As Justice Bell noted in *DPP v Watson*:⁷²

it is a very serious thing to conclude that counsel can exercise decision-making capacity on behalf of an accused without instructions, especially where the consequence would be that the accused would thereby lose the opportunity to test the prosecution case and obtain an acquittal.⁷³

7.50 The Commission notes the concern that requiring an unfit accused to attend a special hearing that involves the empanelment of a jury and determination of criminal responsibility is very likely to be stressful for an accused and their carers. The Commission has recommended that an accused should be allowed to be absent from a special hearing (Recommendation 66) to assist in addressing this concern.

Recommendation

53 A jury should determine the criminal responsibility of all people found unfit to stand trial in the higher courts under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic). If Recommendation 52 to abolish section 21(4) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) is not adopted, the process provided for in that section should not be available to determine the criminal responsibility of a person found unfit.

67 Submission 21 (Criminal Bar Association).

68 Submission 11 (Jamie Walvisch).

69 Submissions 10 (Victorian Equal Opportunity and Human Rights Commission); 19 (Forensicare). Consultation 23 (Supreme Court of Victoria—judges).

70 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8(3).

71 Submission 10 (Victorian Equal Opportunity and Human Rights Commission).

72 [2013] VSC 245 (7 May 2013).

73 Ibid [9].

- 7.51 A similar exception to that discussed at [7.41] applies to determinations of criminal responsibility in special hearings after a finding of unfitness in the Magistrates' Court and Children's Court (if the Commission's recommendations to provide a power to determine unfitness are adopted).

Cost implications of changes to jury involvement in CMIA determinations

- 7.52 The Commission's recommendations to change the current involvement of juries in determinations of unfitness and determinations of criminal responsibility will have cost implications, including:
- costs associated with the jury (for example, the fees paid to jurors)
 - costs associated with court usage and time spent by judges, court staff, defence practitioners and prosecutors in court (for example, in the time taken to empanel a jury and in directions to the jury).

Judge-alone determinations of unfitness to stand trial

- 7.53 The Commission's recommendation to remove the jury in determinations of unfitness to stand trial and to provide that judges and magistrates determine unfitness to stand trial will result in cost savings.
- 7.54 The Juries Commissioner's Office (JCO) advised that there is a fixed cost associated with having jury trials in Victoria (such as staffing and facilities at the JCO and the courts). Additionally, the cost for each prospective juror attending for jury service for the first day is approximately \$46 per person. This comprises the \$40 jury service fee paid to the pool member, and approximately \$6 in administrative costs to the JCO.
- 7.55 In most cases, this \$46 cost to government is likely to be significantly less than the cost incurred by a prospective juror's employer through the requirement that they pay the balance of the salary of their staff member,⁷⁴ and lose the benefit of their productivity for at least one day. In work conducted to analyse the cost implications of the Commission's recommendations (see Chapter 5 at [5.174]–[5.175]), the University of Melbourne calculated the opportunity cost to employers for 33 people per day (the upper limit of the average panel size for an ordinary criminal trial) to be over \$6,600 daily.⁷⁵
- 7.56 The JCO advised that the panel size for a 12-person jury⁷⁶ varied depending on the type of CMIA hearing and whether or not the particular hearing involved challenges.
- 7.57 The panel size for hearings to investigate unfitness to stand trial and special hearings to determine criminal responsibility after a finding of unfitness ranges from 20–27 prospective jurors. If there are to be no challenges, the panel will be 20 people and if there are to be challenges, the panel size is increased to 27 people.⁷⁷
- 7.58 The panel size for a criminal trial where the defence of mental impairment is expected to be raised (where there are no issues regarding unfitness to stand trial) is 30–33 people. The average panel size for a criminal trial is 39 prospective jurors. However, this figure accounts for larger panels required for longer or complex trials.

⁷⁴ *Juries Act 2000* (Vic) s 52(2).

⁷⁵ Alex Avery, Philip Clarke and Stuart Kinner (The University of Melbourne), *Modelling the Economic Costs of Implementing a Magistrate-based Determination of Fitness to Stand Trial and Mental Impairment: Final Report* (commissioned by the Victorian Law Reform Commission) (2014) [unpublished] 17. This was calculated using Australian Bureau of Statistics data that the average daily earnings for a person in Victoria in May 2013 was \$221.04.

⁷⁶ Additional jurors are often empanelled for longer trials.

⁷⁷ The JCO advised the Commission that it usually seeks information from the court on whether there will be challenges in the particular hearing and determines the size of the panel on the basis of that advice.

- 7.59 Using the range of standard panel size of 20–27 prospective jurors for a hearing to investigate unfitness to stand trial, each matter that is not required to be determined by a jury would result in the following savings:
- \$920–\$1,242⁷⁸ (the cost of empanelling a jury for the first day of an unfitness determination)
 - \$480⁷⁹ (the cost for a jury for each subsequent day of the unfitness determination).
- 7.60 Based on information from Forensicare about requests made by the Office of Public Prosecutions for reports of assessments of unfitness in 2012–13, this could result in such savings being made in up to an estimated 45 cases per year.⁸⁰
- 7.61 It was suggested in the Commission’s consultations that many unfitness determinations would be unlikely to run for more than a day if they were uncontested, even with the involvement of the jury. Assuming that all 45 cases required a one-day hearing, the total costs per financial year could be between \$41,400⁸¹ and \$55,890.⁸²
- 7.62 If each case required a two-day hearing, a cost of \$21,600 (\$480 x 45 cases) would be added to these figures, resulting in a total cost of between \$63,000 and \$77,490 for the 45 cases in one financial year. On the basis of these calculations, the costs savings per year associated with not having jury trials to determine unfitness would be between \$41,400 and \$77,490.
- 7.63 As noted at [7.52], empanelling juries also results in costs associated with court resources required for hearings of unfitness matters, such as use of courtrooms and time taken to empanel. These costs have not been included in this savings calculation as the Commission has been unable to quantify them.

Removing judge-alone determinations of criminal responsibility

- 7.64 The Commission’s recommendation to remove judge-alone determinations of criminal responsibility under the current CMIA provisions will require all determinations of criminal responsibility under the CMIA in the higher courts to be made by a jury. If adopted, this will have a cost implication. Requiring cases that previously could have been determined by a judge alone to be determined by a jury would incur fixed costs associated with having a jury (discussed above at [7.54]), as well as the specific costs associated with prospective jurors attending for jury service on the first day of empanelment and the jurors for subsequent days of a hearing.

Hearings in ordinary criminal trials

- 7.65 Assuming the smallest panel size of 30 prospective jurors, each criminal hearing where the defence of mental impairment may be raised and requires determination by a jury incurs the following costs:
- \$1,380⁸³ to empanel a jury for the first day of a criminal trial
 - \$480⁸⁴ for a jury for each subsequent day of the criminal trial.

78 Calculated using the figure of \$46 per prospective juror and a panel of between 20 and 27 prospective jurors.

79 Calculated using the figure of \$40 per juror and a jury of 12 jurors.

80 This estimation is based on data provided by the Victorian Institute of Forensic Mental Health (Forensicare) on report requests by the Office of Public Prosecutions (OPP) in 2012–13, indicating that there were 27 report requests on issues of unfitness to stand trial and the defence of mental impairment and 18 report requests on issues of unfitness to stand trial alone. This estimation assumes that each case would have proceeded and that each report request was for a unique case. However, it may not represent all the requests for reports made over the relevant period. Prior to the beginning of 2012 when funding was secured for such reports from the Department of Justice, Forensicare’s practice was to cap the number of reports completed in response to such requests due to a lack of specific funding for such work.

81 Calculated using the minimum cost for a panel of 20 prospective jurors multiplied by 45 cases where the OPP requested a report from Forensicare on the issue of unfitness.

82 Calculated using the minimum cost for a panel of 27 prospective jurors multiplied by 45 cases where the OPP requested a report from Forensicare on the issue of unfitness.

83 Calculated using the figure of \$46 per prospective juror and a panel of 30 prospective jurors.

84 Calculated using the figure of \$40 per juror and a jury of 12 jurors.

- 7.66 The Commission was not able to obtain an exact figure of the number of judge-alone determinations of criminal responsibility. However, based on its analysis of cases determined under the CMIA in the higher courts, it can be cautiously estimated that just under half of cases might proceed using these provisions.
- 7.67 Of the 159 cases determined under the CMIA between 1 July 2000 and 30 June 2012, there were judgments available for 65 cases (40.9 per cent), from which more detailed information about the case could be gleaned. In 41 of the 65 cases, information in the judgment indicated a finding of not guilty because of mental impairment, of which 23 (56.1 per cent) were made by a judge under the judge-alone provisions.⁸⁵
- 7.68 Using that percentage and the number of reports that were requested from Forensicare in 2012–13 for an assessment on the defence of mental impairment, an estimate can be made of the possible number of judge-alone determinations. Information from Forensicare on the report requests made by the Office of Public Prosecutions in 2012–13, indicates that there were 15 requests for a report on the issue of the defence of mental impairment alone. This is an indication of the minimum number of reports and does not represent all the requests for reports made over the relevant period.⁸⁶
- 7.69 Therefore, assuming all of these cases were to go to trial and the defence of mental impairment was raised, it can be estimated that approximately eight cases in 2012–13 (56.1 per cent of 15 report requests) could have been determined by the judge-alone procedure. If so, the cost of having jury trials for those determinations of criminal responsibility, instead of judge-alone determinations, would be \$11,040⁸⁷ for eight one-day trials.⁸⁸
- 7.70 While this cost implication is an important consideration, in the Commission's view it is not significant and does not outweigh the importance of having community involvement, by way of a jury, in all determinations of criminal responsibility.

Hearings where the accused is unfit to stand trial

- 7.71 The Commission's recommendation to confirm that a jury determine criminal responsibility when an accused is unfit clarifies the current uncertainty about whether judge-alone determinations of criminal responsibility can follow a finding of unfitness. There is insufficient information on the extent of any variation in practice on this issue, therefore it is not clear whether this will represent a substantive change in the operation of the current law and thus result in additional costs for special hearings following a finding of unfitness.
- 7.72 However, for completeness, the Commission has had regard to the costs required for a jury in a special hearing.
- 7.73 Using the panel size range of 20–27 prospective jurors for a hearing to investigate unfitness to stand trial, each matter that is required to be determined by a jury would result in the following costs:
- \$920–\$1,242⁸⁹ to empanel a jury for the first day of a special hearing
 - \$480⁹⁰ for a jury for each subsequent day of the special hearing.

85 In 12 cases, the finding was made by a jury and in six cases there was insufficient information to determine whether the finding was made by a judge under the judge-alone provisions in section 21(4) of the CMIA.

86 Data provided by Forensicare on report requests by the OPP in 2012–13. Prior to the beginning of 2012 when funding was secured for such reports from the Department of Justice, Forensicare's practice was to cap the number of reports completed in response to such requests due to a lack of specific funding for such work.

87 Calculated using the figure at [7.65] that it costs \$1,380 to empanel a jury for the first day of a criminal trial (\$46 per prospective juror and a panel of 30 prospective jurors).

88 A one-day trial has been assumed as, if the matter were one that could have been determined by judge alone, the prosecution and defence are likely to be in agreement as to the proposed evidence and so the trial is unlikely to take more than one day.

89 Calculated using the figure of \$46 per prospective juror and a panel of 30 prospective jurors.

90 Calculated using the figure of \$40 per juror and a jury of 12 jurors.

- 7.74 According to Forensicare, in 2012–13 the Office of Public Prosecutions requested a report on the issues of unfitness and the defence of mental impairment in 27 cases. While this does not represent all report requests made in that year (see [7.68]), if the person was found unfit to stand trial in all such cases, a special hearing would be required to determine criminal responsibility and a jury empanelled for that purpose.
- 7.75 Assuming all of these matters proceeded under the CMIA, if a jury was required to be empanelled in all special hearings to determine criminal responsibility (as would be the case if Recommendations 52 and 53 were implemented), the costs incurred for these matters could range from between \$24,840 to \$33,534 for the first day of the hearing and if each matter required a second day of hearing, an additional \$12,960 for the 27 matters.

Jury directions under the CMIA

- 7.76 Under the CMIA, judges must direct the jury on the following issues:
- the findings available in a special hearing at the commencement of a special hearing
 - how to approach the elements of an offence and any defences when the defence of mental impairment is in issue
 - the consequences of a finding of not guilty because of mental impairment when the defence has been raised in a trial or a special hearing.
- 7.77 The following section discusses each of these directions. The Commission makes recommendations to improve the way the jury is directed in CMIA matters.
- 7.78 Recent work in this area resulted in the *Jury Directions Act 2013* (Vic) that aims to reduce the complexity of jury directions in criminal trials and to assist the trial judge to give jury directions in a manner that is as clear, brief, simple and comprehensible as possible.⁹¹ The Commission's recommendations in this area of law aim to be consistent with this legislation.⁹²

Directions on the findings in special hearings

Current law

- 7.79 At the commencement of a special hearing, the judge must explain to the jury:
- that the accused is unfit to stand trial
 - the meaning of being unfit to stand trial
 - the purpose of a special hearing
 - the findings that are available
 - the standard of proof required for those findings.⁹³
- 7.80 Section 17(1) of the CMIA provides that the following findings are available to the jury at a special hearing:
- not guilty
 - not guilty of the offence because of mental impairment
 - committed the offence charged.

91 *Jury Directions Act 2013* (Vic) s 1.

92 A Bill amending the *Jury Directions Act 2013* (Vic) that aimed to further simplify and clarify the law on jury directions was introduced into Parliament this year but was defeated: *Jury Directions Amendment Bill 2013* (Vic).

93 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 16(3).

- 7.81 The consultation paper highlighted the different approaches taken to directing the jury on the findings available in special hearings and the confusion this may cause. The Commission summarised two of the main approaches:
- The trial judge must explain all three findings to the jury, even where there is no positive or direct evidence in relation to one of the findings (usually in relation to the finding of not guilty because of mental impairment).⁹⁴
 - The trial judge is required to explain to the jury the verdicts that are ‘relevantly available’.⁹⁵
- 7.82 The Commission sought views on the most appropriate way to direct the jury on findings in special hearings.

Views in submissions and consultations

- 7.83 Submissions and consultations that addressed this issue unanimously agreed that the jury directions on findings in special hearings should be in line with the reforms introduced by the Jury Directions Act.⁹⁶ The following views were expressed:
- It is difficult to frame a clear direction if all three findings have to be put to the jury.⁹⁷ If a finding is not open on the evidence, there is no reason to provide it as an option.⁹⁸
 - Jury directions need to be as simple as possible.⁹⁹

The Commission’s conclusion

- 7.84 In the Commission’s view the current requirement in Victoria to direct the jury on all three findings, while being legally correct, is unnecessary and has the potential to be confusing to juries. Under this approach, even where there is no evidence in relation to the finding, or when the accused wishes that the finding not be left to the jury, all findings must still be put to the jury.¹⁰⁰ As the Commission observed in its final report on jury directions, such complex jury directions do not assist effective communication with juries—jury directions should be as clear, brief, simple and comprehensible as possible.¹⁰¹ This is crucial to upholding the accused’s right to a fair hearing.
- 7.85 The Commission agrees with views that jury directions on findings in special hearings should be in line with the reforms that are being driven by the Jury Directions Act. The intention of these reforms is that in giving directions in criminal trials, trial judges are required to give directions on only so much of the law as the jury needs to know to determine the issues in the trial.¹⁰² This would exclude matters not raised in evidence, such as an additional finding in a special hearing.
- 7.86 The centrepiece of the Jury Directions Act which commenced on 1 July 2013 is the jury direction request provisions in Part 3 of the legislation. To address the problems with directions, including their length, relevance and comprehensibility, the provisions create a new framework for determining which directions are given in a trial. However, the procedure specified by the Jury Directions Act does not apply to directions given by trial judges under other legislation and would therefore not apply to the provisions of the CMIA.¹⁰³ The Commission recommends that the direction on the findings in a special hearing should be given in line with Part 3 of the Jury Directions Act.

94 *R v Langley* (2008) VR 90.

95 *Subramaniam v The Queen* (2004) 79 ALJR 116, 124.

96 Submission 11 (Jamie Walvisch). Consultations 12 (Judicial College of Victoria); 24 (County Court of Victoria—judges).

97 Consultation 24 (County Court of Victoria—judges).

98 Submissions 11 (Jamie Walvisch); 8 (Office of Public Prosecutions). Consultation 24 (County Court of Victoria—judges).

99 Submission 11 (Jamie Walvisch).

100 Ian Freckelton, ‘Mandatory Procedures and Fairness in Mental Impairment Hearings’ (2009) 16(2) *Psychiatry, Psychology and Law* 191, 195.

101 Victorian Law Reform Commission, *Jury Directions*, Final Report No 17 (2009) 8.

102 *Jury Directions Act 2013* (Vic) s 5(4).

103 *Ibid* s 9.

- 7.87 If Part 3 of the Jury Directions Act applied to the judge's obligation to direct the jury on CMIA findings, defence counsel would be required to inform the trial judge which findings are in issue and both parties would be required to request the findings in issue they wanted the trial judge to direct, or not direct, the jury on. The findings the trial judge would direct the jury on would depend on whether a finding was in issue or was requested.

Recommendation

- 54 Part 3 of the *Jury Directions Act 2013* (Vic) should apply to the judge's obligation to direct the jury on the findings that are available in special hearings under section 16(3)(d) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

Directions on the elements of an offence when the defence of mental impairment is in issue

- 7.88 The terms of reference ask the Commission to consider whether 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 where the defence of mental impairment is in issue.
- 7.89 In the consultation paper, the Commission identified two main aspects of this issue, as follows:
- *The order of considering elements of an offence*—whether a jury should be directed that the prosecution is required to prove all the elements of an offence before a jury can consider the defence of mental impairment, or directed that the prosecution need only prove certain elements of the offence and not the fault element before the jury can consider the defence of mental impairment.
 - *The relevance of mental impairment to the jury's consideration of the fault element of an offence*—whether a jury ought to be able to consider evidence of mental impairment (mental illness, intellectual disability or other cognitive impairment) in determining whether the fault element of an offence has been proved beyond reasonable doubt.

Current law

Proving the elements of an offence—physical and fault elements

- 7.90 For an accused to be criminally responsible for committing an offence, the prosecution must demonstrate beyond reasonable doubt that the person committed both the physical ('*actus reus*') and mental elements, referred to as fault elements ('*mens rea*'), of that offence. Examples of fault elements are intention, knowledge, or recklessness.
- 7.91 Where an offence does not expressly state whether a fault element applies to a physical element, the common law implies an intention in relation to the offence.¹⁰⁴ One problem in establishing the fault element of an offence is that many offences specify a physical element but do not expressly state whether an intention applies to that physical element. This can make it difficult to identify the relevant state of mind of the accused required for that offence.

- 7.92 To illustrate this point, the Department of Justice's recent *Review of Sexual Offences: Consultation Paper* provides the example of the offence of sexual penetration of a child under the age of 16 years.¹⁰⁵ In these circumstances, it is unclear whether the relevant fault element is the intention of an accused to engage in sexual penetration or the intention of an accused to engage in sexual penetration of a child under the age of 16 years. The paper outlines further difficulties in proving the fault element of an offence:¹⁰⁶
- Different fault elements can be used to refer to similar concepts—words or phrases have been given different meanings depending on the context in which they are used.
 - For some offences, there can be a fault element that does not apply to any physical element (for example, for the offence of 'assault with intent to rape', the intention to rape does not attach to any physical element of the offence but is a state of mind of the accused directed at some possible future conduct).
 - There may be occasions where the standard fault element does not work appropriately for an offence (for example, the offence of rape where the fault element extends to awareness of the fact or not giving any thought to whether a person is consenting).

The fault element in mental impairment cases

- 7.93 As a general principle, when a person is accused of an offence, all the elements of the offence must be proved beyond reasonable doubt.¹⁰⁷ The CMIA specifies that to establish the defence of mental impairment, it must be proved that the accused engaged in conduct (an act or omission) that constitutes the offence.¹⁰⁸ Under the CMIA, conduct 'includes doing an act or making an omission'.¹⁰⁹ This must be proved to the usual standard under the criminal law, that of 'beyond reasonable doubt'.
- 7.94 In matters where mental impairment is an issue, it is currently unclear whether the prosecution must also prove the fault element of the offence, prior to a jury being able to consider whether the person has a defence of mental impairment.
- 7.95 It must then be proved on the balance of probabilities (more likely than not) that, at the time of the conduct, the accused was suffering from a mental impairment that had the effect that the accused did not know the nature and quality of the conduct or did not know that the conduct was wrong.¹¹⁰ If the jury is satisfied of either of these particular effects, the finding will be not guilty because of mental impairment, rendering the person not criminally responsible for their action or omission.¹¹¹ The jury must specify whether a finding was based on a mental impairment defence where an accused is found not guilty.¹¹²

¹⁰⁵ Department of Justice, *Review of Sexual Offences: Consultation Paper* (September 2013) [2.6.1]–[2.6.2]. The review identifies and analyses the main issues with sexual offence laws.

¹⁰⁶ *Ibid* [2.6.1].

¹⁰⁷ *R v Porter* (1933) 55 CLR 182; *Stapleton v R* (1952) 86 CLR 358; *Sodeman v The King* (1936) 55 CLR 192.

¹⁰⁸ *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 20(1).

¹⁰⁹ *Ibid* s 3 (definition of 'conduct').

¹¹⁰ *Ibid* ss 20(1)(a)–(b), 20(2)(b).

¹¹¹ *Ibid* s 20(2).

¹¹² *Ibid* s 22(2)(b).

Approaches to directing the jury on the order of offence elements

- 7.96 Currently in Victoria, there are two main approaches to directing juries in cases where mental impairment is an issue:¹¹³
- the approach taken by the Victorian Court of Criminal Appeal in *R v Stiles*¹¹⁴ ('*Stiles*')
• the approach taken most recently by the High Court in *Hawkins v The Queen*¹¹⁵ ('*Hawkins*').

The *Stiles* approach

- 7.97 In the case of *Stiles*, the accused was charged with manslaughter after assaulting a man with a piece of timber. The mental impairment defence was raised as the accused had been diagnosed with schizophrenia.
- 7.98 While the case did not detail the process by which the fault elements are to be considered in establishing the defence of mental impairment, it did comment on the order in which the jury should consider the elements of the offence.
- 7.99 The court held that the jury must start with the presumption that the accused does not have a mental impairment. The jury must then determine if all the elements of the offence have been proved, with the defence of mental impairment only considered if the prosecution succeeds in proving all elements of the offence. If the jury determines that the accused did not commit the physical elements of the offence, the accused will be acquitted. If the jury is satisfied beyond reasonable doubt that the accused did commit the physical element of the offence and the fault elements were present, they may then consider evidence relating to the defence of mental impairment.¹¹⁶
- 7.100 The *Stiles* approach requires that the jury consider all the elements of the offence prior to making a determination about the existence of a mental impairment. This ensures that the accused is able to obtain a complete acquittal if the jury is not satisfied that the prosecution has proved all the elements of an offence.¹¹⁷
- 7.101 This approach, however, requires the jury to engage in artificial reasoning, as they must presume that the accused is of sound mind while considering the physical and fault elements of the offence, even if they have heard evidence that the accused was suffering from a mental impairment.

The *Hawkins* approach

- 7.102 In the case of *Hawkins*, the accused was charged with the murder of his father. The defence in this case was that the accused, in a disturbed state of mind, intended to commit suicide but upon seeing his father, fired a gun and killed him instead, without the specific intent to murder.
- 7.103 The accused's counsel did not raise the defence of insanity (under the *Criminal Code Act 1924* (Tas)) or wish that defence to be put to the jury and so the main issue considered in the case was the interaction between mental impairment and voluntariness. The court stated:

In principle, the question of insanity falls for determination before the issue of intent. The basic questions in a criminal trial must be: what did the accused do and is he criminally responsible for doing it? ... It is only when those basic questions are answered adversely to an accused that the issue of intent is to be addressed.¹¹⁸

113 Judicial College of Victoria, *Victorian Criminal Charge Book* (23 November 2011) [8.8.1] <<http://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#19084.htm>>.

114 (1990) 50 A Crim R 13.

115 (1994) 179 CLR 500.

116 *R v Stiles* (1990) 50 A Crim R 13, 22.

117 Ibid.

118 *Hawkins v The Queen* (1994) 179 CLR 500, 517.

- 7.104 The *Hawkins* approach therefore requires that after the jury has considered the physical elements, it turns next not to the second element of the offence, namely intent (as per the *Stiles* approach) but rather to the question of whether an accused has a mental impairment defence. Under this approach, once the jury has determined that the accused did the physical acts and does not have a mental impairment defence (and is therefore deemed responsible for those physical elements), it can consider the question of whether they had the requisite level of intention.
- 7.105 Following this approach, the accused could be found not guilty because of mental impairment of an offence that they in fact did not commit (that is, all of the elements of the offence were not committed). This could deny the accused the right of an outright acquittal of the offence.

Other approaches to directing on the order of elements

- 7.106 The *Victorian Criminal Charge Book*¹¹⁹ also outlines other approaches that may be considered, stating that given that the 'law in this area is unclear, judges who are required to charge a jury in a case that raises the defence of mental impairment will need to consider which of these approaches (if any) to apply'.¹²⁰ These approaches include the:¹²¹
- *High Court approach (prior to Hawkins)*—The prosecution must prove all of the elements of the offence before considering the defence of mental impairment. An accused will be acquitted where the fault element cannot be proved due to mental impairment.¹²²
 - *Pantelic approach*—A qualified acquittal may be given where all of the elements have been proved and the accused satisfies the requirements of the defence, or where all elements of the offence are not satisfied because the accused was not acting voluntarily because of their mental impairment.¹²³
 - *UK approach*—Requires the jury to consider the physical elements of the offence. The *mens rea* can only be considered after the defence of mental impairment has been rejected.¹²⁴
 - *ACT approach*—Requires the jury to be satisfied that both the physical elements and the specific intention have been proved before considering the defence of mental impairment. Other aspects of *mens rea* are not considered.¹²⁵
 - *SA approach*—A qualified acquittal may be given where the objective elements of the offence are satisfied. An objective element is defined as an element that is not a subjective element (for example, voluntariness, intention or knowledge).¹²⁶

119 Judicial College of Victoria, above n 113, [8.8.1].

120 Ibid.

121 See Submission 11 (Jamie Walvisch) for a more detailed discussion of the approaches to jury directions where the defence of mental impairment is raised.

122 *R v Porter* (1933) 55 CLR 182; *R v Sodeman* (1936) 55 CLR 192; *R v Stapleton* (1952) 86 CLR 358.

123 *R v Pantelic* (1973) 21 FLR 253.

124 See *R v Antoine* [2001] 1 AC 340; *Attorney-General's Reference (No 3 of 1998)* [2000] QB 401.

125 *R v Ardler* (2004) 144 A Crim R 552.

126 See the *Criminal Law Consolidation Act 1935* (SA) ss 269C–G, 269A (definition of 'objective element').

The relevance of 'mental impairment' to the jury's consideration of the fault element of an offence

- 7.107 A separate but related consideration to the issue of the order of the elements of the offence is whether evidence of the accused's mental impairment (or the condition underpinning the mental impairment) is relevant to the jury's consideration of the fault element of an offence. For example, evidence that the accused had a mental illness may be relevant to the jury's consideration of the fault element of an offence, separate from their consideration of whether that mental illness was a 'mental impairment' and had the requisite effect on their behaviour required for the mental impairment defence to be made out.
- 7.108 This issue has been identified as arising in particular under the *Stiles* approach to directing the jury on offence elements. Under this approach, the jury must start with the presumption that the accused does not have a mental impairment and must first determine if all the elements of the offence have been proved before considering the defence. This means they can only consider evidence that the accused had a mental impairment after they have determined whether the accused committed the fault element of the offence.
- 7.109 It is not clear, however, whether any evidence the jury may hear with regard to the accused's mental condition can be used by them in determining whether the fault element is proved beyond reasonable doubt, or whether this would breach the requirement that they presume the accused is of 'sound mind'. The *Victorian Criminal Charge Book* states that it is to be assumed that the requirement that the jury starts from the presumption that an accused is not mentally impaired, also requires them to exclude consideration of any evidence of a mental illness or other impairment in determining whether the accused committed all the elements of the offence.¹²⁷
- 7.110 As discussed at [7.101], the jury may be required to employ artificial reasoning because they must presume that the accused is not mentally impaired when they consider whether the prosecution has proved both the physical and fault elements of the offence. At the same time, they may be hearing evidence (relevant to the fault elements) that the accused has a mental condition.
- 7.111 Under the *Hawkins* approach, evidence of the accused's mental condition can be considered by the jury as part of its determination of the fault element, as the jury would have already considered the evidence relating to the defence of mental impairment. The High Court in *Hawkins* stated that evidence of 'mental disease' (under section 16 the *Criminal Code Act 1924* (Tas)) is relevant to specific intent where this is not sufficient to amount to a defence of insanity.¹²⁸
- 7.112 The uncertainty in this area of law therefore centres on whether evidence of an accused's mental condition is relevant only to the defence of mental impairment, or whether it should also be relevant to the jury's consideration of proving the fault element of the offence. This, in turn, is relevant to the issue of the order in which different elements of offences should be put before the jury.

Uncertainty in the law and difficulties created by the current approaches

- 7.113 Trial judges have drawn attention to the uncertain state of the law on this issue in light of the decisions in *Stiles* and *Hawkins* and the consequent difficulty in properly instructing juries.¹²⁹
- 7.114 In the Victorian case of *DPP v Soliman* ('*Soliman*'),¹³⁰ this issue arose in the context of whether evidence of the accused's mental illness could be used to determine whether the fourth element of the offence of rape (awareness that or not giving any thought to whether the complainant is not consenting or might not be consenting), had been proved by the Crown beyond reasonable doubt. The court held that:
- If an accused is to be presume[d] to be of sound mind for the purposes of a jury's consideration of all the elements, then evidence which goes to the issue of mental impairment, whether it be evidence supporting the defence or rebutting it, should only be considered if, and when all the elements of rape, are proven. If this were otherwise, then potentially the very same evidence which would be relied upon to establish, or even rebut the defence of mental impairment, may well result in an accused's outright acquittal and would interfere with the presumption of sound mind. This would potentially undermine the *Stiles* approach and undermine the province of the defence of mental impairment itself.¹³¹
- 7.115 Therefore the court held that 'in assessing whether the Crown has proved beyond reasonable doubt that the accused ... was aware that the complainant was not consenting, might not be consenting, or failed to give any thought as to whether or not the complainant was consenting, the jury will not be directed to consider the accused's mental illness'.¹³² The approach taken in *Soliman* was as follows:
- If the jury is satisfied beyond reasonable doubt of all the elements of rape, but is not satisfied on the balance of probabilities that the defence of mental impairment has been established, the accused will be criminally responsible for the offence.
 - If the jury is satisfied beyond reasonable doubt of all the elements of the offence of rape (absent evidence of mental impairment) and is also satisfied on the balance of probabilities that the accused was mentally impaired at the time of the offence, the accused will be found not guilty because of mental impairment.
 - If the jury is not satisfied beyond reasonable doubt of all the elements of the offence of rape, the accused will be acquitted.¹³³
- 7.116 All of the current approaches present difficulties in their application and none of them present a complete solution to the problem. These difficulties include the following effects:
- The accused's opportunity for an acquittal is removed where only the physical elements of an offence must be proved before considering the defence of mental impairment (the *Hawkins* approach).
 - The jury is required to engage in artificial reasoning processes when they are not able to consider evidence of the accused's mental condition in deciding whether the fault element of the offence has been proved beyond reasonable doubt (the *Stiles* approach).

129 See, eg, Transcript of Proceedings, *R v Sutherland* (County Court of Victoria, CR-10-00016, Judge Punshon, 18 October 2012) 118.
 130 [2012] VCC 658 (1 May 2012).
 131 Ibid [41].
 132 Ibid [61].
 133 Ibid [63]–[65].

- The jury is required to engage in complex reasoning by the requirement to separate the physical and fault elements of an offence, which can be confusing in circumstances where the physical element of the offence also incorporates a fault element (the UK and ACT approaches) or splitting issues of intent (the *Hawkins* approach).

Interaction between specific intent and the ‘nature and quality of the conduct’ in mental impairment cases

- 7.117 A further issue that can arise when considering the order in which the jury should be directed to approach the elements of an offence, is the interaction between the fault element for an offence and the first limb of the mental impairment defence—that the accused does not know the ‘nature and quality of the conduct’.
- 7.118 This issue can particularly arise in relation to the ‘specific intent’ aspect of fault elements. Specific intent refers to an intention to cause particular results or consequences by the conduct; for example, for the offence of murder, an accused must have a specific intent to cause a person’s death or really serious injury.¹³⁴
- 7.119 Specific intent is distinguished from ‘basic intent’, which relates to the fault element for ‘doing of the act involved in an offence’;¹³⁵ for example, in the offence of sexual penetration of a child under 16 years, an accused must have intended to take part in the act of sexual penetration.
- 7.120 A basic distinction that has been made between the two types of intent is that specific intent relates to consequences, while basic intent relates to conduct. However, there are tensions in the way in which basic intent has been categorised, for example, in relation to voluntariness, and this distinction is unclear in relation to intoxication.¹³⁶
- 7.121 An approach that requires the jury to consider all the elements of the offence first and consider evidence of the accused’s mental condition when considering the fault elements of the offence can create particular problems in certain cases. This can occur, for example, in circumstances where the accused’s mental condition is such that they were incapable of forming the specific intention¹³⁷ for the offence due to the fact that they did not know the nature or quality of what they were doing. If this is the case, it will be difficult for the prosecution to prove that the accused intended to cause the results or consequences of their physical conduct where there is evidence that the accused had a mental condition and that evidence is capable of demonstrating that the accused did not know that nature and quality of their conduct.
- 7.122 In these cases, if specific intent is not able to be proved, an approach that requires the jury to be satisfied that all the elements of the offence have been proved before considering the defence of mental impairment, could result in an outright acquittal of the accused.

¹³⁴ Judicial College of Victoria, above n 113, [7.2.1.1]

¹³⁵ *He Kaw Teh v The Queen* (1985) 157 CLR 523, 569–70.

¹³⁶ Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (Oxford University Press, 2004) 70–2. See also 502–52.

¹³⁷ While it is possible that this issue could arise in relation to basic intent, it is more likely for this to be an issue in relation to the proof of an accused’s specific intention to cause a particular consequence or result.

The meaning of 'did not know the nature and quality of the conduct'

- 7.123 The requirement that the accused not know the nature and quality of the act refers only to the 'physical character of the act'.¹³⁸
- 7.124 An accused who does not know the nature and quality of their conduct would be unable to appreciate 'the physical thing he [or she] was doing and its consequences'.¹³⁹ The knowledge of the accused relates to the 'physical character' of an action as distinct from its moral aspects.¹⁴⁰ For example, in the case of murder it is 'the capacity to comprehend the significance of the act of killing and of the acts by means of which it was done'.¹⁴¹
- 7.125 This implies that the knowledge must relate to more than just the physical act but consists of 'both a lack of knowledge of the surface features of the act and its harmful consequences'.¹⁴²
- 7.126 The Canadian case of *Cooper v The Queen* contextualised this term, explaining that 'an accused may be aware of the physical character of his [or her] action (i.e. choking) without necessarily having the capacity to appreciate that, in nature and quality, the act will result in the death of a human being'.¹⁴³ An example of this is provided in the case of *R v Porter*:¹⁴⁴
- In the case of murder for example, the accused must have had so little capacity for understanding the nature of life and the destruction of life, that to him or her it was like the breaking of a twig or the destroying of an inanimate object.¹⁴⁵
- 7.127 Another example is where a person is doing an act while not aware of its actual physical features, such as a person who thinks they are hitting a tree with a stick, when they are actually hitting a person.
- 7.128 In summary, to 'know the nature and quality of the conduct' requires that the accused know the physical thing that he or she is doing and the consequences of doing that thing, and is distinct from a moral appreciation of the conduct.

How often do issues of 'nature and quality of the conduct' arise in mental impairment cases?

- 7.129 The proportion of people who rely on the first limb (not knowing the nature and quality of their conduct) of the mental impairment defence is very small and construction of this term has been 'subject to limited judicial attention in the twentieth century'.¹⁴⁶ A study in South Australia estimates approximately 87 per cent of all findings of 'mental incompetence' are based on the second limb of the test (that the accused did not know that their conduct was wrong) and 2 per cent of all mental impairment defences are based on both the first and the second limbs of the test.¹⁴⁷

138 *R v Codere* (1917) 12 Cr App R 21.

139 *R v Porter* (1933) 55 CLR 182, 189.

140 *R v Codere* (1917) 12 Cr App R 21, 27. See also *Willgoss v The Queen* (1960) 105 CLR 295, 301 where the court provided a narrow interpretation of the term 'knowledge' and rejected an argument that 'knowledge' requires a moral appreciation of the conduct.

141 *Sodeman v The King* (1936) 55 CLR 192, 215.

142 Steven Yannoulidis, *Mental State Defences in Criminal Law* (Ashgate, 2012) 15.

143 [1980] 13 CR (3d) 97, [58].

144 (1933) 55 CLR 182.

145 Ibid 188.

146 Sentencing Advisory Council (South Australia), *A Discussion Paper Considering the Operation of Part 8A of the Criminal Law Consolidation Act 1935 (SA)* (2013) 22. Section 269C of the *Criminal Law Consolidation Act 1935 (SA)* also contains a volitional element to the defence. Nine per cent of cases relied on both the volitional element of the test and that the accused did not know the nature and quality of their conduct: Appendix B, Table 6.

147 Ibid Appendix B, Table 6.

- 7.130 This figure is supported by anecdotal information obtained during consultations and through an informal analysis of case data provided to the Commission. The Commission had information about the basis of the finding in 18 cases out of the 159 CMIA cases in the higher courts from 1 July 2000 to 30 June 2012. In none of these cases was the finding made solely on the grounds that the accused did not understand the nature and quality of the conduct.¹⁴⁸ This is supported by anecdotal information obtained during consultations and suggests that the second limb of the test is far more common as a basis of a finding of not guilty because of mental impairment.
- 7.131 Given that in practice the first limb of the mental impairment defence is rarely invoked, it has been argued that any discussion about its meaning is 'largely semantic'.¹⁴⁹
- 7.132 However, despite evidence that suggests that it is infrequent for a case involving a mental impairment defence to rest solely on the first limb of the test, it is important to resolve the issue that has been identified regarding the approach to jury directions where there is a close interaction between the fault element and the first limb of the test regarding the nature and quality of the act.

Views in submissions and consultations

- 7.133 A number of submissions acknowledged that the issues involved in determining the appropriate approach to directing a jury where the defence of mental impairment is raised are complex, and that the current state of the law is unsatisfactory.¹⁵⁰

Reducing complexity for jurors

- 7.134 One of the main issues raised in submissions in relation to jury directions was about the current complexity of directions provided to juries. For example, Jamie Walvisch argued in his submission that:
- Justice is likely to be undermined if jurors are provided with a task that is too complex or divorced from reality. Ideally, any approach that is developed must be capable of being implemented in a readily comprehensible fashion.¹⁵¹
- 7.135 The Australian Clinical Psychology Association was of the view that jurors often struggle to fully understand directions as to what constitutes evidence, what is hearsay, what aspects of the trial to ignore and what constitutes mental impairment. The Australian Clinical Psychology Association argued that jurors then need to understand how to apply all this information to each element of the offence and that '[a] lay jury made up of community members without specialist legal or medical knowledge cannot fully understand complex issues pertaining to mental impairment'.¹⁵²
- 7.136 The Criminal Bar Association highlighted the importance of any changes being consistent with the purpose of simplifying jury directions under section 1 of the Jury Directions Act, in particular, section 19 which provides that a trial judge may 'give to the jury integrated directions in the form of factual questions that address matters that the jury must consider in order to reach a verdict'.¹⁵³

148 This information was taken from 65 judgments to which the Commission had access (40.9% of the 159 cases). There were 41 cases that indicated a finding of not guilty because of mental impairment. There was no information on the basis of the finding in 11 cases. In 12 cases, the basis of the finding was not specified, as it was a jury finding. In 18 cases, there was information on the basis of the finding as it was made by a judge under the judge-alone provisions in section 21(4) of the CMIA. In 16 of these 18 cases, the finding was made on the basis of the second limb of the test and in the remaining two cases the finding was made on both limbs.

149 McSherry and Naylor, above n 136, 536.

150 Submissions 21 (Criminal Bar Association); 18 (Victoria Legal Aid); 11 (Jamie Walvisch). Consultations 23 (Supreme Court of Victoria—judges); 24 (County Court of Victoria—judges).

151 Submission 11 (Jamie Walvisch).

152 Submission 4 (The Australian Clinical Psychology Association).

153 Submission 21 (Criminal Bar Association).

Suggested approaches to directing the jury in submissions

- 7.137 Almost all approaches proposed in submissions were based on existing approaches to jury directions, although it was acknowledged that all can result in problems in their practical application.
- 7.138 Proposed approaches in submissions include adopting the ‘simplicity’ of the original High Court approach,¹⁵⁴ providing for a flexible approach with instructions varying depending on whether specific intent was an issue in a particular case,¹⁵⁵ adopting the *Stiles* approach,¹⁵⁶ or adopting a modified *Hawkins* approach.¹⁵⁷

The Commission’s conclusion

The need for clarity in the law and consistency of approach

- 7.139 The Commission has formed the view that due to the uncertainty that exists in this area of law, there is a need for legislative clarification to the way in which the jury is directed on the elements of the offence when the defence of mental impairment is in issue. The complexity of this area of the law makes it even more important that it is clarified and that jury directions are made as clear and simple as possible.
- 7.140 The Commission has considered the current and other approaches to directing juries and the feedback provided in submissions and consultations.
- 7.141 The Commission is of the view that there are issues with both of the current approaches (*Stiles* and *Hawkins* approaches) to directing a jury where the defence of mental impairment is in issue.
- The Commission does not favour the *Stiles* approach because it requires juries to employ artificial reasoning in presuming that the accused is of sound mind when they consider the physical and fault elements of the offence, while at the same time having to ignore hearing evidence that the accused has a mental impairment.
 - The Commission also does not favour the *Hawkins* approach as the accused may lose the chance for an outright acquittal if the prosecution need only prove the physical elements of the offence before the jury considers the defence of mental impairment.
- 7.142 The Commission has also considered the option of not prescribing an approach in legislation and recommending an approach that is left to the judge’s discretion depending on the particular circumstances of the case. Although such an approach allows for flexibility, it may fail to address concerns about providing clarity and reducing complexity in this area of law. Not prescribing an approach would mean that the current practice for a judge to employ either the *Hawkins* or *Stiles* approach would remain and therefore is subject to the concerns outlined above.

¹⁵⁴ Submission 11 (Jamie Walvisch).

¹⁵⁵ Submission 21 (Criminal Bar Association) recommending the *Stiles* approach be adopted when specific intent is not an issue and the *Hawkins* approach be adopted when specific intent is an issue.

¹⁵⁶ Submission 8 (Office of Public Prosecutions). The OPP’s submission endorsed the approach in *DPP v Soliman* [2012] VCC 658 (1 May 2012), which endorsed the *Stiles* approach.

¹⁵⁷ Submission 18 (Victoria Legal Aid). This submission proposed the jury first consider the physical elements of the offence, then the defence of mental impairment as outlined in the *Hawkins* approach, but then proposed that the ‘mental element’ or fault element of the offence be considered.

The proposed approach

- 7.143 On balance the Commission recommends a new approach that provides a level of prescription with flexible characteristics to ensure that it can be applied to address the different circumstances that can arise in cases where the defence of mental impairment is raised. In making this recommendation, the Commission aims to:
- clarify the law relating to directing the jury where the defence of mental impairment is in issue
 - create an approach for both juries and judges that is not unnecessarily complicated and does not require the jury to engage in artificial reasoning
 - ensure that, as far as possible, the approach is consistent with the principles that a person with a mental condition should be subject to the same standard as a person of sound mind and have the same opportunity for acquittal
 - ensure that, as far as possible, the approach is consistent with the principle that the defence of mental impairment is intended to apply to a person who is not responsible for criminal conduct because of a mental impairment that impaired their ability to understand the nature and quality of their conduct
 - protect the community from any further offending by the person due to mental impairment and to provide treatment of the person's mental condition in a manner that is consistent with the principle of least restriction.
- 7.144 The Commission considers that a prescriptive approach, with built-in flexibility, will provide clarity and consistency to this area of the law, where there was previous uncertainty and variation in approach.
- 7.145 The Commission agrees that the jury should not be required to engage in artificial reasoning. The approach should therefore allow the jury to consider evidence relating to the mental condition of the accused in considering the fault element of the offence.
- 7.146 The Commission also agrees that, as far as possible, a person who raises a defence of mental impairment should be subject to the same standard as a person of sound mind and have the same opportunity for acquittal.
- 7.147 However, the Commission has concerns about the opportunity for acquittal in cases where an accused may be acquitted because the fault element cannot be established due to evidence of the mental condition of the accused being considered. There are two examples where this may arise:
- A person's acts are voluntary and they know the physical thing that they are doing but not the nature and quality of that act—for example, a person thinks they are cutting a loaf of bread but they are actually cutting a person's neck. This person would know they are engaging in the act of cutting, but would not know that they are cutting a person.
 - A person's acts are voluntary, but they do not know the physical thing that they are doing or the nature and quality of that act—for example, a person thinks that they are taking photographs of a person with a camera but they are actually shooting a person.
- 7.148 In the above circumstances, under an approach that requires proof of the fault element together with the physical elements, a person may be acquitted because the prosecution is unable to prove specific intent. For example, where an accused is charged with murder, if the accused did not know the nature and quality of the act, the prosecution will be unable to prove that they intended to kill a person.

- 7.149 The Commission's approach therefore provides an exception to the principle that a person raising the mental impairment defence should have the same opportunity for acquittal as a person of sound mind. This exception, in the Commission's view, is a sound public policy decision made in the interests of community protection. Under these circumstances, where an accused has engaged in conduct constituting the physical elements of an offence and as a result of mental impairment (within the meaning of the CMIA) does not know the nature and quality of their actions, a person should not be acquitted but be made subject to supervision.
- 7.150 This exception would only apply to cases where the fault element is unable to be established because there is evidence of the accused's mental condition that is capable of demonstrating that the accused did not know the nature and quality of their conduct.
- 7.151 The proposed approach requires the judge to determine whether the exception ought to apply to a particular case prior to directing the jury. A threshold question will assist the judge in determining how to direct the jury. This process will assist in making the directions to the jury as clear and simple as possible. This approach is also consistent with the integrated approach to jury directions under the Jury Directions Act.¹⁵⁸
- 7.152 Where the fault element is unable to be established because evidence of the accused's mental condition is capable of demonstrating that the accused did not know the nature and quality of their conduct, only the physical element must be proved before considering the defence of mental impairment. Where the fault element is unable to be proved for a different reason, the accused should be entitled to an acquittal.
- 7.153 In all other cases, all elements of the offence must be proved before the defence of mental impairment is considered.

Recommendation

- 55 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to provide the following approach to directing the jury on how to approach the elements of an offence when the defence of mental impairment is in issue:
- (a) Threshold question for the judge: is the fault element unable to be established because evidence of the accused's mental condition is capable of demonstrating that the accused did not know the nature and quality of their conduct?
 - (b) If the answer to the threshold question is yes, Direction 1 should be given to the jury as follows:
 - (i) The physical elements of the offence must be proved beyond reasonable doubt.
 - (ii) If they cannot be so proved, the accused should be acquitted.
 - (iii) If the physical elements of the offence are proved beyond reasonable doubt, the jury should be directed to consider the defence of mental impairment.

Recommendation cont'd

- (c) If the answer to the threshold question is no, Direction 2 should be given to the jury as follows:
- (i) All elements of the offence must be proved beyond reasonable doubt.
 - (ii) The accused is presumed to be of sound mind; however, evidence of a mental condition can be taken into account in considering whether the fault element of the offence is proved beyond reasonable doubt.
 - (iii) If they cannot be so proved, the accused should be acquitted.
 - (iv) If all elements of the offence are proved, the jury should be directed to consider the defence of mental impairment.

Implications of the Commission's recommendations for related defences under the doctrine of automatism

- 7.154 As discussed in Chapter 4 at [4.81]–[4.82], changes to the definition of mental impairment may have implications for the doctrine of automatism.
- 7.155 The Commission's recommendation on the definition of mental impairment may mean that conditions that were considered not to be a 'disease of the mind' and previously classified as sane automatism and may now fall within a new statutory definition of mental impairment and be classified as insane automatism. People who have mental conditions within this category who fulfil the requirements of the defence of automatism may be liable for supervision (see Recommendation 24).
- 7.156 A further implication for automatism may result from recommendations in relation to jury directions where it is unclear whether the evidence supports the defence of mental impairment (insane automatism) or goes to the voluntariness of the act (sane automatism).
- 7.157 In cases of automatism, the judge must determine which type of automatism to charge the jury about, based on the evidence in the particular case:
- insane automatism: the judge directs the jury about the defence of mental impairment
 - sane automatism: the judge directs the jury about the requirements of a voluntary act.
- 7.158 However, there may be cases where the cause of automatism is unclear. The *Victorian Criminal Charge Book* does not provide guidance as to how to direct the jury in these circumstances and simply states that the judge must explain the meaning of 'disease of the mind' and voluntariness to the jury.
- 7.159 In cases where the cause of automatism is unclear, the jury must decide whether the accused acted in a state of automatism and if so, whether the state of automatism was caused by a 'disease of the mind'.

- 7.160 It is unclear how the Commission's proposed recommendation will affect directions provided to the jury where the cause of automatism is not determined by the judge. While a statutory definition of mental impairment that includes the operational elements of the defence of mental impairment could be applied in cases of insane automatism, it could not be used in directions to the jury in cases of sane automatism where the defence of mental impairment is irrelevant. In this situation, it is possible that jury directions will become more complex, as the judge will have to direct the jury to consider the meaning of the term 'mental impairment' for insane automatism and 'disease of the mind' and voluntariness for sane automatism.
- 7.161 There is also uncertainty about how the jury should be directed on findings in cases where the jury is satisfied that the defence of mental impairment applies but it cannot be excluded as beyond reasonable doubt that the automatism was 'sane automatism'.¹⁵⁹ The CMIA expressly provides that where the defence of mental impairment is proved on the balance of probabilities, the jury should be directed to find the accused not guilty because of mental impairment.¹⁶⁰ However, where the prosecution has failed to prove that the acts of the accused are voluntary, such as in cases of sane automatism, the accused should be acquitted.
- 7.162 These issues are outside the scope of this review but the operation of the doctrine of automatism will need to be considered in the context of the Commission's recommendations that propose changes to the defence of mental impairment (see also discussion at [4.81]–[4.82]).

Directions on the consequences of being found not guilty because of mental impairment

- 7.163 A third issue relating to the jury directions raised by the Commission in its consultation paper was directions on the legal consequences of a finding of not guilty because of mental impairment. The issue focuses on the extent of the trial judge's obligation to direct the jury on the legal consequences of a finding of not guilty because of mental impairment when the defence has been raised in a trial or a special hearing.

Current law

- 7.164 In a usual criminal proceeding, the judge does not explain the legal consequences of the findings to the jury. This is consistent with the well-established role of the jury as explained by the Court of Appeal in the case of *R v Fitchett*:¹⁶¹

The jury task has traditionally been confined to determining whether the prosecution has established its case beyond reasonable doubt and, as they have no part whatever to play in any subsequent sentencing process or disposition of the person before the Court, no mention is ordinarily made of those matters. Not only are such considerations ordinarily regarded as irrelevant to the jury's task, but their introduction has been seen to carry a significant risk of a miscarriage of justice as a consequence of the jury being diverted by their perception of the likely outcome.¹⁶²

¹⁵⁹ Judicial College of Victoria, above n 113, [8.2.1].

¹⁶⁰ *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 20(2).

¹⁶¹ (2009) 23 VR 91.

¹⁶² *Ibid* 100.

- 7.165 However, section 22(2) of the CMIA requires that where a jury has been empanelled and admissible evidence has raised the question of mental impairment, the judge must direct the jury to:
- consider the question
 - explain to the jury the findings which may be made and the legal consequences of those findings.¹⁶³

The purpose of section 22(2) of the CMIA

- 7.166 The purpose of section 22(2) of the CMIA is to address the concern that a jury may be hesitant to find an accused not guilty because of mental impairment where they do not know the consequences of that decision. A jury may be reluctant to find an accused not guilty because of mental impairment if they perceive it could 'result in the immediate release of a disturbed and dangerous person when as a practical proposition in most cases that would almost certainly not be the case'.¹⁶⁴
- 7.167 The Court of Appeal has stated that while the purpose of section 22(2) is clear, whether confining an explanation only to the legal consequences of a particular verdict achieves that purpose is 'doubtful'.¹⁶⁵
- 7.168 There is a statutory duty on the trial judge to provide this explanation, which requires 'that the judge explain the legal consequences, not the possible or probable outcomes for the person before the Court'.¹⁶⁶ However, the requirement to limit an explanation to the legal consequences and not any 'possible or probable' outcomes can be difficult for a judge who is seeking to reassure the jury that the accused is unlikely to be released. This is because judges must navigate tensions between the purposes of the section in reassuring a jury and the requirement to inform the jury that the legal consequence of a finding of not guilty because of mental impairment may be unconditional release.
- 7.169 This difficulty has been highlighted by the Court of Appeal which, after reviewing charges in the Trial Division of the Supreme Court of Victoria, found that:
- there is some confusion concerning what should or should not be said in this regard and the difficulty which has been encountered in resolving the tension. Judges generally appear to have been concerned to reassure jury members that the verdict would not result in the release of the person into the community.¹⁶⁷
- 7.170 It has therefore been suggested that when a possible outcome is unconditional release, something more may be required to 'allay the perceived fears of jury members' than a 'mere recitation of the legal processes and possible orders'.¹⁶⁸

163 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 22(2).

164 *R v Fitchett* (2009) 23 VR 91, 102.

165 *Ibid.*

166 *Ibid.*

167 *Ibid.* 103.

168 *Ibid.*

The requirements of directing a jury on the legal consequences of findings

7.171 The specific requirements for judges directing a jury on the legal consequences of a finding of not guilty because of mental impairment are set out in the *Victorian Criminal Charge Book*.¹⁶⁹ In directing the jury, the judge:

- must inform the jury about the nature of the decisions that will have to be made following a finding of not guilty because of mental impairment
- must explain to the jury that there is a process to be followed which will focus on the question of the appropriate disposition of the person in the particular circumstances of the case
- is not empowered to prognosticate on or pre-empt the decisions to be made with respect to the accused's disposition
- must not convey any impression concerning the desirability, punitive features or public safety aspects of arriving at a particular verdict.

7.172 The *Victorian Criminal Charge Book* also provides an example of directions that were provided to the jury by Justice Osborn in the case of *R v Gemmill*.¹⁷⁰ These directions were endorsed by Victorian Court of Appeal in the case of *R v Fitchett*¹⁷¹ and are as follows:

If you find the accused guilty, then there will be a further hearing before me and I will have to determine how he should be sentenced. If you find him not guilty, that is completely not guilty, he will be discharged and be free to walk away from the court. If you find him not guilty because of mental impairment, then there are two options open to me. The first is to declare that he is liable to a supervision order under the Crimes (Mental Impairment and Unfitness to be Tried) Act (1997) and the second is to order that he be released unconditionally. I would have to form a view on evidence as to what was the appropriate course to be followed.

A Supervision order, which is the first option that would be open to me, may commit the person to custody, or release the person on conditions decided by the court and specified in the Order. So you can see that those are the different legal consequences that follow from the different verdicts available to you. And you can see, as I have told you, that a verdict of not guilty because of mental impairment, has quite different consequences from a verdict of not guilty.¹⁷²

7.173 The Charge Book also stresses the importance of taking the legal consequences of the finding into account in making their determination and that the decision should be based on the evidence in the case.¹⁷³

¹⁶⁹ Judicial College of Victoria, above n 113, [8.8.1].

¹⁷⁰ [2004] VSC 30 (23 January 2004).

¹⁷¹ (2009) 23 VR 91.

¹⁷² Ibid 104.

¹⁷³ Judicial College of Victoria, above n 113, [8.8.2].

Views in submissions and consultations

- 7.174 The Commission sought views on whether any changes are required to the provision governing the explanation to the jury of a finding of not criminally responsible.
- 7.175 While there was some support for the example provided in *R v Fitchett* of Justice Osborn's directions to the jury on the legal consequences of findings,¹⁷⁴ the Office of Public Prosecutions was of the view that the CMI Act should be amended to clarify the requirements of section 22(2)(a).¹⁷⁵
- 7.176 One submission argued that the current directions to the jury on the legal consequences of findings are too complicated.¹⁷⁶ This submission proposed that rather than requiring the judge to explain the difference between an unconditional discharge and a supervision order:
- it would be better if the jury could simply be instructed that people who are found not guilty because of mental impairment will generally be subject to a supervision order. If the jury choose to question the judge about other possible dispositions, he or she should be free to explain the possibility of an unconditional discharge—but that should not be mandated in all cases.
- 7.177 The importance of striking a balance between advising the jury that the accused will not be 'set free' and ensuring that the judge does not provide the jury with any indication of the outcome of the case was emphasised in one submission which proposed that:
- [b]ecause this issue is pertinent to cases in which mental illness is an issue and it can affect a verdict, a trial judge should direct and explain to the jury about the legal consequences of the 'not guilty because of mental impairment' verdict, clearly specifying that the offender would be detained in a secure psychiatric facility for treatment purposes, or released unconditionally if there is no mental health issue at the time of the disposition (which rarely occurs).¹⁷⁷
- 7.178 Victoria Legal Aid and the Australian Clinical Psychology Association were also of the view that the possibility of discharge may influence jury deliberations. The Australian Clinical Psychology Association stated that an explanation of the legal consequences of the findings to the jury is important because the 'lay public will not fully comprehend that the finding of not guilty because of mental impairment does not equate with innocence or an acquittal'.¹⁷⁸ Victoria Legal Aid proposed that in directing the jury on the legal consequences of findings:
- it would be appropriate to inform the jury that a finding of not guilty by reason of mental impairment would not be the end of the matter, and that following that finding the court carefully considers issues relating to risk and appropriate treatment.¹⁷⁹
- 7.179 One of the participants in a meeting with the judges of the County Court of Victoria acknowledged that juries find it 'reassuring' to be directed on the legal consequences of the findings.¹⁸⁰

174 Consultation 24 (County Court of Victoria—judges).

175 Submission 8 (Office of Public Prosecutions).

176 Submission 11 (Jamie Walvisch).

177 Submission 7 (Meron Wondemaghen).

178 Submission 4 (The Australian Clinical Psychology Association).

179 Submission 18 (Victoria Legal Aid).

180 Consultation 24 (County Court of Victoria—judges).

The Commission's conclusion

- 7.180 The Commission acknowledges that there is a tension between the purpose of section 22(2) in providing reassurance to a jury about the protection of the community from what they may perceive as a dangerous accused found not criminally responsible, and the requirement to inform the jury of the legal consequences of such a finding, which include a possible unconditional release.
- 7.181 In Chapter 10 the Commission proposes the addition of a requirement that the court, in deciding whether to unconditionally release a person or declare a person liable to supervision, must have regard to whether the person poses an unacceptable risk of causing physical or psychological harm to another person or other people generally (Recommendation 88).
- 7.182 The Commission is therefore of the view that in directing the jury on the legal consequences of a finding of not criminally responsible, the judge after outlining the legal consequences of such a finding as an indefinite supervision order or unconditional release, should inform the jury, in general terms, of the factors to be considered in making a person liable to supervision.

Recommendation

- 56 The requirements of a judge in directing a jury on the legal consequences of a mental impairment finding should be specified in section 22(2)(a) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) and provide that in explaining the legal consequences of a finding of not criminally responsible because of mental impairment, the judge:
- (a) must explain that the person may be made subject to an indefinite supervision order or unconditionally released
 - (b) must explain that there is a process to be followed by the judge in deciding whether an accused is made liable to supervision or unconditionally released which includes the judge considering evidence on the risk to community safety and appropriate treatment in the particular case, and
 - (c) must not otherwise indicate the probable or likely outcome in relation to the legal consequence of the finding, or convey any impression concerning the desirability, punitive features or public safety aspects of arriving at a particular verdict.

Cost implications of changes to jury directions

- 7.183 The main cost implication of the Commission's recommendations to change jury directions under the three aspects of the CMIA is the resources required to change the *Victorian Criminal Charge Book* and any associated judicial education that may be required. These costs will largely be incurred by the Judicial College of Victoria, which is responsible for the content and updating of the publication.

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8. Rights and interests under the CMIA

Introduction

- 8.1 The terms of reference ask the Commission to have regard to the representation of various interests involved in the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ('CMIA'). In particular, the Commission has been asked to look at whether 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.
- 8.2 The Commission has taken the following approach in considering the issues raised during consultations:
- *Representation of victims' and family members' interests*—These issues relate to the support available to victims and family members of people subject to supervision orders throughout the court process, the notification and court report processes and the need for acknowledgment that the conduct has occurred. The Commission makes recommendations to enhance victim support, improve victim notification processes and promote meaningful sharing of information with victims.
 - *Advocacy for people subject to supervision orders*—These issues relate to the need for legal representation¹ and independent advocacy to safeguard the rights of people on custodial and non-custodial supervision orders. The Commission makes a recommendation to undertake a gap analysis of advocacy services for people who are subject to the CMIA to improve accessibility of these services.
 - *Representation of community interests*—These issues relate to which party best represents the interests of the community in hearings to vary or revoke supervision orders and to grant or revoke extended leave. The Commission makes a recommendation to re-frame the roles of various parties in CMIA proceedings so that the interests of the community are represented by the Director of Public Prosecutions.
 - *Suppression orders*—These issues relate to the balance between the principles of open justice and the successful reintegration of people subject to the CMIA back into the community. The Commission makes recommendations to introduce a statutory principle recognising the importance of suppression orders in the long-term recovery of people subject to supervision orders under the CMIA, and to create a presumption in favour of making a suppression order where it is in the public interest to do so.

Victims and family members

- 8.3 The Commission, in its *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997: consultation paper* ('the consultation paper'), outlined the current provisions under the CMIA for victims and family members in the context of the particular difficulties that can arise in cases under the CMIA.
- 8.4 The Commission sought views on whether the provisions in the CMIA allow for effective participation by victims and family members. The victims and family members consulted by the Commission ranged in experience and included victims who were family members of the accused, victims who were not family members of the accused, and family members who were providing ongoing support to people through CMIA proceedings and on supervision orders.²
- 8.5 The *Victims' Charter Act 2006* (Vic) acknowledges the importance of victims in the criminal justice system and requires investigating, prosecuting and victim service agencies to treat victims with 'courtesy, respect and dignity', provide victims with information, notify victims of certain events or hearings and provide assistance to victims who wish to prepare a victim impact statement.³ The Commission affirms those principles.

The complexity of CMIA matters for victims and family members

- 8.6 Criminal proceedings can be traumatic for the victim of any offence. Family members of an accused may also be affected, for example while providing emotional or financial support to the person through the criminal process.
- 8.7 For victims and family members involved in criminal proceedings under the CMIA, however, the experience can be especially traumatic. CMIA matters can be procedurally complex, subject to significant delays, involve complex relationships between victims and the accused and result in outcomes that may be difficult for a victim to understand and accept.
- 8.8 It is very common in CMIA cases for an accused to be charged with offences against family members. In such cases, the direct victim of an offence may be a parent, spouse, child or sibling of the accused. Therefore, other family members will also be a victim of the offence. In such cases, family members will be dealing with and coming to terms with what has happened and its long-term effects, the trauma of criminal proceedings, as well as possibly providing support to the accused. The difficulties can be particularly heightened when the person who has been charged with an offence has a mental condition, such as a mental illness or intellectual disability, which has or will require ongoing care and support from family members. In some, but not all of these cases, family members may have a very good understanding of the history and complexities of the person's condition and its relationship to the alleged offending. This may not be the case where the victim and their family members do not know the accused.
- 8.9 One study examining the management of forensic patients in Victoria found that 42.5 per cent of offences were committed against a family member of the person.⁴

² The Commission consulted with two victims, one person who was both a victim and a family member of a person on a custodial supervision order, a family member of a person with an intellectual disability and mental illness who is subject to a non-custodial supervision order, two people with an intellectual disability who had been subject or were currently subject to non-custodial supervision orders, a person with an intellectual disability on a non-custodial supervision order and their family member, the Patient Consulting Group at Thomas Embling Hospital and the Community Advisory Group at the Victorian Institute of Forensic Mental Health (Forensicare). Submissions were received from the Patient Consulting Group at Thomas Embling Hospital and a person who was previously subject to a custodial supervision order.

³ *Victims' Charter Act 2006* (Vic) ss 6(1), 7–11, 13.

⁴ Janet Ruffles, *The Management of Forensic Patients in Victoria: The More Things Change, The More They Remain the Same* (PhD Thesis, Monash University, 2010) 121–2.

- 8.10 The difficulties encountered by victims in CMIA proceedings have been explained by the Director of Public Prosecutions in Victoria, John Champion SC, as follows:

Complications in understanding [in CMIA matters] arise due to the fact that a large number of these matters involve homicides within families—so there are family members grieving for a loved one, while on the other hand dealing with the trauma of another loved one being prosecuted for the death.

On top of that, due to a series of different hearings and processes involved, matters involving mental impairment can seem to take longer to finalise than if the offence was being dealt with under the normal court process. The different processes can seem even more mysterious, and can lead to confusion for those involved as lay participants.⁵

- 8.11 The outcome in a CMIA matter may be that the accused is found not guilty because of mental impairment⁶ and this can be confusing and difficult for a victim to accept. In the words of one member of a Homicide Victim Support Group in New South Wales:

Words are very powerful. It is devastating for a family to hear in court that, despite everyone's acknowledgement that this offender murdered this victim, nobody is found guilty of a crime. The verdict of 'not guilty on the grounds of mental illness' often means to the victim's family that the offender is 'getting away with it'. The most important implication of this verdict is that the offender has no conviction against their name. For families, this means that no one is responsible for the death of their loved one.⁷

Participation of victims and family members in the criminal justice process

- 8.12 There are many reasons why it is important to provide victims with the opportunity to participate in criminal proceedings. This may be even more so for victims in CMIA matters, given the complexity of issues and the relationships between people who have been charged with offences and the victims of those offences. A study examining the importance of victim participation in forensic patient proceedings in New South Wales highlighted the complexity of CMIA-type matters:

Victims clearly may have genuine and legitimate concerns with the release of forensic patients about their own safety and security and that of others and therefore need to have the opportunity to contribute. In some cases their input may provide relevant and significant evidence or information for the decision makers. Even in cases where the input has no significant probative value, the participation may have significant therapeutic consequences in reassuring victims about their safety and security and confidence and respect for the legal process. ... Moreover, victimization by a family member or acquaintance, which is a typical scenario in forensic cases, tends to be more personal and therefore more painful and generally is a continuing cause of stress and fear because such victims know that they may encounter the perpetrator in the future and moreover they may feel that they are a likely potential target [citations omitted].⁸

- 8.13 It is important for victims for the accused 'regardless of responsibility, to be held to account'.⁹ Informing victims about the different processes that apply where the defence of mental impairment or unfitness is raised can assist victims in understanding the consequences of findings under the CMIA and reassure victims that an accused is not 'getting off' and that the person will be provided with treatment or supervision if necessary.

5 John Champion SC, 'Launch of Prosecuting Mental Impairment Matters' (Speech delivered at Melbourne, 28 November 2012).

6 The Commission has recommended in Chapter 9 of this report replacing the finding of 'not guilty because of mental impairment' with the accused's 'conduct is proved but not criminally responsible because of mental impairment': see Recommendation 69.

7 Duncan Chappell, Interview with Martha Jabour, Executive Director, Homicide Victims Support Group (Parramatta, New South Wales, 6 August 2009) cited in Duncan Chappell, 'Victimisation and the Insanity Defence: Coping with Confusion, Conflict and Conciliation' (2010) 17(1) *Psychiatry, Psychology and Law* 39, 39.

8 Michael Barnett and Robert Hayes, 'The Role of Victims in NSW Forensic Patient Proceedings' (2009) 13 *University of Western Sydney Law Review* 7, 17–18.

9 Jason Quinn and Alexander I F Simpson, 'How Can Forensic Systems Improve Justice for Victims of Offenders Found Not Criminally Responsible?' (2013) 41 *Journal of the American Academy of Psychiatry and Law* 568, 573.

- 8.14 One way in which victims can engage with the criminal justice system in a meaningful way is through restorative justice techniques. Restorative justice processes are victim-focussed. Restorative justice models aim to 'help heal and empower victims of serious crimes while providing the opportunity for offenders to take responsibility for their actions and assist in the recovery process'.¹⁰ Evidence suggests that restorative justice techniques may work most effectively where the offender and victim share a 'common identity'.¹¹
- 8.15 While studies have shown that restorative justice may contribute to the perception of fairness of the criminal justice system from the perspective of the victim, the evidence on the effectiveness of restorative justice mechanisms is mixed.¹² Despite this, it has been argued that:
- What is certain is that where restorative justice is done well, it goes beyond what traditional responses can achieve and as a result, the potential impact upon individuals, communities and society is substantial. Restorative justice is about more than traditional notions of justice—it is about repairing harm, restoring relationships and ultimately, it is about strengthening those social bonds that make a society strong.¹³
- 8.16 Acknowledgment of the offence may be addressed as part of the recovery process of a person on a supervision order, but whether the circumstances of the offence are addressed as part of a person's therapy and treatment is a clinical decision and depends on the individual and the nature of their case.
- 8.17 A person who is on a supervision order under the CMIA because they have been found not guilty because of mental impairment is, under Victorian law, not criminally responsible for their actions. A person may also be on a supervision order because in a special hearing a jury found that they committed the offence.¹⁴ This is a qualified finding of guilt to recognise the fact that the person was not able to participate fully in the hearing where the assessment of criminal responsibility was made. Therefore this finding differs from a usual finding of guilt. In these situations under the CMIA, unlike a situation where a person has been found guilty of an offence, it may not be appropriate for a person on a supervision order to participate in restorative justice processes.
- 8.18 Restorative justice techniques may require 'considerable adaptation' to work with forensic offenders.¹⁵ Possible barriers may include the victim's difficulty in coming to terms with the outcome of no criminal responsibility due to the finding of not guilty because of mental impairment or the accused's mental condition, which may prevent effective and appropriate participation in the process. Despite these difficulties, it has been argued that exploring restorative justice alternatives is 'perhaps most important' in future research in this area.¹⁶
- 8.19 People who are subject to the CMIA will be supervised either by the Victorian Institute of Forensic Mental Health (Forensicare) or the Department of Human Services (DHS).
- 8.20 While Forensicare's role is to support the needs of a person with a mental illness on a supervision order, given the complex relationships involved in CMIA matters, this role may sometimes extend to providing support to victims in situations where the victim is also a family member of the accused. For example, the Family and Friends Support Group is facilitated by the family and carer advocate at Forensicare and provides an opportunity for peer group support for family and friends of patients.

10 Susan L Miller and M Kristen Hefner, 'Procedural Justice for Victims and Offenders?: Exploring Restorative Justice Processes in Australia and the US' (2014) 31(4) *Justice Quarterly* 1, 3.

11 Quinn and Simpson, above n 9, 572.

12 Jacqueline Juodo Larsen, Australian Institute of Criminology, *Restorative Justice in the Australian Criminal Justice System*, Research and Public Policy Series No 127 (2014) 35.

13 Ibid 36.

14 The Commission has recommended in Chapter 9 of this report replacing the finding in a special hearing of 'committed the offence charged' with the accused's 'conduct is proved on the evidence available': see Recommendation 68.

15 Quinn and Simpson, above n 9.

16 Ibid.

- 8.21 A family and carer advocate is also available at Forensicare to provide direct support to family and friends of patients, and training and advice to staff. The family and carer advocate has 'current or previous direct experience of being a family/carer for a person with a serious mental health issue who has been treated within the public mental health system' to give an 'authenticity to the position'.¹⁷ The family and carer advocate is also the Chair of the Family Sensitive Practice Committee at Forensicare.¹⁸
- 8.22 The Commission is not aware of any equivalent groups for people with an intellectual disability or other cognitive impairment who are supervised under the CMIA by DHS.

Provision for victims and family members in the CMIA

- 8.23 The CMIA acknowledges the role of victims and family members through provisions requiring notification of hearings and outcomes of decisions and enabling victims and family members to make a court report. Amendments to the CMIA in 2001 enhanced these provisions to allow victims to include more information in victim reports on their views of the offending conduct, to allow for more information to be provided to victims about the level of supervision, and to allow victims to elect not to receive information through the victim notification scheme.¹⁹
- 8.24 A victim in relation to an offence is defined in the CMIA as 'a person who suffered injury, loss or damage as a direct result of the offence'.²⁰
- 8.25 The CMIA defines a family member of a person subject to a CMIA order as:
- a spouse or domestic partner, parent or guardian or sibling of the person, or
 - a child of the person or of the person's spouse or domestic partner.²¹
- 8.26 The CMIA requires each victim and each family member to be notified of hearings.²² The Director of Public Prosecutions is required to give 14 days notice, by registered post, of reviews (including major reviews), applications for the variation or revocation of a supervision order and applications for extended leave, if granting the application would significantly reduce the degree of the person's supervision.²³
- 8.27 Other jurisdictions have improved the administrative efficiency of the victim notification process through the use of a register.²⁴ As one study examining the participation of victims in New South Wales forensic proceedings explained:
- A register for victims is a vital aspect of any victim participation scheme because it helps to ensure that all victims who wish to participate can be advised in due time of their opportunities to participate.²⁵

17 Victorian Institute of Forensic Mental Health (Forensicare), *Consumers and carers* (2014) <<http://www.forensicare.vic.gov.au/page.aspx?o=conscare>>.

18 Ibid. The Family Sensitive Practice Committee enables families and carers to provide input and is made up of family/carers, members of the Executive, senior management and clinical staff from Thomas Embling Hospital and the Community Forensic Mental Health Service.

19 Victoria, *Parliamentary Debates*, Legislative Assembly, 29 November 2001, 2188 (John Thwaites).

20 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 3(1).

21 Ibid.

22 Ibid s 38C(1). See also section 38C(5) which states that the Office of Public Prosecutions is not required to give notice to a victim or family member who has indicated they do not wish to be notified of any hearing in relation to the person on the supervision order.

23 Ibid ss 38C(2)–(3), 74.

24 Barnett and Hayes, above n 8, 18.

25 Ibid.

- 8.28 Victims and family members can make court reports at various stages of the CMIA process.²⁶ Reports by victims and family members contain their views on the conduct of the person and the impact of that conduct on them.²⁷ The CMIA provides that a victim or a family member can make a report to the court for the purpose of:
- (a) assisting counselling and treatment processes for all people affected by an offence
 - (b) assisting the court in determining any conditions it may impose on an order made in respect of a person under [the CMIA] or in determining whether or not to grant a person extended leave.²⁸
- 8.29 The guide 'Prosecuting Mental Impairment Matters'²⁹ was released by the Office of Public Prosecutions in November 2012. The guide was developed for victims involved in CMIA matters to facilitate greater participation by them in the prosecution process. It explains the court process where people with a mental condition are prosecuted for serious crimes and outlines the circumstances under which a victim or family member report can be made.
- 8.30 The guide aims to increase input from victims, both at the initial stages of prosecution, but also at the stages when supervision orders are made and reviewed by the court. This reflects the increasing recognition of the importance of victims' rights and participation in CMIA processes.³⁰ Information available to the Commission on the presence of court reports in CMIA cases confirms the need for measures such as the guide to provide more support to victims to participate in CMIA processes.
- 8.31 The Commission's analysis of the 65 CMIA cases in the higher courts where there were judgments available from 2000–01 to 2011–12, indicated that a court report was made or referred to by the judge in 18.5 per cent of cases (12). In 81.5 per cent of cases, a court report was not mentioned by the judge.³¹

Views in submissions and consultations

- 8.32 A number of themes emerged from submissions and consultations with victims and family members. These include:
- the need for support throughout the court process, in particular, that support be provided by a person with lived experience of the complexities of CMIA matters
 - a lack of information about CMIA court processes
 - the benefits of the notification and court report processes managed by the Office of Public Prosecutions
 - the need of victims for acknowledgment that the accused's actions had a significant effect on their lives
 - whether restorative justice measures could be explored as part of providing acknowledgment to a victim and a means of taking responsibility for an accused (this was not raised by victims, but by a family member of a person on a non-custodial supervision order).

26 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 42(1). Section 43(1) provides that victims and family members can make reports at any point before an order is made following a qualified finding of guilt or not guilty because of mental impairment, whenever there is an application for the variation or revocation of an order, and during a major review or an application for extended leave where granting the application would significantly reduce the level of supervision.

27 *Ibid* s 42(2).

28 *Ibid* s 42(1).

29 Office of Public Prosecutions, *Prosecuting Mental Impairment Matters* (2012).

30 The victims who participated in consultation meetings were involved in proceedings prior to the guide being introduced. It is therefore possible that some of the statements by victims regarding the lack of provision of information may have been addressed by the Office of Public Prosecution's guide.

31 Data provided by the Sentencing Advisory Council, higher courts sentencing database. This does not necessarily mean that a court report was not made and provided to the court, but reflects that a court report was not referred to by the judge: see **Appendix D** for methodology.

- 8.33 The Commission firstly discusses stakeholder views under these themes and then makes recommendations to address the areas where the Commission considers changes should be made.

Victim support in the court process

- 8.34 There was a strong view expressed in consultation meetings with victims and family members that it would have been beneficial to have received support during the court process from someone who had gone through a similar experience.³²
- 8.35 One partner of a victim expressed the view that early support is crucial:
It's important to identify people early on and give support early on through the police process and not just the immediate family of the victim. It's about making sure you get information along the way about what is happening.³³
- 8.36 The provision of support during the court process was highlighted as particularly important by one victim (who was also a family member of the accused) who expressed the view that they found attending court an intimidating experience:
it is intimidating for families at court. Court processes are intimidating. The court room was intimidating, particularly the Supreme Court. That's how it is; when the judge is sitting 'in the heavens' it can be intimidating.³⁴
- 8.37 Acknowledging the complexities involved in CMIA matters, the same victim (and family member of the accused) said that while court support was provided, it could have been more useful to have been supported by someone who had gone through the process themselves:
It would have been useful to have someone at the court assisting to explain the process ... A social worker provided support ... however it would have been more useful to have someone there who understands the complexities of the issues, perhaps someone who had been through the court process themselves as a family member of a person on trial ... [My] daughter found the process very traumatic.³⁵
- 8.38 Another partner of a victim supported this view, stating that it would have been useful to have a support person who had experienced something similar themselves:
I generally found that people who have not gone through such an experience do not have the necessary degree of empathy. I think that having experience could contribute to an understanding of what others are going through. It was very difficult to communicate the pain on an individual level.³⁶

Provision of information during the court process

- 8.39 Two participants in consultation meetings, who were both partners of a victim, said that they were not provided with enough information about the court case.³⁷ As one victim stated:
I am concerned that I will not be told about the outcome of the court case, or that I will only find out upon reading it in the paper. ... If I was angry it would only be because I haven't gotten the information that I wanted. I understand that there are a lot of cases but it is still important to relations of victims that they receive adequate information.³⁸

32 Consultations 4 (Family and Friends Support Group, Forensicare); 37 (Partner of a victim of crime).

33 Consultation 22 (Partner of a victim in a CMIA matter).

34 Consultation 4 (Family and Friends Support Group, Forensicare).

35 Ibid.

36 Consultation 37 (Partner of a victim of crime).

37 Consultations 37 (Partner of a victim of crime); 22 (Partner of a victim in a CMIA matter).

38 Consultation 37 (Partner of a victim of crime).

8.40 The partner of a victim also stated:

For example, I had to go on the internet to find out what a directions hearing was. I hadn't realised I could do this. I was unclear on what a directions hearing is about and because I was not sure about whether the directions hearing would include details about the injuries to my partner's body, I did not want to risk going. If I had known more about the hearing, I could have made an informed decision about whether to go or not. It was not about going to see the offender or to watch him be punished.³⁹

8.41 One partner of a victim found the idea of going to court 'stressful' and felt that it was more important to them to be provided with information.⁴⁰ This view was shared by another victim who explained that not being provided with information can affect their experience of the justice system as a whole:

I was informed by the police about a court liaison person but I have not had regular contact with them. I had a lot of questions that were not answered and this had left me wondering whether my questions are important, and whether the criminal justice system thinks that I am important.⁴¹

Court reports

8.42 All of the victims and family members involved in consultation meetings were of the view that the ability to provide a court report is important. The partner of a victim explained that:

Making a report to the court was important to me as once you put something in writing it goes out of my brain and then they know how I feel. You can't keep it all in your brain. ... It's like a cleansing process and there was someone to give it to, which was good.⁴²

8.43 They also praised the Office of Public Prosecutions (OPP) for the assistance provided in completing their report:

The lawyer who I had contact with at the Office of Public Prosecutions is fantastic—because she helped me with the court report. She advised me about getting a statutory declaration. She said if you are worried or frightened give me a call. When you have that, you don't need to worry.⁴³

Victim notifications

8.44 The OPP raised issues in relation to the victim notification system.

Changes suggested to notifications for extended leave

8.45 The CMIA requires the Director of Public Prosecutions (DPP) to give victims and family members of the supervised person 14 days notice of an application for extended leave if the granting of the application would significantly reduce the degree of supervision to which the person is subject.⁴⁴

8.46 The OPP observed that because applications for extended leave must be made every 12 months until a custodial supervision order is varied to a non-custodial supervision order, it must write to victims and family members on behalf of the DPP every 12 months. This is because the OPP does not have information about whether a subsequent application for leave will result in a significantly reduced degree of supervision.

39 Ibid.

40 Consultation 22 (Partner of a victim in a CMIA matter).

41 Consultation 37 (Partner of a victim of crime).

42 Consultation 22 (Partner of a victim in a CMIA matter).

43 Ibid.

44 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 38C(2)(d), (3).

- 8.47 The OPP therefore submitted that the CMIA, in particular section 38C(2)(d), should be amended to provide that the DPP need only notify victims and family members of the granting of extended leave where the supervised person was not on extended leave at the time of the application.

Changes suggested to notification of review hearings

- 8.48 The DPP is required to give victims and family members of the accused 14 days of notice of reviews and other hearings.⁴⁵ While there is no definition of what the Director must do to 'give notice' in the CMIA, section 74 requires that a notice must be sent by registered post. Under section 49 of the *Interpretation of Legislation Act 1984* (Vic), giving notice is 'deemed to be effected at the time at which the letter would be delivered in the ordinary course of post'.
- 8.49 In practice, the OPP advised that they send these letters by registered post at least 21 days before the hearing to comply with these requirements (ensuring that there is enough time for the letter to be sent, for Australia Post to deliver the letter and for the person to collect the letter from the post office).
- 8.50 The OPP noted the difficulties that arise when a person does not collect their letter via registered post from the post office and submitted that:
- The CMIA should be amended to provide that the DPP is taken to have complied with the requirements of section 38C if registered post letters containing the information required in that section and section 38E are posted 21 days (for example) before the hearing date.
 - Where a hearing is adjourned for a period less than three months, an ordinary post letter advising an adjournment should be sufficient so that victims and family members need not attend the post office multiple times to collect letters.
 - Section 38C should include alternatives such as email or other postal systems where receipt of notification can be confirmed.
 - It should be sufficient for one or more family members to be notified rather than all of them.
 - Where the accused has no contact with their family members or does not want them notified, it should not be a requirement that they be notified.⁴⁶
- 8.51 The OPP was of the view that '[r]eceiving constant reminders about the offences can be distressing for some victims' and that it 'can be onerous for victims and family members to continually attend the post office in business hours to collect letters'.⁴⁷
- 8.52 The OPP also advised that while a small number of victims elect not to receive notification of hearings, many victims do not collect their registered post. The OPP suggested that the victims who do not collect their registered post may not want to receive the notification but have not 'opted out' of the system. Multiple letters may sometimes be generated where a hearing is adjourned, or frequent notifications where reviews are held on a regular basis.
- 8.53 The OPP also raised concerns about the difficulty in 'tracking down' victims in situations where the first notification they receive may be for a review hearing at the expiry of a 25-year nominal term. The OPP indicated that it can be difficult to locate victims after this period of time, as there may not have been any ongoing contact with the victim since the offence occurred.⁴⁸

45 Ibid s 38C(3).
46 Submission 24 (Office of Public Prosecutions).
47 Ibid.
48 Ibid.

Support for the notification system

- 8.54 Despite the OPP's concerns outlined above, a partner of a victim expressed strong support for the notification system:

Information provided by the Office of Public Prosecutions is good—they provide me with lots of information. I like being notified by mail not by computer and not phone call because someone else can take the phone call. And you can take time to digest the material if you have it in writing.⁴⁹

The importance of acknowledgment

- 8.55 The finding of not guilty because of mental impairment reflects the fact that the conduct comprising the offence has been proven but because mental impairment affected the person's capacity to such a degree that they did not realise what they were doing or realise that it was wrong, the person is not criminally responsible for what happened. The finding of committed the offence charged (after being found unfit to stand trial), reflects the fact that the conduct comprising the offence has been proven but the finding of guilt is qualified by the fact that the person was not capable of participating in the hearing of the evidence and exercising all of their legal rights to defend the charges.

- 8.56 Therefore, while these findings are treated differently under the law to findings of guilt in non-CMIA matters, they do recognise that the conduct has occurred.

- 8.57 A partner of a victim raised the importance of acknowledging what had occurred. This person stated that while they understand that the person did not know what they were doing, it was still important to them that there was some acknowledgment of the actions of the accused:

Acknowledgment is the only thing that matters. ... It is important to me to obtain an acknowledgment that the accused had been at fault and caused my partner's death. I do not want the accused's family to suffer. ... If the accused had a mental impairment at the time of the accident, he may not understand that what he has done is wrong. I want the accused to be made to understand at some stage about how it has affected me and my family.⁵⁰

- 8.58 The input from people subject to supervision orders indicated the potential for there to be some acknowledgment as part of the recovery process. As discussed above at [8.16], the extent to which a patient may be capable of acknowledging and accepting what has happened is a clinical judgment. Seeking to have them acknowledge what happened may or may not be appropriate, depending on the particular circumstances of the case and the effect it might have on the patient's recovery.

49 Consultation 22 (Partner of a victim in a CMIA matter).
50 Consultation 37 (Partner of a victim of crime).

- 8.59 The Patient Consulting Group⁵¹ provided information about the work that it had done to develop a 'Recovery Pyramid' to be adopted as part of Forensicare's recovery approach. The Recovery Pyramid was developed to 'help patients gain insight of their recovery and also identify their next step' and is linked to the definition of patient recovery which is 'acknowledging your offence and illness and working through your issues'.⁵² The pyramid identifies seven stages of recovery: denial, despair, birth of hope, acceptance, willingness, responsible action and meaningful life. For each stage, descriptions are provided to capture the sorts of feelings or experiences a patient might be having at that particular stage. Under 'meaningful life', some of the descriptors provided touched on this notion of acknowledging what had happened and the consequences of future behaviour. These were provided by patients who had experience of going through the recovery process and were living in the community. They included the following:
- Being aware of consequences when you're in the community and knowing your actions have consequences.
- It is a healing time for some patients after committing their crime.⁵³
- 8.60 The submission provided by the Patient Consulting Group at Forensicare included a comment from a person on a supervision order that illustrates an acknowledgment of what had happened:
- I ended a family's son's life. I can never give that back but what I can do is get well to make sure it never happens again.⁵⁴
- 8.61 It is evident that acknowledgment of the conduct that has occurred in a CMIA matter can and does have a role in the recovery of people on supervision orders. However, the current emphasis of the acknowledgment is on what therapeutic impact this may have on the person subject to the order and their recovery from the condition that resulted in the mental impairment defence, rather than on the victim and on assisting them to also 'recover' from what has happened in a therapeutic way.

Restorative justice

- 8.62 While victims did not raise the concept of restorative justice in submissions and consultations, one family member of a person with an intellectual disability and a mental illness on a supervision order thought that a restorative process may have assisted her brother to understand the consequences of his actions:
- No information was provided to me about what happened to the victim of the incident. I felt that reparation may have assisted my brother's case to try and make him understand that he had hurt someone and that there were consequences because of the car accident.⁵⁵

51 The Patient Consulting Group is comprised of patients at Thomas Embling Hospital and their role is to 'participate in the development and implementation of a recovery approach across Forensicare and to provide consultation, feedback and education for the wider service and the Clinical Governance Management Committee'. Consumers are selected by an interview process. See Victorian Institute of Forensic Mental Health (Forensicare), above n 17.

52 Submission 2 (Forensicare Patient Consulting Group).

53 Ibid.

54 Ibid.

55 Consultation 36 (Family member of person subject to a non-custodial supervision order under the CMIA).

The Commission's conclusion

- 8.63 The Commission recognises that improvements are required to the way in which victims and family members are involved in all criminal proceedings. This has been highlighted recently in a Department of Justice publication *Information and support needs of victims and witnesses in the Magistrates' Court*, which sought to 'fill a gap in the available data about the information and support needs of victims and witnesses in the Magistrates' Court'.⁵⁶ However, given the unique circumstances surrounding CMIA matters, victims and family members need additional specialised support throughout court processes.
- 8.64 The Commission supports a victim participation scheme that allows the victim to decide their level of participation. Victims may have varying levels at which they wish to engage with processes under the CMIA. A victim may wish to have no involvement with CMIA processes or may seek involvement at one or any combination of the following levels:
- *Information*—being provided with information about court processes and outcomes under the CMIA and notified of hearings and reviews.
 - *Engagement*—attending court hearings and reviews where support may be required and being provided with court reports at reviews and hearings.
 - *Outcomes*—being acknowledged through victim-focussed information sharing processes and/or seeking active engagement with the person on the supervision order through involvement in restorative justice measures.
- 8.65 These recommendations are supported by Recommendation 3 in Chapter 2 of this report, which proposes the introduction of a statutory principle in the CMIA that acknowledges the need for victims to be supported and involved in proceedings.

Information

- 8.66 There is a need to improve methods of providing information to victims and family members throughout the court process.
- 8.67 The Commission acknowledges the concerns raised by the Office of Public Prosecutions (OPP) in relation to the victim notification process, in particular the difficulties in locating victims, the requirement to send all notifications by registered mail, and problems of notifying about a potential decrease in the level of supervision with limited information on the person.
- 8.68 The Commission supports the continuation of the current victim notification process, but is of the view that there should be greater flexibility in that system. For example, under the CMIA, notice is not to be given to a victim or family member where they have given notice to the Director of Public Prosecutions that they do not wish to be notified of any hearing in relation to the person subject to the supervision order.⁵⁷ However, there may be instances where a victim only wants to be notified if a person's supervision order is varied from a custodial supervision order to a non-custodial supervision order and would prefer to be notified by email, rather than registered post as required in the CMIA.⁵⁸ The notification process should be flexible enough to allow this to occur.

⁵⁶ Victim Support Agency, Department of Justice, *Information and Support Needs of Victims and Witnesses in the Magistrates' Court* (2013) 25.
⁵⁷ *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 38C(5).
⁵⁸ *Ibid* s 74.

- 8.69 The Commission's view is that a register would assist in reducing the administrative burden of the victim and family member notification process for the OPP. An automated system that allowed victims to update their contact details, preferred mode of contact and the level of participation they are seeking would be beneficial in providing flexibility for victims and reducing the administrative burden for the OPP.⁵⁹ All victims would initially be entered into the system to be notified of all hearings and reviews and could then elect to decrease their level of involvement in CMIA processes.
- 8.70 The issue raised by the OPP about having to routinely notify victims of extended leave applications when they have insufficient information to know that, if an application for extended leave is granted, the level of supervision to which the person is subject would be significantly reduced, is addressed by Recommendation 62 below. If the Director of Public Prosecutions represents the community at review hearings and applications for extended leave, they will have sufficient information to know whether a victim will need to be notified.

Engagement

- 8.71 The Commission has had regard to the principle underpinning section 42(1)(a) of the CMIA that provides for a victim or family member to provide a report to the court to assist in counselling and treatment processes for all people affected by the offence.⁶⁰ This unequivocally frames the therapeutic context of victim involvement. The Commission's view is that the approach by which victims are provided with information should sit within this therapeutic framework and should only occur with the consent of the victim and within the boundaries of appropriate information sharing for both the victim and person subject to the supervision order.
- 8.72 Research has shown that where victims are provided with information about the court process and the possible outcomes, they are more satisfied with the process even if the actual outcome of the case was not what the victim had sought. One study examining how the forensic system can improve justice for victims found that 'some of the methods of restorative justice and victim inclusion may enhance procedural justice and therefore the overall satisfaction of victims'.⁶¹ This finding was supported by another study looking at procedural justice that found:
- Justice appraisals by victims about how they are treated are often more meaningful than the outcome itself. ...victim-centered focus and the emphasis on treating victims with dignity and giving them ample opportunities to participate and share their feelings reinforces victims' feeling of justice and belief in the system [citation omitted].⁶²
- 8.73 For example, where a victim consents to obtaining information, they could be advised about a range of details regarding the supervision order, including the conditions of the order, contact with the supervisory organisation and the treatment or services being provided. If the person on the supervision order does not consent to the victim being provided with information, the victim could be given general information about the nature of the supervision order and the types of conditions that may be imposed. Where the person on the supervision order consents to the victim being provided with additional information, the victim could be provided with information about the treatment and services that the person is receiving. This information may provide reassurance to the victim about the processes that a person on a supervision order is subject to under the CMIA and that something is being done to prevent further conduct from occurring. However, care should be taken in providing such information to ensure that the expectations of individuals involved are managed appropriately and to be clear that this would not extend to providing input on decisions regarding treatment or level of supervision.

59 An automated system which automatically generates letters and can be accessed and updated by the victim would not add to the administrative workload of the Office of Public Prosecutions.

60 This principle has framed the approach taken in Recommendation 60(a).

61 Quinn and Simpson, above n 9.

62 Miller and Hefner, above n 10, 21.

Outcomes

- 8.74 The Commission acknowledges the difficulties that would be involved in developing a restorative justice process for victims in CMIA matters. However, while many victims understand that the accused in a CMIA matter is not criminally responsible for their actions, they still seek acknowledgment of the conduct that gave rise to CMIA proceedings and its effect on their lives, and reassurance that there are consequences by way of supervision or services for the person who is subject to the CMIA. One way this could be achieved is through greater information sharing between Forensicare, the Department of Human Services and the Office of Public Prosecutions.
- 8.75 Given the complexities of relationships involved in CMIA matters and the different outcomes and findings, many victims expressed the view that specialised knowledge was required by professionals who provide support to victims and family in CMIA matters that extends beyond the qualifications and experience of those who provide support to victims and family members in other criminal proceedings.
- 8.76 While most professionals in the mental health workforce have ‘learned experience’, that is, experience gained from study or work experience, the value of including people with ‘lived experience’ in the mental health workforce has been widely acknowledged.⁶³ People with lived experience of mental illness may not have experienced a mental illness themselves, but may have supported or cared for a person with a mental illness.

Recommendations

- 8.77 The Commission makes four recommendations that seek to provide more support to victims to facilitate their involvement in CMIA proceedings.

Recommendations

- 57 The Victims Support Agency in the Department of Justice should conduct work to develop a victim support scheme to provide court support, information on processes and outcomes and to assist victims to make court reports under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).
- 58 Section 74 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to provide that notice of a hearing required to be given to a family member or victim under the Act must be sent by a form of communication that allows the sender to determine if the notice has been received. Such means include, but are not limited to, registered post and other correspondence that involves notification of receipt, including electronic communication.

63

See, eg, Australian Health Ministers' Advisory Council, *A National Framework for Recovery-oriented Mental Health Services: Policy and Theory* (2013). This document states that recovery-oriented mental health service delivery 'draws strength from, and is sustained by, a diverse workforce that is appropriately supported and resourced and includes people with lived experience of mental health issues in their own lives or in close relationships'.

Recommendations cont'd

- 59 The Office of Public Prosecutions should investigate options for the development of a register specifically for victims and family members under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic). The register should include contact details of people on the register, indicate a person's nominated level of participation in processes under the Act and their preferred form of communication. The register should be automated and capable of being updated by the people on the register.
- 60 The Victorian Institute of Forensic Mental Health (Forensicare), the Department of Human Services and the Office of Public Prosecutions should investigate options that promote more meaningful information sharing with victims about the processes governing people subject to supervision orders. Key features of the scheme should be as follows:
- (a) The guiding principle underpinning the scheme should be to assist counselling and treatment processes for all people affected by an offence.
 - (b) Participation by victims is voluntary and can only occur with the consent of the victim.
 - (c) Where general information about the order is provided to the victim, information sharing could occur without the consent of the person on the supervision order.
 - (d) If the person on the supervision order consents, and doing so would not be detrimental to the recovery of the person, additional information about the person's treatment could be provided to the victim.

Cost implications of victim-focussed recommendations

- 8.78 The Commission's recommendation to introduce a victim support scheme will have resource implications in terms of scoping and initial set up, as well as ongoing resourcing.
- 8.79 The work required for the Office of Public Prosecutions (OPP) will also have an impact on organisational resources. However, there could be a reduction in resources once the register has been established, due to the creation of a more efficient process of communicating with victims. There may also be a cost saving from the reduction in notifications that are sent by registered mail, in cases where the victim has indicated that a different method, such as email, can be used or that they do not wish to receive any notifications.
- 8.80 Setting up the recommended information-sharing scheme between Forensicare, the Department of Human Services and the OPP will have resource impacts for all three agencies. However, depending on the approach taken to the victim support scheme recommended above, some of this work could be streamlined.

People subject to supervision orders

- 8.81 In considering the interests of people subject to supervision orders under the CMIA, the Commission has considered both the level of legal representation currently being provided to people subject to the CMIA, and the need for advocacy for people subject to supervision orders under the CMIA.

Legal representation

- 8.82 A person subject to a supervision order has the right to appear before the court, in person, in any hearing in which the court is considering:
- making, varying or revoking a supervision order in respect of the person
 - granting extended leave to the person
 - revoking a grant of extended leave.⁶⁴
- 8.83 The CMIA allows the person subject to a supervision order to be legally represented at any of these hearings.⁶⁵ A person applying for leave before the Forensic Leave Panel may also be represented by a legal practitioner.⁶⁶
- 8.84 Most people subject to a supervision order have legal representation when the court is making, varying or revoking the order. As mentioned in the consultation paper, however, legal representation at Forensic Leave Panel hearings is uncommon, with only six applicants legally represented in 22 hearings conducted in 2011.⁶⁷
- 8.85 The Commission sought views on whether the current level of legal representation for people subject to supervision orders is appropriate.

Views in submissions and consultations

- 8.86 Victoria Legal Aid (VLA) submitted that formal legal representation would not be required at all hearings for people subject to orders under the CMIA. VLA advised that there are benefits in legal representation where leave applications are not supported or are contested and that, operationally, there is a process in place to refer these matters to VLA.
- 8.87 One person with an intellectual disability on a supervision order provided an example of a legal representative also acting as an advocate.⁶⁸
- 8.88 They explained the role of their lawyer in court as follows:
- My lawyer was good at helping me to understand what was going on in court. I was able to talk to them and tell them how I was feeling. I was happy for my lawyer to talk for me in court.⁶⁹
- 8.89 A participant at a consultation meeting with people subject to custodial supervision orders said that they had legal representation at one of their early hearings before the Forensic Leave Panel and that they found this very helpful.⁷⁰

64 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 36(1).

65 *Ibid* s 36(3).

66 *Ibid* s 70(1).

67 Forensic Leave Panel, *Annual Report 2011* (2012) Appendix C.

68 Consultation 29 (Person previously subject to a non-custodial supervision order under the CMIA).

69 *Ibid*.

70 Consultation 1 (Consumer Advisory Group (CAG), Thomas Embling Hospital).

- 8.90 However, in the submission made by Forensicare's Patient Consulting Group, a view was expressed that lawyers sometimes advocate in a best interests model rather than on instructions from the accused:

Currently a mental impairment defence seems to exacerbate stigma and reduce consultation and collaboration with the defendant as there is an assumption that the defendant won't understand. Sometimes lawyers have strong views on the direction the case should take and impose this on defendants.⁷¹

The Commission's conclusion

- 8.91 The Commission acknowledges that legal representation has been held to be a part of the right to a fair hearing.⁷²
- 8.92 Based on the views of VLA that additional legal representation is not required at CMIA hearings, the Commission does not make a recommendation about legal representation.

Advocacy for people subject to supervision orders

- 8.93 An advocate can encompass a lot of different roles beyond legal representation. This could include providing information to a person about their rights and assisting the person to exercise their rights in a variety of ways, from facilitating discussions through to best interests representation.
- 8.94 The principles of least restriction and gradual reintegration underlying the CMIA aim to ensure that people progress through the various stages of supervision and that their liberty is not restricted for longer than required. The aim is to effect successful community reintegration and to protect the community effectively. However, these principles may be of limited benefit, given the vulnerability of people subject to the CMIA who may require assistance to be able to exercise these rights.
- 8.95 As stated in the Commission's *Guardianship* report, there is little point in having a principle of least restriction unless people detained in custody under a supervision order receive assistance from a skilled advocate.⁷³ The Commission therefore recommended in that report that the role of advocacy for people subject to supervision orders under the CMIA be legislated and appropriately resourced.⁷⁴
- 8.96 Advocates could assist people subject to a supervision order to decide whether they should apply for a review to vary the order, or to assist a person during a review hearing.⁷⁵
- 8.97 Under the *Disability Act 2006* (Vic), the Office of the Public Advocate is empowered to protect and promote the rights of people with a disability.⁷⁶ The *Mental Health Act 2014* (Vic)⁷⁷ ('MHA 2014') provides an advocacy program for people receiving public mental health services. The advocacy program will provide advocates to visit mental health services and provide telephone advice to 'assist people to participate in decisions about their assessment, treatment and recovery'.⁷⁸ Advocates will provide information, empower patients to make their own decisions about their treatment and recovery and where required, make representations on behalf of people.⁷⁹

71 Submission 2 (Forensicare Patient Consulting Group).

72 See, eg, *R v Chaouk* [2013] VSC 48 (15 February 2013); *Slaveski v Smith* [2012] VSCA 25 (29 February 2012).

73 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) 565.

74 Ibid.

75 Ibid 559.

76 The *Disability Act 2006* (Vic) and *Guardianship and Administration Act 1986* (Vic) both contain provisions regarding the involvement of the Office of the Public Advocate in protecting the rights of persons with a disability.

77 The *Mental Health Act 2014* (Vic) replaced the *Mental Health Act 1986* (Vic) on 1 July 2014: see Chapter 1 n 14.

78 Department of Health, *A new Mental Health Act for Victoria: Summary of Proposed Reforms* (October 2012) 3.

79 Ibid.

- 8.98 The Community Visitor Program run by the Office of the Public Advocate comprises volunteers who conduct unannounced visits to accommodation facilities for people with a disability or a mental illness at any time to monitor and report on the adequacy of services provided, in the interests of residents and patients.⁸⁰
- 8.99 Consumer consultants at Forensicare provide systemic advocacy for patients to promote effective service delivery. While consumer consultants do not advocate on behalf of patients, they work with and support patients to participate in their treatment and recovery and facilitate awareness about services and options. Consumer consultants also have a role in providing support and advice to staff on service provision from a patient perspective.
- 8.100 The consumer consultants focus on broad systemic issues that promote effective service delivery. They do not advocate on behalf of individual patients, unless the issue may have broader application.
- 8.101 The Consumer Leadership and Engagement Program established by Forensicare provides the opportunity for people subject to supervision orders to be involved in the 'development, planning, management, delivery and evaluation' of services at Forensicare.
- 8.102 People subject to supervision orders can also advocate for themselves and become involved in service improvement through two groups established by Forensicare:
- Consumer Advisory Group: consists of patients at Thomas Embling Hospital and current and past patients of Thomas Embling hospital who are part of the Community Forensic Mental Health Service. The group meets monthly and aims to 'enhance the quality of Forensicare's service delivery across the organisation'.⁸¹
 - Patient Consulting Group: consists of patients at Thomas Embling Hospital who meet fortnightly to 'participate in the development and implementation of a recovery approach across Forensicare' and 'provide consultation, feedback and education to the wider service and the Clinical Governance Management Committee'.⁸²
- 8.103 The Commission sought views on whether there is a need for more advocacy or support for people subject to supervision orders.

Views in submissions and consultations

- 8.104 The Office of the Public Advocate called for a legislated right for people on supervision orders to access advocacy at regular intervals, especially during reviews of supervision orders, for applications to vary orders and for decisions about leave.⁸³ The Office of the Public Advocate also supported the recommendation in the Commission's report on guardianship that the role of advocacy for people subject to supervision orders under the CMIA be legislated and appropriately resourced.⁸⁴

⁸⁰ Office of the Public Advocate, *Community Visitors* (10 April 2014) <<http://www.publicadvocate.vic.gov.au/services/107/>>.

⁸¹ Victorian Institute of Forensic Mental Health (Forensicare), above n 17.

⁸² Ibid.

⁸³ Submission 14 (Office of the Public Advocate).

⁸⁴ Submission 14 (Office of the Public Advocate); Victorian Law Reform Commission above n 73, 565.

- 8.105 The Office of the Public Advocate provided the following case study to illustrate the importance of advocacy for people under the CMIA:

Case study: Mr A

Mr A, who was 41 years of age and had an intellectual disability, spent 371 days in remand prior to being found unfit to plead by a jury. Mr A spent an extended period in custody due to the lack of availability of a suitable disability accommodation treatment facility. His period of incarceration resulted in distress for Mr A. During his incarceration he was chemically restrained as staff did not know how to manage his behaviour. The OPA [Office of the Public Advocate] advocate involved in the case made the point that there was a link between Mr A's deterioration and the lack of services that he received. She said that to continue in the current situation was a significant breach of his human rights. The County Court Judge involved in the case said the circumstances of Mr A were 'intolerable and unacceptable'. Following advocacy by OPA [Office of the Public Advocate] and a request from the Judge to the Secretary of the Department of Human Services, a placement was found for Mr A.⁸⁵

- 8.106 A number of patients at the consultation meeting with the Consumer Advisory Group at Thomas Embling Hospital raised the possibility of creating a peer worker program. Such a program could use the expertise of people with lived experiences of mental illness to advocate on behalf of patients and work in groups with patients and staff at Thomas Embling.⁸⁶
- 8.107 Another participant at the Commission's consultation with the Consumer Advisory Group at Thomas Embling Hospital explained the operation of the Personal Helpers and Mentors Program, which is a federally-funded program supporting people in the community whose lives are affected by mental illness. This participant supported the introduction of a similar program at Thomas Embling Hospital.⁸⁷
- 8.108 Participants in consultation meetings conducted by the Commission with staff of the Department of Human Services (DHS) also supported the development of an advocacy program for people subject to supervision orders under the CMIA.⁸⁸ One DHS case worker suggested an advocate or independent third person could be useful in court to translate issues 'from lawyer talk' into something the individual can understand.⁸⁹ The case worker suggested that advocates would need to have specialised knowledge and should not be general social workers or from 'an ordinary local advocacy agency'.⁹⁰
- 8.109 Another DHS case worker suggested the involvement of the Office of the Public Advocate, arguing that there needs to be an oversight mechanism to protect people's rights and to ensure consistency.⁹¹
- 8.110 This concept of an advocate 'translating issues' for people subject to supervision orders may have application in addressing miscommunications between people on supervision orders and those involved in decision making under the CMIA. For example, it was evident from the Commission's consultations with forensic patients in Thomas Embling Hospital that there are misconceptions about the factors that can influence the outcome of a leave hearing, such as clothing choice and how members of the Forensic Leave Panel may have been feeling on a particular day.

85 Submission 14 (Office of the Public Advocate).

86 Consultation 1 (Consumer Advisory Group (CAG), Thomas Embling Hospital).

87 Ibid.

88 Consultations 9 (Department of Human Services case managers, Gippsland and Latrobe); 17 (Department of Human Services case managers, Shepparton).

89 Consultation 17 (Department of Human Services case managers, Shepparton).

90 Ibid.

91 Consultation 9 (Department of Human Services case managers, Gippsland and Latrobe).

- 8.111 One participant in a consultation meeting with the Consumer Advisory Group at Thomas Embling said that they wore a suit as they believed it would impress the Forensic Leave Panel members and demonstrate that they were serious about their leave application. At the leave hearing, the judge complimented this participant on their suit, causing them to feel that the suit may have positively affected the result of the hearing.⁹²
- 8.112 Another participant commented that they wanted to go to their hearing dressed in their customary way in pants and a jumper, and did not feel they had to dress up just to make a good impression.⁹³
- 8.113 Another perception expressed by a participant was that the outcome of their leave application 'seemed to be influenced by the judge's mood'.⁹⁴
- 8.114 Advocates could assist in these situations by explaining processes, providing information or facilitating discussions between people on supervision orders and decision makers. This approach would quickly address any miscommunications that may arise and improve transparency in decision making for people subject to supervision orders under the CMIA.

The Commission's conclusion

- 8.115 The Commission's aim in making recommendations in this area is to provide accessible advocacy for persons subject to CMIA orders.
- 8.116 The Commission agrees that people on supervision orders under the CMIA should have access to advocacy services that provide information and assist the person to exercise their rights.
- 8.117 The Commission supports the recommendation in its report on guardianship that advocacy for people subject to supervision orders under the CMIA should be legislated and appropriately resourced, but it is not recommending that advocacy be legislated for people under the CMIA.
- 8.118 In its *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers*, the Victorian Parliament Law Reform Committee made the following finding:
- Disability advocacy plays an important role promoting the human rights of people with an intellectual disability or cognitive impairment. An ongoing relationship with a disability advocate is a positive mechanism for helping a person with an intellectual disability or cognitive impairment navigate through the justice system.⁹⁵
- 8.119 The Commission supports Recommendation 5 of the Victorian Parliament Law Reform Committee. It recommended that:
- the Victorian Government ensure that clients with a disability who seek assistance from disability advocacy services have adequate access to those services.⁹⁶
- 8.120 There have been developments since the Commission's previous recommendation for legislated advocacy. Two important developments are changes to the role of the Mental Health Legal Centre and the commencement of the MHA 2014, discussed above at [8.97].⁹⁷

92 Consultation 1 (Consumer Advisory Group (CAG), Thomas Embling Hospital).

93 Ibid.

94 Ibid.

95 Victorian Parliament Law Reform Committee, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (2013) 80.

96 Ibid 81.

97 The *Mental Health Act 2014* (Vic) replaced the *Mental Health Act 1986* (Vic) on 1 July 2014: see Chapter 1 n 14.

- 8.121 As part of the implementation of the MHA 2014, it was announced that the Department of Health is providing funding for advocacy services to 'support patients in public mental health services to understand and exercise their rights'.⁹⁸
- 8.122 The second development relates to changes in funding to the Mental Health Legal Centre that have significantly reduced the level of services it is able to provide. This means that it is unlikely to be able to provide an advocacy service for people on supervision orders. Victoria Legal Aid will, however, continue to provide specialist legal assistance through its Mental Health and Disability Advocacy program.
- 8.123 Given the current and proposed developments in the mental health sector and the range of services available through the Office of the Public Advocate in the disability sector, it is unclear whether all people subject to a supervision order under the CMIA will have access to advocacy services.
- 8.124 It is beyond the scope of this reference to determine the nature and scope of advocacy services that are required by people on supervision orders under the CMIA. To appropriately resource a legislated advocacy scheme, a scoping exercise should be undertaken to:
- determine which services are currently being provided to people under the CMIA
 - identify gaps where people subject to the CMIA are unable to access timely advocacy services.

Recommendation

- 61 The Department of Human Services and the Department of Health should undertake a gap analysis of advocacy services for people who are subject to the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) to ensure that all people subject to the Act have access to advocacy services. The analysis should have specific reference to the gaps in relation to a range of advocacy services, from formal advocacy to 'peer advocacy' programs and the exercise of rights that include the following:
- (a) rights of appeal against findings and supervision orders imposed under the Act
 - (b) rights to apply for a variation or revocation of a supervision order
 - (c) rights to apply for extended leave and other leave
 - (d) rights in relation to bail and remand (including place of custody)
 - (e) rights in relation to restrictive practices and compulsory treatment.

Community interests

Parties involved in CMIA proceedings

- 8.125 Government bodies and the prosecution are involved in various stages of making and reviewing supervision and leave orders. The main purpose of their involvement is to represent the public interest and to assist the court.
- 8.126 In the consultation paper, the Commission set out in detail the different level of involvement of government bodies and the prosecution in different stages of the CMIA process.⁹⁹
- 8.127 The Attorney-General, the Director of Public Prosecutions, the Department of Health and the Department of Human Services may be involved in the following hearings:
- orders for unconditional release and supervision orders
 - making, varying or revoking a supervision order and granting extended leave (or revoking extended leave)
 - appeals against confirmation, variation and revocation of supervision orders
 - leave and extended leave appeals
 - appeal against unconditional release of a person transferred to Victoria.
- 8.128 This means that aside from the person subject to the supervision order, the Attorney-General, Director of Public Prosecutions, Secretary to the Department of Human Services or Secretary to the Department of Health may also be involved in a hearing or appeal concerning supervision orders. In the consultation paper, the Commission identified that the involvement of these parties may be problematic for the following reasons:
- *The interests of the state (executive and prosecution) may be over-represented*—The current arrangement results in two government bodies acting in the interests of the community and potentially in opposition to the person subject to the supervision order (although the prosecution and government bodies do not always take an opposing stance). This raises the question of whether these provisions create an imbalance in representation and whether the involvement of all of these parties is necessary to effectively represent the community's interest. Further, one of the purposes of the introduction of the CMIA was to reduce executive involvement.
 - *Involvement of multiple parties can have resource implications and increase the length of the process*—The involvement of multiple parties could result in delays to hearings because of the number of people that need to be coordinated. If each party must put a view forward, this also results in longer hearings.
 - *Lack of clarity in the CMIA on the reason for involvement*—The parties involved may see their role as tokenistic or merely a formality. The CMIA does not make clear why these parties are involved at different stages, other than to represent the public interest.
- 8.129 The Commission sought views on the representation of community interests in the CMIA system of supervision, and in particular:
- whether the involvement of multiple agencies representing the community's interests unnecessarily increases costs
 - the most appropriate way of representing the community's interests under the CMIA.

- 8.130 During the reference period and prior to the publication of the consultation paper, the Court of Appeal also considered the responsibilities of various parties in CMIA proceedings in *NOM v DPP* ('*NOM*').¹⁰⁰ In *NOM* the Court of Appeal held that the Attorney-General and Secretary to the Department of Health should take a position on whether the court should vary the existing regime of supervision.¹⁰¹
- 8.131 However, it remains unclear which party represents the interests of the community in hearings of applications to vary or revoke a supervision order or to grant or revoke a grant of extended leave under the CMIA. Either the Attorney-General or the Director of Public Prosecutions could possibly undertake this function.
- 8.132 A discussion of the roles of various parties involved in CMIA proceedings is provided below.

Current roles of parties in representing community interests

- 8.133 A person or body may be a party to proceedings or *amicus curiae* ('friend of the court'). Whether a person or body is a party or *amicus curiae* should depend on the nature of its interest in the outcome of the proceedings. The rights accorded to the person or body flow from the effect the orders would have on them.
- 8.134 A body might become joined to a proceeding in three ways: as an original party; as an intervenor; or as *amicus curiae*. Sir Anthony Mason made the following distinction between the status of an intervenor and *amicus curiae*:
- Intervenors become parties who are liable to an order for costs being made against them; they have the rights of parties. ... Intervention status has traditionally carried an entitlement to present oral argument, an entitlement that is both necessary and appropriate to a person who has the status of a party. The rules of natural justice entitle such a party to be heard. Amicus status is different. Underlying the procedure is the notion that the amicus is presenting an argument which will assist the Court. So there is no *entitlement* to present an oral argument and there is every reason for limiting the amicus to cases in which the amicus will deliver an argument which would not otherwise be presented to the Court and limiting the argument to written argument, except in exceptional cases [emphasis in original].¹⁰²
- 8.135 In legal terms, a party, whether original or intervening, has a legitimate expectation that its submissions will be heard and considered. This is guaranteed to the parties by the rules of natural justice.¹⁰³

The role of the Attorney-General

- 8.136 Under the 'Governor's pleasure' regime that governed this area of the law prior to the introduction of the CMIA, the executive¹⁰⁴ made decisions on the release of people under Governor's pleasure orders. The Adult Parole Board would review detainees every 12 months and provide a report to the Attorney-General. The Attorney-General would then make a decision about whether to recommend release to Cabinet. If the Attorney-General recommended release, Cabinet would discuss the recommendation and if approved, refer the matter to the Governor-in-Council. If release was approved by the Governor-in-Council, the person would be supervised by the Adult Parole Board for five years. A decision to release a person under a Governor's pleasure order could therefore be influenced by political considerations.¹⁰⁵

¹⁰⁰ [2012] VSCA 198 (24 August 2012).

¹⁰¹ Ibid [38].

¹⁰² Sir Anthony Mason, 'Intervenors and Amici Curiae in the High Court: A Comment' (1998) 20 *Adelaide Law Review* 173, 174.

¹⁰³ As expressed by the maxim *audi alteram partem*: see *R v Abrahams* (1895) 21 VLR 343; *Twist v Randwick Municipal Council* (1976) 136 CLR 106; *R v Fisher* (2009) 22 VR 343.

¹⁰⁴ The executive is the administrative arm of government and comprises government employees who work in government departments and agencies. Members of the legislature are appointed as Ministers to oversee the executive government.

¹⁰⁵ Victorian Parliament Community Development Committee, *Inquiry into Persons Detained at the Governor's Pleasure* (1995) 2.

- 8.137 Prior to the decision in *NOM*, the role of the Attorney-General under the CMIA was discretionary, usually involved the testing of evidence adduced by other parties, and sometimes involved submissions as to outcome.
- 8.138 The *Forensic Health Legislation (Amendment) Act 2002* (Vic) amended the CMIA to give the Attorney-General the right to appear and the right to appeal a court decision under the CMIA. In the second reading speech for the Bill, the Minister for Health stated that:
- Experience has shown that the involvement of the Attorney-General's legal representatives speaking on behalf of the community is invaluable. The Attorney is the first law officer of the state and has played no part in the initial prosecution. The Attorney can therefore come to court to protect the community's interests.¹⁰⁶
- 8.139 The Court of Appeal in *NOM* held that in addition to the function that the Attorney-General usually takes in adducing evidence and cross-examining witnesses to explore the evidence, the Attorney-General and the Secretary to the Department of Health should adopt a 'clear and unequivocal position where the evidence permits'.¹⁰⁷ The Court of Appeal also observed that a failure to take up any position could give rise to a perception that there was a desire to avoid any public criticism if the person was to re-offend.¹⁰⁸
- 8.140 It is unclear why the Attorney-General is required to take such an active role in CMIA proceedings compared with other proceedings. One reason may be the 'quasi-inquisitorial' nature of the proceedings as outlined by the Court of Appeal in *NOM*:
- It is clear from the structure of the Act ... that the nature of an application for revocation of a supervision order is imbued with a substantial inquisitorial dimension. ... As in the case of the Secretary, the Attorney-General, as a party to quasi-inquisitorial proceedings, may play an important role in presenting and exploring the facts. ... The inquisitorial role which the Attorney-General seeks to discharge is not in any way incompatible with making submissions as to whether the existing regime of supervision and treatment should be varied [citations omitted].¹⁰⁹
- 8.141 One of the concerns with this approach is the involvement of the executive government in decision making under the CMIA. This difference between executive and judicial functions recognises that decisions by the executive are 'unlikely to preserve the rights of individuals, such as forensic patients who pose a range of risks: risk of harm to others, risk of re-offending, risk of relapsing from a serious mental illness'.¹¹⁰
- 8.142 Concerns around the involvement or input of the executive in decisions relating to the detention and supervision of people subject to the CMIA was one of the key criticisms of the Governor's pleasure regime that was replaced by the CMIA. In examining the role of the Attorney-General in determining release for detainees under the Governor's pleasure regime, the Community Development Committee's *Inquiry into Persons Detained at the Governor's Pleasure* in 1995 identified the following problems:
- The executive is not necessarily the most qualified body to determine decisions about release.
 - Decision makers will possibly be 'over-cautious' in balancing the best interests of the detainee with the interests of the community.
 - The nature of parliamentary decision making may not be consistent with the best interests of the person and the principles of natural justice.¹¹¹

106 Victoria, *Parliamentary Debates*, Legislative Assembly, 29 November 2001, 2188 (John Thwaites).
 107 *NOM v DPP* [2012] VSCA 198 (24 August 2012) [38].
 108 *Ibid* [37].
 109 *Ibid* [21], [32].
 110 Tessa Boyd-Caine, 'A Matter of Discretion?' (2011) 36(2) *Alternative Law Journal* 121, 122.
 111 Victorian Parliament Community Development Committee, above n 105, 98.

- 8.143 Based on these considerations, the Community Development Committee recommended that ‘variation or release proceedings involving persons found not guilty on the ground of mental impairment should be conducted before a judge of the Supreme Court, regardless of where the original trial was conducted’.¹¹²
- 8.144 In 1993, the Human Rights and Equal Opportunity Commission (HREOC) released the Burdekin Report,¹¹³ an inquiry into the human rights of people with a mental illness, including forensic patients. In commenting on the previous Governor’s pleasure regime, HREOC highlighted the importance of not involving the executive government in the decision-making process to determine if a forensic patient should be released:
- Perhaps mindful of how poorly equipped they are for the task, decision-makers tend to make very conservative assessments. The impression of witnesses who gave evidence on this topic was that regardless of what the advisory body recommends, the decision-makers generally decide against release ... It seems improbable that such decisions are always based on a rational assessment of the prisoner’s potential threat to the rights of the wider community. The prime criterion is sometimes the potential for political damage to a government perceived by the public as being soft on criminals.¹¹⁴
- 8.145 In its recent review, the New South Wales Law Reform Commission recommended retaining the requirement to notify the Attorney-General of the release of a person under their system, given the Attorney-General’s appeal rights.¹¹⁵ In New South Wales, however, the Attorney-General may only appeal on a question of law.¹¹⁶

The role of the Director of Public Prosecutions

- 8.146 Under the Governor’s pleasure regime, once a person became a detainee they had no right to appear at reviews by the Adult Parole Board and there was no right for legal representatives to appear at reviews on behalf of the detainee. There was also no right to appeal a decision of the Adult Parole Board. The role of the Director of Public Prosecutions (DPP) was therefore limited to prosecuting matters under the *Crimes Act 1958* (Vic).
- 8.147 The DPP operates independently of government in relation to ‘decisions on the institution, preparation and conduct of criminal proceedings’.¹¹⁷ The DPP ‘commands a unique and crucial position within Victoria’s criminal justice system’ and leads the conduct of criminal prosecutions with ‘independence, integrity and impartiality’.¹¹⁸
- 8.148 In considering the independence of the DPP, a distinction is to be drawn between independence and accountability. While the DPP is independent from the executive government, the position is accountable to the Attorney-General for performance of their functions and powers.¹¹⁹
- 8.149 The Office of Public Prosecutions (OPP) conducts litigation on behalf of the DPP.¹²⁰ The OPP also provides support to victims through its Victims Strategy and Services section.

112 Ibid 143.

113 Human Rights and Equal Opportunity Commission, *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with a Mental Illness* (1993).

114 Ibid 798–9.

115 New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report No 138 (2013) 262.

116 *Mental Health (Forensic Provisions) Act 1990* (NSW) s 77A(6).

117 Office of Public Prosecutions, *Director of Public Prosecutions* <<http://www.opp.vic.gov.au/About-Us/Who-we-are-and-what-we-do/DPP>>. See *Public Prosecutions Act 1994* (Vic) s 22 for the functions of the Director of Public Prosecutions.

118 Office of Public Prosecutions, *The Pursuit of Justice: 25 Years of the DPP in Victoria* (2008).

119 See *Public Prosecutions Act 1994* (Vic) s 10(1).

120 Ibid s 41(1).

- 8.150 The DPP is required to behave as a model litigant.¹²¹ The guidelines set out requirements that government agencies must adhere to, including to act consistently and fairly in handling litigation and in undertaking and pursuing appeals, and to consider whether there are 'reasonable prospects for success' or if the appeal is 'otherwise justified in the public interest'.¹²²
- 8.151 After a supervision order has been imposed, the role of the DPP does not extend beyond providing information to the court on their requirement to give notice to victims and family members. The DPP usually seeks to be excused and takes no active part in hearings after informing the court that they have fulfilled their obligations to notify victims and family members.¹²³
- 8.152 One example of where the DPP's role continues post-sentence is the process of review for indefinite sentences under the *Sentencing Act 1991* (Vic).¹²⁴ Indefinite sentences may be imposed by a court on its own initiative or on an application made by the DPP.¹²⁵ The DPP is involved in the process of reviewing indefinite sentences by making applications for review, leading evidence at the review and appealing the outcome of a review.¹²⁶
- 8.153 The DPP also has a role under the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) which provides for the continued detention of serious and high-risk sex offenders post-sentence. The DPP may act as an applicant for a detention order and must give notice of an application to victims listed on the Victims Register.¹²⁷ The DPP must notify the Secretary of the Department of Justice as soon as possible after an indefinite order is imposed.¹²⁸

The roles of the Department of Health and the Department of Human Services

- 8.154 Before *NOM*, the role of the Department of Health (DH) was largely administrative and focussed on facilitating the production of evidence before the court.¹²⁹ Under the Governor's pleasure regime, reports were prepared for reviews by the Adult Parole Board by 'professional staff responsible for the treatment and management of the detainees'.¹³⁰
- 8.155 However, in *NOM* it was held that that the nature of an application for revocation has a 'substantial inquisitorial dimension' and that the Secretary to DH, 'as a party to quasi-inquisitorial proceedings, should play a role in presenting and exploring the facts and in making submissions'.¹³¹
- 8.156 As with the role of the Attorney-General, the Court of Appeal in *NOM* held that the Secretary to DH should take a position on whether the court should vary the existing regime of supervision.¹³²
- 8.157 The Department of Human Services (DHS) was not a party to the proceeding in *NOM*. However, due to DHS's similar responsibilities and rights to appear in CMIA matters where DHS (rather than DH) supervises the person subject to the order, the decision may have implications for its obligations as well.
- 8.158 The role undertaken by DHS in having the 'custody, care and control' of forensic residents under the CMIA is quite different to the role played by the Secretary to DH.

121 The Victorian Government has adopted the Model Litigant Guidelines, which require all government agencies to 'behave as a model litigant in the conduct of litigation'. See Department of Justice, *Model Litigant Guidelines: Guidelines on the State of Victoria's Obligation to Act as a Model Litigant* (2011) Guideline 1.

122 Department of Justice, *Model Litigant Guidelines: Guidelines on the State of Victoria's Obligation to Act as a Model Litigant* (2011) Guidelines 1(a), 1(b) and 1(h).

123 Submission 8 (Office of Public Prosecutions). See also *NOM v DPP* [2012] VSCA 198 (24 August 2012) [14].

124 *Sentencing Act 1991* (Vic) s 18H(1).

125 *Ibid* s 18A(5).

126 *Ibid* ss 18H(1)(a), (2), 18L, 18O(2).

127 *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) ss 33, 94(2).

128 *Ibid* s 26(1).

129 Victorian Parliament Community Development Committee, above n 105, 89–90.

130 *Ibid* 89.

131 *NOM v DPP* [2012] VSCA 198 (24 August 2012) [21], [25].

132 *Ibid* [38].

- 8.159 While DH provides treatment and care to forensic patients ‘at arms length’ through Forensicare, DHS directly provides services to forensic residents through DHS case managers. Case managers facilitate treatment, develop care plans and directly supervise forensic residents.
- 8.160 In addition, DHS and DH do not have experience in providing information on the risk a person poses to the community. This expertise lies with expert witnesses such as forensic psychiatrists and psychologists. However, the departments are often called upon to take a position as to the risk a person would pose in a non-custodial setting or if their order were revoked.

Views in submissions and consultations

- 8.161 The Commission did not receive a large volume of input on this issue and very few submissions specifically addressed the questions raised by the Commission.

Resources

- 8.162 Victoria Legal Aid was of the view that review processes are currently resource-intensive and highlighted that ‘[a]ny increase in the number of agencies specifically representing the community’s interests will further increase these costs’.¹³³

Representing the community’s interests

- 8.163 Two submissions were supportive of the current system and were of the view that a consideration of community interests is inherent in the process of judicial decision making.¹³⁴ One participant in a consultation meeting with the Department of Health highlighted that there are advantages to having a range of parties involved in CMIA hearings, such as obtaining perspectives on the issue, which is particularly important in relation to matters of risk assessment.¹³⁵
- 8.164 In considering the role of the Attorney-General, one participant in a meeting with judges of the County Court of Victoria stated that the input from the Attorney-General in these matters can be ‘pro-forma’.¹³⁶ It was also noted that legal practitioners representing the Attorney-General often act on instructions to ‘effectively seek guarantees’ that cannot be provided that ensure that people subject to supervision orders no longer pose a risk to the community.¹³⁷
- 8.165 A participant in a consultation meeting with DHS case managers supported this view, pointing out that in their experience ‘[t]he Attorney-General’s position always tends to be that they do not want any change in the order’.¹³⁸
- 8.166 The OPP advised that they do not currently make a submission in CMIA hearings about the result but instead limit their role ‘to informing the court about notice to victims and family members, whether victims or family members have prepared a report, and any other matters relating to the Act that the court requires assistance with’.¹³⁹ The DPP usually seeks to be excused from the proceedings once this role has been fulfilled and leave to do so is usually granted by the court.¹⁴⁰

133 Submission 18 (Victoria Legal Aid).

134 Submissions 18 (Victoria Legal Aid); 21 (Criminal Bar Association).

135 Consultation 26 (Office of the Chief Psychiatrist and Legal Branch, Department of Health).

136 Consultation 24 (County Court of Victoria—judges).

137 Ibid.

138 Consultation 6 (Department of Human Services case managers, Disability Forensic Assessment and Treatment Service (DFATS) and Long Term Rehabilitation Program (LTRP)).

139 Submission 8 (Office of Public Prosecutions).

140 Ibid.

- 8.167 The DPP may also be directed to file an outline of the case with the court as provided in section 76A of the CMIA. The OPP explained this role in their submission as preparing the 'summary of facts and proceedings in the case' in the Supreme Court and providing the 'other parties with copies of the depositions, or Crown opening, or other documents from the original court hearing' in the County Court.¹⁴¹
- 8.168 The OPP also explained that in certain cases the DPP, rather than the Attorney-General, has made an application for variation from a non-custodial supervision order to a custodial supervision order. The OPP advised that this tends to occur 'where the person continues to offend (for instance), so those circumstances do arise where the DPP would wish to exercise a right for such an application and the right to an appeal from such a hearing'.¹⁴²
- 8.169 In considering possible reforms, the OPP was not supportive of an expansion of the DPP's role under the CMIA, suggesting that rights to appeal should not be extended but that its role should be limited to notifying victims and family members and informing the court about those matters.¹⁴³ It was also proposed that the role of the OPP could be removed altogether if the CMIA was amended to transfer the role of providing victim and family member notification to the Attorney-General.¹⁴⁴
- 8.170 In considering the role of DHS, one DHS case worker thought that the position of DHS should be 'more like a "friend of the court"', that is, a neutral position for the purpose of providing information. Another participant at this meeting explained that one of the difficulties in the requirement that DHS adopt a position in CMIA matters is that DHS provides both the treatment and supervision of people with an intellectual disability and this can place them in a difficult position with the person on the order.¹⁴⁵
- 8.171 A DHS case worker in the same region highlighted that it is difficult for DHS to take a position in CMIA matters as this requires them to undertake a risk assessment when they 'do not have the tools or structures to perform it' and if an opinion was required, there would need to be appropriate training and tools in place to support this function.¹⁴⁶ It was therefore suggested that the role of DHS in these hearings should be to provide information rather than an opinion.¹⁴⁷
- 8.172 The Criminal Bar Association raised the issue of 'equality of arms' in relation to the court being required to give weight to submissions from both the Attorney-General and the Secretary of the relevant department:

If the court is to give specific weight to the submissions of both the Attorney-General and the Secretary, this could give rise to unfairness or an "inequality of arms". Whilst there is ample justification for the community's interests to be represented by way of a contradictor, it would seem adequate that one party only performs this role. It is hoped that the passage of time will demonstrate that the Departments of Health or Human Services only adopt a position as to outcome in the clearest of cases.¹⁴⁸

141
142
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Ibid.
Ibid.
Ibid.
Ibid.
Consultation 34 (Department of Human Services case managers, Bayside and Southern Melbourne).
Ibid.
Ibid.
Submission 21 (Criminal Bar Association).

The Commission's conclusion

- 8.173 The aim of the Commission in making recommendations is to clarify the law on hearings of an application to vary or revoke a supervision order, or to grant or revoke a grant of extended leave, in relation to:
- who is responsible for representing the community's interest under the CMIA
 - who is a 'party' under the CMIA
 - the roles of parties in hearings.
- 8.174 The Commission acknowledges that in its submission the Office of Public Prosecutions was not supportive of an expansion of the Director of Public Prosecution's role under the CMIA (see [8.169]). However, the Commission concludes that the Director of Public Prosecutions should be responsible for representing the interests of the community in hearings related to supervision orders, extended leave and release of people subject to the CMIA. The Director of Public Prosecutions, and the Office of Public Prosecutions, who prosecute on the Director's behalf, are well placed to deal with these matters for the following reasons:
- the requirement to act as a 'model litigant'
 - criminal proceedings are conducted independently of the executive government
 - their experience appearing in reviews of indefinite sentences discussed at [8.152]
 - their standing, expertise, knowledge and contact with victims.
- 8.175 The Attorney-General should not have a legislated role in CMIA review hearings because this role involves acting in the political interests of the executive government.¹⁴⁹ One of the aims of the CMIA was to remove the role of the executive government in decision making under the legislation. The Attorney-General's continued involvement in decision making under the CMIA would therefore contradict the underlying principles of the legislation.
- 8.176 The court may allow any other person having a 'substantial interest in the matter' to appear in person and, if the court gives leave, to be legally represented at hearings.¹⁵⁰ This provision would still allow the Attorney-General to appear in CMIA hearings with the court's leave.
- 8.177 The role of the Department of Health and Department of Human Services should be re-framed as being witnesses and providers of evidence only and should not give them status as parties to the proceeding. The Department of Health and Department of Human Services are service providers and should assist the court by providing reports and evidence on the treatment and management of the person on the supervision order.
- 8.178 The Commission considers that the above approach is correct in principle, practical in application, and will result in cost savings in legal representation.

149 The Attorney-General does have various roles in other legislation but this is mainly in relation to vexatious litigants and appeals. See, eg, *Family Violence Protection Act 2008* (Vic) s 189; *Vexatious Proceedings Bill 2014* (Vic); *Personal Safety Intervention Orders Act 2010* (Vic); *Criminal Procedure Act 2009* (Vic) s 327; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 35.

150 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 37(1).

Recommendation

- 62 Amendments should be made to the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) to re-frame the roles of the Attorney-General, the Director of Public Prosecutions and the Secretaries to the Department of Health and Department of Human Services in proceedings under the Act as follows:
- (a) The Attorney-General should not be a party to proceedings under the Act or be specifically mentioned as having a role under the Act.
 - (b) The Attorney-General should not have an entitlement to appear under section 37(1)(a) of the Act.
 - (c) The interests of the community should be represented by the Director of Public Prosecutions. The Director of Public Prosecutions should be a party to the following proceedings:
 - (i) hearings of applications to make, vary or revoke a supervision order
 - (ii) hearings of applications for extended leave
 - (iii) appeals against decisions to make, vary, confirm or revoke a supervision order
 - (iv) appeals against decisions to grant extended leave
 - (v) appeals against decisions to refuse extended leave.
 - (d) The Secretary to the Department of Health and the Secretary to the Department of Human Services should not be a party to proceedings. The role of the Secretaries to these departments should be to provide reports to assist the court in decision making and to give evidence in hearings on the treatment and management of people on supervision orders under the Act.

Cost implications of re-framing roles under the CMIA

- 8.179 The Commission's recommendations regarding the reframing of the role of different government organisations in representing the community's interest are likely to have cost implications.
- 8.180 The reframing of the role of the Director of Public Prosecutions will require an increase in resources for the Office of Public Prosecutions to support a growth of its role to be responsible for representing the community.
- 8.181 The reframing of the roles of the Attorney-General, the Department of Health and the Department of Human Services, will likely result in a reduction in the resources required by those agencies for legal representation at court hearings. There will continue to be a resource requirement for the Department of Human Services and the Department of Health for the relevant staff to prepare reports and possibly attend court hearings to give evidence. However, the removal of the need for legal representation will result in a significant cost reduction.

Hearings for people supervised by Forensicare

- 8.182 Forensicare provided data to the Commission on the number of court hearings regarding people supervised by Forensicare. The data set covered court hearings for three financial years from 2010–11 to 2012–13 and related only to people supervised by Forensicare. Therefore, they do not represent the total court hearings related to people on supervision orders that would have occurred under the CMIA in that period.
- 8.183 Over the period, in total there were 204 court hearings relating to people on supervision orders under the CMIA. Broken down into financial years, these were as follows:
- 2010–11: 69 court hearings
 - 2011–12: 63 court hearings
 - 2012–13: 72 court hearings.
- 8.184 The court hearings included major reviews of supervision orders, court-ordered reviews of supervision orders, applications for variation and revocation of supervision orders, applications for or renewal of extended leave and some mentions.¹⁵¹
- 8.185 For each of these hearing types for people supervised by Forensicare, there are potential costs associated with legal representation from up to four organisations, including:
- the person on the supervision order (likely to be Victoria Legal Aid)—\$557 fee in the County Court and \$1057 fee in the Supreme Court for conference and appearance¹⁵²
 - the Director of Public Prosecutions—\$622 for a solicitor from the Office of Public Prosecutions for a County Court or Supreme Court review hearing matter
 - the Department of Health—an average of approximately \$1700 for counsel fees per brief.¹⁵³
- 8.186 Costs are also incurred by the Department of Justice through legal representation for the Attorney-General at hearings in relation to supervision orders. The Commission was provided information on this as a cost per supervised person rather than per hearing. The average cost of counsel fees, over a five-year period from 2009–10 to 2013–14, equates to \$4720 per person per year.¹⁵⁴
- 8.187 The costs for appearance fees will likely be higher for court hearings in the Supreme Court.
- 8.188 Information was available on the jurisdiction of the court hearings for the 2011–12 and 2012–13 financial years only. Of the 135 court hearings in that period, 63.7 per cent (86 court hearings) were in the County Court and the remaining 36.3 per cent (49 court hearings) were in the Supreme Court.¹⁵⁵

151 Data provided by Forensicare on court hearings relating to people supervised by Forensicare from 2010–11 to 2012–13. Forensicare keeps a record of hearings where staff are required to prepare a report or attend court; so this data primarily relates to major hearings under the CMIA and does not include all the hearings listed for a particular matter, such as directions hearings and mentions. The most common hearing type was court-ordered review (89) followed by major review (26).

152 Victoria Legal Aid, *VLA Handbook for lawyers: Table T—Counsel's fees in Crimes (Mental Impairment and Unfitness to be Tried) Act matters* (2 January 2014) <<http://handbook.vla.vic.gov.au/handbook/639.htm>>. The fees in Table T may be increased in matters involving applications for a revocation of a supervision order, an order for review and a major review.

153 Information provided by the Department of Health. This is an average figure calculated on the basis of one calendar year in which the department briefed counsel to appear on behalf of the Secretary on 61 occasions. The total cost to the department for briefing counsel was \$104,240. The cost per brief varies significantly depending on the complexity of the matter. The figure does not include costs incurred internally by the department for hearings.

154 Information provided by the Department of Justice. This is an average of total costs, not an indication of how much each person's matter actually cost. The cost per person varies significantly depending on the complexity of the matter. This figure is calculated on the basis of hearings for a total of 475 people over a five-year period from 2009–10 to 2013–14. In total the amount spent on counsel fees over the five-year period was \$2,244,159, with an average cost per year of approximately \$448,832. Costs per year ranged from \$374,724 for hearings for 65 people in 2009–10 to \$505,022 for hearings for 103 people in 2011–12. These figures do not include costs incurred internally by the department for hearings.

155 Forensicare keeps a record of hearings where staff are required to prepare a report or attend court; so this data primarily relates to major hearings under the CMIA and does not include all the hearings listed for a particular matter, such as directions hearings and mentions. The most common hearing type was court-ordered review (89) followed by major review (26).

- 8.189 In addition, costs are incurred by Forensicare in the preparation of reports and attendances in court by staff for hearings. In 2012–13, Forensicare staff prepared reports for 69 court hearings for people on supervision orders and attended court to give evidence in 59 of these hearings. If court hearings are delayed or adjourned, this can result in the need for further, updated reports when the matter is ultimately heard.¹⁵⁶

Hearings for people supervised by the Department of Human Services

- 8.190 The Department of Human Services provided information on the number of hearings for the calendar years 2012 and 2013. For each year, there were:
- 2012: 36 hearings in total, of which 12 were attended with counsel and 24 were attended without counsel
 - 2013: 39 hearings in total, of which 36 were attended with counsel and three were attended without counsel.
- 8.191 For each of these hearing types for people supervised by the Department of Human Services, there are potential costs associated with legal representation from up to four organisations, including:
- the person on the supervision order (likely to be Victoria Legal Aid)—\$557 fee in the County Court and \$1057 fee in the Supreme Court for conference and appearance
 - the Director of Public Prosecutions—\$622 for a solicitor from the Office of Public Prosecutions for a County Court or Supreme Court review hearing matter
 - the Department of Human Services—an average of approximately \$2,296 for counsel fees per hearing¹⁵⁷ (an average of \$3,235 for each hearing in 2012 and an average of \$1357 for each hearing in 2013).
- 8.192 Costs are also incurred by the Department of Justice through legal representation for the Attorney-General at hearings in relation to supervision orders. The Commission was provided information on this as a cost per supervised person rather than per hearing. The average cost of counsel fees, over a five-year period from 2009–10 to 2013–14, equates to \$4720 per person per year.¹⁵⁸
- 8.193 There was no information available on the jurisdiction for each hearing.

¹⁵⁶ Victorian Institute of Forensic Mental Health (Forensicare), *Report of Operations 2012–2013* (2013) 34.

¹⁵⁷ Information provided by the Department of Human Services. This was calculated using data on the cost per month of fees for counsel for hearings and the number of hearings attended by counsel per month. The total cost per year was calculated and then divided by the total cost of hearings attended by counsel per year. These costs only cover the costs to engage barristers for hearings. It does not take into account the costs incurred internally by the department on hearings, including costs incurred by the internal Legal Services Branch (for example, in preparing for a hearing, attending a hearing, preparing reports for a hearing, and advice to the department) and by the department's staff members who supervise clients on non-custodial supervision orders and custodial supervision orders (for example, preparing reports for the hearing, attending the hearing and arranging expert reports).

¹⁵⁸ Information provided by the Department of Justice. This is an average of total costs, not an indication of how much each person's matter actually cost. The cost per person varies significantly depending on the complexity of the matter. This figure is calculated on the basis of hearings for a total of 475 people over a five-year period from 2009–10 to 2013–14. In total the amount spent on counsel fees over the five-year period was \$2,244,159, with an average cost per year of approximately \$448,832. Costs per year ranged from \$374,724 for hearings for 65 people in 2009–10 to \$505,022 for hearings for 103 people in 2011–12. These figures do not include costs incurred internally by the department for hearings.

Suppression orders under the CMIA

- 8.194 This final section of the chapter outlines recommendations relating to suppression orders. This issue was not specified as a particular matter in the terms of reference but was raised in the consultation paper because in deciding to make a suppression order, judges must balance the principles of gradual reintegration, transparency and accountability, and community safety under the CMIA.
- 8.195 The Commission therefore sought views on whether the provision for suppression orders in the CMIA is operating justly, consistently and effectively with these principles. The Commission sought views on the following specific issues relating to suppression orders under the CMIA. These included:
- the matters that the court should consider when making a suppression order
 - any issues that arise concerning suppression orders
 - the appropriate balance between therapeutic considerations and open proceedings.

The principle of open justice

- 8.196 Open justice is a fundamental aspect of the legal system. It is seen as a 'fundamental aspect of the common law and the administration of justice' and is demonstrated through procedures being conducted in 'open court', presenting information and evidence publicly to all those in the court and allowing the fair and accurate reporting of proceedings by the media.¹⁵⁹
- 8.197 The principle of open justice requires that all court proceedings take place in public except in limited circumstances. This principle is reflected in section 24 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) that provides for a 'fair and public hearing' for accused.
- 8.198 The *Open Courts Act 2013* (Vic) was introduced on 1 December 2013 and consolidated provisions contained in various Acts relating to non-publication orders and closed court orders in the Supreme Court, the County Court, the Magistrates' Court, the Coroner's Court and the Victorian Civil and Administrative Tribunal. The Open Courts Act uses the term 'suppression order' which is consistent with terminology in the CMIA.
- 8.199 The second reading speech of the Open Courts Act describes its purpose as being to reinforce 'the primacy of open justice and the free communication of information in relation to proceedings in Victorian courts and tribunals'.¹⁶⁰ To achieve this aim, the legislation provides for a general presumption in favour of disclosure of information and of holding hearings in open court.¹⁶¹
- 8.200 The Open Courts Act outlines a range of factors that a court must consider before making a suppression order. The legislation includes 'subject-matter specific' exceptions to the Open Courts Act including the provisions in the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) and the *Public Health and Wellbeing Act 2008* (Vic) and the CMIA.¹⁶²
- 8.201 While the operation of section 75 of the CMIA¹⁶³ is not affected by the operation of the Open Courts Act, the principles in this legislation provide context for consideration of the issues relevant to the granting of suppression orders under the CMIA.

159 Jason Bosland and Ashleigh Bagnall, 'An Empirical Analysis of Suppression Orders in the Victorian Courts: 2008–12' (2013) 35 *Sydney Law Review* 671, 674.

160 Victoria, *Parliamentary Debates*, Legislative Assembly, 27 June 2013, 2417 (Robert Clark, Attorney-General).

161 *Open Courts Act 2013* (Vic) ss 4, 28.

162 See *Open Courts Act 2013* (Vic) s 8(2) for a list of legislation not affected.

163 Section 75 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) sets out the public interest test for granting suppression orders.

Mental illness and the media

8.202 This section describes some of the recent research on the reporting of cases in the media where unfitness or the defence of mental impairment has been raised. A consideration of the way in which the media represents these cases contextualises the specialised approach to suppression orders taken under the CMIA.

8.203 While evidence shows that reports about mental illness in the media have become more positive, reports about people with a mental illness accused of committing offences continue to be stigmatising and sensationalised.¹⁶⁴ A New Zealand study examining references to mental illness in print media found that:

If those with a mental illness are only newsworthy when they generate conflict or constitute a threat to the community, then these aspects will be emphasised in organising stories and headlining articles. The successful patients living ordinary lives in the community are, because of their non-deviant character, simply not newsworthy or reportable. Such practices define the context within which we work to develop less stigmatised understandings of mental illness.¹⁶⁵

8.204 One study examining news and current affairs-related items on free-to-air television stations found that, in contrast with a previous study looking at print media, representations of people with a mental illness in the broader Australian community did not predominantly associate mental illness with violence or bizarre behaviour.¹⁶⁶ This study suggested that 'deliberate media strategies promoted by beyondblue, MindFrame and other similar national strategies in recent years have fundamentally changed the wider community discourse about mental disorders'.¹⁶⁷

8.205 A more recent study suggests that the perceived stigmatising effect of newspaper reporting of homicide by people with a mental illness may not be about selective over-reporting but about the manner in which mental illness is reported.¹⁶⁸ This study, looking at print media in England and Wales, found that:

stigmatizing media reports will be particularly obvious and memorable to those individuals (e.g. patients, their families and mental health care providers) who are already feeling stigmatized or particularly aware of the problem of stigma.¹⁶⁹

8.206 Another New Zealand study looked at this issue in more detail by comparing print media coverage of homicides involving mentally disordered offenders with homicides involving offenders who were not mentally impaired at the time of the offence. This study found that the language used in these articles may be responsible for reinforcing negative stereotypes:

The NGRMI [not guilty by reason of mental impairment] homicides were more often highlighted with bold sensationalized titles and accompanied with photographs depicting strong emotional themes. ... it is fair to assume that these processes would assist in etching the event in the public mind.¹⁷⁰

164 See, eg, Ruth Allen and Raymond G Nairn, 'Media Depictions of Mental Illness: an Analysis of the Use of Dangerousness' (1997) 31 *Australian and New Zealand Journal of Psychiatry* 375; Brian McKenna, Katey Thom and Alexander I F Simpson, 'Media Coverage of Homicide Involving Mentally Disordered Offenders: A Matched Comparison Study' (2007) 6(1) *International Journal of Forensic Mental Health* 57, 62; Megan Kalucy et al, 'Comparison of British National Newspaper Coverage of Homicide Committed by Perpetrators with and without Mental Illness' (2011) 45 *Australian and New Zealand Journal of Psychiatry* 539, 546.

165 Allen and Nairn, above n 164, 380.

166 Connie Henson et al, 'More Us Than Them: Positive Depictions of Mental Illness on Australian Television News' (2009) 43 *Australian and New Zealand Journal of Psychiatry* 554.

167 Ibid 554, 558.

168 Kalucy et al, above n 164.

169 Ibid.

170 McKenna, Thom and Simpson, above n 164, 61–2.

8.207 A study examining the reporting of schizophrenia in the Australian media, also found that '[v]iolence featured in 47.3% of stories and 46.0% were adjudged to be stigmatizing'.¹⁷¹

8.208 However, a PhD study by Meron Wondemaghen concluded from interviews with experienced crime reporters that it is the violent nature of the offence rather than the involvement of mental illness that creates such media attention:

The interviews propose that violent crime—rather than mental illness or the mentally ill—is the newsworthy aspect of a news story. It is unlikely that the press uniquely sensationalises mentally ill offenders as being inherently violent, as all violent offenders are prone to such news coverage because violence has news appeal.¹⁷²

Suppression orders and the CMIA

8.209 The CMIA takes a different approach to the Open Courts Act in the making of suppression orders. This is evident in the results of a recent study looking at the number of suppression orders made in Victoria. Despite there only being a very small number of CMIA cases in the courts each year, the number of suppression orders made in CMIA cases is relatively large due to the special vulnerabilities of this group. A total of 1501 suppression orders were made in the Victorian Supreme, County and Magistrates' Courts between 25 February 2008 and the end of 2012.¹⁷³ Of these suppression orders, 277 relied upon 'subject-matter specific' exceptions and 76 of those were made in relation to CMIA matters.¹⁷⁴

8.210 Generally, a court may only make a suppression order if the order is 'necessary to prevent a real and substantial risk of prejudice to the proper administration of justice that cannot be prevented by other reasonably available means' or it is 'necessary to protect the safety of any person' [emphasis added].¹⁷⁵ The test for making a suppression order under the CMIA, however, provides that the court may make a suppression order if it is in the public interest to do so.¹⁷⁶

8.211 In *Re PL*,¹⁷⁷ Justice Cummins stated that it is in the public interest that the progressive rehabilitation of the person subject to the supervision order is not defeated. However, Justice Cummins was also of the view that suppression orders should not be granted lightly, and that to justify a suppression order, '[t]he degree of likely negative impact [on the person subject to the supervision order] needs to be examined in each case'.¹⁷⁸

8.212 People subject to supervision orders who have not yet been convicted of a crime are subject to this public interest test. The rationale for this was summarised by Justice Cummins in the case of *Re PL*:¹⁷⁹

it must be remembered that applicants found not guilty by reason of mental impairment (or previously insanity) have not been convicted of a crime. Characteristically, they have suffered from a mental illness. The court's jurisdiction in that respect is protective. It should be remembered that ultimately the best protection for the community is that persons found not guilty by reason of mental impairment are able to return to the community as useful citizens.¹⁸⁰

171 Belinda Cain et al, "'Schizophrenia' in the Australian Print and Online News Media" (2014) 6(2) *Psychosis: Psychological, Social and Integrative Approaches* 1, 1.

172 Meron Wondemaghen, *Frames of Mental Illness and Violent Crime: Perspectives from the Courts and the Media* (PhD Thesis, Monash University, 2012) 230. Examples of media articles reporting on CMIA cases include 'Victoria's Killer Cabbie Can't Be Named', *The Daily Telegraph* (Sydney), 26 November 2008 and 'Killers, Rapists and Other Criminally Insane Patients Walking Streets of Melbourne', *The Herald Sun* (Melbourne), 6 November 2009.

173 Bosland and Bagnall, above n 159, 679.

174 Ibid 680–81.

175 *Open Courts Act 2013* (Vic) ss 18(1)(a), (c).

176 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 75(1).

177 [1998] VSC 209 (15 December 1998) [27].

178 Ibid.

179 Ibid.

180 Ibid [15].

- 8.213 A suppression order can be made under the CMIA to prevent the publication of any evidence given in the proceeding, the content of any report or other document put before the court in the proceeding, or any information that might enable an accused or any person who has appeared or given evidence in the proceeding to be identified.¹⁸¹ A party to the proceeding may apply for a suppression order or the court may make it on its own initiative.¹⁸²
- 8.214 The circumstances in which a court may make a suppression order to 'any proceeding before a court' under the CMIA are limited. Some people subject to supervision orders under the CMIA will not be involved in a proceeding under the CMIA until they make an application for extended leave or have their order reviewed. This may be many years from the time the supervision order was made and means that the person's identity is unprotected during this time and when taking other forms of leave.

Views in submissions and consultations

- 8.215 A number of issues raised in submissions and consultations related to those that were raised in the consultation paper. These include setbacks in treatment and recovery due to publicity, the stigma associated with negative reporting of mental illness in the media and problems with successful reintegration. The issue of respect for the privacy of victims was not raised in submissions and consultations.
- 8.216 In addition to the issues identified in the consultation paper, issues were raised about the practical operation of section 75 of the CMIA and the effect that publishing identifying information of people on CMIA orders can have on others. These issues, along with those raised in the consultation paper, are discussed below.

Setbacks in treatment and recovery due to publicity

- 8.217 A number of submissions and consultations discussed the negative effect that media publicity can have on the rehabilitation of people on supervision orders under the CMIA.¹⁸³ As one participant in the Consumer Advisory Group (Community Operations) consultation meeting stated:
- whenever something of interest to the media happens at the [Thomas Embling] hospital, the media rehash things that other consumers of the service have done, even if they have nothing to do with the incident being reported. This can cause issues to resurface for consumers, carers and victims.¹⁸⁴
- 8.218 Victoria Legal Aid argued that publication of information can be 'detrimental to the wellbeing and therapeutic outcomes' of people on supervision orders under the CMIA.¹⁸⁵
- 8.219 Two submissions acknowledged the importance of the principles of open justice, yet argued that special considerations apply to people subject to supervision orders under the CMIA.¹⁸⁶ Professor Andrew Carroll explained that without suppression orders:
- it would be quite impossible to safely rehabilitate many of our patients. Open reporting would result in a media circus with the inevitable publicising and sensationalising of our patients' lives having a profoundly detrimental effect on their social adjustment and mental health. The public do not in general appreciate that CMIA patients are not criminal offenders, and any reporting would inevitably be prejudicial to good long-term outcomes.¹⁸⁷

¹⁸¹ *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 75(1).

¹⁸² *Ibid* s 75(2).

¹⁸³ Submissions 18 (Victoria Legal Aid); 6 (Associate Professor Andrew Carroll); 19 (Forensicare). Consultation 5 (Consumer Advisory Group (CAG), Community Forensic Mental Health Service).

¹⁸⁴ Consultation 5 (Consumer Advisory Group (CAG), Community Forensic Mental Health Service).

¹⁸⁵ Submission 18 (Victoria Legal Aid).

¹⁸⁶ Submissions 19 (Forensicare); 6 (Associate Professor Andrew Carroll).

¹⁸⁷ Submission 6 (Associate Professor Andrew Carroll).

- 8.220 One participant in a consultation meeting with judges of the County Court of Victoria commented that there is a ‘sensationalisation of mentally ill offenders’ and that they need protection.¹⁸⁸
- 8.221 Forensicare supported this view and raised the issue of stigma in relation to forensic patients, arguing that open proceedings may have ‘significant negative consequences’ for both the community and the person subject to the supervision order. The negative consequences may result from mental illness being a ‘highly stigmatising diagnosis’ which poses challenges to the person on the order in terms of recovery and reintegration and make it more difficult for a person to ‘engage with community services, gain employment and form relationships’.¹⁸⁹

Successful reintegration into the community

- 8.222 Forensicare argued that the best way to ensure community protection is through the successful reintegration into the community of people subject to CMIA orders.¹⁹⁰
- 8.223 Submissions argued that publishing identifying information about people subject to CMIA orders may affect their successful reintegration into the community.¹⁹¹ As Forensicare explained, the stress of media publicity on forensic patients may increase the chance of relapse and ‘impede a person’s motivation to engage in rehabilitative processes’.¹⁹² People are less likely to engage with organisations in the community if they regard the community as hostile towards them and the ‘presence of good community integration, particularly employment, is well recognised as a factor that reduces a person’s long-term risk of engaging in violence’.¹⁹³

The ‘public interest’ test

- 8.224 Forensicare commented that reporting of CMIA cases in the media can often be biased and while research indicates that the risk of violent offending by people on supervision orders under the CMIA is low, the ‘popular view usually overestimates the magnitude of risk of harm posed by those with a mental illness’.¹⁹⁴ Forensicare was therefore of the view that the public interest in the successful reintegration of a person on a supervision order back into the community will almost always outweigh the public interest in being provided with information on individual cases. Publishing information on individual cases is only likely to increase the overestimation of the risk in the community and does not assist in increasing community understanding of any association between mental illness and offending.¹⁹⁵
- 8.225 The Criminal Bar Association supported this view, explaining that the long-term stability of a person on a supervision order ‘is key’ and ‘provides the community with the strongest safeguard against further offending’.¹⁹⁶ The Criminal Bar Association also highlighted that the ‘principle of open justice has always been subject to appropriate limitations necessary to do justice in an individual case’.¹⁹⁷

188 Consultation 24 (County Court of Victoria—judges).

189 Submission 19 (Forensicare).

190 Ibid.

191 Submissions 6 (Associate Professor Andrew Carroll); 18 (Victoria Legal Aid); 19 (Forensicare).

192 Submission 19 (Forensicare).

193 Ibid.

194 Ibid.

195 Ibid.

196 Submission 21 (Criminal Bar Association).

197 Ibid.

- 8.226 The Criminal Bar Association acknowledged that while victims' rights are important, suppression orders are not often made because victims' rights tend to predominate over the rights of people on supervision orders.¹⁹⁸
- 8.227 The Criminal Bar Association supported the principle underpinning the discussion in *Re PL*.¹⁹⁹ It argued that stronger statutory mechanisms are required to be consistent with the reasoning in this case and to better reflect the objectives of the CMIA.²⁰⁰ It was also of the view that the therapeutic interests of the person on the supervision order ought to 'routinely predominate', subject to a public interest test, because they have not been convicted of a crime but are mentally ill.²⁰¹
- 8.228 The Criminal Bar Association also supported the view that people on supervision orders under the CMIA are not subject to the usual sentencing principles but are diverted into a 'supportive and therapeutic health care system' and that this should be taken into account, subject to a public interest test.²⁰²
- 8.229 Forensicare argued that given the vulnerability of people subject to supervision orders and that they have not been convicted of a crime, it is appropriate to adopt a wider test for granting suppression orders under the CMIA than that which applies to other matters before the courts.²⁰³

Operation of section 75 of the CMIA

- 8.230 A number of submissions raised practical issues with the operation of section 75 of the CMIA.²⁰⁴ Forensicare was of the view that a suppression order should be able to be made at any time, not just limited to 'proceedings before a court' under the CMIA. As outlined by Forensicare, a person subject to a supervision order is not protected until a new application is made in relation to their supervision status, which may not occur until many years after the original order was imposed when the person applies for extended leave.²⁰⁵ Forensicare went on to question whether this difficulty arises from the practice of not seeking orders at the criminal trial or whether section 75 has been interpreted not to apply to proceedings at this stage.²⁰⁶
- 8.231 Victoria Legal Aid (VLA) supported the introduction of a presumption in favour of suppressing a person's name or any information capable of identifying someone.²⁰⁷ VLA was also of the view that while most suppression orders only relate to information which could identify a person, there should be the capacity under the CMIA to apply for broader suppression orders.²⁰⁸
- 8.232 The Criminal Bar Association identified that there can be difficulties in specifying a time period for the suppression order in CMIA cases because the period for treatment and rehabilitation is likely to be lengthy and unable to be fixed. The Criminal Bar Association therefore recommended that the CMIA make specific reference to the 'importance of long-term stability' in considering suppression orders.²⁰⁹

198 Ibid.
 199 Ibid.
 200 Ibid.
 201 Ibid.
 202 Ibid.
 203 Submission 19 (Forensicare).
 204 Submissions 19 (Forensicare); 18 (Victoria Legal Aid); 21 (Criminal Bar Association).
 205 Submission 19 (Forensicare).
 206 Ibid.
 207 Submission 18 (Victoria Legal Aid).
 208 Ibid.
 209 Submission 21 (Criminal Bar Association).

Effect of suppression orders on others

8.233 The Australian Community Support Organisation (ACSO) raised concerns about the effect that media attention can have on other people with a mental illness or other cognitive impairment who may reside with the person on a supervision order. ACSO expressed the view that this should be a factor that is considered in deciding whether to make a supervision order, because:

Disruption at such a residence could impact on any of the residents' capacity to effectively reintegrate into the community and pose risks outside the usual liability of accommodation provision. The suppression of names and addresses of residential facilities is sought in these special cases to ensure the safety and wellbeing of all.²¹⁰

The Commission's conclusion

8.234 The aims of the Commission in developing recommendations on suppression orders are to:

- ensure community protection through the successful reintegration of people subject to supervision orders under the CMIA
- clarify the circumstances in which suppression orders can be made under the CMIA.

8.235 The Commission acknowledges and supports the powerful principle of open courts. However, in recognition of the special vulnerability of a person accused of an offence under the CMIA, the importance of reintegration for community safety and the rehabilitation prospects of a person on a supervision order, the Commission agrees with the views expressed in submissions and consultations that there should be a presumption in favour of suppressing information that may identify a person under the CMIA.

8.236 The Commission also agrees that section 75 of the CMIA unnecessarily limits an application for a suppression order to 'any proceeding before a court' under the CMIA.

Recommendations

63 A statutory principle should be added to the provisions governing suppression orders under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) that outlines that the purpose of making a suppression order is to enable the long-term recovery of people subject to the Act and to facilitate community reintegration for the protection of the community.

64 Section 75 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to:

- (a) insert a presumption in favour of suppression of a person's name and identifying information, and
- (b) provide that where the court is satisfied that it is in the public interest to do so:
 - (i) the court may make a suppression order in any proceeding (within the meaning of section 4 of the Act), or
 - (ii) a person may make an application for a suppression order at any time once any proceeding (within the meaning of section 4 of the Act) has commenced.

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9. Processes and findings under the CMIA in all courts

Introduction

- 9.1 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ('CMIA') outlines the process for determining unfitness to stand trial and for special hearings. It also sets out the process for establishing the defence of mental impairment.
- 9.2 The CMIA contains provisions which set out the consequences that follow findings in the unfitness to stand trial and mental impairment processes. These differ from the consequences that follow a trial in the usual criminal process, reflecting the different principles that underlie the CMIA.
- 9.3 In this chapter, the Commission discusses the law that applies to these processes and findings and makes recommendations to improve their operation. In addition, the Commission discusses its recommendations on the appeal processes and the 'ancillary' orders and consequences that follow a finding under the CMIA. The Commission proposes that the recommendations in this chapter apply to all courts unless specified otherwise.
- 9.4 The Commission's recommendations on the processes and findings under the CMIA aim to:
- resolve procedural anomalies in the CMIA, for example, by clarifying that reports under section 41(1) of the CMIA can be provided before the court declares that a person is liable to supervision, as well as after this declaration
 - ensure that the participation of the accused in the proceedings that affect them is maximised by the provision of in-court support, but also ensure that the CMIA operates in line with its therapeutic focus, for example, by allowing the accused to be absent from a special hearing where it would be too distressing
 - ensure that findings under the CMIA better reflect the outcome of CMIA proceedings, so that the CMIA operates in a way that is transparent and recognises the interests of victims in the process
 - streamline existing processes and thereby reduce the replication of information or procedures, for example, by providing for a process to consolidate multiple investigations of unfitness to stand trial into a single investigation
 - provide an approach for a review of ancillary orders and consequences to follow a CMIA finding where these orders and consequences are necessary for community safety or do not have a punitive effect
 - develop appeal processes to ensure that people who are subject to a CMIA finding have the opportunity to correct any significant errors in the initial decision so that a fair outcome is reached.

Improvements to the process for determining unfitness to stand trial and special hearings

- 9.5 The question of whether an accused is unfit to stand trial is determined by a jury on the balance of probabilities in the Supreme Court or County Court.¹ The jury must make a finding that the accused is fit or unfit to stand trial for the offence charged. In Chapter 7, the Commission makes a recommendation for investigations of unfitness to stand trial to be conducted by a judge or magistrate, in place of a jury.
- 9.6 If a jury finds the accused unfit to stand trial, the judge must determine whether they are likely to become fit to stand trial within 12 months.² If the judge determines that the accused is likely to become fit and they do become fit after a period of adjournment, the trial will proceed as an ordinary criminal trial.³
- 9.7 If the judge determines that the accused is not likely to become fit within 12 months, or remains unfit after the period of adjournment,⁴ a special hearing must be conducted before a jury to determine whether:
- the accused is not guilty of the offence (a complete acquittal)
 - the accused is not guilty of the offence because of mental impairment, or
 - the accused committed the offence.⁵
- 9.8 A special hearing is conducted as closely as possible to a criminal trial.⁶ The accused found unfit to stand trial is deemed to have pleaded not guilty to the offence.⁷
- 9.9 If an accused is found to have committed the offence at a special hearing, this constitutes a 'qualified finding of guilt'.⁸ A qualified finding of guilt does not amount to a conviction. There can be no further prosecution of the person in respect of the same offence and the finding is subject to appeal as if the person had been found guilty in an ordinary criminal trial.⁹
- 9.10 In the following section, the Commission makes recommendations to improve the process for determining unfitness to stand trial and special hearings. These recommendations relate to:
- the ability of the court to remand an accused in custody to an 'appropriate place' before a special hearing
 - the presence of the accused at a special hearing
 - the provision of in-court support in special hearings.

1 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 7(3).

2 *Ibid* s 11(4).

3 *Ibid* s 14(4).

4 *Ibid* s 12(5). If the accused remains unfit after the adjournment, but the adjournment was less than 12 months, a further adjournment may be ordered but only up to a total of 12 months: s 14(2).

5 *Ibid* s 17(1).

6 *Ibid* s 16(1).

7 *Ibid* s 16(2)(a).

8 *Ibid* s 18(3)(a).

9 *Ibid* ss 18(3)(a)–(c).

Reports on unfitness to stand trial

- 9.11 The CMIA provides the court with the power to order reports to determine whether the accused is unfit to stand trial.¹⁰ Information provided to the Commission indicated that this power is rarely exercised.¹¹ Submissions and consultations did not indicate that any change was needed to these provisions. However, granting courts the power to order the production of reports on unfitness to stand trial in the Magistrates' Court and Children's Court was strongly supported. The Commission has therefore recommended that the Magistrates' Court and Children's Court also have the power to order reports concerning an accused's unfitness to stand trial (see Recommendations 28(g) and 45(d)) but does not recommend any change to the power in the higher courts.
- 9.12 While the court has the power to order a report to assist it in determining unfitness to stand trial, they do not have similar powers in relation to the defence of mental impairment. The Office of Public Prosecutions supported the introduction of a power for the court to order expert reports in respect of the defence of mental impairment.¹² The Commission considers that in contrast to the question of unfitness to stand trial, where the state subjects the accused to the trial process, the defence of mental impairment is raised on the election of the defence. Therefore, responsibility for producing reports on the defence of mental impairment should lie with the defence.¹³

Process after an accused is found unfit to stand trial

Timeframe between a 'permanent' finding of unfitness and a special hearing

- 9.13 Under the CMIA, if the accused is found unfit to stand trial and the judge determines that the accused is not likely to become fit within 12 months ('permanent finding of unfitness'), the court must proceed to hold a special hearing within three months.¹⁴
- 9.14 While the period of adjournment before a special hearing can be extended for a further period not exceeding three months, this only appears to apply to situations where an accused has been found unfit to stand trial but a judge has granted an adjournment because the accused is likely to become fit within 12 months ('temporary finding of unfitness').¹⁵
- 9.15 The judge may also extend the three-month period between a finding that there is a real and substantial question as to unfitness to stand trial and the investigation into unfitness.¹⁶

Views in submissions and consultations

- 9.16 The Criminal Bar Association and a member of the Commission's advisory committee noted an issue in relation to the timeframe for holding a special hearing following a permanent finding of unfitness. The Criminal Bar Association observed in its submission that the fact that the court has the power to extend time following a finding that there is a real and substantial question as to unfitness and a temporary finding of unfitness, suggests that parliament has taken a different view of a person who has been found permanently unfit to stand trial.¹⁷

¹⁰ Ibid ss 10(1)(d), 11(1)(b).

¹¹ Data provided by the Victorian Institute of Forensic Mental Health (Forensicare) on report requests in the second quarter of 2013–14 (October to December 2013) indicates that only three reports on unfitness to stand trial were ordered by the County Court. All three related to matters where the person was in custody.

¹² Submission 8 (Office of Public Prosecutions).

¹³ The defence of mental impairment can also be raised by the prosecution with leave of the trial judge under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 22(1).

¹⁴ *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 12(5).

¹⁵ Ibid s 14(5); Submission 21 (Criminal Bar Association).

¹⁶ *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 8(3)–(4).

¹⁷ Submission 21 (Criminal Bar Association).

- 9.17 The Criminal Bar Association noted that there are pending cases now outside the three-month period following a permanent finding of unfitness with no clear power for the court to extend that period. The Criminal Bar Association considered that the question will be the subject of further litigation and potentially a request for legislative review.

The Commission's conclusion

- 9.18 The Commission acknowledges that from a practical or operational perspective it can be difficult for courts and the parties to proceed with matters within a strict timeframe. However, on balance, the Commission does not recommend a change to the three-month period following a permanent finding of unfitness (for example, by providing for a power for the court to extend the period). As submitted by the Criminal Bar Association, the timeframes set out in the CMIA are for the benefit of the accused. The Explanatory Memorandum to the Crimes (Mental Impairment and Unfitness to be Tried) Bill, for example, states:

These time frames are provided to ensure that persons who are unfit to stand trial have the issues in relation to them determined as soon as possible to ensure that if appropriate treatment or services are required to assist the person they can be provided as soon as possible.¹⁸

- 9.19 In situations where an accused has been found permanently unfit to stand trial, and therefore there is no possibility of them becoming fit within a reasonable period, their interests are best served by a resolution of the matter and the commencement of their treatment as soon as practicable. This is consistent with the Commission's threshold recommendation for measures to avoid unreasonable delay in Chapter 2. Maintaining a limit of three months before the special hearing protects this group of people who, due to their unfitness, are unlikely to be able to advocate for timeframes favourable to them to be adhered to. It will minimise any stress caused by the legal process for both the accused and victims. It could also minimise any deterioration in the accused's mental condition. Further, as the Commission discusses in Chapter 11, accused with an intellectual disability who may be unfit are sometimes held on remand in prison. It is crucial that any period spent in prison is minimised for people who are unfit.

Power to remand a person to an 'appropriate place' after a permanent finding of unfitness

- 9.20 Following a temporary finding of unfitness to stand trial, the judge may remand the accused in custody in an 'appropriate place' for no more than the period by the end of which the accused is likely to be fit.¹⁹ The CMIA defines an 'appropriate place' to mean an approved mental health service, a residential treatment facility or a residential institution.²⁰ In other words, an appropriate place is a place where an accused can receive the treatment or services they need to assist them to become fit to stand trial.

Views in submissions and consultations

- 9.21 The Victorian Institute of Forensic Mental Health (Forensicare) noted that while the court can remand a person who is temporarily unfit to stand trial to an appropriate place, no such power is set out for a person found permanently unfit, pending the holding of a special hearing. Forensicare noted that the reason for the difference is unclear and argued that a provision should be introduced to allow an accused awaiting a special hearing to be remanded to an 'appropriate place'.²¹

¹⁸ Explanatory Memorandum, Crimes (Mental Impairment and Unfitness to be Tried) Bill 1997 (Vic) cl 8(2).
¹⁹ *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 11(4)(b), 12(2).
²⁰ *Ibid* s 3 (definition of 'appropriate place').
²¹ Submission 19 (Forensicare).

The Commission's conclusion

- 9.22 The Commission agrees that there does not appear to be a reason for the inconsistency between the ability of the court to order a remand to an appropriate place in situations where an accused is temporarily unfit and where an accused is permanently unfit. In the Commission's view, this procedural anomaly should be addressed by amending the CMIA to give the court the power to remand an accused who is permanently unfit to an appropriate place as well as the orders available in section 12(2) of the CMIA. The Commission considers that such an amendment is consistent with the therapeutic focus of the CMIA.

Recommendation

- 65 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to enable a judge or magistrate to make any order under section 12(2) of the Act, including remanding the accused in custody in an appropriate place for the period before the special hearing following a finding that the accused is unfit to stand trial and is not likely to become fit within 12 months.

Providing exceptions to the requirement that an accused attend a special hearing

Views in submissions and consultations

- 9.23 The Office of Public Prosecutions suggested that the court should be allowed to direct that the accused not be in court where they are legally represented and would be distressed or confused by the proceedings.²²

The Commission's conclusion

- 9.24 The Commission agrees with this suggestion. The stress an accused can experience as part of the trial process is often exacerbated when they have a mental illness, intellectual disability or other cognitive impairment. Special hearings are conducted as nearly to a criminal trial as possible²³ and could similarly be distressing for people who are unfit to stand trial. While the Commission considers that the participation of people who are unfit to stand trial in the processes that affect them should be maximised as far as possible, this should not occur where the process would be unduly distressing or result in a deterioration of their mental health. As Justice Osborn observed in *DPP v CJC*:²⁴
- there are strong reasons of both humanity and public policy, supporting the view that if a person is not fit to take part in a trial, they should not be forced to take part in a special hearing before a jury. These proceedings should be no more of a public spectacle of suffering than is necessary.²⁵

²² Submission 8 (Office of Public Prosecutions).

²³ *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 16(1).

²⁴ [2008] VSC 585 (18 December 2008).

²⁵ *Ibid* [35].

- 9.25 Under the *Criminal Procedure Act 2009* (Vic) the court may excuse a person from attending a hearing. 'Attend' includes being physically present in court or being brought before the court by audiovisual link.²⁶ The Commission considers that the CMIA should contain a similar provision to allow accused to participate in this less confrontational way.

Recommendation

- 66 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to:
- (a) enable a judge or magistrate to excuse an accused from attending a special hearing with the consent of both parties, and
 - (b) provide that an accused may 'attend' a special hearing by audiovisual link, with the consent of both parties.

In-court support during special hearings to optimise participation

- 9.26 As noted in Chapter 3, the importance of support measures in the unfitness to stand trial process was one of the strongest themes to come out of the Commission's review of the CMIA.

Views in submissions and consultations

- 9.27 Submissions that addressed this issue and stakeholders consulted agreed that accused with mental conditions should be provided with more support in court.²⁷ The benefits of giving support measures a greater role in the unfitness to stand trial process are outlined at [3.116].

The Commission's conclusion

- 9.28 In the Commission's view, the law should accommodate the varying abilities and needs of accused who may be unfit to stand trial to the greatest extent possible. Further, where an accused has been found unfit, their participation in the special hearing should be optimised through the provision of support in court. The Commission considers this is important to ensure that as far as possible people who are unfit are given the opportunity to participate, in a way equal to those who are fit, in the proceedings that affect them.
- 9.29 In Chapter 3, the Commission discusses ways of supporting an accused to optimise their ability to become fit to stand trial prior to a court determining their unfitness. These include:
- the use of a 'communication assistant' or intermediary to interpret what is said in court
 - improvements to communication methods in court—for example, using more visual aids and making questions asked in court and other discussions in court easier to understand
 - modifications to court procedure—for example, introducing shorter sessions or reducing the formality or intimidating character of proceedings.

²⁶ *Criminal Procedure Act 2009* (Vic) ss 3 (definition of 'attend'), 330(3). Note that while section 3 defines 'attend' to include being brought to the court by audiovisual link, section 330 refers to section 3 as defining 'attend' to mean being physically present in court.

²⁷ Submissions 18 (Victoria Legal Aid); 19 (Forensicare); 6 (Associate Professor Andrew Carroll); 8 (Office of Public Prosecutions); 29 (Victorian Equal Opportunity and Human Rights Commission). Consultations 21 (Consultant psychiatrists, Forensicare); 53 (Head Office (Youth Justice, Forensic Disability, Child Protection and Senior Practitioner), Department of Human Services).

- 9.30 The Commission considers that these supports are just as relevant to people who have been found unfit to stand trial in maximising their participation in special hearings.
- 9.31 The Commission has made a recommendation in Chapter 3 for more support measures to be made available in the court process (Recommendation 19). For example:
- the introduction of a formal support person scheme
 - the development and use of practice notes or practice directions in courts to promote the use of support measures for accused with a mental illness, intellectual disability or other cognitive impairment in court.
- 9.32 This recommendation is equally applicable and broad enough to cover people who have been found unfit to stand trial. The recommendation will be supported by other recommendations on training for the judiciary in managing proceedings involving people with mental conditions (Recommendation 13) and for lawyers in supporting their client's ability to participate in proceedings (Recommendation 11).

Streamlining the hearing of multiple matters under the CMIA

Views in submissions and consultations

- 9.33 The Criminal Bar Association raised a concern about the need for a finding of unfitness to stand trial having to be made by a jury in relation to each matter where the accused is facing multiple matters. The Criminal Bar Association suggested that where an application is made by the defence, and the court agrees, the question of unfitness in relation to all matters should be able to be determined in one proceeding.²⁸
- 9.34 The Criminal Bar Association raised similar issues in relation to an accused who raises the defence of mental impairment in multiple matters. It suggested that in such cases, on the application of the accused, and where the court agrees, one proceeding should be held in relation to all of those matters or some of them.²⁹

The Commission's conclusion

- 9.35 The Commission agrees with the Criminal Bar Association's submission that streamlining multiple hearings in relation to unfitness to stand trial and the defence of mental impairment is in the interests of the accused, victims and the community as a whole. It will result in more efficient use of resources by avoiding the unnecessary replication of procedures. Further, it avoids any stress caused to the accused or victims by multiple proceedings.
- 9.36 The Commission proposes that the Criminal Procedure Act be amended to permit the concurrent hearing of multiple matters relating to unfitness to stand trial or the defence of mental impairment. This could be achieved by introducing an exception to Schedule 1 clause 5 of the Criminal Procedure Act, which currently provides that a charge-sheet or indictment may contain charges for 'related offences'. Where there are multiple matters relating to unfitness or the defence of mental impairment, the offences in these matters may not qualify as 'related offences' under the Criminal Procedure Act.³⁰ An amendment could therefore be made to create an exception to this rule in Schedule 1 clause 5 so that the court may, with the consent of the accused and the prosecution, make an order permitting:
- a charge-sheet or indictment to contain charges for multiple matters in which the question of unfitness to stand trial has been raised

- a charge-sheet or indictment to contain charges for multiple matters in which the issue of whether the defence of mental impairment is established is to be determined.

9.37 Introducing an option to streamline multiple hearings where the defence of mental impairment is in issue may not be appropriate in all circumstances. Unlike the question of unfitness to stand trial, which relates to the accused's mental state at the time of the trial, the defence of mental impairment relates to the mental state of the accused at the time of an offence. If the accused is involved in a number of matters, each matter would not necessarily relate to offences that occurred while the accused was suffering from the same mental condition or was impaired by the mental condition to the same degree required by the defence. In the Commission's view, requiring a judicial order to be made based on the consent of the parties will act as a safeguard against the streamlining of matters where it would be inappropriate having regard to the rules of joinder of charges.³¹

Recommendation

- 67 The *Criminal Procedure Act 2009* (Vic) should be amended to permit the court, with the consent of the accused and the prosecution, to make an order allowing:
- (a) a charge-sheet or indictment to contain charges for multiple matters in which the question of unfitness to stand trial has been raised, and
 - (b) a charge-sheet or indictment to contain charges for multiple matters in which the issue of whether the defence of mental impairment is established is to be determined.

The names of findings under the CMIA

- 9.38 A special hearing is conducted after an accused has been found unfit to stand trial to determine whether:
- the person is not guilty of the offence (a complete acquittal)
 - not guilty of the offence because of mental impairment, or
 - committed the offence.³²
- 9.39 If the defence of mental impairment is raised in the course of an ordinary trial, there are three possible outcomes. The accused may be found guilty, not guilty, or not guilty because of mental impairment.
- 9.40 In the following section, the Commission discusses improvements it proposes to the terminology of the findings of 'committed the offence charged' and 'not guilty because of mental impairment'.

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Schedule 1 clause 5 of the *Criminal Procedure Act 2009* (Vic) provides for the joinder of charges.
Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) s 17(1).

Changing the finding of 'committed the offence charged'

- 9.41 The New South Wales Law Reform Commission observed that the qualified finding of guilt may create the perception that the accused has been found guilty of an offence, even though there has not been a usual trial of the evidence that would enable a full investigation of the facts.³³
- 9.42 The qualified finding of guilt in Victoria contrasts with the equivalent finding available in Tasmania. Tasmania provides that 'a finding cannot be made that the defendant is not guilty of the offence charged'.³⁴ It also contrasts with the finding recommended by the Community Development Committee, whose report paved the way for the introduction of the CMIA, that 'on the limited evidence available, a finding cannot be made that the person is not guilty of the offence or any offence available as an alternative'.³⁵
- 9.43 In its *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997: consultation paper* ('the consultation paper'), the Commission asked whether changes should be made to the findings in special hearings, particularly to the finding of 'committed the offence charged'.

Views in submissions and consultations

- 9.44 The Commission did not receive much feedback about whether the finding of 'committed the offence charged' should be changed. Two submissions agreed that the current terminology could lead to a perception of guilt and have a stigmatising effect.³⁶ Only one submission supported an amendment to the finding.³⁷

The Commission's conclusion

- 9.45 In the Commission's view, a finding that more accurately labels the outcome of a special hearing should be adopted. The Commission considers that it is important that the CMIA operates in a transparent manner to avoid any misperceptions that the accused has been found guilty and yet 'escapes' criminal sanctions.
- 9.46 The Commission recommends that the CMIA be amended to replace the finding that the accused 'committed the offence charged' with a finding that the accused's 'conduct is proved on the evidence available'. The Commission considers that this finding more accurately reflects the outcome of a special hearing. It demonstrates that the conduct the accused has been charged with was proved, but it also acknowledges that a special hearing is not an ordinary trial with evidence available to enable a full investigation of the facts. The Commission considers that changing the finding in this way will make its meaning and its implications clearer and more readily understood by victims and the community.

Recommendation

- 68 Section 17(1) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to change the finding that the accused 'committed the offence charged' to a finding that the 'conduct is proved on the evidence available'.

33 New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Consultation Paper No 6 (2010) 42 [2.35].

34 *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 17(d).

35 Victorian Parliament Community Development Committee, *Inquiry into Persons Detained at the Governor's Pleasure* (1995) 183, Recommendation 33.

36 Submissions 11 (Jamie Walvisch); 18 (Victoria Legal Aid).

37 Submission 11 (Jamie Walvisch).

Changing the finding of ‘not guilty because of mental impairment’

- 9.47 A finding of ‘not guilty because of mental impairment’ raises similar issues to the finding of ‘committed the offence charged’ discussed earlier. The use of the words ‘not guilty’ in the finding can cause confusion and stress for victims.³⁸ As Barnett and Hayes have observed:

Many victims may not fully understand what exactly it means by not guilty by reason of mental illness [an equivalent to not guilty because of mental impairment]. Often, these victims can feel betrayed by the criminal justice system and feel that they will receive little recognition for what happened to them. For victims, the term *not guilty* can suggest that the crime is not acknowledged or recognised by the justice system [emphasis in original].³⁹

The Commission’s conclusion

- 9.48 In the Commission’s view, a finding that more accurately labels the outcome when the defence of mental impairment is proved should be adopted. The Commission recommends that the finding of ‘not guilty because of mental impairment’ be replaced with a finding of ‘conduct is proved but not criminally responsible because of mental impairment’. The Commission considers that it demonstrates that the conduct the accused has been charged with was proved, but it also acknowledges that the accused is not criminally responsible for that conduct because of their mental impairment. The recommended finding should give more recognition of the circumstances of the offence to victims than a finding that includes the words ‘not guilty’. It could also address any misinterpretations in the community that the accused has been found ‘not guilty’ despite having engaged in the conduct constituting the offence.
- 9.49 The Commission considers that changing the finding in this way will promote the transparent operation of the CMIA. Like the recommendation the Commission makes on the finding of ‘committed the offence charged’ (Recommendation 68), this recommendation will make the meaning and the implications of this finding clearer and more readily understood by victims and the community.

Recommendation

- 69 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to change the finding that the accused is ‘not guilty of the offence because of mental impairment’ to a finding that the ‘conduct is proved but not criminally responsible because of mental impairment’.

38 Michael Barnett and Robert Hayes, ‘The Role of Victims in NSW Forensic Patient Proceedings’ (2009) 13 *University of Western Sydney Law Review* 7, 29.

39 Ibid.

Process that follows a CMIA finding

- 9.50 In this section, the Commission examines the current process that follows a finding that the accused committed the offence charged or is not guilty because of mental impairment. It makes recommendations in relation to the process:
- for providing information to the court before an order for unconditional release
 - for preparing certificates on availability of facilities and services under section 47 of the CMIA
 - that should apply after a CMIA finding where a person is already subject to a supervision order.
- 9.51 If a person found unfit to stand trial is then found not guilty by a jury in a special hearing, this is taken to be a finding of not guilty at a criminal trial.⁴⁰ This is an acquittal and the court is required to release the person. Similarly, a person found not guilty in an ordinary criminal trial must be released.
- 9.52 Where a person is found to be either not guilty because of mental impairment or to have committed the offence, the judge may either unconditionally release the person or order that the person be liable to supervision.⁴¹ If the judge orders that the person is liable to supervision, they may make an order that is custodial or non-custodial.⁴² A custodial supervision order is an order for the supervision of the person in detention. A non-custodial supervision order is an order for the supervision of the person in the community subject to conditions.
- 9.53 A supervision order is for an indefinite term. Once the court declares a person liable to supervision, but before the court imposes a supervision order, it can also make orders granting bail, remanding the person in custody and for a medical or psychological examination of the person.⁴³
- 9.54 In Chapter 5, the Commission considers the options that should be available to magistrates following a CMIA finding in the Magistrates' Court. In Chapter 6, the Commission considers these options in relation to young people.

Ensuring information is provided to the court after a finding

- 9.55 A court must consider several matters prior to making an order for the unconditional release of a person under the CMIA.
- 9.56 A person can only be released unconditionally if the court:
- has obtained and considered the report on the person's mental condition and the possible effect on their behaviour of unconditionally releasing the person of at least one registered medical practitioner or registered psychologist who has examined the person (section 40(2) report)
 - is satisfied that the person's family members and victims of the charged offence have been given reasonable notice of the hearing at which the court is proposing to order release
 - has considered any report of the family members or victims
 - has obtained and considered any other reports necessary.⁴⁴

40 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 18(1).
41 *Ibid* ss 18(4), 23.
42 *Ibid* s 26(2).
43 *Ibid* ss 19(1), 24.
44 *Ibid* s 40(2).

- 9.57 Thus, reports and information must be prepared and provided to the court after the making of findings and prior to a court deciding whether to release the person or declaring them liable to supervision.
- 9.58 In addition, there are two documents that are provided to the court once a person is declared liable to supervision:
- a report on the mental condition of the person declared liable to supervision under section 41(1) of the CMIA (mental condition report)
 - a certificate of available services under section 47 of the CMIA (certificate of available services).

Views in submissions and consultations

- 9.59 Victoria Legal Aid, the Criminal Bar Association and Forensicare identified two issues in relation to the timing of the court's decision on whether the person can be unconditionally released and the time at which reports are provided to the court.
- 9.60 First, Forensicare submitted that it is unclear whether the court is required to make this decision immediately or can adjourn the matter to obtain further evidence, such as reports. Forensicare observed that while section 23 of the CMIA suggests that this step must follow immediately, the court cannot order an unconditional release without obtaining and considering the section 40(2) report.
- 9.61 Forensicare submitted that providing for a clear power for the case to be adjourned to obtain the reports required would ensure that the option of unconditional release is considered together with the option for supervision.⁴⁵ Forensicare highlighted the importance of this issue, noting that once a person is made liable to supervision, the option of unconditional release is no longer available.⁴⁶
- 9.62 The second issue concerns the requirement that the court cannot unconditionally release a person unless they have considered the mental condition report. Under the current law, where the defence seeks an unconditional release but the prosecution seeks an order declaring the person liable to supervision, the court must first order a section 40(2) report. Then, if the court decides to declare the person liable to supervision, the court must order both a certificate of available services and a mental condition report⁴⁷ of the person declared liable to supervision (these are discussed in more detail below).⁴⁸
- 9.63 The Office of Public Prosecutions (OPP) submitted that, in practice, the court orders a certificate of available services and a mental condition report *prior* to declaring the person liable to supervision with a request that the mental condition report address the matters required in the section 40(2) report. The OPP notes that this practice may be contrary to the requirement that the mental condition report be provided *if* a person is declared liable to supervision (and not before the person is declared liable to supervision).⁴⁹ The OPP suggested that the CMIA be amended to provide that a certificate of available services and a mental condition report, which address the matters that the court must consider in a decision to unconditionally release the person, are sufficient in this circumstance.⁵⁰

⁴⁵ Submission 19 (Forensicare).

⁴⁶ Ibid.

⁴⁷ *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 47, 41(1). These are discussed in more detail at [9.69]–[9.73].

⁴⁸ Submission 19 (Forensicare).

⁴⁹ Submission 8 (Office of Public Prosecutions).

⁵⁰ Ibid.

- 9.64 The Criminal Bar Association noted similar problems to those raised by the OPP and added that when deciding whether to unconditionally release a person the court is required to consider a mental condition report.⁵¹ The Criminal Bar Association submitted that mental condition reports should be available for all options being considered by the court.⁵²

The Commission's conclusion

- 9.65 The Commission agrees with Forensicare's submission that the CMIA should be amended to clarify that a CMIA matter can be adjourned before the decision to declare a person liable to supervision or to order an unconditional release. The requirement for the court to obtain and consider certain reports before making an order for unconditional release⁵³ implies that the court need not make a decision immediately after the person has been found to have committed the offence charged or to be not guilty because of mental impairment. However, the Commission agrees that making it clear that the court can adjourn the matter to obtain these reports will remove any confusion that currently exists on the timing of the decision. Further, it will also provide support for the court to obtain other information, such as the certificate of available services, in considering whether to declare a person liable to supervision. This will ensure that both options—declaring the person liable to supervision or unconditionally releasing them—will be considered with the optimal information available.⁵⁴

Recommendation

- 70** The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to enable the court to adjourn a matter to obtain any reports necessary under section 40(2) or a certificate of available services under section 47 prior to a decision to declare that the person is liable to supervision or to order the person be released unconditionally under sections 18(4) or 23.

- 9.66 The submissions by the OPP and the Criminal Bar Association raised two matters that need to be addressed:
- the requirement that the court cannot unconditionally release a person unless they have considered the mental condition report is inconsistent with such reports only being available after a person has been declared liable to supervision⁵⁵
 - the replication of information in the section 40(2) report and the mental condition report.
- 9.67 The Commission agrees with the Criminal Bar Association that mental condition reports should be available at the point that the court is deciding whether to declare the person liable to supervision or unconditionally release them. This will avoid the court being forced to act in a way that is inconsistent with the CMIA; in addition, it will avoid situations where the option of unconditionally releasing the person is not given due consideration because of the limited application of mental condition reports.

51 Submission 21 (Criminal Bar Association).

52 Ibid.

53 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 40(2).

54 The Commission also recommends that the court have regard to whether a person poses an unacceptable risk of causing physical or psychological harm in deciding whether to declare the person liable to supervision or to unconditionally release the person: Recommendation 88.

55 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 41(1).

Recommendation

- 71 Section 41 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended so that reports on the mental condition of a person under that section can be prepared and filed prior to a decision to declare that the person is liable to supervision under sections 18(4) or 23.

9.68 The Commission notes that the section 40(2) report and the mental condition report serve different purposes. The section 40(2) report is targeted at a decision to unconditionally release the person as it considers the possible effect of the proposed order on the person's behaviour. The mental condition report contains information about the person's treatment or other plans to manage their mental condition if a person is declared liable to supervision. The Commission considers that one report could cover the information required in both reports. The Commission agrees with the OPP that a mental condition report that addresses the matters in section 40(2) would be sufficient in place of a section 40(2) report. The Commission considers that this change would provide clarity in the requirements for reports, avoid any unnecessary replication of information and encourage a more efficient process.

Recommendation

- 72 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended so that the court need not consider the report on the mental condition of a person under section 41(1) and a report under section 40(2)(a) if the report under section 41(1) addresses the matters listed in section 40(2)(a).

Extending the timeframe for preparing a certificate of available services

Reports on mental condition of people declared liable to supervision

- 9.69 When a person is declared liable to supervision, the court receives a report on the mental condition of the person. The 'appropriate person' (the service responsible for supervising the person), is responsible for providing this report. This is either the authorised psychiatrist for Forensicare (for people with a mental illness)⁵⁶ or the Secretary to the Department of Human Services (DHS) (for people with an intellectual disability).⁵⁷
- 9.70 The report on the mental condition of the person must be provided within 30 days of the person being declared liable to supervision. It contains the following:
- a diagnosis and prognosis of the condition or an outline of the person's behavioural problems
 - the person's response to treatment, therapy and counselling
 - a suggested treatment or other plan for managing the condition.⁵⁸

⁵⁶ Department of Health, *Non-custodial Supervision Orders: Policy and Procedure Manual* (2011) 20.

⁵⁷ Department of Human Services, *Disability Services Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 Practice Guidelines 2007* (2007) 37.

⁵⁸ *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 41(1).

Certificate of available services

- 9.71 If a court declares a person liable to supervision, the court may remand the person in custody in an appropriate place. Before making this order, the court must first receive a certificate of available services to confirm that the facilities or services necessary for the order are available. Alternatively, the court can remand the person in custody in a prison. However, the court cannot remand a person in prison unless there is 'no practicable alternative in the circumstances'.⁵⁹
- 9.72 The requirement for a certificate of available services also applies when a court makes a supervision order. The certificate is required before a court can commit a person to custody in an appropriate place or provide for a person to receive services. As with remand, the court must not make a supervision order committing a person to prison unless it is satisfied there is no practicable alternative.⁶⁰
- 9.73 The certificate of available services must be provided to the court within seven days of receiving its request unless the court extends this period.

Views in submissions and consultations

- 9.74 The Commission received feedback that the time provided to prepare the certificate of available services (seven days) is insufficient.⁶¹ Stakeholders who expressed this view noted that:
- The preparation of the certificate of available services is time-consuming, particularly when a person has not had previous interaction with DHS. It requires DHS to assess not only the available facilities and services but also whether the person meets the eligibility criteria for receiving disability services under the *Disability Act 2006* (Vic).⁶²
 - To determine whether a person is suitable for the Disability Forensic Assessment and Treatment Service (DFATS), DHS generally conducts a full psychological assessment of the person to assess their risk and treatment and management needs. This takes between six and seven weeks.⁶³
 - The internal approval procedures within DHS also take time and have to be factored into the period allocated for the preparation of the certificate of available services.⁶⁴
- 9.75 In one of the Commission's consultations with DHS case managers, participants noted the importance of ensuring that the facilities and services made available were appropriate given that the person could be subject to the supervision order for a long period of time.⁶⁵
- 9.76 Forensicare submitted that the timeframe for the provision of section 47 certificates should be the same as that for mental condition reports (30 days). Forensicare noted that the section 47 certificate which relates to the custody, care or treatment of a person is dependent on the suggested treatment plan in the mental condition report.⁶⁶

59 Ibid ss 24(1)(c), (3).

60 Ibid ss 26(3)–(4).

61 Consultations 2 (Department of Human Services case managers, Barwon); 6 (Department of Human Services case managers, Disability Forensic Assessment and Treatment Service (DFATS) and Long Term Rehabilitation Program (LTRP)); 9 (Department of Human Services case managers, Gippsland and Latrobe).

62 Consultation 2 (Department of Human Services case managers, Barwon). The eligibility criteria under the Disability Act require an assessment of the person before they are 18 years old because the criteria are based on an impairment in functioning before the age of 18. This could require tracing information back to school reports or doctors' reports, which are not always easily accessible. It was also noted that there is little guidance on how to prepare a certificate of available services (in cases where a person has not had previous interaction with DHS) and how to perform an environmental scan as part of the requirements of the certificate.

63 Consultation 6 (Department of Human Services case managers, Disability Forensic Assessment and Treatment Service (DFATS) and Long Term Rehabilitation Program (LTRP)).

64 Consultation 2 (Department of Human Services case managers, Barwon).

65 Consultation 9 (Department of Human Services case managers, Gippsland and Latrobe).

66 Submission 19 (Forensicare).

- 9.77 In the Commission's consultation with judges of the Supreme Court of Victoria, one judge noted that an order remanding a person to custody pending an investigation into unfitness to stand trial is contingent upon a certificate of available services being provided to the court. In most cases, a person would already be detained in a mental health facility when a supervision order is being made. It was suggested that the CMIA should be amended so that a certificate of available services need not be provided to the court if a person is already detained.⁶⁷
- 9.78 Victoria Legal Aid noted that while certificates of available services are used when a person is placed on a custodial supervision order, the same process is not followed when a person is placed on a non-custodial supervision order. It submitted that a consistent approach in the provision of certificates for both types of supervision orders should be preferred.⁶⁸

The Commission's conclusion

- 9.79 The Commission recognises the difficulties involved in providing a certificate of available services within a period of seven days. The Commission also agrees that the certificate contains information relevant to an order that is in place for an indefinite period. The Commission considers that the information in the certificate should therefore be put together in a considered and thorough manner. This should be balanced against the need to avoid any unreasonable delay and the benefit to the person of commencing their treatment or management under the CMIA sooner rather than later.
- 9.80 On balance, the Commission recommends that certificates of available services should be provided within the same timeframe as mental condition reports (30 days). As Forensicare noted, this will enable the certificate to draw on the information provided in the mental condition report. The Commission considers this will result in higher quality information being provided to the court, in addition to addressing some of the concerns about the lack of time to prepare certificates. If more time than 30 days is required, the Commission proposes that the court should continue to have the discretion that currently exists under the CMIA to order a longer period.

Recommendation

- 73** Section 47(4) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to require the provision of a certificate of available services to the court within 30 days after receiving a request under section 47(1) or within such a longer period as the court allows.

- 9.81 The Commission notes the view that where a person is in remand and a certificate of available services has been prepared, there is no need to prepare an additional certificate where a supervision order is being made.
- 9.82 On balance, the Commission considers that there are benefits in requiring a certificate of available services to be prepared when making a supervision order, regardless of whether one has been prepared previously. In the Commission's view, the initial and subsequent certificates have different focuses.

- 9.83 The initial certificate of available services concerns an order in place for a finite amount of time, whereas the subsequent certificate relates to an order that could operate for an indefinite period of time. Further, the subsequent certificate has a greater therapeutic focus. As noted by Forensicare, it draws on the information provided in the mental condition report to give effect to the treatment or management prescribed there.⁶⁹ The mental condition report is not prepared when the court is making an order to remand the person.
- 9.84 Finally, the Commission considers that the information in the certificate of available services at the time an order remanding a person into custody is made will not necessarily be relevant at the time the court is making a supervision order. The Commission therefore does not make a recommendation for the CMIA to specify that a certificate is not required when the person is already in custody.
- 9.85 The Commission does not consider there is a need to specify that certificates of available services should be required for the making of a non-custodial order, as suggested by Victoria Legal Aid. The current provisions in the CMIA are broad enough to require the provision of a certificate for the making of a non-custodial supervision order.⁷⁰

Improving the process where a person is already subject to a supervision order

Views in submissions and consultations

- 9.86 It was observed in submissions and consultations that it is relatively common for people to be placed on multiple supervision orders.
- 9.87 The Criminal Bar Association suggested that if a supervision order already exists, the court should be able to change the time period for supervision, if appropriate, on an already existing order, instead of subjecting a person to multiple supervision orders.⁷¹

The Commission's conclusion

- 9.88 The Commission agrees that there should be scope to streamline supervision orders where appropriate to reflect updated circumstances, rather than automatically subjecting a person to multiple supervision orders. This will avoid the replication of supervision orders and the confusion and burden associated with a person being on multiple supervision orders and make the process more efficient.
- 9.89 The CMIA should be amended to enable a court to decline to impose a supervision order where a person is already subject to a supervision order. For example, where a person is subject to an indefinite supervision order and is then liable to be subject to a two-year supervision order in the Magistrates' Court, the court could decline to make the two-year supervision order. In contrast, if a person is subject to a two-year supervision order in the Magistrates' Court and then becomes liable to be subject to an indefinite supervision order in the higher courts, the court could proceed to impose the indefinite supervision order. The review periods will not depend on the order that already exists, as this may be inappropriate where the existing order is less restrictive than the new order to be imposed. Rather, the review period will rely on the supervision order that, in the court's view, should take precedence.

69 Submission 19 (Forensicare).

70 The court is required to consider a certificate of available services before making a supervision order 'providing for a person to receive services in an appropriate place or from a disability service provider, the Secretary to the Department of Human Services or the Secretary to the Department of Health': *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 26(3)(b). Further, the court must request a certificate of available services if it is considering imposing a supervision order providing for a person to receive services 'from a disability services provider' or 'in an approved mental health service': *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 47.

71 Submission 21 (Criminal Bar Association).

Recommendation

- 74 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to enable a court to decline to impose a subsequent supervision order where a person is already subject to a supervision order.

Ancillary orders and consequences

- 9.90 In the usual criminal process, ancillary orders and consequences can follow a sentence when a person is found guilty of an offence. The ancillary orders or consequences can vary depending on the particular type of offence. In some cases, the orders are made at the court's discretion. In other cases, consequences or orders are mandatory by virtue of the legislation. For example, in the usual criminal process, when a person is found guilty of an offence, the court is usually required to record a conviction against the person. When the offence is less serious, the court usually has a discretion not to record a conviction. Some ancillary orders can only be made following a conviction, while others can flow after a finding of guilt without a conviction.
- 9.91 A finding under the CMIA that a person committed the offence charged (following a finding of unfitness to stand trial) or a finding of not guilty because of mental impairment does not result in a conviction for an offence.
- 9.92 The imposition of ancillary orders and consequences following a criminal finding of guilt raises the issue of whether these orders or consequences should also follow a finding under the CMIA. In the consultation paper, the Commission examined these ancillary orders and consequences and sought input on their applicability in CMIA matters.
- 9.93 Generally, submissions and consultations indicated that the limited and inconsistent application of the law relating to ancillary orders and consequences in both the higher courts and the Magistrates' Court needed to be addressed.
- 9.94 The absence of ancillary orders or consequences in CMIA matters in the Magistrates' Court (where currently no finding of unfitness to stand trial or orders following a finding of not guilty because of mental impairment can be made) was a concern strongly expressed by Victoria Police. The importance of the availability of ancillary orders or consequences for CMIA matters in the Magistrates' Court was also highlighted at the Commission's roundtable on the CMIA in the Magistrates' Court.⁷²
- 9.95 The following reasons were given in support of providing for ancillary orders and consequences to follow CMIA findings:
- It is important for the safety of the community.⁷³
 - Automatically excluding people subject to the CMIA from being subject to ancillary orders or consequences does not accord with rehabilitative principles that encourage them to take responsibility for themselves and their actions.⁷⁴

72 Consultation 47 (Magistrates' Court roundtable).

73 Submissions 21 (Criminal Bar Association); 30 (Victoria Police). Consultation 27 (Victoria Police—police prosecutors).

74 Submission 19 (Forensicare).

- 9.96 Feedback to the Commission generally agreed that any recommendations on ancillary orders or consequences should aim to achieve consistency and ensure that these orders or consequences are not punitive⁷⁵ or compensatory.⁷⁶ If they are necessary, they are made for community safety or the treatment and stability of the person.⁷⁷
- 9.97 In this section, the Commission outlines:
- ancillary orders and consequences that are relevant to findings under the CMIA
 - the views expressed in submissions and consultations on each type of ancillary order and consequence
 - the Commission's recommended approach to determining which ancillary orders and consequences should be available following a finding under the CMIA.

Restitution, compensation and recovery

- 9.98 Part 4 of the *Sentencing Act 1991* (Vic) provides for orders to be made following a finding of guilt for an offence. These are:
- *A restitution order*—Where a person is found guilty or convicted of an offence connected with theft, an order may be made requiring the return of stolen goods or property or money to replace the stolen goods.⁷⁸
 - *A compensation order*—Where a person is found guilty or convicted of an offence, an order may be made for the person to pay compensation for:
 - pain and suffering to any person who has sustained an injury as a direct result of the offence,⁷⁹ or
 - property loss sustained by any person who has suffered loss or destruction of, or damage to, property.⁸⁰
 - *An order for recovery of assistance paid under the Victims of Crime Assistance Act 1996* (Vic)—Where a person is found guilty of or convicted of particular offences⁸¹ and an award of assistance is made in respect of an injury or death that resulted from an offence, an order may be made requiring the offender to pay an amount of money to the state.⁸²
 - *A cost recovery order*—Where a person is found guilty or convicted of an offence relating to contamination of goods and bomb hoaxes, an order may be made requiring the offender to pay to the state an amount to cover the costs incurred by an emergency services agency, such as Victoria Police or the Ambulance Service Victoria.⁸³

Views in submissions and consultations

- 9.99 Victoria Legal Aid and Forensicare submitted that restitution orders, compensation orders and orders for recovery under the Victims of Crime Assistance Act or cost recovery orders should not be available following a CMIA finding.⁸⁴ The Criminal Bar Association agreed that compensation orders and orders for recovery under the Victims of Crime Assistance Act were not appropriate. However, they noted that restitution orders may be appropriate in some circumstances.⁸⁵

75 Submissions 21 (Criminal Bar Association); 19 (Forensicare); 18 (Victoria Legal Aid).

76 Submission 19 (Forensicare).

77 Submissions 8 (Office of Public Prosecutions); 21 (Criminal Bar Association).

78 *Sentencing Act 1991* (Vic) ss 84–5.

79 *Ibid* ss 85A–85M.

80 *Ibid* s 86.

81 Within the meaning of the *Victims of Crime Assistance Act 1996* (Vic).

82 *Sentencing Act 1991* (Vic) s 87A.

83 *Ibid* ss 87C–87N.

84 Submissions 18 (Victoria Legal Aid); 19 (Forensicare).

85 Submission 21 (Criminal Bar Association).

- 9.100 The Office of Public Prosecutions (OPP) submitted that compensation and restitution orders should be available upon a CMIA finding. The OPP noted that compensation and restitution orders are discretionary and so if such an order was inappropriate in the circumstances of a particular case, the judge could decline to make the order.⁸⁶ A victim the Commission consulted with also supported some form of compensation for victims in CMIA matters.⁸⁷

Confiscation and forfeiture

- 9.101 Another consequence that can follow findings of guilt in the criminal process is an order for confiscation or forfeiture of property used in the commission of offences or owned by the offender.
- 9.102 The difference between confiscation and forfeiture has been described as follows:
- ‘forfeiture’ describes the procedure used to take away specific property belonging to an offender or someone else that is ‘tainted’ because it was either used in connection with, or was derived from, the commission of an offence. The term ‘confiscation’ is slightly broader and describes the procedure for taking away any financial benefits gained through criminal activity, through the making of a ‘pecuniary penalty order’ [citations omitted].⁸⁸
- 9.103 In Victoria, the *Confiscation Act 1997* (Vic) governs the laws for forfeiture and confiscation of property following charges or convictions for Victorian offences. The scheme is primarily conviction-based, but depending on the type of offence, the mechanism for confiscation or forfeiture varies.
- 9.104 In summary, the Confiscation Act provides for the following orders:
- *Discretionary court-ordered forfeiture*—a discretionary court order for forfeiture of tainted property upon conviction of any indictable offence or a specified summary offence.⁸⁹
 - *Automatic forfeiture*—an automatic order for forfeiture of property that has been ‘restrained’⁹⁰ upon conviction of an ‘automatic forfeiture offence’.⁹¹
 - *Civil forfeiture*—a discretionary court order for forfeiture of property restrained on suspicion that it is ‘tainted property’. The order is available for property that was involved in the commission of a civil forfeiture offence. No finding of guilt or conviction is required for a civil forfeiture order to be made.⁹²
 - *Discretionary pecuniary penalty orders*—a discretionary court order for a person to pay a sum of money to the state usually equivalent to the proceeds of crime upon conviction.⁹³
 - *Disposal orders*—a discretionary court order upon conviction for the disposal or destruction of property relating to drugs or explosive substances or property with no value or lawful use.⁹⁴

86 Submission 8 (Office of Public Prosecutions).

87 Consultation 22 (Partner of a victim in a CMIA matter).

88 Sentencing Advisory Council, *Sentencing, Parole Cancellation and Confiscation Orders*, Report (2009) 16.

89 *Confiscation Act 1997* (Vic) pt 3 div 1. Specified offences are listed in Schedule 1 and include a Schedule 2 offence.

90 This means that a restraining order has been made on the property which prohibits an accused from disposing of or dealing with the property or any interest in property.

91 *Confiscation Act 1997* (Vic) ss 35–6. Automatic forfeiture offences are listed in Schedule 2.

92 Ibid ss 36H, 37(1). Section 132 of the Confiscation Act provides that any question of fact to be decided by a court under that Act is to be decided on the balance of probabilities. Section 3 defines ‘tainted property’. Schedule 2 lists civil forfeiture offences.

93 Ibid ss 58–9.

94 Ibid ss 77–8.

Views in submissions and consultations

- 9.105 Forensicare submitted that punitive forfeiture orders should not apply to CMIA findings.⁹⁵ The Criminal Bar Association observed that confiscation orders may be appropriate in some circumstances.⁹⁶ Victoria Legal Aid submitted that orders in relation to confiscation and forfeiture should be discretionary in all circumstances following CMIA proceedings.⁹⁷
- 9.106 The Office of Public Prosecutions (OPP) was of the view that confiscation orders should be available following CMIA findings. However, to address any potential punitive effect that may be caused by confiscation in these circumstances, the OPP submitted that confiscation should occur only in relation to proceeds and benefits of the crime and also for the purpose of preserving property to satisfy potential restitution and compensation orders made under the Sentencing Act.⁹⁸

Licence cancellation and disqualification

- 9.107 Cancellation of and disqualification from obtaining a driver licence or suspension of a driver licence are other examples of consequences that can follow a conviction and/or sentence.
- 9.108 Section 89 of the Sentencing Act requires a court to cancel a driver licence and disqualify a person from obtaining one for at least 18 months if they are found guilty of certain motor vehicle offences.
- 9.109 The *Road Safety Act 1986* (Vic) also provides for various categories of automatic and court-ordered licence suspension and disqualification, depending on the type of offence.⁹⁹

Views in submissions and consultations

- 9.110 The Criminal Bar Association supported the notion of ancillary orders that seek to manage risk in appropriate circumstances.¹⁰⁰ Victoria Legal Aid and Forensicare submitted that orders that affected community safety (such as licence disqualification and cancellation) may be appropriate.¹⁰¹ The Office of Public Prosecutions submitted that licence cancellation and disqualification orders should be available upon a finding that the person committed the offence charged, but that further consideration should be given to whether these orders should be available upon a finding of not guilty because of mental impairment.¹⁰²

Sex offenders registration

- 9.111 Administrative consequences can follow a sentence for a criminal offence. One example is registration on a register of sexual offenders. The *Sex Offenders Registration Act 2004* (Vic) sets out a scheme for the registration of 'registrable offenders' who have been found guilty of or sentenced for particular offences.¹⁰³ Upon registration, registrable offenders are required to comply with the reporting obligations in the Sex Offenders Registration Act.¹⁰⁴
- 9.112 The purpose of the sex offenders registration scheme is to require sex offenders to provide information via reporting to the police on a regular basis in order to reduce the likelihood that they will re-offend and to facilitate the investigation and prosecution of future offences. The scheme also aims to prevent registered sex offenders from working with children.¹⁰⁵

95 Submission 19 (Forensicare).

96 Submission 21 (Criminal Bar Association).

97 Submission 18 (Victoria Legal Aid).

98 Submission 8 (Office of Public Prosecutions).

99 See, eg, *Road Safety Act 1986* (Vic) ss 28, 89C.

100 Submission 21 (Criminal Bar Association).

101 Submissions 18 (Victoria Legal Aid); 19 (Forensicare).

102 Submission 8 (Office of Public Prosecutions).

103 *Sex Offenders Registration Act 2004* (Vic) s 6(1).

104 Ibid pt 3.

105 Ibid s 1.

- 9.113 All adults who are sentenced for Class 1 or 2 offences—broadly speaking, sexual offences against or involving children¹⁰⁶—automatically become registered sex offenders.¹⁰⁷ There are no exceptions and the court has no discretion regarding registration.
- 9.114 In addition to the automatic registration of those offenders, the courts have discretionary powers to register other offenders by making a sex offender registration order.¹⁰⁸
- 9.115 The Sex Offenders Registration Act may apply to people who are subject to the CMIA. Depending on the type of offender and type of offence, registration consequences may flow from either a ‘finding of guilt’ or a ‘sentence’.¹⁰⁹ A ‘finding of guilt’ includes a finding that a person is not guilty because of mental impairment and a finding in a special hearing that the person committed the offence charged.¹¹⁰
- 9.116 A ‘sentence’ is defined to include a declaration that the accused is liable to supervision under Part 5 of the CMIA and an order that the accused be released unconditionally under the CMIA.¹¹¹
- 9.117 The Sex Offenders Registrations Act provides for alternative reporting arrangements for a person with a ‘disability’, defined as including a person who is a forensic patient or a forensic resident under the CMIA.¹¹² A parent, guardian, carer or another nominated person can report on behalf of a registrable offender with a disability.¹¹³
- 9.118 Disability is also a factor that can be taken into account by a court when considering an offence of failing to comply with reporting obligations.¹¹⁴
- 9.119 The Commission examined issues regarding the registration of offenders in its reference on sex offenders registration. One of the Commission’s recommendations related to the circumstances in which a court should be permitted to decline to make a ‘registration order’ in respect of any person found guilty of any offence at any time. One of the circumstances was the court being satisfied on the balance of probabilities that the person would be unable to comply with the reporting obligations due to physical or other cognitive impairment.¹¹⁵

Views in submissions and consultations

- 9.120 The Office of Public Prosecutions submitted that the registration of people subject to the CMIA was necessary for community protection.¹¹⁶ Victoria Legal Aid (VLA) supported the Commission’s recommendation in its report on sex offenders registration that a court should be permitted to decline to make a registration order where the person would be unable to comply with reporting obligations due to physical or other cognitive impairment. In addition, VLA submitted that courts should be permitted to decline to make a registration order where the person is already subject to a supervisory regime.¹¹⁷

106 The age of the child victims to which the offences apply differs from one offence to another. See Victorian Law Reform Commission, *Sex Offenders Registration*, Information Paper (2011) Appendix A.

107 *Sex Offenders Registration Act 2004* (Vic) s 6. In addition, offenders who were ‘existing controlled registrable offenders’ immediately before 1 October 2004 were required to be retrospectively registered: ss 3 (definition of ‘existing controlled registrable offender’), 6(4).

108 *Sex Offenders Registration Act 2004* (Vic) s 11. The circumstances in which the courts can exercise this discretionary power are set out in more detail in Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, Consultation Paper No 17 (2013).

109 Automatic registration follows a sentence for a Class 1 or 2 offence: *Sex Offenders Registration Act 2004* (Vic) s 6(1). The making of a sex offender registration order can follow a sentence or a finding of guilt: ss 11(1)–(2A).

110 *Ibid* s 4(1)(d).

111 *Ibid* s 3 (definition of ‘sentence’).

112 *Ibid* ss 3 (definition of ‘disability’), 5(2).

113 *Ibid* ss 23(4)–(5).

114 *Ibid* s 46(2)(b).

115 Victorian Law Reform Commission, *Sex Offenders Registration*, Final Report No 23 (2012) xxiv, Recommendation 17.

116 Submission 8 (Office of Public Prosecutions).

117 Submission 18 (Victoria Legal Aid).

- 9.121 The Criminal Bar Association noted that in general the Sex Offenders Registration Act does not proceed on the basis of individual risk assessment. The Criminal Bar Association submitted that if the Commission's recommendations were to be adopted and registration is made discretionary, the legislation could have a role to play in CMIA matters. However, the Criminal Bar Association did not support the automatic registration of people found unfit to stand trial or not guilty because of mental impairment. It noted:

It must be remembered that the reduction of the risk of further offending lies at the core of CMIA supervision orders in any case. Further, there may be an unfortunate circularity in the position that a person who is unfit or not guilty of offending should be placed on an order the breach of which is enforced by criminal sanction.¹¹⁸

Forensic sample orders and forensic sample retention orders

- 9.122 Courts can make an order directing a person 'to undergo a forensic procedure for the taking of a sample from any part of the body' ('forensic sample order').¹¹⁹ An order may be made after a court finds a person guilty of a forensic sample offence.
- 9.123 When hearing an application for a forensic sample order, a court takes into account the seriousness of the circumstances of the forensic sample offence.¹²⁰
- 9.124 In addition, courts may make orders for forensic procedures to be conducted on people suspected of offences.¹²¹ Unless a 'forensic sample retention order' is later obtained, any sample taken in those circumstances must be destroyed in accordance with the *Crimes Act 1958* (Vic).¹²²
- 9.125 In deciding whether to make a forensic sample retention order, the court takes similar considerations into account as when it decides to make a forensic sample order.¹²³
- 9.126 Forensic sample orders can be made in relation to findings of 'not guilty by reason of mental impairment'.¹²⁴ Forensic sample retention orders can also be made upon a finding of 'not guilty by reason of mental impairment'.¹²⁵
- 9.127 The Commission notes that at present a forensic sample order can be made only in relation to offences specified in Schedule 8 of the *Crimes Act* other than offences heard and determined summarily.¹²⁶ An amendment that will commence on 1 July 2014 will make all indictable offences 'forensic sample offences'¹²⁷ and so subject to an order.

Views in submissions and consultations

- 9.128 Victoria Legal Aid submitted that these orders should be discretionary in CMIA matters.¹²⁸
- 9.129 The Office of Public Prosecutions (OPP) noted that forensic sample orders are available upon a finding of not guilty by reason of mental impairment, but these are not available upon a finding at a special hearing that the person committed the offence charged. The OPP submitted that forensic sample orders should also be available upon a finding that the person committed the offence charged.¹²⁹

118 Submission 21 (Criminal Bar Association).
119 *Crimes Act 1958* (Vic) s 464ZF(2).
120 Ibid s 464ZF(8).
121 Ibid ss 464T(3), 464U(7), 464V(5).
122 Ibid ss 464ZFB–464ZFC. Section 464ZFB is subject to s 464ZFD.
123 Ibid s 464ZFB(2).
124 Ibid s 464ZFAAA.
125 Ibid s 464ZFB(1A).
126 Ibid s 464ZFAAA(1), sch 8.
127 *Crimes Amendment (Investigation Powers) Act 2013* (Vic) ss 9–10.
128 Submission 18 (Victoria Legal Aid).
129 Submission 8 (Office of Public Prosecutions).

The Commission's conclusion

- 9.130 The Commission recognises that there are gaps and inconsistencies in the current law concerning the ancillary orders and consequences that may follow a CMIA finding, in contrast to the orders and consequences that may follow an ordinary criminal finding. For example:
- Restitution, compensation, cost recovery orders and orders for recovery of assistance paid under the Victims of Crime Assistance Act may only be made upon a 'finding of guilt' or 'conviction' under the Sentencing Act.¹³⁰ As those terms are not defined, it is unclear whether such orders could be made following a CMIA finding.
 - Court-ordered forfeiture orders, automatic forfeiture orders, pecuniary penalty orders and disposal orders may only be made upon a conviction.¹³¹ The definition of 'conviction' does not include a finding under the CMIA.¹³²
 - Forensic sample orders and forensic sample retention orders are available after a finding of not guilty because of mental impairment but not after a finding in a special hearing that the accused committed the offence charged.
- 9.131 The Commission does not make recommendations in relation to each type of ancillary order or consequence that should follow a CMIA finding as these issues are not clearly within the scope of the terms of reference. However, the Commission considers that these are important issues that should be given further consideration.
- 9.132 In the following section, the Commission sets out a framework to inform a review of the relevant ancillary orders and consequences following a finding under the CMIA, in line with the principles and approach underpinning this report's recommendations.

Adherence to the principles underlying the CMIA

- 9.133 Two key principles that underpin the CMIA are that a person should not be punished for an offence if they are not morally blameworthy for their behaviour (legitimate punishment) and that the community should be protected from the risk that may be posed because of a person's mental condition (community safety).
- 9.134 In line with these principles the Commission considers that ancillary orders or consequences should, as far as possible:
- not be punitive, either in intention or effect¹³³
 - be made or occur where necessary for the safety of the community.¹³⁴

Legitimate punishment

- 9.135 Whether or not an ancillary order or consequence is inconsistent with the principle of legitimate punishment depends on its intention and effect.
- 9.136 An ancillary order or consequence that has a punitive intention and effect is clearly in breach of the principle, and therefore, should not be available after a CMIA finding.
- 9.137 For example, the Commission considers that confiscation that relates to lawfully acquired property or that goes beyond the removal of the proceeds of crime is punitive¹³⁵ and should not follow a CMIA finding.

¹³⁰ *Sentencing Act 1991* (Vic) ss 84(1), 85B(1), 86(1), 87D(1).

¹³¹ *Confiscation Act 1997* (Vic) ss 32(1), 35(1), 58(1)–(2), 77(1).

¹³² *Ibid* s 4.

¹³³ Submissions 21 (Criminal Bar Association); 19 (Forensicare); 18 (Victoria Legal Aid).

¹³⁴ Submission 21 (Criminal Bar Association).

¹³⁵ In its discussion on proportionality in sentencing in relation to confiscation orders, the Sentencing Advisory Council noted that confiscation orders that go beyond the proceeds of crime are punitive: Sentencing Advisory Council, above n 88, 77.

- 9.138 However, other orders for confiscation or forfeiture that are directed solely at the proceeds of crime are not punitive in intention or effect, as they merely restore the status quo which existed prior to the occurrence of the conduct. Therefore, they may be appropriate following a CMIA finding.
- 9.139 Similarly, a restitution order which involves the return of property to its proper owner is not punitive in effect or intention. It results merely in the removal of property which the person never had a right to and thus restores the status quo. It may be appropriate following a CMIA finding.
- 9.140 However, it is not clear that ancillary orders or consequences not categorised as punitive but which may have a punitive effect, or those that are directed in response to the 'fault' would be appropriate following a CMIA finding.
- 9.141 For example, compensation orders have been viewed by courts to be a way for the state to facilitate a civil action to recover compensation by victims.¹³⁶ These orders are not strictly construed as 'punitive'. However, although such orders may not have a punitive intent, their effect on the person required to pay compensation may be punitive. Further, linking the order to the fault, and by extension, the criminal responsibility of the person, could be problematic when the person has been found not guilty because of mental impairment. It may not be a problem in cases where the person has been found unfit to stand trial and then found to have committed the offence in a special hearing.
- 9.142 The Commission is of the view that as a general principle, compensation should be available for all victims who meet the current criteria under the Sentencing Act. A victim of crime should not be disadvantaged in terms of their entitlement for compensation because the conduct that resulted in loss was committed by a person found under the law not to be responsible for that conduct. However, the Commission also considers that it is problematic for a person found not criminally responsible for offending conduct to be held liable for loss arising from that conduct and to incur a loss themselves where compensation is ordered.
- 9.143 Further consideration of this issue is required to find a solution that appropriately balances these two important considerations. One option could be the establishment of a compensation fund by the Victorian Government (similar to that available through the Victims of Crime Assistance Tribunal)¹³⁷ that enables victims to be appropriately compensated in CMIA matters, while ensuring that the compensation does not result in a loss to the person where they have not been found responsible under the law for their conduct.¹³⁸ Consideration of this issue could also be assisted by an examination of the civil liability for actions of people with a mental illness.¹³⁹

136 *Director of Public Prosecutions v Energy Brix Australia Corp Pty Ltd* (2006) 14 VR 345, 346.

137 *Victims of Crime Assistance Act 1996* (Vic) s 1.

138 The Law Commission of New Zealand considered options for a state-funded compensation scheme and identified the advantages and disadvantages of each option: see Law Commission (New Zealand), *Compensating Crime Victims*, Report No 121 (2010) 25–7.

139 See *Adamson v Motor Vehicle Insurance Trust* (1957) 58 WALR 56; *Carrier v Bonham* [2001] QCA 234 (22 June 2001). The issues are discussed in Nikki Bromberger, 'Negligence and Inherent Unreasonableness' (2010) 32 *Sydney Law Review* 411; Wendy Bonython, 'The Standard of Care in Negligence: The Elderly Defendant with Dementia in Australia' (2011) 10(2) *Canberra Law Review* 119.

Community safety

- 9.144 The need to ensure community safety may justify the imposition of an order that may otherwise be considered punitive, such as licence disqualification.¹⁴⁰ Fox and Freiberg have observed that such orders are mostly ‘punitive and akin to traditional sanctions’.¹⁴¹ However, disqualification also serves the purpose of protecting community safety.¹⁴²
- 9.145 The Commission considers that the protective nature of licence suspension or disqualification provisions may justify these orders being made following a finding under the CMIA.
- 9.146 Other examples of orders which protect community safety that may be appropriate to impose following a finding under the CMIA include:
- *Orders under the Sex Offenders Registration Act*—As the Commission observed in its report on sex offenders registration, registration is not a punishment for past crimes. Rather, the Sex Offenders Registration Act seeks to protect the community from the risk that those who have been sentenced for sexual offences in the past may re-offend in the future.¹⁴³
 - *Forensic sample orders and forensic sample retention orders*—The main purpose of both orders is to address any risk the person may pose to the community in the future. Courts have, for example, considered the social utility of the order in deciding whether the order should be made.¹⁴⁴

A discretionary power to make orders

- 9.147 In the Commission’s view, any application of ancillary orders and consequences to findings under the CMIA should not be mandatory or be imposed automatically, but should instead be based on the court’s discretion.
- 9.148 Flexibility in the law is essential to accommodate the varying circumstances of people subject to the CMIA. For example in relation to the Sex Offenders Registration Act:
- A person’s mental condition could prevent them from complying with their reporting obligations.
 - It may not be appropriate or necessary for a person already subject to the CMIA supervision regime (which would manage the risk to the community) to be on the Sex Offenders Register.¹⁴⁵
- 9.149 The Commission reiterates its recommendations in the report on sex offenders registration that:
- A person should only be included in the Sex Offenders Register by order of a court (and that automatic registration be discontinued).
 - The court should be permitted to decline making a registration order if the person would be unable to comply with the reporting obligations due to a physical or other cognitive impairment.¹⁴⁶

140 Richard Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (Oxford University Press, 2nd ed, 1999) 536, citing *Creed v Dudley* [1984] WAR 344; *Calder; Ex parte Attorney-General* [1987] 1 Qd R 348, 356.

141 Ibid.

142 *R v Rae* (Unreported, Supreme Court of Victoria Court of Criminal Appeal, Young CJ, Crockett and Brooking JJ, 7 November 1984) 4 (Young CJ).

143 Victorian Law Reform Commission, above n 115, 5.

144 *R v Lagona* [1998] VSC 220 (17 December 1998) [27].

145 See Victorian Law Reform Commission, above n 115, xxii, Recommendation 4.

146 Ibid xxii–xxiii.

Distinguishing between different CMIA findings

9.150 The Commission considers that it will be necessary to examine whether the orders and consequences that follow a finding of ‘not guilty because of mental impairment’ and ‘committed the offence charged’ should be distinguished where appropriate. However, the Commission agrees with the Office of Public Prosecution’s view that forensic sample orders should also be available upon a finding that the person committed the offence charged (or that the accused’s ‘conduct is proved on the evidence available’ under the Commission’s recommendation). There does not appear to be a reason for people who have been found to have committed the offence charged to be excluded from the forensic sample regime.

Recommended approach to reviewing ancillary orders and consequences following CMIA findings

9.151 The following recommendation sets out the Commission’s recommended approach to reviewing the ancillary orders and consequences that should follow a CMIA finding.

9.152 If there is an expansion of the types of ancillary orders and consequences that are available following a finding under the CMIA, this will have cost implications, including costs in imposing, managing and enforcing the orders and consequences.¹⁴⁷

Recommendation

75 The Victorian Government should review the ancillary orders and consequences that may follow a finding under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) with the aim of clarifying the ancillary orders or consequences that should or should not be available following a finding under the Act. In conducting any such review, the following approach should be taken:

- (a) Ancillary orders and consequences following findings under the Act should, as far as possible, not be punitive in intention or effect and should be made where necessary for the safety of the community.
- (b) Ancillary orders and consequences following findings under the Act should not be mandatory or imposed automatically, but should instead be founded on the court’s discretion.
- (c) The ancillary orders and consequences that follow a finding that the ‘conduct is proved on the evidence available’ and a finding that the ‘conduct is proved but not criminally responsible because of mental impairment’ should be distinguished where appropriate.

Using information about findings under the CMIA for other purposes

- 9.153 Information about a finding under the CMIA can be used for other purposes, for example:
- It can form part of a person's criminal record.
 - It can arise in a working with children check.
 - It can affect a person's ability to obtain licences or accreditation required for employment in the public transport industry.
- 9.154 The Commission does not make any specific recommendations on how information concerning a finding under the CMIA should be used. However, in the following section, the Commission sets out its view on this issue that could inform a review on the use of CMIA findings.

Criminal records

- 9.155 A CMIA finding can appear on a person's criminal record. Victoria Police's information release policy for police checks implies that a finding of not guilty because of mental impairment will be included in a police check at least when they relate to serious offences committed by adults.¹⁴⁸ Victoria Police indicated that such information will be released if the release is in the interest of community safety. In making a decision to release, Victoria Police considers the seriousness of the conduct, the circumstances surrounding the conduct and whether the information would be considered to be directly relevant to the purpose of the police check. Serious offences could include murder, attempted murder and intentionally causing serious injury.
- 9.156 Forensicare's Patient Consulting Group observed:
- There are some patients in the rehab units who are finding it hard to get jobs even when there is a verdict of not guilty because of mental impairment due to the results of police checks. This is affecting rehabilitation. Some patients had the understanding (based on the advice and assurance of their lawyers) that they would not have a criminal record if they went down the mental impairment path.¹⁴⁹

Working with children check

- 9.157 The purpose of a working with children check is to 'assist in protecting children from sexual or physical harm by ensuring that people who work with or care for them have their suitability to do so checked by a government body'.¹⁵⁰
- 9.158 A finding of guilt for particular offences, particular sentences or sex offender registration can affect whether the Secretary to the Department of Justice will grant or even assess an application for a working with children check. Applications are categorised according to factors including whether a person:
- has been found guilty of certain offences
 - is subject to sex offender registration
 - is subject to particular sentencing or supervision orders.

148 Victoria Police, *Information Release Policy—National Police Certificate* (Information Sheet, 2013).
 149 Submission 2 (Forensicare Patient Consulting Group).
 150 *Working with Children Act 2005* (Vic) s 1(1).

- 9.159 For example, if a person has been found guilty of a sexual offence against a child, their application for a working with children check may not be assessed by the Secretary to the Department of Justice.¹⁵¹ The findings under the CMIA listed above are included in the definition of a ‘finding of guilt’.¹⁵²
- 9.160 The Office of Public Prosecutions and Victoria Police submitted that it is appropriate that information about a finding under the CMIA be available to assessments for working with children checks.

Accreditation or licence to provide transport services

- 9.161 Information about CMIA findings may also be required for an accreditation or a licence to provide certain transport services. For example, an application for accreditation to operate a commercial or local bus service must be refused if the person has been found guilty of particular types of offences. The findings under the CMIA are included in the definition of a guilty finding.¹⁵³
- 9.162 Information about a CMIA finding may also be taken into account in assessments of a person’s suitability to hold a driver licence in cases where a CMIA finding does not specifically exclude them from eligibility. This was highlighted in the case of *XFI v Director of Public Transport (Occupational Business Regulation)*.¹⁵⁴ In that case, a person previously subject to the CMIA was refused accreditation by the Victorian Taxi Directorate on the grounds that it was not in line with the ‘public care objective’ in the *Transport (Compliance and Miscellaneous) Act 1983* (Vic).¹⁵⁵

The Commission’s conclusion

- 9.163 When a person has been found to have committed the offence charged or found not guilty because of mental impairment under the CMIA, they are not held criminally responsible for that conduct. The Commission considers that if a person is not criminally responsible for their conduct, information about the finding should only be made available in exceptional circumstances, where it is in the public interest, having regard to the link between the CMIA finding and community safety.
- 9.164 The Commission acknowledges that there is a need to balance the person’s need to return to society against the public interest and community safety. There may be some cases where there is a compelling reason to make the information available, particularly in relation to eligibility to work with or provide services to vulnerable groups. Further, despite the person being found not criminally responsible for their conduct, it has been proved to the requisite standard that they engaged in the conduct.
- 9.165 When assessing the need for information about CMIA findings in particular circumstances, the Commission considers that the amount of time since the CMIA finding is relevant. The more distant a CMIA finding is, the less predictive the finding becomes of the person’s likely future conduct. This same principle underpins the spent conviction scheme, which aims to limit discrimination on the basis of certain convictions.¹⁵⁶

151 Ibid ss 12–14.

152 Ibid s 4(d).

153 *Bus Safety Act 2009* (Vic) ss 3, 27.

154 [2008] VCAT 2303 (31 October 2008). The matter was appealed in *Director of Public Transport v XFI* [2011] VSCA 302 (11 October 2011).

155 Victorian Law Reform Commission, above n 108, 156–7.

156 National Crime Check, *Spent Convictions Information* <https://www.nationalcrimecheck.com.au/police-checks-individuals/resources/spent_convictions_information>.

- 9.166 The Commission considers that more work should be done to develop an approach to addressing these issues based on the reasoning outlined above. A related issue discussed in Chapter 2 is the advice provided by defence practitioners to their clients on the consequences of a CMIA finding, including the possibility that it will affect their criminal record.¹⁵⁷ As noted at [2.206], it is important that clients are informed about how a plea under the CMIA may affect them now and into the future.

Whether costs orders should be made against the prosecution

- 9.167 Victoria Police submitted that cost orders should not be made against the prosecution where a person has been found to have committed the offence (following a finding of unfitness) or not guilty because of mental impairment. Victoria Police noted that there have been circumstances where it has incurred the full costs of the process even though the physical elements of the offence have been proved and pursuing the matter was in the public interest and in accordance with the Office of Public Prosecution's prosecutorial guidelines.¹⁵⁸
- 9.168 The Commission notes that the current costs order regime that operates in the Magistrates' Court is broad enough to prevent costs from being awarded against the prosecution. Section 401 of the Criminal Procedure Act provides:
- the costs of, and incidental to, all criminal proceedings in the Magistrates' Court are in the discretion of the court and the court has full power to determine by whom, to whom and to what extent the costs are to be paid.
- 9.169 The Commission therefore does not see a compelling reason to create a specific provision on this issue. The Commission considers that the flexibility of determining costs on a case-by-case basis should be maintained.

Appeals in CMIA matters

- 9.170 Appeals provide an opportunity for a higher court to reconsider a decision of the lower court.¹⁵⁹ The opportunity to reconsider a decision of the lower court serves several functions, which are set out in the consultation paper.¹⁶⁰
- 9.171 The opportunity to appeal in CMIA matters is particularly important, given the vulnerability of accused who are found unfit to stand trial and the serious consequences of being found unfit (and subsequently being found to have committed the offence charged) or found not guilty because of mental impairment. These consequences include the indefinite duration of supervision orders and the rigorous conditions to which the person is subject.
- 9.172 In the consultation paper, the Commission discussed the infrequency of appeals for CMIA matters.¹⁶¹ There appears to have been only one appeal of an unfitness finding since the introduction of the CMIA.¹⁶² The Criminal Bar Association observed that the Victorian Supreme Court Registry has not had a single appeal from a finding of not guilty because of mental impairment.¹⁶³

¹⁵⁷ The Commission recommends the development of practice information for lawyers acting in criminal matters involving accused with a mental illness, intellectual disability and other cognitive impairment (Recommendation 11).

¹⁵⁸ Submission 30 (Victoria Police).

¹⁵⁹ Peter D Marshall, 'A Comparative Analysis of the Right to Appeal' (2011) 22 *Duke Journal of Comparative & International Law* 1.

¹⁶⁰ Victorian Law Reform Commission, above n 108, 82.

¹⁶¹ Ibid 82–3.

¹⁶² Kerri Eagle and Jonathon Adams, 'Appealing a Mental Illness Verdict in New South Wales' (2014) 21(1) *Psychiatry, Psychology and Law* 67; *R v NCT* [2009] VSCA 240 (23 October 2009) [6], [7].

¹⁶³ Submission 21 (Criminal Bar Association). The reasons for this are explored later in this chapter at [9.178].

Expanding the appeal rights under the CMIA

Current appeal rights under the CMIA

- 9.173 If a jury makes a finding of unfitness to stand trial, a person has a right to appeal the finding of unfitness to the Court of Appeal.¹⁶⁴ If the Court of Appeal allows the appeal, it must set aside the finding of unfitness and either refer the matter to the Supreme Court or County Court for trial or remit the matter for a rehearing of the unfitness investigation.¹⁶⁵
- 9.174 Following a special hearing, a finding that the person committed the offence is subject to appeal in the same manner as if they had been convicted of an offence.¹⁶⁶
- 9.175 A person may appeal a verdict of not guilty because of mental impairment to the Court of Appeal.¹⁶⁷ If the Court of Appeal allows an appeal because it thinks that the verdict of not guilty because of mental impairment should not stand, or considers that the proper verdict should have been guilty of an offence, it may substitute the verdict for a verdict of guilty.¹⁶⁸ Otherwise, if the Court of Appeal allows the appeal, it must set aside the verdict of not guilty because of mental impairment and either enter a verdict of acquittal or order a new trial.¹⁶⁹
- 9.176 The Director of Public Prosecutions (DPP) may appeal to the Court of Appeal against an order for unconditional release. This right exists in both the unfitness and mental impairment processes. If the Court of Appeal declares the person liable to supervision, it can either remit the matter back to the original court with or without directions or it can make a supervision order.¹⁷⁰ The CMIA does not provide a right for a person to appeal against a declaration that they are liable to supervision. However, a person has the right to appeal against a supervision order (either a custodial supervision order or non-custodial supervision order) once it has been made by the court.¹⁷¹ The DPP, Attorney-General, the Secretary to the Department of Human Services and the Secretary to the Department of Health can also appeal against a supervision order.

Views in submissions and consultations

- 9.177 The Commission did not receive many views in submissions or consultations about CMIA appeals. It was noted that the low number of appeals in this area could be due to a lack of resources and the inability of people under the CMIA to advocate for their rights, given their vulnerability.¹⁷²
- 9.178 The Criminal Bar Association identified three main barriers to appeals in CMIA matters in its submission:¹⁷³
- *An appeal against a finding of not guilty because of mental impairment must be lodged prior to a supervision order being made*—An appeal against a standard conviction must be lodged within 28 days of the person being sentenced,¹⁷⁴ whereas an appeal against a verdict of not guilty because of mental impairment must be filed within 28 days of the day on which the verdict is recorded.¹⁷⁵ The effect of this discrepancy is that a person found not guilty because of mental impairment must lodge an appeal prior to knowing the order that will be made against them.

164 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 14A(1).

165 *Ibid* s 14A(6).

166 *Ibid* s 18(3)(c).

167 *Ibid* s 24AA(1).

168 *Ibid* s 24AA(7).

169 *Ibid* s 24AA(8).

170 *Ibid* ss 19A(2)–(3), 24A(2)–(3).

171 *Ibid* s 28A(1).

172 Submissions 13 (Australian Community Support Organisation Inc.); 4 (The Australian Clinical Psychology Association).

173 Submission 21 (Criminal Bar Association).

174 *Criminal Procedure Act 2009* (Vic) s 275(1).

175 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 24AA(2).

- *The Court of Appeal can impose a conviction in lieu of a finding of mental impairment*—If the Court of Appeal allows an appeal from a finding of not guilty because of mental impairment, one option open to the court is to substitute the finding of not guilty because of mental impairment for a verdict of guilty. This provides a strong disincentive to appeal. For example, in cases where a person pursues an appeal on the ground that they should have been acquitted, having been found not guilty because of mental impairment and receiving a non-custodial supervision order, they risk being sentenced to imprisonment.
- *Even if an appeal is successful, the likely remedy is a retrial, where an accused found not guilty because of mental impairment runs the risk of being found guilty and imprisoned*—A person who has been ‘acquitted’ based on their mental impairment runs the risk of being convicted if their appeal is successful and the Court of Appeal orders a retrial. At the retrial, a jury may find the person guilty and they could face a term of imprisonment.

9.179 The following suggestions were made in relation to appeals in CMIA matters:

- There should be a right of appeal in the CMIA for people found fit to stand trial.¹⁷⁶
- Section 24AA of the CMIA should be amended so that an application for leave to appeal is commenced by filing a notice of application for leave to appeal within 28 days of the verdict or a declaration that a person is liable to supervision.¹⁷⁷
- There could be a right of appeal for both the accused and for the prosecution following an investigation into unfitness to stand trial by a judge.¹⁷⁸

The Commission’s conclusion

9.180 The infrequency of appeals in CMIA matters could reflect the fact that in a high proportion of these cases the parties agree with the conduct and outcome of the case (for example, they agree that the evidence establishes the defence of mental impairment)¹⁷⁹ and therefore perceive no grounds of appeal. The Commission also considers that it is an indication that, on the whole, court processes and the safeguards in place are operating to produce appropriate outcomes. The Commission has nonetheless examined the issues raised in submissions and consultations to assess whether the appeal provisions in the CMIA operate in a way that is consistent with its underlying principles. In doing so, the Commission’s approach is to ensure that appeals achieve the following aims:

- People who are subject to a CMIA finding should have the opportunity to correct any significant errors in the initial decision so that the ‘right’ outcome is reached. This affords important protection against miscarriages of justice.¹⁸⁰
- Any processes established to give people who are subject to a CMIA finding the right to appeal should be fair and enable the adequate and effective review of the initial decision.¹⁸¹
- People subject to a CMIA finding should have effective access to the right to appeal.¹⁸²
- The right to appeal a finding or order should be available regardless of which jurisdiction the person comes under.

176 Submission 18 (Victoria Legal Aid).
 177 Submission 21 (Criminal Bar Association).
 178 Consultation 41 (Supreme Court of Victoria—judge).
 179 See discussion in Chapter 7 at [7.67].
 180 Marshall, above n 159, 3.
 181 Ibid 2.
 182 Ibid 21. Recommendation 61 in Chapter 8 seeks to ensure that if there are any gaps in effective access by people under the CMIA, this is picked up and addressed in a gap analysis of advocacy services to ensure that all people subject to the CMIA have access to advocacy services.

Right to appeal a finding of fitness to stand trial

- 9.181 Although an accused can appeal a finding of unfitness to stand trial, the CMIA does not provide for a right to appeal a finding that a person is fit to stand trial.
- 9.182 In the Commission's view, an accused should have the right to appeal a finding that they are fit to stand trial. The Commission considers a right to appeal in this instance will protect against situations where a person is subjected to the trial process when they should not have been, potentially then found guilty and subject to a criminal sentence. The Commission considers that there should also be a right to appeal from a finding on the accused's fitness to plead guilty (see Recommendation 16) for the same reason.
- 9.183 A right to appeal a finding of fitness to stand trial or a finding of fitness to plead guilty could be enacted in several ways. The right to appeal could be inserted directly in the CMIA. This is the approach adopted in South Australia.¹⁸³ Other Australian jurisdictions have not explicitly provided for this right.
- 9.184 Alternatively, the current law on appeals against conviction could be broad enough to provide for a right to appeal a finding of fitness to stand trial or fitness to plead guilty. In New Zealand, a 'retrospective determination of fitness' generally occurs by way of an appeal against conviction;¹⁸⁴ for example, where the process of determining unfitness to stand trial was not properly undertaken, leading to a false finding of fitness.¹⁸⁵
- 9.185 In Victoria, a person convicted of an offence has a broad right to appeal against their conviction on any ground;¹⁸⁶ for example, on the basis that there has been a substantial miscarriage of justice.¹⁸⁷ The Court of Appeal could additionally be empowered to enter a finding of unfitness to stand trial or order a new investigation into unfitness, which would be similar to the New Zealand model.
- 9.186 On balance, the Commission considers that a right to appeal should be introduced directly into the CMIA in relation to findings of fitness. The alternative, of using the process of appeals against conviction will result in a postponement of the opportunity to consider any errors made in the finding of fitness. This would be a waste of resources and would unnecessarily prolong the process for accused and victims. Further, there may be evidentiary difficulties with raising the issue of unfitness to stand trial without contemporaneous evidence.¹⁸⁸
- 9.187 A CMIA right of appeal would provide a better opportunity to correct any significant errors in the initial decision, protect against miscarriages of justice and result in a better process for an effective review of the initial decision.
- 9.188 As discussed at [9.173], a person has a right to appeal a finding of unfitness to stand trial by a jury.¹⁸⁹ In Chapter 7, the Commission recommended that investigations of unfitness to stand trial be conducted by a judge or a magistrate in all cases. In the Commission's view, the right to appeal a finding of unfitness should be preserved, regardless of the change in the role of the jury. This would maintain the opportunity for the accused to identify any unfairness in the investigation of unfitness.

183 *Criminal Law Consolidation Act 1935 (SA)* s 269Y(4)(b).

184 Warren Brookbanks, 'Raising the Issue of Unfitness to Stand Trial Post-conviction' (Presentation at the 33rd Australian and New Zealand Association of Psychiatry, Psychology and Law Annual Congress, Adelaide, 30 November 2013).

185 Joseph Allan Sakdalan and Sabine Visser, "'Are Defendants Found Fit to Stand Trial Really Fit?': Human Rights Issues in Fitness to Stand Trial" (Presentation at the 33rd Australian and New Zealand Association of Psychiatry, Psychology and Law Annual Congress, Adelaide, 28 November 2013).

186 *Criminal Procedure Act 2009 (Vic)* s 274.

187 *Ibid* s 276.

188 *R v Erskine* [2009] EWCA Crim 1425 (14 July 2009) [89].

189 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)* s 14A.

Recommendation

- 76 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended so that in a criminal proceeding in the County Court or the Trial Division of the Supreme Court, the accused may appeal to the Court of Appeal against:
- (a) any finding on fitness to stand trial, and
 - (b) any finding on fitness to plead guilty.

Right to appeal a finding of not guilty because of mental impairment

- 9.189 As discussed at [9.178], a person found not guilty because of mental impairment must lodge an appeal prior to knowing the order that will be made against them. This is in contrast to a standard appeal against conviction, where the appeal must be lodged 28 days after a person is sentenced.
- 9.190 This raises the question of whether the right to appeal a CMIA finding should be the same as the right to appeal a criminal verdict. The CMIA provides that a finding that the accused committed the offence is subject to appeal in the same manner as if they had been convicted of an offence.¹⁹⁰
- 9.191 The Explanatory Memorandum to the Bill which introduced this right of appeal stated that the provision ‘follows, to the extent reasonably possible, the structure of the substantive appeals provisions’ in the Criminal Procedure Act.¹⁹¹ This indicates an intention for consistency as far as possible between both sets of appeal rights.
- 9.192 The Commission recognises that the decision to appeal is often made on the basis of whether the appeal could result in a better outcome. An argument could be made that an accused found not guilty because of mental impairment should be able to make the decision to appeal with the same level of information as a person found guilty—that is, with a full understanding of what the outcomes may be. However, as the consequences of a finding under the CMIA and a criminal verdict of guilty are not the same and serve different purposes, the Commission does not consider this argument compelling.
- 9.193 The objectives of the CMIA are therapeutic rather than punitive. It is not appropriate for defence counsel to consider only the duration of an order when deciding whether to appeal. To do so could undermine the therapeutic opportunities provided by the CMIA. The strategic considerations guiding counsel should be understood accordingly. Strategic decisions about appeals that would reduce the exposure of a person to the very treatment they require are contrary to the objectives of the CMIA and should be discouraged.
- 9.194 The current right to appeal a finding of not guilty because of mental impairment and the supervision order are sufficient to ensure an opportunity to adequately review errors in both the finding of not guilty because of mental impairment and the imposition of the supervision order, ensuring the ‘right’ outcome is reached in both circumstances. In addition, an extension of time for filing the notice of appeal can be granted.¹⁹²

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191
192

Ibid s 18(3)(c).
Explanatory Memorandum, Criminal Procedure Bill 2008 (Vic) cl 370.
Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) s 76C.

- 9.195 Consequently, the Commission does not recommend amending the CMIA to allow an application for leave to appeal to be filed within 28 days after a declaration that a person is liable to supervision, as is the case in the Criminal Procedure Act.

Imposition of guilty verdict or retrial in place of not guilty because of mental impairment

- 9.196 The Criminal Bar Association submitted that the possible imposition of a guilty verdict (on appeal or at a retrial) in place of a finding of not guilty because of mental impairment acts as a disincentive to appealing the finding.¹⁹³
- 9.197 A finding of not guilty because of mental impairment is an ‘acquittal’ predicated upon a finding that the person is not liable for criminal punishment because they were mentally incapable of being responsible for their criminal act. As noted, it also potentially exposes the person to consequences based on an assumption that they require a therapeutic (as opposed to a punitive) response. An appeal from such an ‘acquittal’ is therefore directed at ascertaining whether the controls associated with a therapeutic response are justified.¹⁹⁴ So understood, an appeal under section 24AA is directed at determining whether the act of deeming a person as deserving of a therapeutic response (by virtue of recording a verdict of not guilty because of mental impairment) is in error of law. If it is determined that there is an error of law and the person does not require a therapeutic response, what must then be ascertained is whether on the facts the person is deserving of a punitive response (by being found guilty) or no response (by being found not guilty).
- 9.198 While the Commission recognises that these outcomes may act as a disincentive, they do not result in a situation where the accused would be tried again for an offence they have been acquitted of. Further, the existing right to appeal still facilitates the adequate and effective review of any errors and a just result being reached.

De novo appeals from the Magistrates’ Court and Children’s Court

- 9.199 The Commission notes that if unfitness to stand trial was able to be determined and orders imposed by a magistrate in either the Magistrates’ Court or Children’s Court,¹⁹⁵ these matters could be appealed, requiring the County Court to hear the matter afresh on appeal.
- 9.200 A person convicted of an offence by the Magistrates’ Court may appeal against their conviction to the County Court.¹⁹⁶ This is conducted as a rehearing (‘*de novo* appeal’).¹⁹⁷ This means that the entire hearing is conducted again. On hearing the *de novo* appeal, the County Court may exercise powers which are limited to the powers the Magistrates’ Court can exercise.¹⁹⁸

The Commission’s conclusion

- 9.201 Currently, when an accused pleads guilty in the Magistrates’ Court, but pursues a *de novo* appeal against their conviction in the County Court on the basis of the defence of mental impairment, the only option the County Court has if the defence is successful is to discharge the person. The County Court may only exercise the powers the Magistrates’ Court can exercise, and the only option currently available to the Magistrates’ Court is a discharge. This may not always be appropriate. The Commission has recommended that the Magistrates’ Court be given the power to make supervision orders following a finding of not guilty because of mental impairment, which would address this issue.¹⁹⁹

193 Submission 21 (Criminal Bar Association).
194 Ibid.
195 See Chapters 5 and 6.
196 *Criminal Procedure Act 2009* (Vic) s 254.
197 Ibid s 256(1).
198 Ibid s 256(2).
199 See Recommendations 30 and 32 in Chapter 5.

- 9.202 The current mechanisms for *de novo* appeals under the Criminal Procedure Act would apply to any new processes in the Magistrates' Court and the Children's Court with two minor amendments. First, if a *de novo* appeal follows the imposition of a supervision order, that order should be kept in place until the appeal is heard to ensure that the safety of the community is protected during the period before the appeal.
- 9.203 Second, to allow appeals on CMIA matters to the County Court, it will be necessary to clarify that the right to appeal includes a CMIA finding and supervision order. The Commission considers that the right to appeal a finding under this recommendation should include findings of fitness or unfitness to stand trial and findings of fitness or unfitness to plead guilty, consistent with Recommendation 76.

Recommendations

- 77 The *Criminal Procedure Act 2009* (Vic) should be amended so that an appeal to the County Court against a supervision order does not result in a stay of any supervision order imposed on the person.
- 78 The *Criminal Procedure Act 2009* (Vic) should be amended so that a person may appeal to the County Court against:
- (a) a finding and supervision order made in the Magistrates' Court under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) and in the Children's Court, under the *Children, Youth and Families Act 2005* (Vic), or
 - (b) a supervision order made in the Magistrates' Court under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) and in the Children's Court, under the *Children, Youth and Families Act 2005* (Vic).

Improving the supervision, review and leave framework in the higher courts

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10. Improving the supervision, review and leave framework in the higher courts

Introduction

- 10.1 The terms of reference ask the Commission to consider whether changes should be made to the provisions governing supervision and review in the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ('CMIA'), including the frequency, form and conduct of reviews.
- 10.2 This chapter focuses on topics raised in the Commission's *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997: consultation paper* ('the consultation paper') concerning the supervision, review and leave framework under the CMIA, in particular:
- the model of decision making underpinning supervision and review
 - improvements to decision making by the court, Forensic Leave Panel and people responsible for supervision
 - the operation of indefinite supervision orders and 'nominal terms'
 - specific procedural improvements to the legislative framework for the making of supervision orders, including processes for the review and leave of supervised people.
- 10.3 The Commission's recommendations aim to ensure that, where it can be done safely, the level of supervision and restriction on the liberty of people subject to supervision orders is reduced. The implementation of a refined supervision, review and leave framework will ensure that this occurs in appropriate circumstances. The Commission concludes:
- Transparency and accountability are key principles that run through the CMIA. CMIA processes should promote procedural fairness and open and transparent decision making. The Commission recommends a new framework for the review of supervision orders to improve clarity and understanding of the law. The Commission also makes recommendations to improve clarity and transparency in the communication of reasons by the Forensic Leave Panel and for a review of the Internal Leave Review Committee.

- The duration of supervision should be proportionate to the risk the supervised person poses.¹ Supervision should occur only if it is necessary to address the actual risk posed by the person to the community and continue only for so long as it is necessary to achieve that aim. The Commission's recommendations ensure that significant reviews of orders are linked to the actual decrease or increase in the risk posed by the person and any improvements or decline in the person's progress or recovery, rather than to a term connected to the seriousness of the offence. The recommendations also aim to make the CMIA more consistent with modern principles of risk assessment and identify more precisely the points at which restrictions on a supervised person can be reduced in a way consistent with the safety of the community.
- The nature of the supervision and the restrictions attached to the supervision order should be the minimum necessary to accomplish the goal of addressing the supervised person's risk to community safety.² Where possible, less restrictive conditions or alternatives should be considered.
- The fundamental justification for the imposition of CMIA orders is the protection of the community. Where a person no longer poses an unacceptable risk to the community, the justification for CMIA intervention ceases to exist. The Commission therefore recommends that people subject to the CMIA should not be supervised under this system when they only pose a risk to themselves.
- Decisions under the CMIA on the level of supervision or leave entitlements should reflect the recovery or the progress of a person and their risk to the community. A lack of information, for example, should not stall a supervised person's progress through the system. The Commission therefore makes recommendations to ensure continuity in decision making between the court and the Forensic Leave Panel and within the Forensic Leave Panel itself.

10.4 The overall aim of the Commission's recommendations is to address the areas where a mismatch has been identified in the current operation of the CMIA between the level of supervision required for a person subject to the CMIA and the supervision they actually receive. The recommendations are targeted at reducing false positives (people who are legally seen to be an unacceptable risk but who are not in actuality) while not increasing false negatives (people who are not deemed an unacceptable risk legally but will be when released).³

The current supervision, review and leave framework under the CMIA

10.5 The CMIA introduced a new system to govern the supervision of people found not guilty because of mental impairment⁴ or found to have committed the offence after being found unfit to stand trial.⁵ It introduced a power for the court to impose supervision orders and established a new framework for reviewing supervision orders and granting leave to people subject to supervision.

1 Christopher Slobogin, 'Legal Limitations on the Scope of Preventive Detention' in Bernadette McSherry and Patrick Keyzer (eds) *Dangerous People: Policy, Prediction and Practice* (Routledge, 2011) 37.

2 Ibid.

3 Ibid 40.

4 The Commission has recommended in Chapter 9 of this report replacing the finding of 'not guilty because of mental impairment' with accused's 'conduct is proved but not criminally responsible because of mental impairment': see Recommendation 69.

5 The Commission has recommended in Chapter 9 of this report replacing the finding in a special hearing of 'committed the offence charged' with accused's 'conduct is proved on the evidence available': see Recommendation 68.

Supervision orders

- 10.6 Following a finding under the CMIA, the court can unconditionally release the person or declare the person liable to supervision and then make a custodial supervision order or non-custodial supervision order. A supervision order is for an indefinite term. A 'nominal term' for the supervision order must be set by the court, which prescribes the minimum time before a 'major review' of the order must occur. These are discussed later in this chapter at [10.115]–[10.125].
- 10.7 A person with a mental illness subject to a supervision order is supervised by an 'approved mental health service' under the Department of Health. In all but exceptional circumstances, the Victorian Institute of Forensic Mental Health (Forensicare) is the 'approved mental health service' that supervises people with a mental illness. Different arrangements apply depending on whether the person with a mental illness is on a custodial supervision order or a non-custodial supervision order:
- A person subject to a custodial supervision order ('forensic patient') is detained and supervised at the Thomas Embling Hospital, Forensicare's secure hospital. Forensicare will nominate an authorised psychiatrist at Forensicare to manage the forensic patient and their treatment.
 - People subject to non-custodial supervision orders or forensic patients who are on extended leave are supervised in the community by Forensicare through its Community Forensic Mental Health Service. Forensicare will nominate an authorised psychiatrist from Forensicare or a local approved mental health service to manage and treat the person, sometimes in collaboration with a private psychiatrist.
- 10.8 A person with an intellectual disability or other cognitive impairment subject to a supervision order is both supervised by and receives treatment from agencies in the Department of Human Services. Different arrangements apply depending on whether the person is subject to a custodial supervision order or a non-custodial supervision order.
- Within Disability Services, the Disability Forensic Assessment and Treatment Services manage and provide treatment to a person subject to a custodial supervision order ('forensic resident'). Forensic residents can be detained in either a residential treatment facility or a residential institution.
 - A person subject to a non-custodial supervision order is managed by and receives treatment in the community from Disability Services, part of the Department of Human Services.

Review of supervision orders

- 10.9 The CMIA removed the involvement of the executive in the review process by shifting responsibility for these decisions to the judiciary (the Supreme Court or County Court).
- 10.10 The CMIA also provided for:
- a new process for the variation and revocation of supervision orders, including processes for the review of supervision orders clarifying the criteria on which the review should be based
 - a 'comprehensive system of reports' in relation to people subject to supervision orders, to ensure that they have regular reviews and are not lost in the system⁶
 - a major review by a court for each person subject to a supervision order to consider whether to release the person or reduce the degree of supervision to which the person is subject following the expiry of the nominal term.⁷

Leave under supervision orders

- 10.11 The CMIA established an independent body—the Forensic Leave Panel—to be the main leave decision-making body. The Panel was established to increase the transparency and accessibility of the leave process that the ‘Governor’s pleasure’ system lacked.⁸ The CMIA introduced four different types of leave with more specificity on their nature and durations. The Panel makes the decisions on the majority of leave applications.
- 10.12 In both the review and leave process, the CMIA introduced the right of people subject to supervision orders to appear at hearings and more substantial appeal rights.

The pathway for gradual reintegration and the principle of least restriction

- 10.13 The CMIA system of supervision has been characterised as ‘gradualist’⁹ or ‘staggered’,¹⁰ in recognition ‘that the treatment and reintegration of people with a mental disorder is most appropriately considered on a gradual basis’.¹¹ 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, both supervised then unsupervised, to off-ground leave, both supervised then unsupervised, and then extended leave), eventually ‘graduates’ to a non-custodial supervision order and is finally released following revocation of the non-custodial supervision order.¹²
- 10.14 This pathway is designed to operate in conjunction with the principle of least restriction which underpins the CMIA’s supervision and review framework. The principle of least restriction requires ‘that restrictions on a person’s freedom and personal autonomy should be kept to the minimum consistent with the safety of the community’.¹³
- 10.15 A key question the Commission raised in the consultation paper was whether this staggered pathway for release is operating well in practice for all people subject to supervision orders (for both people with a mental illness and people with an intellectual disability or other cognitive impairment). In particular, the Commission asked what improvements, if any, could be made to the CMIA decision-making, leave and review framework at a systemic level.
- 10.16 There were multiple observations in submissions and consultations that supervised people are not progressing through the system as they should be, and that practices are not always consistent with the pathway for gradual reintegration and the principle of least restriction. Forensicare’s Patient Consulting Group observed:

There seems to be a minimum time people have to stay supervised, regardless of whether you are well or not. Sometimes it feels as though they just have to keep you here for a period of time just because that is what is expected.¹⁴

⁸ Ibid.

⁹ 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, 387.

¹⁰ Janet Ruffles, *The Management of Forensic Patients in Victoria: The More Things Change, The More They Remain the Same* (PhD Thesis, Monash University, 2010) ii.

¹¹ Victoria, *Parliamentary Debates*, Legislative Assembly, 18 September 1997, 186 (Jan Wade, Attorney-General).

¹² 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.

¹³ *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 39.

¹⁴ Submission 2 (Forensicare Patient Consulting Group).

- 10.17 Submissions that addressed this subject and those consulted attributed the ‘inertia’¹⁵ working against progression along the CMIA pathway to characteristics of the current supervision and review system:
- *Over-cautiousness or undue ‘conservatism’ in the approach of people involved in the system, from psychiatrists to the Forensic Leave Panel and the court*¹⁶—One group in consultations thought that the main ‘block’ in progression was at the stage where a person was under a non-custodial supervision order and that these orders were being relied on as a ‘safety net’.¹⁷ Freckelton has observed that the Supreme Court has been more liberal in varying orders from a custodial supervision order to non-custodial supervision order than in revoking supervisory status completely.¹⁸ This has also been the subject of other academic discussion¹⁹ and the subject of a PhD study published in 2010, the findings of which are discussed at [10.137]–[10.148] in this chapter.²⁰
 - *The presumptions that apply in reviews of supervision orders*—The effect of these is to place a significant onus on the supervised person to convince the court that the level of supervision should be reduced by ‘disproving’ that there is any risk to community safety, rather than the state being required to advance positive evidence that demonstrates the continued need for the existing level of supervision.²¹
 - *The way community safety is considered*—Some people observed that there was a ‘lack of rigour’ in applying the test for ‘endangerment’ used throughout the CMIA. Decision makers tend to be overly risk-averse and will decline a reduction in the level of supervision or a grant of leave at any identification of risk, no matter its significance.²²
 - *A lack of flexibility in the system*—There is little scope to respond to a breach of a non-custodial supervision order in a way that is proportionate to the behaviour encompassed by the breach. Breaches of differing levels, for example, use of alcohol or drugs, or further offending behaviour, can result in the same consequence of a significant reversal of the pathway towards gradual reintegration. It will usually take some years before the supervised person can return to the position they were in before the breach and there can be inconsistency in decision making in these cases.²³
- 10.18 It was also observed that there was a lack of less restrictive facilities for supervised people to ‘step down’ to.²⁴ The system’s lack of flexibility in this area could result in a mismatch between the supervision the person should ideally receive and the supervision order that is actually made.
- 10.19 The slow progression is even more pronounced for people with an intellectual disability who are subject to supervision orders under the CMIA. This was attributed to a lack of specialist accommodation, support and treatment.²⁵ In particular, it was noted that there was a lack of mandated requirements for planning for treatment and reintegration.²⁶

15 Consultation 43 (Higher courts roundtable).
16 Submissions 3 (Gunvant Patel); 6 (Associate Professor Andrew Carroll). Consultations 21 (Consultant psychiatrists, Forensicare); 24 (County Court of Victoria—judges).
17 Consultation 15 (Northern Area Mental Health Service).
18 Ian Freckelton, ‘The Preventive Detention of Insanity Acquittes: A Case Study from Victoria’ in Bernadette McSherry and Patrick Keyzer (eds) *Dangerous People: Policy, Prediction and Practice* (Routledge, 2011) 83, 94.
19 See, eg, Bernadette McSherry, ‘Legal Issues’ (1999) 6 *Journal of Law and Medicine* 216, 221.
20 Ruffles, above n 10.
21 Consultation 43 (Higher courts roundtable).
22 Submissions 18 (Victoria Legal Aid); 3 (Gunvant Patel); 6 (Associate Professor Andrew Carroll). Consultations 21 (Consultant psychiatrists, Forensicare); 18 (Goulburn Valley Area Mental Health Service).
23 Submission 18 (Victoria Legal Aid). Consultation 24 (County Court of Victoria—judges).
24 Consultations 15 (Northern Area Mental Health Service); 6 (Department of Human Services case managers, Disability Forensic Assessment and Treatment Service (DFATS) and Long Term Rehabilitation Program (LTRP)).
25 Consultation 28 (Senior Practitioner—Disability Practice Leader, Office of Professional Practice, Department of Human Services).
26 Submission 14 (Office of the Public Advocate). Consultation 28 (Senior Practitioner—Disability Practice Leader, Office of Professional Practice, Department of Human Services).

- 10.20 The Commission discusses this issue in further detail in Chapter 11, which contains the Commission's findings regarding the operation of the CMIA system of supervision for people with an intellectual disability or other cognitive impairment and its recommendations to ensure a person-centred approach to that cohort. Chapter 11 also contains the Commission's recommendations to address the lack of less restrictive facilities for people with a mental illness and barriers to accessing facilities for people with an intellectual disability.
- 10.21 The Commission is of the view that the characteristics of the system listed above are inconsistent with the CMIA's principle of gradual integration. This conclusion has framed the Commission's approach to recommending change in this area of the CMIA's operation.
- 10.22 The Commission's recommendations seek to establish a new framework to govern review and leave decisions so that the level of supervision and pathway to gradual reintegration is more closely tied to the person's actual risk to the community and their recovery, progress or decline. Gradual reductions in the level of supervision and progression along the pathway should not be barred by the availability of services, nor should they be impeded by an unfounded conservatism among decision makers or within the CMIA itself. The Commission is of the view that a cautious approach is warranted in CMIA cases. However, where there is over-cautiousness that results in a person being subject to a higher level of supervision than is consistent with the minimum required to protect community safety, this is inconsistent with the principles underpinning the CMIA, including the principle of least restriction. It could also result in the continued stigmatisation of the CMIA cohort, which would undermine their ability to return to society as functioning members.

Decision makers under the supervision, review and leave framework

- 10.23 In this section, the Commission examines the key decision-making bodies in the CMIA system of supervision. In particular, the courts, the Forensic Leave Panel and the Internal Leave Review Committee. The Commission considers the following issues:
- whether Victoria should adopt a different model of decision making to the judicial model that currently exists
 - whether transparency and continuity in decision making regarding leave can be improved
 - the role of the Internal Leave Review Committee in leave decisions involving forensic patients.

The judicial model of decision making

- 10.24 Under the CMIA, the judiciary has responsibility for decisions regarding supervision, rather than the executive as was the case under the Governor's pleasure regime.
- 10.25 The criminal jurisdictions of the Supreme Court and County Court make decisions on:
- the imposition of supervision orders
 - the review, variation and revocation of supervision orders
 - decisions to grant, revoke or renew extended leave.²⁷

- 10.26 In the consultation paper, the Commission asked whether a specialised independent court or tribunal should be considered as an alternative to the current judicial model of decision making. This was based on the notion identified in the Commission's preliminary consultations that an independent court or tribunal could embed a higher level of expertise in forensic mental health and disability and a greater involvement of clinicians in decision making. The consultation paper highlighted jurisdictions that employed different models of decision making involving independent courts or tribunals:
- In Queensland, a Mental Health Court comprises a judicial officer and two psychiatrists. The Mental Health Court makes the initial disposition and the Mental Health Review Tribunal then reviews the person under the forensic order at least every six months.²⁸
 - In New South Wales, a criminal court makes the initial order for supervision, but the Mental Health Review Tribunal reviews the orders following the initial order.²⁹
 - In the Australian Capital Territory, the hearing proceeds in a criminal court but the Civil and Administrative Tribunal makes and reviews the order.³⁰

Views in submissions and consultations

- 10.27 There was some support for an alternative model that did not rely on the judicial model to make supervision and review decisions.³¹ However, most submissions did not comment on whether Victoria should have a model other than the judicial model.
- 10.28 There was slightly more support for maintaining the current model of decision making. It was noted that:
- The judicial scrutiny of CMIA matters was warranted because the decisions being made are not entirely clinical, but have a legal dimension and implications for human rights and the community.³²
 - The judiciary confers greater legitimacy on the decisions being made.³³
 - There is value in having multiple judges from a larger pool to assess supervision orders rather than being dependent on judges from a smaller pool under an alternative model.³⁴
 - Having to transfer a matter to a specialist court could cause delay and disruption.³⁵
- 10.29 The following advantages of an alternative model, such as a model based on the Queensland Mental Health Court or the New South Wales Mental Health Review Tribunal, were raised:
- Expertise could be better embedded in an alternative model. For example, judges and barristers would develop expertise practising in that field and independent psychiatrists could assist the court or tribunal.³⁶
 - It would reduce the workload that is now being placed on the judiciary in the criminal jurisdiction, which can detract from their principal responsibility of conducting jury trials.³⁷

28 Meetings were held by the Hon. Philip Cummins with the Queensland Mental Health Court and the Queensland Mental Health Tribunal to inform the Commission about how this system works in practice in that jurisdiction.

29 *Mental Health (Forensic Provisions) Act 1990* (NSW) ss 44–6.

30 *Crimes Act 1900* (ACT) ss 318–19, 328–9, 335; *Mental Health (Treatment and Care) Act 1994* (ACT) s 36L.

31 Submission 6 (Associate Professor Andrew Carroll). Consultations 18 (Goulburn Valley Area Mental Health Service); 24 (County Court of Victoria—judges). Advisory committee (meeting 1).

32 Submission 18 (Victoria Legal Aid). Consultation 26 (Office of the Chief Psychiatrist and Legal Branch, Department of Health).

33 Consultation 26 (Office of the Chief Psychiatrist and Legal Branch, Department of Health).

34 Ibid.

35 Submission 21 (Criminal Bar Association).

36 Submission 6 (Associate Professor Andrew Carroll). Consultation 24 (County Court of Victoria—judges).

37 This was noted by one participant in Consultation 24 (County Court of Victoria—judges).

- It may be more appropriate for a separate tribunal to be involved in decisions under the processes for review, variation and revocation of supervision orders and extended leave rather than judges of a court where the original supervision order was made.³⁸

The Commission's conclusion

- 10.30 The Commission recognises that there are benefits of having a mental health court or tribunal, including the benefit of enhancing the inquisitorial nature of the hearing for people subject to the supervision order, victims and family members.³⁹ The Commission also recognises the substantial resources and commitment that courts currently devote to the management of CMIA matters.
- 10.31 However, the Commission considers that the current level of support in Victoria for a mental health court or tribunal is not sufficient to sustain a recommendation for a change from the judicial model of decision making. The Commission also considers that the benefits of a judicial model of decision making currently outweigh the benefits of an alternative model.

The benefits of the judicial model

- 10.32 Courts have an established procedural framework and safeguards, including mechanisms for appeal.⁴⁰ Since the introduction of the CMIA, Victorian courts have produced what has been described as 'Australia's richest and most complex jurisprudence in relation to mental health law'.⁴¹ The value of the jurisprudence and the expertise that has developed within the current judicial model should not be underestimated. Courts also provide continuity in approach. In many cases, the judge who made the supervision order is also responsible for the review and revocation of that order.⁴²
- 10.33 The Commission agrees with the view that the judicial scrutiny of CMIA matters is warranted, particularly because it concerns decisions on the initial and continued detention of a person and community safety. As Justice Vincent observed in his submission to the Community Development Committee as part of its *Inquiry into Persons Detained at the Governor's Pleasure*, CMIA matters have a public dimension:
- The individual concerned has been detained following the conduct of a public court hearing and is subject to a public order. The problem should go back to that kind of body and be dealt with in the same way.⁴³
- 10.34 The Commission also agrees that courts confer legitimacy and a high 'degree of authority',⁴⁴ which is more effective at ensuring confidence within the community and for victims and providing assurance that their interests are important and have not been forgotten.⁴⁵ The Community Development Committee ultimately recommended that given the nature of decisions about risk that are required in this area, the community would have the most confidence in the decisions of a court.⁴⁶

38 This was noted by one participant in Consultation 23 (Supreme Court of Victoria—judges).

39 Law Commission (New Zealand), *Mental Impairment Decision-Making and the Insanity Defence*, Report No 120 (2010) 84. The Law Commission of New Zealand relied on the reasoning in submissions made to a review of the New South Wales forensic mental health legislation.

40 Ibid 82.

41 Freckelton, above n 9, 399.

42 Victorian Parliament Community Development Committee, *Inquiry into Persons Detained at the Governor's Pleasure* (1995) 141.

43 Ibid.

44 Ibid.

45 Law Commission (New Zealand), above n 39, 81.

46 Victorian Parliament Community Development Committee, above n 42, 142–3.

- 10.35 In addition, the separation and independence of courts from the executive and legislative branches of government, fundamental to the rule of law, is a key feature of the judicial model of decision making, which in the Commission's view, should be retained in the form of the judicial review of supervision orders and decisions regarding extended leave. Together with the degree of authority the court confers, this is integral to ensuring there is community confidence in decision making regarding matters of community safety and the liberty of people subject to supervision under the CMIA.

The 'Kable principle'

- 10.36 The Commission has considered the concern noted in consultations regarding the judiciary exercising functions connected to the review of orders and granting of extended leave post-imposition of the original supervision order.
- 10.37 When a court conducts a hearing connected to the review of or granting of extended leave under a supervision order that has been imposed under the CMIA, it is sitting as a court and thus exercising judicial power. This invokes the rule, known as the 'Kable principle', that it is unconstitutional for a state court to exercise a power that is fundamentally incompatible with its capacity to exercise federal judicial power under Chapter III of the Commonwealth Constitution.⁴⁷ Such powers are said to impair the court's 'institutional integrity'.⁴⁸
- 10.38 Whether or not the exercise of a particular function impairs a state court's institutional integrity depends in part on whether it requires the court to conduct itself in a way that is so contrary to its 'essential characteristics' that it would appear to the public that the court was acting at the direction of the executive. Those characteristics include those listed by Chief Justice French in the case of *Condon v Pompano Pty Ltd*:⁴⁹
- the reality and appearance of decisional independence and impartiality
 - the application of procedural fairness
 - adherence as a general rule to the open court principle
 - the provision of reasons for the courts' decisions.⁵⁰
- 10.39 These characteristics are identifiable throughout the CMIA review and extended leave decision-making process, particularly through the following features:
- open hearings in court
 - rights of appearance, including for the person subject to the supervision order, the Director of Public Prosecutions, the Attorney-General and other 'interested parties'⁵¹ (within a 'quasi-inquisitorial' framework)⁵²
 - the ultimate decision regarding reductions on the level of supervision and restrictions on a supervised person's liberty rests solely with the court
 - rights of appeal against decisions made regarding confirmation or variation⁵³ and revocation of non-custodial supervision orders⁵⁴
 - the provision of reasons for decisions regarding the confirmation, variation or revocation of orders or the granting, extension or revocation of extended leave.

47 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

48 *Ibid* 127–8.

49 (2013) 295 ALR 638.

50 *Ibid* 659.

51 Note that in Chapter 8, the Commission recommends that the roles of the Attorney-General, and the Secretaries to the Department of Health and Department of Human Services (DHS) be re-framed and their rights to appear as parties be minimised or removed and the Director of Public Prosecutions be responsible for appearing as a party representing the community's interest.

52 *NOM v DPP* [2012] VSCA (24 August 2012) [25]. If a statute confers quasi-inquisitorial or inquisitorial functions that do not threaten a State court's institutional integrity, it is not problematic for judges of that court to exercise them: *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 600 (McHugh J).

53 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 34.

54 *Ibid* s 34A.

- 10.40 It is clear that these features of the CMIA review and extended leave processes do not depart from the required characteristics listed above at [10.38]. Therefore, it would not appear that these processes alter the court's functions in a way that would attract the Kable principle.
- 10.41 The Commission recognises that one of the major advantages of a mental health court or tribunal is their capacity to embed forensic expertise in their processes. As Freckelton has observed:
- Inquisitorial review bodies constituted by lawyers experienced in mental health, psychiatrists and community members with lengthy experience in mental health generally enjoy a significant advantage over the courts in exploring the dangerousness of persons with mental illness and assimilating the presentation of such patients.⁵⁵
- 10.42 However, any deficiencies in the judicial model in terms of forensic expertise can be addressed by improving the current CMIA framework in other ways. For example, the Commission recommends an expansion and resourcing of the Mental Health Court Liaison Service (MHCLS) program (Recommendation 29) and providing the Magistrates' Court with the power to obtain independent expert reports (Recommendation 28(g)).
- 10.43 The recommendations the Commission makes on arrangements for considering and representing interests under the CMIA in Chapter 8 also seek to bring review hearings more in line with the inquisitorial format of hearings in a mental health court or tribunal.
- 10.44 The Commission therefore does not recommend a change from the judicial model of decision making currently under the CMIA.

Recommendation

- 79 The judicial model of decision making should be retained under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

Transparency and continuity in leave decisions

Purpose of leave

- 10.45 Under the CMIA, forensic patients and forensic residents are able to apply for a leave of absence from their supervision order. Forensic patients and forensic residents may be granted leave from their place of custody:
- to access necessary services that cannot be provided in custody (such as medical services)
 - to attend court
 - on humanitarian grounds (for example, attending a family member's funeral)
 - in anticipation of discharge (for example, to find accommodation or seek employment)
 - as part of a rehabilitation plan to develop the social skills necessary for rehabilitation and social reintegration.⁵⁶

- 10.46 The purpose of leave is to allow a person on a custodial supervision order to gradually reintegrate into the community. A graduated approach to granting leave aims to balance the person's rehabilitative needs with the safety of the community. A person's progress through the various types of leave will therefore vary from individual to individual and will depend on the nature of the person's illness or condition, their response to treatment or rehabilitation and their risk profile.⁵⁷

Types of leave

- 10.47 The types of leave available under the CMIA are:
- *Special leave of absence*—allows a forensic patient or forensic resident on a custodial supervision order to leave their place of detention and receive services for a period not exceeding seven days for the purpose of receiving medical treatment, or 24 hours for non-medical treatment purposes.⁵⁸
 - *On-ground leave*—allows a forensic patient or forensic resident to leave their place of detention and receive services, but requires them to remain 'within the surrounds' of the place of detention.⁵⁹
 - *Limited off-ground leave*—allows a forensic patient or forensic resident, for a maximum of six months, to leave their place of detention between the hours of 6am and 9pm and outside those hours on a maximum of three days in any seven-day period.⁶⁰
 - *Extended leave*—allows a forensic patient or a forensic resident to leave the place where they are being detained for a period of time not exceeding 12 months.⁶¹

Who can authorise leave?

- 10.48 Applications for special leave are made to the authorised psychiatrist (for forensic patients) or the Secretary to the Department of Human Services (for forensic residents).⁶²
- 10.49 The CMIA established the Forensic Leave Panel to hear and determine applications for on-ground and limited off-ground leave and appeals of special leave decisions.⁶³
- 10.50 The Forensic Leave Panel's role is 'integral to the rehabilitation of patients and residents and facilitates their reintegration into the community'.⁶⁴ The Panel's membership consists of one or more judges of the Supreme Court, one or more judges of the County Court, the Chief Psychiatrist and any members necessary from time to time for the proper functioning of the Panel.⁶⁵
- 10.51 For the purpose of a hearing, the 'panel' consists of a judicial member, a member appointed to the panel to represent the view and opinions of members of the community, and the person who is primarily responsible for the treatment and care of the applicant who is:
- for forensic patients, the Chief Psychiatrist and a medical practitioner with experience in forensic psychiatry, or
 - for forensic residents, a registered psychologist with forensic experience.⁶⁶

57 Department of Health, *Non-custodial Supervision Orders—Policy and Procedure Manual* (2011) 8.

58 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 50(6)(a).

59 *Ibid* ss 51–2.

60 *Ibid* s 53.

61 *Ibid* s 56(1)(a).

62 *Ibid* s 50(2).

63 *Ibid* s 60(1).

64 Forensic Leave Panel, *Annual Report 2011* (2012) 1.

65 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 59(2). Schedule 1 cl 4 of the CMIA provides that a judicial member ceases to hold office on ceasing to hold the office of judge.

66 *Ibid* sch 2 cl 1.

- 10.52 The judicial member of the Forensic Leave Panel is the chairperson for the hearing.
- 10.53 The Supreme Court and County Court make decisions regarding extended leave. The court that made the original supervision order will hear and determine applications for extended leave under a supervision order.
- 10.54 In the consultation paper, the Commission asked about the operation of the Forensic Leave Panel and whether there was a need for changes to the leave processes to make them more just, efficient and consistent with the principles underlying the CMIA. The Commission also sought feedback on people's experiences of leave processes.

Continuity in decision making between the Forensic Leave Panel and the court and within the Panel

Views in submissions and consultations

- 10.55 The Commission was informed that courts require a high level of reassurance before they approve an application for extended leave.⁶⁷ This appears to be because the court will often not have the necessary background information on the supervised person's progress through earlier leave stages. This is in contrast to the Forensic Leave Panel, who would have seen their progress through the various stages of leave before the application for extended leave.
- 10.56 The disparity in information can result in an inefficient allocation of resources. Associate Professor Ruth Vine observed:

persons who have extensive leave to the community still require a bed at the forensic service resulting in an exit block. ... in the context of the current very limited services, this gap between the threshold set by the Forensic Leave Panel and that set by the Court results in (in my view) unnecessary utilisation of high cost, limited availability services to the detriment of other persons who need those services.⁶⁸
- 10.57 The Commission's recommendation in Chapter 11 to establish a medium-secure facility for forensic patients aims to address the shortage of available 'step down' options for people transitioning through the CMIA system and removes the block in progression. In addition, the Commission considers that decisions should be based on a balanced assessment of their risk to the community and on their recovery or progress. Any obstacle in a supervised person's gradual reintegration that is tied to gaps in information rather than these factors should be addressed. This is consistent with the CMIA principle that the restrictions on a person's freedom and personal autonomy should be kept to the minimum consistent with the safety of the community. The Commission is therefore of the view that it is necessary to address any reluctance by the court to grant extended leave because it lacks background on the ongoing progress of the supervised person.
- 10.58 At the Commission's roundtable on the CMIA in the higher courts, it was suggested that the court should take into account any leave the person has already taken and the progress made in those periods of leave.⁶⁹ Issues relating to the continuity of decision making within the Forensic Leave Panel were also raised. Members of the Panel the Commission consulted noted that the way the Panel is structured means that members do not always know how a particular person is progressing through the leave system from a holistic point of view. The same members would not sit on a person's panel each time they applied for leave. Members noted the importance of being provided with relevant documents from previous hearings, particularly previous conditions imposed on leave applications or reasons why leave was previously refused.⁷⁰

⁶⁷ Submission 1 (Associate Professor Ruth Vine).

⁶⁸ Ibid.

⁶⁹ Consultation 43 (Higher courts roundtable).

⁷⁰ Consultation 49 (Forensic Leave Panel—members).

The Commission's conclusion

- 10.59 The Commission recognises the importance of continuity in decision making to ensure that a person's progress through the supervision regime is not hindered because of a lack of information.
- 10.60 The Commission agrees with the suggestion proposed at the roundtable that courts should take into account previous leave and progress made by a person while on leave. Accordingly, it recommends that in deciding whether to grant leave, the court must have regard to any on-ground or off-ground leave the person has been granted and their compliance with the conditions of their leave. This information could be provided together with the application for extended leave, for example, as part of the leave plan.⁷¹
- 10.61 The court is already required to take into account a person's extended leave and their compliance with the conditions of the extended leave when varying a custodial supervision order to a non-custodial supervision order.⁷² This provision, coupled with the Commission's recommendation, will ensure that the person's progress throughout the leave system will be taken into consideration by the court in decision making.
- 10.62 In the Commission's view, the Forensic Leave Panel should also be required to consider any on-ground or off-ground leave the person has been granted and their compliance with the conditions of their leave when determining any grant of leave. This would ensure that Panel members receive and consider this information in all applications. The Commission's recommendation below to encourage the Panel to provide written reasons will also assist in ensuring that Panel members have greater access to the reasons why leave was previously refused.
- 10.63 From an operational perspective, the Forensic Leave Panel could provide its members with information on previous leave taken by the supervised person and any written reasons for decisions on previous applications using its own internal processes. Alternatively, the Panel may request this information as part of the 'leave plan'.⁷³

Recommendation

- 80 Sections 40(1) and 54(4) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to require the court and the Forensic Leave Panel respectively to have regard to any on-ground or off-ground leave the person has been granted and their compliance with the conditions of their leave when deciding whether to grant leave.

⁷¹ *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 57A.

⁷² *Ibid* s 32(3).

⁷³ *Ibid* s 54B(2)(d). A leave plan includes information on the purpose of the leave and how it will contribute to the forensic patient or forensic resident's rehabilitation, any proposed conditions of the leave and any other information the Clinical Director or Secretary to DHS consider relevant or that the Forensic Leave Panel has requested.

Improving transparency and communication in the leave process

Views in submissions and consultations

- 10.64 Submissions and people consulted indicated that there was a lack of transparency in the leave decision-making process, which in some cases had led to a negative perception of such processes. In particular:
- Some supervised people felt unclear about the ‘way out’ of Thomas Embling Hospital.⁷⁴ They felt that supervised people should be made aware of the processes that need to be satisfied before a person can be released.⁷⁵
 - There was a lack of understanding about how Forensic Leave Panel decisions were made.⁷⁶ One participant in Thomas Embling Hospital’s Consumer Advisory Group said that it was unclear why some people have their leave approved and others do not.⁷⁷
 - Some supervised people noted that it was their experience that when informing them of decisions on leave applications, the Forensic Leave Panel does not provide reasons why they had not been granted leave. Nor was it their experience that the Panel provided feedback on how they could work towards obtaining leave in the future. They noted that written feedback, in addition to oral feedback, was important because they may not remember all the details of the oral feedback.⁷⁸
- 10.65 Members of the Forensic Leave Panel consulted by the Commission were of the view that transparency could be increased by improving the way reasons are provided to forensic patients and residents, particularly in terms of how reasons are verbally communicated to patients and residents at hearings. It was noted that the nature and extent of oral decisions and reasons can vary from hearing to hearing. Members made the following suggestions:
- When leave is granted, it would be valuable to read out each type of leave that has been granted and any variations in or rejections of leave.
 - The Panel should explain why it has, as an independent body, reached its conclusion. This will also help allay any resentment the supervised person might feel towards the treating team following a negative decision.⁷⁹
- 10.66 However, it was also noted that providing written reasons for every item on the application would require substantial resources.⁸⁰
- 10.67 The Commission’s advisory committee agreed that the communication approach of the Forensic Leave Panel could be improved.⁸¹

74 Consultation 1 (Consumer Advisory Group (CAG), Thomas Embling Hospital).

75 Ibid.

76 Submission 2 (Forensicare Patient Consulting Group). Consultation 1 (Consumer Advisory Group (CAG), Thomas Embling Hospital).

77 Consultation 1 (Consumer Advisory Group (CAG), Thomas Embling Hospital).

78 Ibid.

79 Consultation 49 (Forensic Leave Panel—members).

80 Consultation 23 (Supreme Court of Victoria—judges).

81 Advisory committee (meeting 2).

The Commission's conclusion

- 10.68 The Commission is conscious of the considerable significance leave decisions have on the leave applicant. As Forensicare's Patient Consulting Group noted:

Forensic Leave Panel hearings can be intimidating because there is so much riding on it. It can also be exciting if you get your leave or such a downer if you don't.⁸²

- 10.69 It is clear that the Forensic Leave Panel also recognises the profound effect its hearings have. In its 2010 annual report, the Panel noted:

The panel recognises that attending a hearing can be difficult and stressful for some forensic patients and residents. The panel seeks to create an environment where patients and residents feel able to express their views and wishes freely. The panel is also sensitive to the needs of treating staff, who must balance the requirement to provide candid evidence to the panel with the need to maintain a healthy therapeutic relationship with the patient or resident.⁸³

- 10.70 Given the importance of leave decisions to supervised people, the Commission agrees with the view that as far as possible these decisions should be communicated in a way that will assist their understanding of:
- the independence of the decision-making process
 - the outcome of a particular hearing
 - the reasons a leave application was approved or rejected
 - the steps they can take to increase the likelihood of success of their next application.

- 10.71 The Commission acknowledges that this already occurs in leave hearings, but that the practice could be encouraged further and be applied more consistently. Providing comprehensive reasons promotes the principles of transparency and accountability that runs through the CMIA and supports the individualised approach the Commission considers should be taken to the CMIA cohort. Feedback on how a supervised person can strengthen their future leave applications encourages the recovery and progress of the person, which is consistent with the CMIA's therapeutic focus.

- 10.72 The Forensic Leave Panel is already required to provide reasons for its decisions.⁸⁴ The Commission considers that it is unnecessary to add to this requirement through further legislation. However, it could help address perceptions and experiences of people subject to leave processes if efforts were focussed on the communication methods employed in delivering reasons and communicating with leave applicants. The Commission has thus formed the view that Panel members should be provided with education and training to facilitate improvements in this area, including the verbal communication of reasons. This forms part of the package of recommendations made regarding education and training for other people working under the CMIA that the Commission recommends in Chapter 2.

- 10.73 The Forensic Leave Panel may give reasons orally, but a person applying for leave can also request the reasons in writing.⁸⁵ While the Commission can see the value in providing written reasons following each hearing, making it mandatory in every case would be too onerous for the Panel. Determining leave applications already requires a substantial commitment from Panel members and staff. The Commission also notes that where an application for leave is rejected by the Panel, it is required to write to the person who applied for leave informing them that they have the right to request written reasons for the decision.⁸⁶

82 Submission 2 (Forensicare Patient Consulting Group).

83 Forensic Leave Panel, *Annual Report 2010* (2011) 13.

84 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 66(1).

85 *Ibid* s 66(2).

86 *Ibid* s 66(4).

- 10.74 The Commission considers, however, that there is a need to increase awareness of the right to apply for written reasons. In 2011 only one patient requested a written statement of reasons from the Forensic Leave Panel in 2011.⁸⁷ This is inconsistent with the feedback the Commission received that leave applicants want to be provided with written reasons. The Commission therefore recommends that as part of the education and training for Panel members, members are encouraged to inform the leave applicant of their right to request written reasons at the end of the hearing. This will also increase the awareness of the right to request reasons among the people who supervise the leave applicant, such as the treating team.

Recommendation

- 81 An education and training package should be developed for Forensic Leave Panel members that:
- (a) emphasises the importance of explaining each type of leave that has been granted or rejected and any variations in leave
 - (b) emphasises the communication of the reasons why the Panel, as an independent body, has reached its decision to approve or reject the leave application
 - (c) encourages Panel members to provide suggestions on how the person can improve their likelihood of success in subsequent leave applications, and
 - (d) ensures that Panel members inform the person of their right to request written reasons at the end of the hearing.

The role of the Internal Leave Review Committee

- 10.75 The Vincent Review was commissioned in 2001 to consider leave arrangements for patients at the Thomas Embling Hospital in response to community safety concerns after a patient absconded from the hospital. The Vincent Review recommended establishing a committee to comment on leave applications, convened by Forensicare's Clinical Director and comprising the Chief Psychiatrist, senior clinical staff and heads of treating teams. The purpose of such a committee was to:
- consider leave applications (other than applications for special leave)
 - consider the associated treatment plans
 - ensure relevant clinical issues are considered
 - formally endorse the plans.
- 10.76 Under the proposal, the Clinical Director was then to pass on the advice of the committee to the formal leave decision-making body.⁸⁸
- 10.77 Forensicare implemented the Vincent Review's recommendation by establishing the Internal Leave Review Committee.
- 10.78 In the consultation paper the Commission asked whether changes are required to the operation of the Internal Leave Review Committee.

Views in submissions and consultations

- 10.79 The information the Internal Leave Review Committee produces was viewed positively. Forensic Leave Panel members consulted said that the information provided by the Committee was comprehensive and useful for the Panel's decision making.⁸⁹ The Office of Chief Psychiatrist observed that the Committee enabled the Panel to be assisted by expert advice and the background the Committee has in the matter.⁹⁰
- 10.80 However, the Commission also received feedback that the Internal Leave Review Committee was perceived as being risk-averse⁹¹ and lacking in transparency.⁹² At a practical level, Victoria Legal Aid observed that the Internal Leave Review Committee's processes can result in applications being delayed or discontinued.⁹³
- 10.81 The following suggestions were made on how the Internal Leave Review Committee's process could be improved:
- Where the Internal Leave Review Committee does not support a leave application, their reasons should be explained in more depth, because their decisions are very influential.⁹⁴
 - Leave applicants could receive more feedback from the Internal Leave Review Committee and leave applicants should be allowed to attend the Committee's meetings if they wish.⁹⁵
 - It is unclear whether leave applicants are given the Committee's documents relating to their application. These should be provided to them as a matter of procedural fairness.⁹⁶
- 10.82 Victoria Legal Aid submitted that the functions of the Internal Leave Committee should be reviewed to assess whether it is consistent with the purposes of the CMIA and the statutory functions of the Forensic Leave Panel.⁹⁷ It also submitted that all leave applications be considered by the Forensic Leave Panel, regardless of whether they have been declined by the Internal Leave Review Committee, and that a disclosure framework be established to ensure that the Committee has all applications and documentation.
- 10.83 Forensicare submitted that it did not support an approach under which the Internal Leave Review Committee's existence and operations would be legislatively mandated. However, Forensicare recognised a need to review the Committee in light of a recovery approach and welcomed the opportunity to consider and respond to any feedback received about the Committee by the Commission.⁹⁸

The Commission's conclusion

- 10.84 As highlighted in consultations with the Forensic Leave Panel and the Chief Psychiatrist, the Internal Leave Review Committee provides benefits to the leave process. It is a means of providing useful expert assistance to the Panel or the court and an extra degree of oversight for leave applications. Further, the Internal Leave Review Committee ensures consistency in the approach taken by Forensicare to preparing documentation (such as applicant profiles and leave plans or statements).⁹⁹

89 Consultation 49 (Forensic Leave Panel—members).

90 Consultation 26 (Office of the Chief Psychiatrist and Legal Branch, Department of Health).

91 Consultation 1 (Consumer Advisory Group (CAG), Thomas Embling Hospital).

92 Submission 18 (Victoria Legal Aid). Consultation 49 (Forensic Leave Panel—members).

93 Submission 18 (Victoria Legal Aid).

94 Consultation 49 (Forensic Leave Panel—members).

95 Consultation 1 (Consumer Advisory Group (CAG), Thomas Embling Hospital).

96 Consultation 49 (Forensic Leave Panel—members).

97 Submission 18 (Victoria Legal Aid).

98 Submission 19 (Forensicare).

99 The applicant profile contains information to assist the Forensic Leave Panel to make a decision about granting or varying leave, including the relationship between the forensic patient or forensic resident's impairment, condition or disability and the offending conduct, their current mental state or pattern of behaviour and the offence that led to the making of the supervision order: *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 54A(2).

- 10.85 Unlike the Forensic Leave Panel, the Internal Leave Review Committee does not have a legislative basis. Its policy, procedures and decision making are determined internally, even though its recommendations may be influential in the Panel or court's decision making. The Commission therefore accepts that this may lead to the concerns expressed in submissions and consultations about how the Internal Leave Review Committee operates in terms of transparency, fairness and consistency with the principles underpinning the CMIA.
- 10.86 However, the Commission considers that legislative regulation of the Committee would be ineffective and could undermine its original purpose. As one of the Commission's advisory committee members noted, the legislative regulation of the Committee may only lead to the formation of another committee that sits below it, which would add another stage to an already bureaucratic leave process. In the Commission's view, the best way to address the concerns raised in submissions and consultations is through a response by Forensicare to the feedback in this report and a review of the operation of the Committee.
- 10.87 The Commission therefore recommends that the Internal Leave Review Committee be reviewed to ensure that it operates consistently with the principles that underlie the CMIA. The Commission considers that operational considerations should not take precedence over the principles that underlie the CMIA, which should form the primary basis of the Committee's recommendations in leave applications.

Recommendation

- 82 A review should be conducted of the processes of the Internal Leave Review Committee to consider whether they operate consistently with the principles that underlie the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

- 10.88 The Commission notes that there is no equivalent body that operates in the same way in relation to forensic residents who are supervised by the Department of Human Services.

Improvements to the review and release framework

Overview of the current review process

- 10.89 As discussed at [10.6], a supervision order under the CMIA has an indefinite term.¹⁰⁰ This means that the person can be subject to the order for an indefinite period, potentially for the rest of their life.
- 10.90 Once a court makes a supervision order, the court can vary or revoke it. The process of varying and reviewing orders, together with the grant of extended leave, facilitates the transition of people subject to supervision orders through the CMIA's staggered system of release.
- 10.91 A court can vary or revoke a supervision order using three procedures under the CMIA:
- at a major review
 - in the course of a review or further review
 - through an application to vary or revoke the supervision order.

- 10.92 The court that originally made the supervision order must conduct a ‘major review’ of the order at least three months before the end of the ‘nominal term’ of the order, and at intervals not exceeding five years after that for the duration of the order.¹⁰¹
- 10.93 When a person is declared liable to supervision and the court makes a supervision order in relation to that person, the court may direct a ‘review’ of the matter at the end of a certain period.¹⁰² Unless the court revokes the order, the court may also direct a ‘further review’ of the matter following an application to vary or revoke an order or a ‘review’ of an order.¹⁰³ The court may order a further review any number of times.
- 10.94 When a person subject to a custodial supervision order applies to vary the order, or has a review or further review of their order, the court can decide that the order will stay in place either by confirming the order or by varying the place of custody. Alternatively, the court can decide to change the custodial supervision order by varying the order to a non-custodial supervision order.¹⁰⁴
- 10.95 When a person subject to a non-custodial supervision order applies to vary or revoke that order, or has a review or further review of the non-custodial supervision order, the court can decide not to change the order either by confirming the order or by varying the conditions of the order. Alternatively, the court may change the order. The court can vary the order to a custodial supervision order, resulting in the detention of the person, or it can revoke the non-custodial supervision order and release the person.¹⁰⁵
- 10.96 In deciding whether to vary or revoke a supervision order, the court must have regard to matters such as the person’s mental impairment or other condition or disability.¹⁰⁶ These are discussed in more detail at [10.188]–[10.192].
- 10.97 In the following section, the Commission considers the following issues:
- the retention of indefinite supervision orders
 - problems with nominal terms and the need for a new approach to the timing of major reviews
 - the presumptions that apply at each decision-making stage
 - the frequency of reviews and further reviews.

Retaining indefinite terms for supervision orders in the higher courts

- 10.98 In the consultation paper the Commission discussed the influence that the indefinite nature of the regime had on the decisions that accused make.¹⁰⁷ For example, a person may choose to plead guilty and receive the certainty of a sentence rather than an indefinite term. The person may choose to do this even though they had a legitimate mental impairment defence to the charge. The Commission noted that these outcomes would be inconsistent with the CMIA’s underlying principles. There could be the abrogation of the right to a fair trial for people who are unfit to stand trial. Alternatively, the result may be the illegitimate punishment of a person who is not criminally responsible for an offence. This can also result in the further over-representation of people with mental conditions in the prison population.

101 Ibid s 35(1). A nominal term is the period imposed with reference to the maximum penalty of the offence that specifies when the court is to conduct a major review of the order.

102 Ibid s 27(2).

103 Ibid ss 32(5), 33(2).

104 Ibid s 32(1).

105 Ibid s 33(1).

106 Ibid s 40.

107 Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, Consultation Paper No 17 (2013) 147–8.

- 10.99 The Commission also noted the detrimental effect that imposing an order without a release date can have on the wellbeing of the person subject to the order, which may be contrary to the CMIA's therapeutic focus. However, the consultation paper also recognised the need to strike a balance with other principles, such as the protection of the community from the risk posed by the person and the interests of victims.

Views in submissions and consultations

- 10.100 Submissions that addressed this issue and those consulted pointed to weaknesses of making orders for an indefinite term:
- It creates a perception that it would be better for the accused to plead guilty because there is more certainty when serving a sentence.¹⁰⁸
 - It causes supervised people to feel trapped or lack the motivation to get better.¹⁰⁹
 - The supervision period is longer than the sentence a person would have served had they been found guilty.¹¹⁰
 - It heightens the risk of arbitrary detention.¹¹¹
 - It fosters the perception that the revocation or variation of orders will be the 'exception rather than the norm'.¹¹²
- 10.101 However, others thought that an indefinite term acted as a safety net and was part of what kept them well or helped them 'maintain focus'.¹¹³
- 10.102 The Commission did not receive much feedback on whether or how indefinite orders should be changed. There was some qualified support for orders that were fixed term.¹¹⁴ However, it was also noted that after a fixed-term order lapsed, there might be some people who would still need to be managed because of the risk they posed to the community and they may not meet the criteria for an order under the civil system.¹¹⁵
- 10.103 It was suggested that if supervision orders were to remain indefinite, there should be a flexible decision-making framework in place once an order is made.¹¹⁶
- 10.104 The Commission's advisory committee expressed the view that indefinite terms were a way of recognising that CMIA orders were based on a therapeutic framework, rather than one that is corrections-based (where orders have a definite term).
- 10.105 Further, members of the Commission's advisory committee observed that any attempt to introduce fixed-term orders would lead to an additional complicated process to extend those orders when they expired and would render the process akin to a sentencing exercise, whereby the court would be required to undertake a prediction of the risk that the person might pose in the future when setting a limited term at the time the supervision order is imposed. The Commission was advised that it would be very difficult to do this in relation to people who are subject to supervision orders. For example, some people with a mental illness may recover very quickly, while others may have a longer period of recovery. For people with an intellectual disability or other cognitive impairment, a different approach may be required to predict their ongoing risk.

108 Submission 17 (Name withheld). Consultations 1 (Consumer Advisory Group (CAG), Thomas Embling Hospital); 15 (Northern Area Mental Health Service).

109 Consultations 15 (Northern Area Mental Health Service); 17 (Department of Human Services case managers, Shepparton); 38 (Person subject to a non-custodial supervision order under the CMIA).

110 Consultation 21 (Consultant psychiatrists, Forensicare).

111 Submissions 10 (Victorian Equal Opportunity and Human Rights Commission); 20 (Law Institute of Victoria); 3 (Gunvant Patel).

112 Submission 13 (Australian Community Support Organisation Inc.). Consultation 9 (Department of Human Services case managers, Gippsland and Latrobe).

113 Consultations 15 (Northern Area Mental Health Service); 30 (Person subject to a non-custodial supervision order under the CMIA and family member); 36 (Family member of person subject to a non-custodial supervision order under the CMIA).

114 Submission 6 (Associate Professor Andrew Carroll). Consultations 21 (Consultant psychiatrists, Forensicare); 22 (Partner of victim in a CMIA matter); 4 (Family and Friends Support Group, Forensicare).

115 Consultation 21 (Consultant psychiatrists, Forensicare).

116 Consultation 15 (Northern Area Mental Health Service).

- 10.106 Indefinite terms, along with a flexible staggered process for transition, were favoured as a mechanism for providing supervision within which gradual reductions in restrictions can occur that are commensurate with the particular risk posed by an individual at different stages of the process.

The Commission's conclusion

- 10.107 The Community Development Committee, whose report formed the basis for the CMIA, grappled at length with the issue of whether an indefinite or limited term should be imposed on people. In trying to balance the need for community protection against arbitrary detention, the Community Development Committee said:

a more structured and rigorous release process will significantly reduce the likelihood of persons being detained for longer than their condition warrants.¹¹⁷

- 10.108 It noted in particular the comments made by Dr David Neal, in expressing support for limiting terms, about the risks in each system:

One danger is the tariff and the other danger is open-ended detention becoming, 'Let's play it safe and hold people well beyond when they ought to have been held if their mental illness were really the consideration.' The underlying question is: Are these people continuing to be ill and continuing to be dangerous?¹¹⁸

- 10.109 The Community Development Committee ultimately recommended a limiting term for supervision orders that denoted the time after which an order would lapse.
- 10.110 The Commission acknowledges the tensions in a system that strives to achieve community protection while at the same time provides safeguards against the arbitrary detention of people who have not been found criminally responsible or not had their criminal responsibility determined through the usual criminal process.
- 10.111 The Commission is of the view that indefinite term orders in the higher courts are consistent with the therapeutic focus of the CMIA. Such orders are also consistent with the principle of community protection underlying the CMIA that recognises that the recovery of a supervised person should proceed on a gradual basis so that their risk can be managed to a point where they can ultimately be reintegrated into the community.
- 10.112 The supervision of people under the CMIA is justified on these principles and not on the basis of proportionality or deterrence which would form the basis of a criminal sentence. In the Commission's view, the duration of orders should therefore be based on the time a supervised person needs to recover or progress through the system of gradual reintegration before they can safely return to the community. The length of time it takes for this to happen varies from person to person and is difficult to predict at the time of the making of a supervision order.
- 10.113 On balance, the Commission considers that supervision orders should continue to be indefinite. However, reforms should be targeted at ensuring the decision-making framework in place once an order is made is rigorous and ensures that the period a person is supervised closely reflects the minimum period necessary to address the person's risk to the community. This is the focus of the Commission's recommendations in this area. The Commission makes recommendations below to introduce changes designed to address the issues in [10.100] concerning the indefinite term of orders, as well as improving the operation of the gradual pathway in accordance with the intentions of the CMIA.

Recommendation

- 83 There should be no change to the indefinite term of supervision orders imposed in the higher courts as provided in section 27 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

Replacement of nominal term system with a new system of five-year 'progress reviews'

- 10.114 In the consultation paper the Commission sought views on whether the method for setting the nominal term should be changed, and if so, how it should be changed. The Commission also asked about the steps that could be taken to ensure that the phrase 'nominal term' was better understood.

The current nominal term system under the CMIA

- 10.115 When a court imposes a supervision order, it must then set a 'nominal term' in accordance with the CMIA. A nominal term is the period that specifies when the court is to conduct a major review of the order. The purpose of a major review is to determine whether to release the person subject to the supervision order.¹¹⁹

Purpose of a nominal term under the current law

- 10.116 The purpose of the nominal term is to ensure that the court reviews the supervision order over the indefinite period. If appropriate, having regard to a range of principles and factors, the court may reduce the level of supervision with a view to possible release. This reflects the principle of gradual reintegration and aims to ensure that the period of detention is referable to the person's mental condition and risk posed to community safety.
- 10.117 The nominal term in the CMIA seeks to strike a balance between two competing considerations.¹²⁰ On the one hand, it aims to prevent the detention of people on an indefinite order with no opportunity for review or release when they no longer pose a risk to the community. On the other hand, it aims to prevent the release of people subject to supervision orders while they still pose a certain level of risk to the community.
- 10.118 The key aim of a nominal term is to ensure that a person does not get 'lost in the system', as was the concern under the Governor's pleasure regime, and to indicate the maximum time before a presumption in favour of reducing the level of supervision of the person is to apply.

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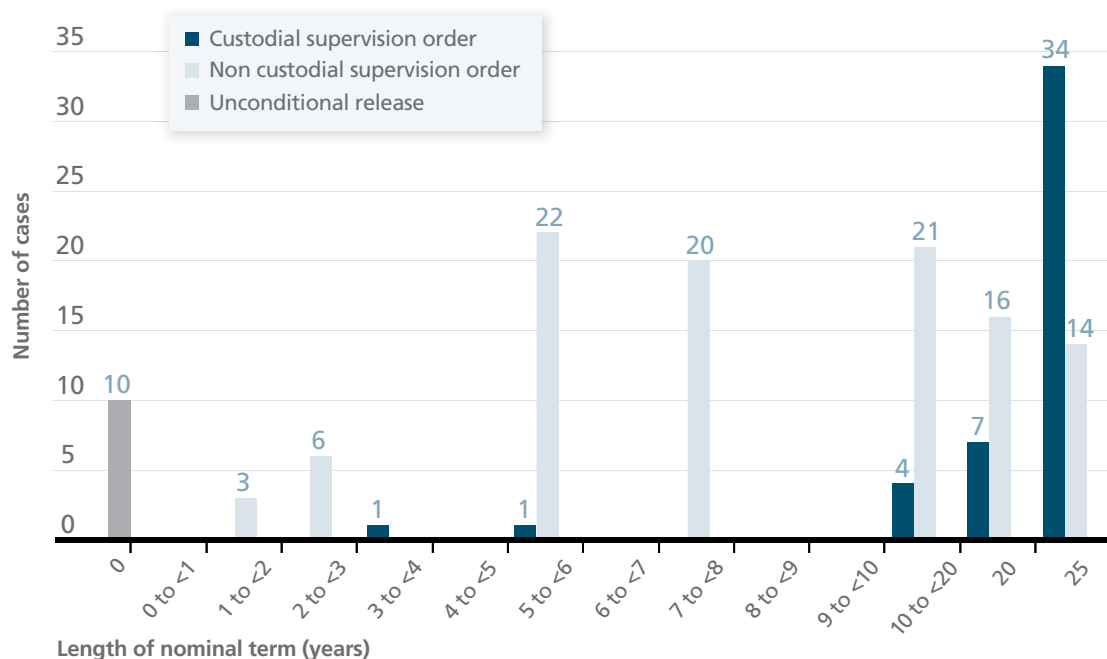
Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) s 35(2).
Victoria, *Parliamentary Debates*, Legislative Assembly, 18 September 1997, 185 (Jan Wade, Attorney-General).

Method for setting a nominal term under the current law

- 10.119 The setting of a nominal term is a mandatory requirement. A court is required to impose a nominal term in accordance with section 28 of the CMIA. The general approach to the setting of the nominal term is by reference to the maximum penalty of the offence that the person has been found not guilty of or found at a special hearing to have committed.
- 10.120 This is contained in a table in section 28 of the CMIA which provides as follows:
- murder or treason—25 years (the penalty for murder and treason under the *Crimes Act 1958* (Vic) is life imprisonment or such term of years as is fixed by the court).
 - a ‘serious offence’ within the meaning of the *Sentencing Act 1991* (Vic)¹²¹—the maximum term of imprisonment for the offence
 - any other offence that has a term of imprisonment as its statutory maximum penalty—half the maximum term of imprisonment for the offence
 - any other offence punishable by imprisonment where there is no statutory maximum penalty—a period specified by the court.
- 10.121 For example, for murder, the nominal term that must be imposed is 25 years. For the offence of rape, a ‘serious offence’ under the *Sentencing Act*, the nominal term that must be imposed is 25 years. For an offence such as indecent act with a child under 16 years, the nominal term would be half the maximum penalty for the offence, therefore five years.
- 10.122 In some cases, a person may be found not guilty because of mental impairment of more than one offence or found at a special hearing to have committed more than one offence. If this is the case, the nominal term is calculated by reference to the offence that carries the longest maximum term of imprisonment.¹²²
- 10.123 **Figure 6** illustrates the nominal terms imposed in the cases dealt with under the CMIA over the 12-year period from 2000–01 to 2011–12, where the court imposed either a custodial supervision order or a non-custodial supervision order in the higher courts (see **Appendix D**). It shows that almost three-quarters of the 47 custodial supervision orders (72.3 per cent) had a nominal term of 25 years, with murder the offence charged. Unconditional releases are also reflected in the figure as having a nominal term of zero. The nominal terms do not provide an accurate representation of the actual length of time that a person was detained under a custodial supervision order or was supervised in the community on a non-custodial supervision order. However, they provide a clear indication that the current approach of setting nominal terms by reference to the maximum penalty, results in people being potentially subject to long periods of detention.

121 This includes offences such as manslaughter, child homicide, defensive homicide, intentionally causing serious injury, threats to kill, rape, assault with intent to rape, some forms of incest, sexual penetration of child under 16, persistent sexual abuse of a child under the age of 16, abduction or detention, abduction of a child under the age of 16, kidnapping and armed robbery. See *Sentencing Act 1991* (Vic) s 3.

122 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 28(2).



Source: Sentencing Advisory Council, higher courts sentencing database

Figure 6: Length of nominal term in cases under the CMIA, 2000–01 to 2011–12

What happens at a major review?

- 10.124 In a major review of a custodial supervision order, there is a presumption in favour of varying the order to a non-custodial supervision order. The court must vary the order to a non-custodial supervision order, unless satisfied that the safety of the person subject to the order or members of the public will be seriously endangered because of the variation.¹²³ If the court is satisfied that varying the order will seriously endanger the person or members of the public, the court must confirm the current order or vary the place of custody.¹²⁴
- 10.125 In a major review of a non-custodial supervision order, the court may confirm the order, vary the conditions of the order or revoke the order.¹²⁵ Unlike a major review of a custodial supervision order, a person subject to a non-custodial supervision order does not have the advantage of a presumption that the court will vary their order and release them. In that sense, the major review of a non-custodial supervision order is not very different to a usual review of a supervision order.

Views in submissions and consultations

- 10.126 Submissions that addressed this subject and the majority of people consulted did not agree with the current method of setting the nominal term and supported change in this area.¹²⁶

¹²³ Ibid s 35(3)(a)(i).

¹²⁴ Ibid s 35(3)(a)(ii).

¹²⁵ Ibid s 35(3)(b).

¹²⁶ For: submissions 18 (Victoria Legal Aid); 19 (Forensicare); 21 (Criminal Bar Association); 6 (Associate Professor Andrew Carroll); 11 (Jamie Walvisch); 2 (Forensicare Patient Consulting Group). Against: Submission 8 (Office of Public Prosecutions) (unless there are problems that can be identified).

Problems with the current nominal term approach

10.127 The Commission received the following feedback about nominal terms:

- A nominal term is not reflective of outcomes or the supervision period.¹²⁷
- A sentence can be shorter than the nominal term.¹²⁸
- It does not give supervised people hope or aspirations for recovery.¹²⁹
- It can give supervised people false hope if they assume that the term is a definite term.¹³⁰
- The term is confusing to everyone.¹³¹ One participant described it as ‘terrifying’ for the person under supervision and their family.¹³²
- It is not tailored to the individual.¹³³
- It is inappropriate for the term to be based on the maximum penalty of an offence the person has been found not guilty of because of mental impairment or found at a special hearing to have committed.¹³⁴
- It is unfair and misleading for the term to be based on the maximum penalty when it would be highly unusual to have the maximum sentence imposed if convicted.¹³⁵
- The nominal term is often of such a long period (for example, 25 years for the offence of murder) that it undermines its intended purpose as a safeguard against arbitrary detention.¹³⁶

10.128 The only advantage of nominal terms identified was that it acts as a safeguard against arbitrary detention when the person no longer poses a risk to the community.¹³⁷

10.129 The Office of Public Prosecutions submitted that it was unable to identify any problems with the current method of setting nominal terms.¹³⁸

Suggestions for alternate approaches

10.130 As an alternative to nominal terms, some stakeholders were of the view that the frequency of reviews should be tailored to the individual.¹³⁹ However, others pointed to the difficulty in forecasting what the term should be, and whether this should be decided by an expert or a judge.¹⁴⁰

127 Submissions 21 (Criminal Bar Association); 6 (Associate Professor Andrew Carroll). Consultation 4 (Family and Friends Support Group, Forensicare).

128 Submission 21 (Criminal Bar Association). Consultations 4 (Family and Friends Support Group, Forensicare); 6 (Department of Human Services case managers, Disability Forensic Assessment and Treatment Service (DFATS) and Long Term Rehabilitation Program (LTRP)).

129 Consultations 1 (Consumer Advisory Group (CAG), Thomas Embling Hospital); 4 (Family and Friends Support Group, Forensicare).

130 Submissions 19 (Forensicare); 6 (Associate Professor Andrew Carroll).

131 Submissions 19 (Forensicare); 21 (Criminal Bar Association); 6 (Associate Professor Andrew Carroll). Consultations 1 (Consumer Advisory Group (CAG), Thomas Embling Hospital); 21 (Consultant psychiatrists, Forensicare); 36 (Family member of person subject to a non-custodial supervision order under the CMIA).

132 Consultation 4 (Family and Friends Support Group).

133 Consultation 3 (Villamanta Disability Rights Legal Service).

134 Submission 11 (Jamie Walvisch).

135 Submission 19 (Forensicare).

136 Ibid.

137 Submissions 11 (Jamie Walvisch); 19 (Forensicare); 20 (Law Institute of Victoria); 10 (Victorian Equal Opportunity and Human Rights Commission).

138 Submission 8 (Office of Public Prosecutions).

139 Submission 18 (Victoria Legal Aid). Email from Daniel Webb (Human Rights Law Centre) to Nina Hudson (Victorian Law Reform Commission), 30 January 2014.

140 Consultation 18 (Goulburn Valley Area Mental Health Service).

- 10.131 There was greater support for reviews at fixed intervals that were not dependent on the offence, or on the initiation of the court or the supervised person. The Victorian Human Rights and Equal Opportunity Commission said that this would provide:
- a fundamental safeguard against arbitrary detention and unjustified limitations on a person's human rights, by providing oversight of how the supervision order is operating, ensuring the continued appropriateness of the order, and guarding against people getting 'lost in the system'.¹⁴¹
- 10.132 Forensicare submitted that major reviews at fixed intervals would remove confusion about the nominal term by making it clear to supervised people that their order is indefinite, but will be subject to judicial review at fixed intervals.¹⁴² Further, it would dissociate the timing of major reviews from a criminal sentence and refocus attention on the supervised person's clinical progress.¹⁴³
- 10.133 There was support for periods before a major review or other reviews ranging from every year to every five years.¹⁴⁴
- 10.134 Most participants at the Commission's roundtable on the CMIA and the higher courts also preferred major reviews at fixed intervals. These participants thought that this approach would be more straightforward to apply than deciding on a term depending on each case. Consultant psychiatrists noted that it would be difficult to assess how long it would take for the person to recover and their future risk at the time a supervision order is imposed. Setting a term in each case could also be subject to different judicial approaches, which in turn could lead to differences in outcomes for people in similar circumstances.
- 10.135 The advisory committee observed that the majority of people have their supervision order revoked before their major review. Advisory committee members generally supported a five-year term before a major review. It was noted that a five-year term would help address the problem of 'warehousing' people with an intellectual disability.¹⁴⁵ Five years was also thought to be consistent with clinical experience and was identified to be the point where people started to show real progress. This view was also expressed at the Commission's roundtable on the CMIA and the higher courts.¹⁴⁶
- 10.136 Aside from changing the method of setting the nominal term, there was support for changing the phrase 'nominal term' itself because of the confusion the phrase caused. Suggestions included 'major review period', 'minimum review period', 'progress review period' or 'review period'.

Available data about detention times under the current nominal term framework

- 10.137 A PhD study completed in 2010 contains publicly available information on the detention times of people subject to the CMIA. The study involved 146 participants comprising:
- all individuals who had been found not guilty because of mental impairment since the enactment of the CMIA in 1997
 - individuals who had been found not guilty by reason of insanity prior to the CMIA but had been detained under the Governor's pleasure system when the CMIA commenced and were thus transitioned into the CMIA system.

¹⁴¹ Submission 10 (Victorian Equal Opportunity and Human Rights Commission). See also, Submission 19 (Forensicare).

¹⁴² Submission 19 (Forensicare).

¹⁴³ Ibid.

¹⁴⁴ Submissions 11 (Jamie Walvisch); 19 (Forensicare). Consultation 23 (Supreme Court of Victoria—judges).

¹⁴⁵ Advisory committee (meeting 2).

¹⁴⁶ Consultation 43 (Higher courts roundtable). Participants in the roundtable meeting suggested a period between three and five years.

- 10.138 Data for the study was collected from mid-2005 to late 2006. Of the 146 participants, 123 were males and 23 were female, aged from 19.63 years to 81.44 years. Of the total 146 participants, 67 (45.9 per cent) had been found not guilty because of mental impairment of the offence of murder.¹⁴⁷
- 10.139 The vast majority of the sample were people who were being or had been supervised by Forensicare (93.2 per cent, 136 in total). The remaining 10 participants (6.8 per cent) were supervised by the Department of Human Services. There were four main cohorts in the study:
- 64 individuals who were subject to custodial supervision orders
 - 8 individuals who were on extended leave from their custodial supervision order in the community
 - 52 individuals who were subject to non-custodial supervision orders
 - 15 individuals who had had their orders under the CMIA revoked by the court.¹⁴⁸
- 10.140 The study analysed a range of data on the characteristics of the 146 individuals subject to the CMIA, rates of verdicts of not guilty because of mental impairment and the length of detention over time. Of particular interest to the issue being considered by the Commission is the data on the length of detention times in relation to the key transition stages under the review and leave framework.¹⁴⁹

Length of detention under custodial supervision order before extended leave

- 10.141 There were 41 participants who had been granted extended leave under a custodial supervision order.
- 10.142 Overall, the average detention length before a grant of extended leave under a custodial supervision order was 7.88 years. The median length of detention was 7.05 years—meaning that half of the 41 participants were granted extended leave by the time 7.05 years had elapsed. The minimum period of detention was under one year (0.60 years) and the maximum time was 21.07 years.

Length of detention under custodial supervision order before variation to a non-custodial supervision order

- 10.143 There were 24 participants who had their custodial supervision orders varied to a non-custodial supervision order.
- 10.144 The average detention length before a variation of a custodial supervision order to a non-custodial supervision order was 11.89 years. The median duration of detention before variation was 10.16—meaning 12 participants had their order varied within approximately 10 years. The minimum period of detention before variation was 4.71 years and the maximum period was 25.53 years.

¹⁴⁷ Ruffles, above n 10, 129. A further 21.2% (n=31) were found not guilty because of mental impairment of assault-related offences and 8.9% (n=13) of attempted murder.

¹⁴⁸ A further seven participants had died while on supervision orders under the CMIA.

¹⁴⁹ People who were transitioned from the Governor's pleasure regime to the CMIA system were included in the collection of data and this may have led to an inflation of the CMIA period of detention. The author explored whether there were methodological explanations for the findings in relation to detention and concluded there were not: Ruffles, above n 10, 166–8.

Length of detention before revocation of a non-custodial supervision order

- 10.145 There were 15 participants who had had their order revoked by the close of the study.¹⁵⁰
- 10.146 The average length of detention before revocation of a supervision order (and thus release from the regime) across the 15 people who had their orders revoked was 10.09 years. The median duration was 9.01 years—meaning that half of participants had had their order revoked after nine years. The minimum length of time before revocation was 2.94 years and the maximum time was 22.18 years.
- 10.147 Eleven of these 15 participants had been found not guilty of murder because of mental impairment. All 15 participants whose orders were revoked were released prior to the expiration of their nominal term. Nine of the participants found not guilty of murder because of mental impairment who remained under detention at the end of the study were being detained beyond the expiration of the nominal term.¹⁵¹

Length of detention for people with an intellectual disability

- 10.148 Of the 10 participants who had an intellectual disability and were supervised by the Department of Human Services, none had their orders revoked and four had no change in legal status by a grant of extended leave or variation to a non-custodial supervision order. Of these four people, three had been detained for over 10 years and two for more than 15 years.¹⁵²

The Commission's conclusion

Replacement of nominal term system with a new system of five-year 'progress reviews'

- 10.149 The Commission agrees with the majority view in submissions and consultations that the CMIA provisions on the nominal term require change. There are four key reasons why another method of setting the term before a major review is required.

Reasons for change

- 10.150 First, as raised in submissions and consultations, the nominal term is not reflective of the actual period of supervision a supervised person generally requires. Data on the detention times of people who were subject to the CMIA up to 2006 suggests that periods of detention vary vastly in individual cases. There are many cases where people are detained for significantly shorter or significantly longer periods than indicated by the nominal term. The particular period of supervision required in a case is dependent on the individual circumstances of the person, including the particular nature of their underlying mental condition and the person's response to treatment or services. The seriousness of the offence does not and should not correlate with the time a person should be supervised and, by extension, the point at which their order should be subject to a major review. A person involved in a less serious offence with a more serious mental condition could require a longer period of supervision than a person who is involved in a more serious offence, but who has a mental condition that is less severe.
- 10.151 Second, there is a clear lack of understanding about the implications of a nominal term. There is often a misconception among supervised people, lawyers, victims, family members and the community that it relates to the period of detention, rather than an indication of when the supervised person is entitled to a major review.

150 These participants were all forensic patients, so revocation refers to the revocation of a non-custodial supervision order following variation from a custodial supervision order: see Ruffles, above n 10, 132.

151 Ibid 132–3.

152 Ibid 135.

- 10.152 Third, it is inappropriate to link the nominal term to the maximum penalty of an offence. One of the main aims of the CMIA was to create a specialised pathway that did not overlap with the ordinary criminal justice system. The nominal term is one of the few instances where the CMIA preserves an inappropriate connection with the criminal justice system.
- 10.153 Finally, the Commission agrees with the view that nominal terms fail to meet the very aim they are designed to achieve. A major review after 25 years (the nominal term for murder), for example, is not an adequate safeguard against arbitrary detention or the supervised person becoming ‘lost in the system’.

The new approach proposed

- 10.154 The Commission’s view is that the provisions in the CMIA in relation to nominal terms should be repealed and that in their place a new system be legislatively provided. The new system should:
- develop an approach that is reflective of the nature of supervision orders under the CMIA
 - promote transparency and increase understanding of the nature of supervision orders for victims of crime and people subject to supervision orders and their family members
 - ensure that reviews are not linked to a criminal penalty but based on an approach that reflects the CMIA principle of least restriction, the principle of gradual integration and the CMIA’s therapeutic focus
 - ensure that reviews are an effective safeguard against arbitrary detention and avoid any unreasonable delay in a supervised person’s progression through the supervision regime.
- 10.155 On balance, the Commission has concluded that ‘major reviews’ of orders should occur more frequently under a clear and more transparent system of review. The Commission recommends a new type of review in place of a ‘major review’ that currently relies on the nominal term imposed based on the offence. The Commission recommends that ‘progress reviews’ be conducted every five years for both custodial supervision orders and non-custodial supervision orders. The progress review should occur every five years, regardless of whether there has been a separate variation of the order before the end of the five years. In line with the current law, the Commission does not recommend that a custodial supervision order be varied unless a 12-month period of extended leave has been completed, to preserve the principle of gradual reintegration.
- 10.156 In selecting this period, the Commission has been guided by feedback in the Commission’s roundtable on the CMIA and the higher courts and advice from the advisory committee that forensic patients tend to show signs of recovery from a mental illness within the first three to five years of being placed under supervision.¹⁵³ A five-year term was also thought to be suitable for people with an intellectual disability who may show signs of improvement in behaviour or functioning after that period.¹⁵⁴ The Commission considers that a ‘progress review’ every five years is consistent with CMIA principles—it ensures that the point at which a person should be released can be identified more precisely and protects against arbitrary detention. A five-year progress review will also reflect what occurs in reality under the operation of the CMIA as illustrated by the data discussed on detention rates.

- 10.157 A 'progress review' every five years will also promote transparency in CMIA processes by ensuring that the implications of a supervision order are clear to supervised people, lawyers, victims, family members and the community.
- 10.158 The term 'progress review' will be more easily understood than 'major review'. Further, the five-year intervals negate the need to use the phrase 'nominal term', which many people find confusing. The phrase 'nominal term' is used in the CMIA because there are multiple terms prescribed in the legislation that vary based on the offence. With a standard five-year term, it will be unnecessary to define the term with a specific name.¹⁵⁵ The introduction of a progress review in place of a nominal term will avoid the incorrect reference to the nominal term to describe the 'length' of the order and instead place the proper emphasis on the indefinite length of the term for supervision.
- 10.159 These recommendations will ensure that supervised people and their family members will be more aware of what to expect when a supervision order is imposed. It will also provide victims with a more accurate understanding of the nature of supervision orders and clarity as to the extent of the consequences of a finding under the CMIA. The recommendations will also enhance the ability of lawyers to provide accurate legal advice on the decision to proceed down the CMIA pathway.
- 10.160 Finally, the Commission considers that its recommendations will ensure that the community has a more accurate understanding of the nature of the regime that follows the making of a supervision order. Nominal terms have been confused for a 'sentence' instead of a term related to the major review period. This in turn can lead to people subject to the CMIA being thought of as criminally responsible, for example, by being labelled as 'killers' in the media.¹⁵⁶ In the Commission's view, it is important that the provisions in the CMIA are as clear as possible to avoid any confusion in the community about the consequences of a finding under the CMIA.

Recommendation

- 84 The provisions in the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) relating to nominal terms in the higher courts should be repealed, and replaced by provisions to the effect that:
- (a) a supervision order is for an indefinite term and that the matter is to be brought back to the court at the end of every five years for a 'progress review'
 - (b) the court must set a term of five years before the first progress review of a supervision order to run from the day the person was first made subject to the supervision order, and
 - (c) the court that made the supervision order must conduct the first progress review of the order before the end of the five-year term and thereafter at intervals not exceeding five years for the duration of the order.

¹⁵⁵ This approach also addresses the point submitted by Victoria Legal Aid that it is inappropriate to set nominal terms with regard to offences where only the physical conduct comprising the offence has been proved, and not necessarily the mental element of the offence: Submission 18 (Victoria Legal Aid).

¹⁵⁶ See, eg, Anthea Cannon, 'Thrill Killer to Get 25 years: Judge Says She has No Choice Over Sentencing', *Geelong Advertiser*, 21 February 2014.

Presumptions that apply at each decision-making stage

- 10.161 The presumptions that apply in decision making are currently not consistent throughout the CMIA. **Appendix F** sets out the relevant presumptions that apply at each decision-making stage of the current review system under the CMIA.
- 10.162 In major reviews, there is a presumption that the court must vary a custodial supervision order to a non-custodial supervision order unless the court is satisfied on the evidence available that the safety of the person subject to the supervision order or members of the public will be seriously endangered as a result of reducing the supervision status of the person.¹⁵⁷ This presumption is advantageous to the person subject to a supervision order. However, it stands in contrast with the presumption that applies to varying orders when an application is made. In this case, the presumption is in favour of keeping the person on the custodial supervision order. The court must *not* vary a custodial supervision order to a non-custodial supervision order unless satisfied that the safety of the person subject to the supervision order or members of the public will not be seriously endangered.¹⁵⁸
- 10.163 In extended leave matters, there is no presumption either way. The court *may* grant an application of extended leave if satisfied that the safety of the forensic patient or forensic resident will not be seriously endangered because of the extended leave.¹⁵⁹
- 10.164 The existence of different presumptions that apply at various stages of the decision-making process prompted the Commission to examine in the consultation paper why these differences exist and how they operate in practice at different stages of review.

Views in submissions and consultations

- 10.165 There was some support for a presumption at every review that the supervised person will be transferred to a less restrictive order.¹⁶⁰ Forensicare submitted that there should be a presumption that a non-custodial supervision order be revoked at a major review. This presumption currently only applies to custodial supervision orders. The Criminal Bar Association submitted that the current presumption that the court must not vary a custodial supervision order to a non-custodial supervision order during the nominal term suggests a punitive approach rather than a protective approach based on the person's progress or risk.¹⁶¹
- 10.166 At the Commission's roundtable on the higher courts, participants identified reasons to support a presumption that supervision will be reduced unless it is positively demonstrated that the existing level of supervision is necessary for the safety of the community. These were:
- The onus should be on the state to provide positive evidence that justifies the continued detention or restriction of the person, rather than the reverse position where the person is required to provide evidence that they should no longer be detained or restricted.
 - At a practical level, it is harder for the supervised person to effectively prove the absence of risk to the community than for the state to provide evidence in support of the presence of risk to the community.
 - Making the presumption more favourable to the transfer to a less restrictive option will better promote the progress of supervised people through the system, and in particular, people with an intellectual disability. There is a significant inertia in the system and a tendency to be on supervision orders for too long.¹⁶²

157 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 35(3).
158 *Ibid* s 32(2).
159 *Ibid* s 57(2).
160 Submissions 18 (Victoria Legal Aid); 11 (Jamie Walvisch).
161 Submission 21 (Criminal Bar Association).
162 Consultation 43 (Higher courts roundtable).

- 10.167 One participant in the roundtable on the CMIA in the higher courts noted that the jump from a custodial supervision order to extended leave was a large one and there should not be a presumption that a person on a custodial supervision order should obtain extended leave. However, it was also noted that it is rare for people to apply for extended leave without having already been on unescorted leave in the community. Other participants also pointed to other safeguards including:
- The decision to grant extended leave is made by the court.
 - An application for leave relies on the support of the treating team.
 - Victoria Legal Aid's grant of legal assistance depends on the benefit which a grant might give to a person and their prospects of success, which limits frivolous or unmeritorious applications being made to the court.¹⁶³

The Commission's conclusion

- 10.168 In almost all stages of the current review process the onus is on the supervised person to demonstrate that the level of supervision should be reduced. Given that supervised people have not been found to be criminally responsible through the usual criminal process, the Commission agrees with views that the state should be required to justify their continued indefinite detention.
- 10.169 The Commission considers that the current presumptions contribute to the slowing of the progression of a supervised person through the CMIA system in a way that is inconsistent with the principle of least restriction. In the Commission's view the presumptions in the CMIA should ensure that restrictions on the supervised person's freedom and personal autonomy be kept to the minimum consistent with the safety of the community.
- 10.170 To strike this balance, the Commission recommends a new set of presumptions under the 'progress review' framework proposed to replace nominal terms and major reviews as follows:
- a neutral objective assessment, with no presumption that the level of supervision be reduced, at the first progress review (at five years)
 - a presumption, at subsequent progress reviews, that the level of supervision for both custodial supervision orders and non-custodial supervision orders be reduced, unless the court considers that to do so would pose an unacceptable risk of causing physical or psychological harm to the community
 - if the supervised person applies for a variation of a custodial supervision order before the first progress review at five years, there should be a presumption that the court must not reduce the level of supervision, unless the court is satisfied that there is no unacceptable risk of causing physical or psychological harm to the community
 - a neutral objective assessment, with no presumption that the level of supervision be reduced, if the supervised person applies for a variation of a non-custodial supervision order before the first progress review at five years
 - a neutral objective assessment, with no presumption that the level of supervision be reduced, if the supervised person applies for a variation of the order following the first progress review, during a period between progress reviews.
- 10.171 The presumptions rely on an assessment of whether the person poses an 'unacceptable risk of causing physical or psychological harm'. The Commission recommends replacing the 'endangerment test' under the CMIA with this test, discussed in further detail later in this chapter.

- 10.172 Despite the presumption that applies at the first progress review, the Commission recommends retaining the requirement that a custodial supervision order must not be varied unless a 12-month period of extended leave has been completed, to preserve the system of gradual reintegration (see also Recommendation 86).
- 10.173 The Commission considers that the recommendations to introduce progress reviews and to vary the presumptions that apply in the CMIA are consistent with the purposes of the CMIA, including community protection. In addition, there are protective factors that exist within the system, as identified in consultations at [10.167].

Recommendation

- 85 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to introduce the following presumptions to apply at progress reviews of supervision orders:
- (a) the court must not vary a custodial supervision order to a non-custodial supervision order before the first progress review unless satisfied on the evidence available that the person would not pose an unacceptable risk of causing physical or psychological harm to another person or other people generally as a result of the variation
 - (b) at the second progress review of a custodial supervision order and progress reviews thereafter, the court must vary the custodial supervision order to a non-custodial supervision order unless satisfied on the evidence available that the person would pose an unacceptable risk of causing physical or psychological harm to another person or other people generally as a result of the variation, and
 - (c) at the second progress review of a non-custodial supervision order and progress reviews thereafter, the court must revoke the non-custodial supervision order unless satisfied on the evidence available that the person would pose an unacceptable risk of causing physical or psychological harm to another person or other people generally as a result of the revocation of the order.

Variation of a custodial supervision order to a non-custodial supervision order

- 10.174 Forensicare's submission highlighted the need to clarify whether at a major review a custodial supervision order can be varied to a non-custodial supervision order without a period of extended leave. Forensicare noted that section 35(3)(a)(i) of the CMIA taken at face value allows for the court to vary a custodial supervision order to a non-custodial supervision order directly at a major review, without an intervening period of extended leave. It was submitted that this contradicts section 32(3)(a), which provides that a court must not vary a custodial supervision order to a non-custodial supervision order unless the supervised person has completed a period of at least 12 months extended leave.
- 10.175 In the Commission's view the inconsistency between s 35(3)(a)(i) and section 32(3)(a) should be resolved to avoid any confusion and provide greater clarity in the CMIA. The Commission's firm view is that a custodial supervision order should not be varied to a non-custodial supervision order unless a period of extended leave has been completed. This is consistent with the CMIA's principle of gradual reintegration.

Recommendation

- 86 Section 35(3)(a)(i) of the Crimes (*Mental Impairment and Unfitness to be Tried*) Act 1997 (Vic) should be amended to clarify that a custodial supervision order should not be varied to a non-custodial supervision order at a progress review unless the forensic patient or forensic resident has completed a period of at least 12 months extended leave.

10.176 The proposed processes under Recommendations 84 and 85 are illustrated below in **Figure 7**, which shows the pathway for a person on a custodial supervision order and **Figure 8**, which shows the pathway for a person on a non-custodial supervision order.

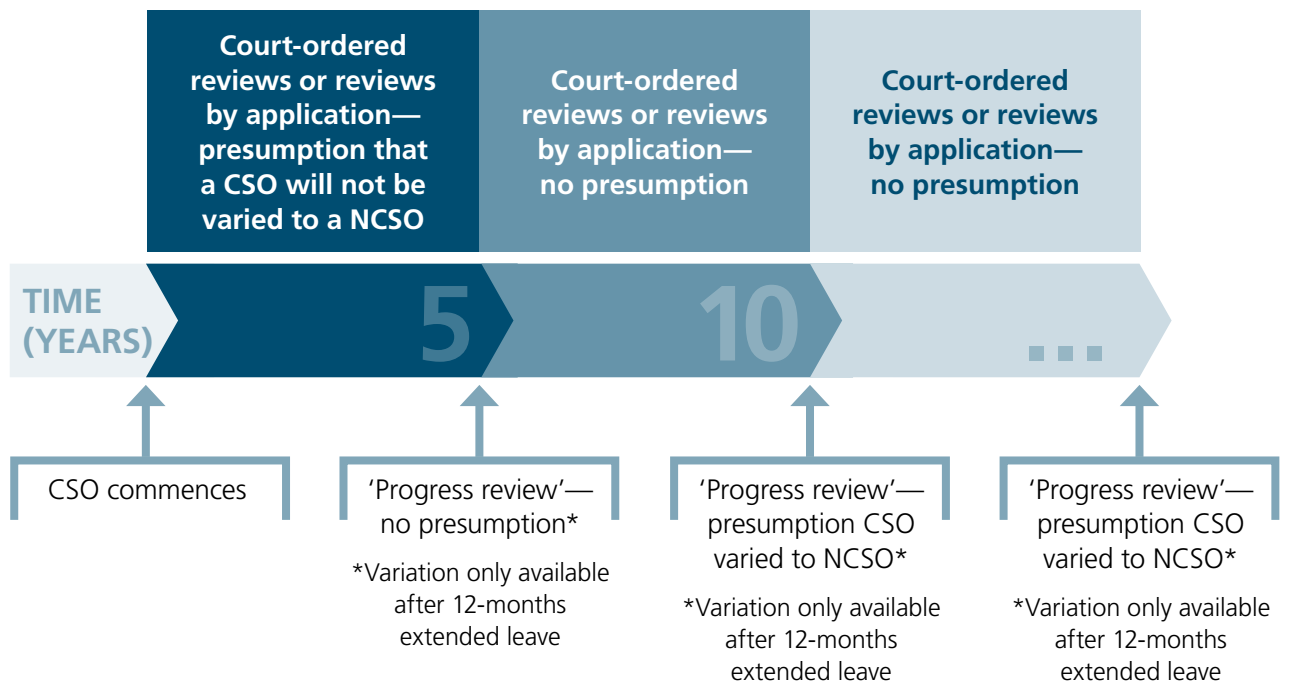


Figure 7: Pathway for a supervised person on a custodial supervision order

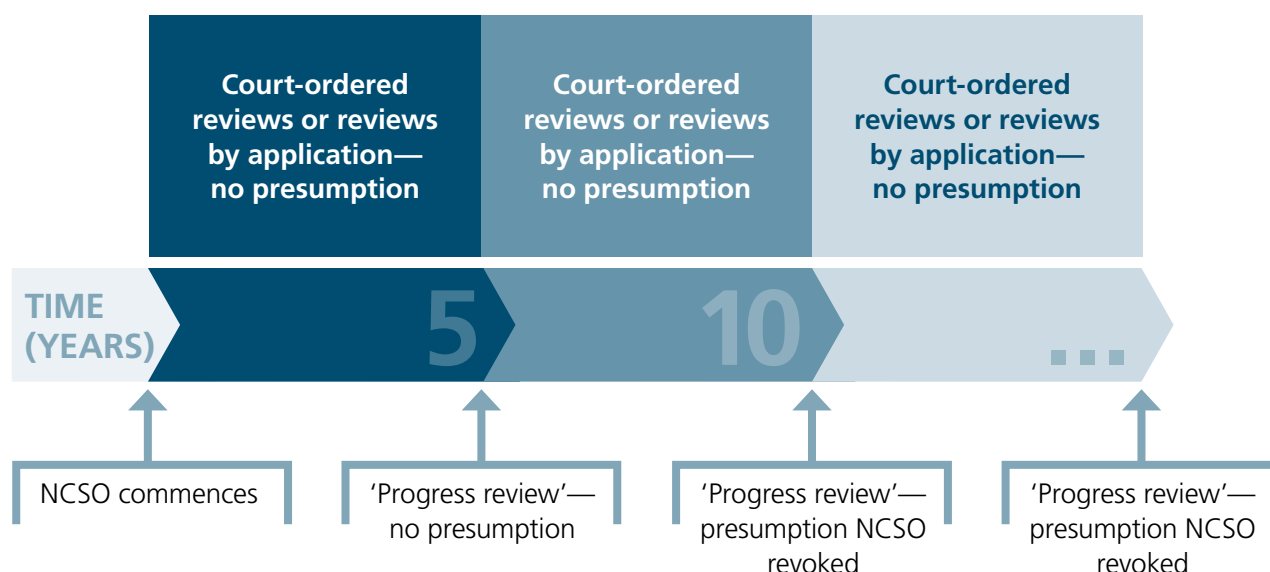


Figure 8: Pathway for a supervised person on a non-custodial supervision order

Frequency of reviews or further reviews

10.177 The CMIA provides judges with the flexibility to decide how often to review, or further review, a person's supervision order.¹⁶⁴ The CMIA only specifies the timing of the major review.¹⁶⁵ Some judges may conduct annual reviews, while others set shorter or longer periods. In the consultation paper, the Commission asked whether the CMIA should be more prescriptive in this area.

Views in submissions and consultations

10.178 There was some support for requiring the automatic review of supervision orders every two years, as proposed in Recommendation 431 of the Commission's *Guardianship* Final Report.¹⁶⁶

10.179 However, others noted that frequent reviews were not necessarily a good option. Frequent reviews can be stressful for patients and provide them with false hope when the outcome is likely to be a confirmation of the existing order.¹⁶⁷ Further, the potential outcome could be a source of anxiety to victims of the offences.¹⁶⁸ It is also very resource-intensive to hold reviews.¹⁶⁹

The Commission's conclusion

10.180 In the Commission's view, flexible reviews on application by the accused should be maintained. Having flexible provisions on the frequency of reviews allows judges to set the timing of reviews to best suit the individual case. The Commission considers flexible reviews provide a more individualised approach than automatic reviews. As the Victorian Equal Opportunity and Human Rights Commission noted, these reviews are important in light of the very different needs and requirements of the individuals subject to supervision under the CMIA.¹⁷⁰

¹⁶⁴ Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) ss 27(2), 32(5), 33(2).

¹⁶⁵ Ibid s 35(1).

¹⁶⁶ Submission 14 (Office of the Public Advocate).

¹⁶⁷ Submission 19 (Forensicare). Consultation 26 (Office of the Chief Psychiatrist and Legal Branch, Department of Health).

¹⁶⁸ Submission 8 (Office of Public Prosecutions).

¹⁶⁹ Submission 8 (Office of Public Prosecutions). Consultation 26 (Office of the Chief Psychiatrist and Legal Branch, Department of Health).

¹⁷⁰ Submission 10 (Victorian Equal Opportunity and Human Rights Commission).

- 10.181 The Commission considers that more frequent reviews, where there is no clear reason for the review, are not necessarily preferable. As suggested in submissions and consultations, review hearings can be traumatic and counter-therapeutic for the person subject to the supervision order, their family members and victims.
- 10.182 Further, reviews require substantial resources, including:
- court time
 - legal representation for each party involved
 - time to provide information to the court on the progress of the person subject to the supervision order, including the time it takes to prepare reports and give evidence in court.
- 10.183 The Commission's view is that the disadvantages of automatic reviews (in addition to the progress reviews in Recommendation 84) outweigh their benefits.
- 10.184 As Forensicare submitted, the court receives an annual report detailing the supervised person's treatment, prognosis and future treatment plan. Both the Office of Public Prosecutions and Forensicare also noted that applications to vary a supervision order or for extended leave can be made at any time.¹⁷¹ The Commission considers that these factors would ensure that the progress of supervised people receives adequate oversight while preserving the flexibility that the CMIA currently gives to courts in determining review periods.
- 10.185 Therefore, no other changes are recommended to the frequency of reviews or further reviews.

Factors that guide decision making in review, release and leave decisions

- 10.186 In this section the Commission makes recommendations to change or add to the factors that guide decision making in review, release and leave decisions by the court and the Forensic Leave Panel.
- 10.187 **Appendix G** contains versions of the relevant provisions if the Commission's recommendations were to be adopted.

Current principles and factors under the CMIA

- 10.188 The decision-making criteria in the CMIA attempt to strike a balance between the supervised person's freedom and the safety of the community. As McSherry has observed:
- The problem really lies in drawing up appropriate criteria which will lead to the detention of those who really may do harm in the future, whilst allowing for the absolute discharge of those who do not pose a risk to the public.¹⁷²
- 10.189 Section 39 of the CMIA requires that in making, varying or revoking a supervision order or granting or revoking extended leave, the court must apply the principle that 'restrictions on a person's freedom and personal autonomy should be kept to the minimum consistent with the safety of the community'.¹⁷³

171 Submissions 19 (Forensicare); 8 (Office of Public Prosecutions).
 172 McSherry, above n 19, 221.
 173 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 39.

- 10.190 Under section 40(1) of the CMIA, the court must have regard to whether the person is, or would if released be, *likely to endanger* themselves, another person, or other people generally because of their mental impairment. In other sections of the CMIA, for example in extended leave applications, the court may grant extended leave if it is satisfied that the safety of the forensic patient or forensic resident, or members of the public will not be *seriously endangered* as a result of the forensic patient or forensic resident's extended leave.¹⁷⁴ When the CMIA requires an assessment of whether the person is 'likely to endanger' themselves or another person, or whether their safety or safety of members of the public will be 'seriously endangered', the Commission refers to this as the 'endangerment test'.
- 10.191 In addition, under section 40 the court must have regard to:
- the nature of the person's mental impairment or other condition or disability
 - the relationship between the impairment, condition or disability and the offending conduct
 - the need to protect people from such danger
 - whether there are adequate resources available for the treatment and support of the person in the community
 - any other matters the court thinks relevant.¹⁷⁵
- 10.192 Reports play an important role in the court's decision making. The court must obtain and consider reports from a range of people involved in the supervision of the person. These include medical practitioners, psychologists and case managers involved in supervising the person. Victims of the offence and family members of the supervised person may also make a report to the court.¹⁷⁶
- 10.193 In this section, the Commission considers the factors that guide decision making in the review, release and leave framework with a focus on sections 39 and 40 of the CMIA. This includes decisions made by the courts and the Forensic Leave Panel. The Commission's recommendations aim to:
- ensure that decision-making factors operate justly and consistently with the principles that underlie the CMIA
 - support the gradual reintegration of supervised people into the community where they do not pose an unacceptable risk to the community
 - bring decision-making factors into line with modern risk assessment
 - ensure that in addition to judicial decisions, other decisions made in relation to supervised people are subject to the oversight of the CMIA.

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Ibid s 57(2).
Ibid s 40.
Ibid s 40(2)(d).

The endangerment test applied by decision makers

- 10.194 The CMIA decision-making framework permits the detention of a person based on their 'dangerousness' justified on the basis of community protection. A significant part of the decision to make, vary or revoke a supervision order or to grant extended leave hinges on the court's assessment of the dangerousness of the person subject to the supervision order. Other decision makers under the CMIA also rely on the endangerment test. These are detailed in **Appendix F** and include, for example:
- the authorised psychiatrist or Secretary to the Department of Human Services in granting applications for special leave
 - the Forensic Leave Panel in granting applications for on-ground leave or limited off-ground leave
 - the Chief Psychiatrist or the Secretary to the Department of Human Services in suspending a leave of absence
 - a member of the police force or an ambulance officer when exercising an emergency power of apprehension.
- 10.195 When making, varying or revoking an order, the court must consider whether the person is 'likely to endanger' themselves or other people if released.¹⁷⁷ As the Court of Appeal noted in *NOM v DPP ('NOM')*,¹⁷⁸ section 40(1) of the CMIA has a discretionary character with no particular factor being a decisive consideration.¹⁷⁹
- 10.196 In other decisions made under the CMIA, for example, in a major review of a custodial supervision order, the decision is based on whether the decision maker is satisfied that the safety of the person or other members of the public will or will not be 'seriously endangered'. As the Court of Appeal held in *NOM*, 'likely to endanger' is about the probability of a risk materialising unlike 'serious endangerment' which encompasses the gravity of the possible harm in the event that the risk eventuates.¹⁸⁰
- 10.197 In the consultation paper, the Commission asked whether the court should continue to consider the 'dangerousness' of the person subject to the supervision order.

Views in submissions and consultations

- 10.198 There was general support for a refinement of the test for endangerment. Forensicare, for example, submitted that the current test is 'open-ended and ambiguous, covering both criminal and non-criminal conduct'.¹⁸¹
- 10.199 Submissions identified the need to clarify the threshold of endangerment that applies in the CMIA.¹⁸²
- 10.200 There was also support for clarifying the meaning of 'endangerment' and ensuring that the likelihood of endangerment is couched in terms of serious or significant risk to justify ongoing preventative detention.¹⁸³ The Criminal Bar Association observed:

In some cases, our members have had to submit, sometimes strenuously, that some risk to the safety of the community is acceptable. ... This distinction should be made clear in the Act.

177 Ibid s 40(1)(c).

178 [2012] VSCA 198 (24 August 2012).

179 Ibid [47], [49].

180 Ibid [57], [64].

181 Submission 19 (Forensicare).

182 Submissions 6 (Associate Professor Andrew Carroll); 19 (Forensicare).

183 Submissions 18 (Victoria Legal Aid); 21 (Criminal Bar Association); 19 (Forensicare); 6 (Associate Professor Andrew Carroll).

- 10.201 The Criminal Bar Association noted that ‘unacceptable risk’ is a term that is being increasingly used in Victoria.¹⁸⁴
- 10.202 Some participants at the Commission’s roundtable on the higher courts were of the view that the gravity of the harm in the test should be more clearly expressed in terms of serious harm. For example, a person should not be indefinitely detained if they are at risk of committing minor thefts. However, it was noted that where a person was a repeat offender it may be important to protect the community from these less serious crimes. Participants at the roundtable also suggested that the different references to ‘endangerment’ throughout the CMIA should be clarified.¹⁸⁵

The Commission’s conclusion

- 10.203 The use of ‘likely to endanger’ in some parts of the CMIA and ‘seriously endanger’ in other parts implies that different thresholds trigger the intervention of decision makers at different stages of the process. In the Commission’s view there is no reason for a different threshold to apply depending on the decision maker or the decision being made.
- 10.204 The Commission considers that in each decision, whether it is a grant of special leave, or in exercising the emergency power of apprehension, the common issue for the decision maker concerns the risk the supervised person poses to the community and the level of supervision that should correspond to that risk. Whether the decision involves increasing the level of supervision or decreasing it, the level of risk consistent with the safety of the community is the same. Therefore the question for the decision maker on the level of supervision necessary to keep the risk at that acceptable level should also be the same. The Commission recommends that the threshold for the ‘danger’ or risk the supervised person poses should be the same throughout the CMIA. This will also address any confusion caused because of the differing thresholds and provide greater clarity in the law.
- 10.205 The Commission also agrees that the endangerment test needs to be changed so that there is more clarity on the degree of risk and the gravity of the harm it encompasses. Assessing ‘dangerousness’ is currently open to much subjective interpretation and the interpretation of the term ‘serious endangerment’ has been ‘somewhat elastic’.¹⁸⁶
- 10.206 The Commission therefore recommends that the CMIA moves away from the endangerment test and instead relies on a test that is based on an ‘unacceptable risk of physical or psychological harm’.

Unacceptable risk

- 10.207 The Commission considers that an ‘unacceptable risk’ is an appropriate measure of the likelihood of the risk the supervised person may pose. First, an unacceptable risk indicates that there is some level of risk that will be acceptable and will counteract any assumption that a person must prove that they pose no risk before their level of supervision can be reduced.¹⁸⁷ In relation to a refusal of bail, for example, which relies on a similar measure of risk, it is not enough that there is ‘a tenuous suspicion or fear of the worst possibility if the offender is released’.¹⁸⁸ This recognises the difficulty in demonstrating that a supervised person will not pose a risk at all following a change in the level of supervision.¹⁸⁹ As Freckelton observes, having to satisfy a ‘negative’ or prove that something will not happen, is difficult.¹⁹⁰

184 Submission 21 (Criminal Bar Association).
185 Consultation 43 (Higher courts roundtable).

186 Freckelton, above n 18, 89.

187 *Nigro v Secretary to the Department of Justice* [2013] VSCA 213 (16 August 2013) [113].

188 *Haidy v DPP* [2004] VSC 247 (22 April 2004) [15]. The *Bail Act 1977* (Vic) allows people to be released on bail unless the prosecution satisfies the court that the accused is an ‘unacceptable risk’ who would fail to appear in court, commit an offence while on bail, endanger the safety or welfare of members of the public or interfere with witnesses or otherwise obstruct the court of justice.

189 See, eg, Submission 3 (Gunvant Patel) and consultation 18 (Goulburn Valley Area Mental Health Service).
190 Freckelton, above n 9, 383.

- 10.208 Second, a test based on unacceptable risk recognises that assessing risk requires a level of subjective judgment by the decision maker on the level of risk that society is prepared to accept when balanced against the supervised person's right to liberty and freedom. As the Sentencing Advisory Council observed in its final report on *High-Risk Offenders: Post-Sentence Supervision and Detention*, in addition to expert evidence, it involves a social judgment about what risks are acceptable and what responses to risks are appropriate.¹⁹¹ The Sentencing Advisory Council referred to the case of *Attorney-General (Qld) v Sutherland*¹⁹² where the Queensland Supreme Court observed:

the assessment of what level of risk is unacceptable, or alternatively put, what order is necessary to ensure adequate protection of the community, is not a matter for psychiatric opinion. It is a matter for judicial determination, requiring a value judgment as to what risk should be accepted against the serious alternative of deprivation of a person's liberty.¹⁹³

- 10.209 In the context of bail decisions and the post-sentence detention of sex offenders, courts have avoided tying 'unacceptable risk' to a particular likelihood of risk, for example, a risk that is 'more likely than not' or 'more probable than not'.¹⁹⁴ The Commission considers that tying the level of risk to a particular level or probability is unhelpful and difficult to apply in practice. Further, the Commission considers that a supervised person's risk should be considered in an individualised and holistic manner, for example, having regard to the measures in place to manage their risk. By being less prescriptive, a test based on an 'unacceptable risk' provides the flexibility to consider whether there is a sufficient likelihood of the occurrence of the risk which, having regard to all relevant circumstances, makes it unacceptable.¹⁹⁵
- 10.210 Third, while it incorporates some level of social judgment, a test based on an unacceptable risk is more in line with modern risk assessment than a test based on dangerousness. As observed by Ogloff and Davis:

There have been many conceptual and scientific developments in the field of violence risk assessment in the past decade. Once thought of as 'predicting dangerousness' and requiring clinicians to make dichotomous predictions of 'dangerous behaviour' at some future point, contemporary risk assessment is more likely to recognise that prevention and management of risk for violence are primary. Rather than being seen as a stable characteristic, the move from predicting 'dangerousness' to predicting risk for violence has seen the emergence of risk approaches and instruments that incorporate both static and dynamic variable.¹⁹⁶

- 10.211 The Commission considers that the recommended test will encourage decision makers to engage in more nuanced assessments of a supervised person's risk, rather than a 'black and white' assessment of whether a person is 'dangerous' or 'not dangerous'. In *MacBain v Director of Public Prosecutions*,¹⁹⁷ for example, the court held that risks could be reduced to an acceptable level with the imposition of particular bail conditions. Participants at the Commission's roundtable on the CMIA and the higher courts noted the importance of considering how any risk the supervised person poses to the community is moderated by the particular conditions that would be attached to the supervision order and any other protective factors that would be in place.

¹⁹¹ Sentencing Advisory Council, *High-Risk Offenders: Post-Sentence Supervision and Detention*, Final Report (2007) 158.

¹⁹² [2006] QSC 268 (27 September 2006).

¹⁹³ Ibid [30].

¹⁹⁴ *Nigro v Secretary to the Department of Justice* [2013] VSCA 213 (16 August 2013) [116]; *Haidy v DPP* [2004] VSC 247 (22 April 2004) [16]. Under section 9 of the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic), the court may make a supervision order in respect of an eligible offender only if the court is satisfied that the offender poses an 'unacceptable risk' of committing a relevant offence if a supervision order is not made and the offender is in the community.

¹⁹⁵ *Haidy v DPP* [2004] VSC 247 (22 April 2004) [14]–[16], [18].

¹⁹⁶ James R P Ogloff and Michael R Davis, 'Assessing Risk for Violence in the Australian Context' in D Chappell and P Wilson (eds), *Crime and Justice in the New Millennium* (Lexis Nexis, 2005) 294, 320.

¹⁹⁷ [2002] VSC 321 (9 August 2002) [17].

Type of harm

- 10.212 In relation to the type of harm, the Commission recommends a test based on physical or psychological harm. The CMIA currently does not define what ‘endangerment’ means, for example, whether it requires the endangerment to be physical or psychological, or whether it requires the risk that a violent offence will be committed (as opposed to a non-violent offence). The Commission considers that specifying the type of harm in the test will provide more clarity for decisions makers and experts when applying the test. The *Bail Act 1977* (Vic), for example, that relies on the test of ‘unacceptable risk’, allows the court to consider whether the person would commit an offence while on bail.¹⁹⁸ The *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) provides that the court may make a supervision order if satisfied that the eligible offender poses an unacceptable risk of committing a relevant offence.¹⁹⁹
- 10.213 In the Commission’s view, ‘physical or psychological harm’ is the type of harm that justifies the preventive detention of people found not guilty because of mental impairment or found to have committed the offence charged following a finding of unfitness to stand trial. The Commission considers that conduct that does not cause physical or psychological harm to a person, such as relatively minor theft, does not warrant the continued detention of the person to the level required under the CMIA. The Commission also considers that this type of harm would be suitable for application in the summary jurisdiction where lower level offending such as driving offences may pose an unacceptable risk of physical or psychological harm.
- 10.214 Case law indicates that ‘unacceptable risk’ already includes an assessment of the gravity of the harm that may eventuate. The Commission does not recommend defining the gravity of the harm with greater precision, for example, in terms of serious physical or psychological harm. The ‘unacceptable risk’ test already implicitly considers the level of harm that would be ‘unacceptable’.
- 10.215 On a broader level, the Commission considers that a test based on an ‘unacceptable risk of physical or psychological harm’ is more consistent with the principles underlying the CMIA, and in particular, ensuring that supervision continues only for so long as it is necessary to address the level of risk that is considered to be unacceptable.

Recommendation

- 87 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to require:
- (a) When making decisions, the relevant decision maker to:
 - (i) for section 40(1)(c), consider whether the person would pose an unacceptable risk of causing physical or psychological harm to another person or other people generally because of his or her mental impairment
 - (ii) for sections 50(3)(b), 54(2)(b), 54(3)(b), 57(2) and Schedule 3 clause 4, be satisfied that the person would not pose an unacceptable risk of causing physical or psychological harm to another person or other people generally
 - (iii) for sections 55(1), 58(1), 58(4)(a) and 73F(5) be satisfied that the person would pose an unacceptable risk of causing physical or psychological harm to another person or other people generally, and
 - (iv) for section 30(1)(b), have a reasonable belief that the person would pose an unacceptable risk of causing physical or psychological harm to another person or other people generally.
 - (b) The court under section 40(1)(d) to consider the need to protect people from such risk.

Relevant factors in the decision to unconditionally release or declare a person liable to supervision

- 10.216 Under the CMIA, following a finding that the accused committed the offence charged (after being found unfit to stand trial) or a finding of not guilty because of mental impairment, the court may declare the person liable to supervision or unconditionally release them. The court must consider matters prior to making this decision, such as a report on the person's mental condition. These are discussed in further detail in Chapter 9.
- 10.217 However, the court is not required to consider the risk the person poses to the community when making this decision. In the Commission's view the decision to unconditionally release a person into the community should involve a consideration of their risk, consistent with the principle of community safety that runs through the CMIA. Further, as Forensicare highlighted in its submission, once a person is made liable to supervision, the option of unconditional release is no longer available.²⁰⁰ Consistent with the principle of least restriction, a person should be given the earliest opportunity for release where they do not pose an unacceptable risk to the community. The Commission therefore recommends that this factor should be considered in the decision to declare a person liable to supervision, in addition to the decisions following the declaration.²⁰¹

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Submission 19 (Forensicare).
In Chapter 9, the Commission has recommended changes to the CMIA to improve the way information is provided to the court prior to a declaration of liability for supervision or an order for unconditional release.

- 10.218 Section 40(2) of the CMIA (which contains a presumption against unconditional release) and this recommendation should not apply to the Children’s Court where the Commission has recommended a presumption in favour of unconditional release (Recommendation 48(b)).

Recommendation

- 88** The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to require that, in deciding whether to declare the person liable to supervision or to unconditionally release the person, the court is to have regard to whether the person poses an unacceptable risk of causing physical or psychological harm to another person or other people generally.

Role of the offence in the assessment of risk

- 10.219 The seriousness of the offence against which a finding is made is not included in the matters that the court is required to take into account. However, the court is required to consider the relationship between the impairment, condition or disability and the offending conduct.²⁰²
- 10.220 In the consultation paper, the Commission observed that relying on matters that are traditionally sentencing principles (for example, the principle of proportionality reflected in the consideration of ‘seriousness of the offence’) may inadvertently import a punitive element to decision making and constrain the ability of the court to make a true assessment of future risk.²⁰³ The Commission sought views on the appropriate role of the seriousness of the offence in the making, varying and revocation of orders and applications of leave.

Views in submissions and consultations

- 10.221 Submissions that addressed this issue and people consulted viewed the seriousness of the offence as relevant in assessing risk.²⁰⁴ The Criminal Bar Association said that it was appropriate that the CMIA contemplates the offence (and therefore its seriousness) and its connection to the accused’s mental condition.²⁰⁵

The Commission’s conclusion

- 10.222 The Commission agrees with the views expressed in the majority of submissions and consultations on this issue. As noted by Carroll, Lyall and Forrester:

Given that past behaviour is the single best predictor of future behaviour, it is actually understandable and appropriate that the index offence exerts an influence on risk management decisions. The challenge for clinicians is to ensure that this does not occur in a facile manner, whereby, for example, certain sorts of offence necessarily result in certain lengths of detention [citation omitted].²⁰⁶

²⁰² *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 40.

²⁰³ New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Consultation Paper No 6 (2010) 147.

²⁰⁴ See, eg, submissions 8 (Office of Public Prosecutions); 21 (Criminal Bar Association). Consultation 43 (Higher courts roundtable).

²⁰⁵ Submission 21 (Criminal Bar Association).

²⁰⁶ Andrew Carroll, Mark Lyall and Andrew Forrester, ‘Clinical Hopes and Public Fears in Forensic Mental Health’ (2004) 15(3) *Journal of Forensic Psychiatry and Psychology* 407, 412.

- 10.223 A 2010 study of people found not guilty because of mental impairment in Victoria found that the seriousness of the offence tends to be a recurring consideration when courts make and review supervision orders under the CMIA. The study suggested that offence seriousness 'remains at the forefront of the risk assessment process', especially when courts are making the initial order.²⁰⁷ The study analysed the detention times of 146 participants who had been found not guilty because of mental impairment and found that shorter periods of detention were associated with less serious offences. For example, participants who had been found not guilty of murder because of mental impairment had an average total time under supervision of 12.81 years, compared with 6.87 years for rape and sexual assault offences and 2.27 years for property offences, such as robbery, theft and fraud.²⁰⁸
- 10.224 Using more complex regression analysis of the detention times according to the offence, the study concluded that while the seriousness of the offence appeared to be at the forefront of the risk assessment process at the dispositional stage, later decision-making stages appeared to be informed by a 'more comprehensive examination of dangerousness which takes account of a range of risk factors peculiar to each individual'.²⁰⁹ The study therefore concluded that courts in this jurisdiction are not using an 'informal tariff based on the seriousness of the ... offence to determine the length of detention' of people found not guilty because of mental impairment following the making of a supervision order.²¹⁰
- 10.225 This supports the proposition that even though the seriousness of the offence plays a role in the risk assessment that may be conducted in decision making, courts are not importing a punitive element into their decisions, which is consistent with the rationale behind the CMIA.
- 10.226 The Commission therefore does not recommend any change to the role of the offence in decisions concerning supervised people.

Relevance of 'risk to self' in the risk assessment

- 10.227 The CMIA currently requires courts and decision makers to consider the likelihood of the supervised person endangering themselves, in addition to the likelihood of the person endangering other people. In the consultation paper the Commission asked for views on whether the court should continue to consider the likelihood of the person endangering themselves.

Views in submissions and consultations

- 10.228 There was nearly unanimous support from those who addressed the issue for removing the requirement that the court consider the supervised person's risk to themselves.²¹¹ It was thought that this risk could be addressed through other mechanisms such as the civil mental health and disability systems and that a consideration of a person's 'risk to self' should not be a factor in reviewing orders. The Criminal Bar Association submitted that the factor should be given less weight, but not necessarily disregarded entirely.²¹²
- 10.229 Participants at the Commission's roundtable on the higher courts also supported removing this requirement. One participant provided an example of a person with an intellectual disability who was held on a CMIA order so that he would not run out on the road and hurt himself.²¹³

207 Ruffles, above n 10, iii.

208 Ibid 136.

209 Ibid 159.

210 Ibid iii.

211 For: submissions 18 (Victoria Legal Aid); 19 (Forensicare); 6 (Associate Professor Andrew Carroll); 11 (Jamie Walvisch). Against: Submission 13 (Australian Community Support Organisation Inc.).

212 Submission 21 (Criminal Bar Association).

213 Consultation 43 (Higher courts roundtable).

The Commission's conclusion

- 10.230 The views expressed in submissions and consultations were based on practices under the *Mental Health Act 1986* (Vic) ('MHA 1986'). The Commission's conclusions have drawn on this, as well as the provisions of the *Mental Health Act 2014* (Vic) ('MHA 2014'), which replaced the MHA 1986 on 1 July 2014.
- 10.231 The Commission agrees with the majority view in submissions and consultations on this issue. As the New South Wales Law Reform Commission noted:
- an argument can be made that it is inappropriate to use the coercive apparatus of the criminal justice system (and the associated forensic mental health system) solely for the purpose of preventing an offender, who has not been convicted of a crime, from harming him or herself. This is particularly so in light of the detailed civil legislative and administrative arrangements that exist to care, support and supervise people in the general community ...²¹⁴
- 10.232 The main justification for preventive detention, and the imposition of a CMIA order more specifically, is for the protection of the community. In the Commission's view, where the person does not pose an unacceptable risk to the community, the justification for CMIA intervention ceases to exist. If a person is at risk of harming themselves, and not other people in the community, this risk may be more properly managed within the civil system instead of the CMIA. Compulsory orders under the MHA 2014²¹⁵ operate within a different framework to CMIA orders, although they also aim to prevent harm to others, as well as harm caused to the person who is subject to the order. For example, the MHA 1986 provided that a person may be involuntarily treated if 'necessary for his or her health or safety' or 'for the protection of members of the public'.²¹⁶ Orders for compulsory treatment under the MHA 2014 have equal regard to the risk posed to others and the risk posed to themselves, as well as separately considering the need to prevent serious deterioration in the person's mental health and the need to use the least restrictive treatment.²¹⁷ If the only risk posed by a person who has become subject to the CMIA is to themselves, the Commission's view is that supervision should not be provided by the CMIA but via less restrictive options under the civil mental health and disability regimes.
- 10.233 The Commission's recommendations in Chapter 2 are designed to increase the linkages between the criminal system and civil mental health and disability systems.
- 10.234 The Commission also notes that in addition to the civil system, a person's risk to themselves could be managed within the clinical relationship with their treating team, and as part of the requirement in the CMIA that the court have regard to the person's mental impairment or other condition or disability.²¹⁸
- 10.235 The Commission considers that this approach, consistent with the principle of least restriction, ensures that supervision under the CMIA occurs only if it is necessary to address a person's risk to the community and continues only for so long as it is necessary to achieve this aim.

²¹⁴ New South Wales Law Reform Commission, above n 203, 159.

²¹⁵ The *Mental Health Act 2014* (Vic) replaced the *Mental Health Act 1986* (Vic) on 1 July 2014: see Chapter 1 n 14.

²¹⁶ *Mental Health Act 1986* (Vic) s 8(1)(c).

²¹⁷ For example, when determining whether to make, vary or revoke a treatment order under Division 4 of Part 4 of the *Mental Health Act 2014* (Vic), regard must be had to the 'treatment criteria' set out in section 5, including the criterion in section 5(b)(ii), which provides that the decision maker must have regard to 'serious harm to the person or to another person'.

²¹⁸ *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 40(1)(a).

Recommendation

- 89 References to the danger the person poses to themselves or the person's safety in sections 40(1)(c), 54(2)(b), 54(3)(b), 55(1), 57(2), 58(1), 58(4)(a), 30(1)(b), 73F(5) and Schedule 3 clause 4 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be removed.

Scope of the risk assessment in relation to the mental condition and behaviour

- 10.236 Sections 40(1)(a) and (b) of the CMIA require a court to have regard to the nature of the person's mental impairment or other condition or disability and its relationship to the offending conduct. Section 40(1)(c) requires a court to make an assessment of the likelihood of the danger that the person poses because of their mental impairment (or other condition or disability).

Views in submissions and consultations

- 10.237 In submissions and during consultations, concerns were raised regarding the scope of this risk assessment with regard to factors other than the underlying mental condition.
- 10.238 In particular, a problem was raised about how this risk assessment operated in practice for people subject to non-custodial supervision orders who may have co-occurring problematic behaviours such as alcohol or drug abuse or personality issues (in addition to a mental condition). Although such people may have stabilised for some period of time in relation to their mental condition, their ongoing behavioural issues (which in some cases may not be directly connected to the mental condition which gave rise to the supervision order) make them more likely to breach the conditions of their order and therefore render them more susceptible to variations to more restrictive orders.
- 10.239 In this way, the difficulties or inability to comply with the conditions on a non-custodial supervision order (such as not consuming drugs or alcohol) can operate as a barrier to progressing through the stages of supervision. In some cases, it may lead to a regression in the stages of supervision; for example, non-compliance may lead to a variation of a non-custodial supervision order to a custodial supervision order.
- 10.240 The particular way in which the CMIA operated for this group was described by Dr Grant Lester in a presentation at a seminar at Forensicare as 'the sting in the tail' of the non-custodial supervision order.²¹⁹ A submission to the Commission described this group of people as being susceptible to periods of extended detention 'verging on preventative detention'.²²⁰
- 10.241 Stakeholders suggested that the risk assessment conducted as part of section 40(1) should be specifically referable to the link between a person's mental condition (such as a mental illness) and the original offending behaviour,²²¹ rather than their risk of engaging in particular behaviour that may constitute a breach of a condition but not meet the standard required under section 40(1)(c) of endangering the community.

219 Grant Lester, 'A non Custodial Supervision Order. Client beware; it has a Sting in its Tail' (Speech delivered at the Clinical and Legal Perspectives on Mental Disorder in Criminal Law: a targeted workshop for lawyers and health professionals, Thomas Embling Hospital, Yarra Bend Road Fairfield, 13 August 2013).

220 Submission 1 (Associate Professor Ruth Vine).

221 Submissions 21 (Criminal Bar Association); 1 (Associate Professor Ruth Vine).

- 10.242 This issue was the subject of discussion at the Commission’s roundtable on the higher courts. Concerns were noted by some participants around the disproportionate consequences for people in this group when there are factors present (which may not have been factors at the time of the offence) that result in a non-custodial supervision order being varied to a custodial supervision order. It was noted that the person can then face a very long period of custodial supervision and ‘limitation on their rights’.²²²
- 10.243 Concerns were also noted from a human rights perspective. If a person poses a risk for reasons other than their mental illness, then the justification for treating them differently and subjecting them to detention no longer exists. Reference was made to the requirements under a human rights approach for there to be ‘a nexus between the impairment and the risk they pose for special treatment to be justified’.²²³
- 10.244 However, other participants expressed reservations about whether other factors, such as drug or alcohol use or personality disorders, could be disentangled from the mental condition that underpinned the original offence. One participant stressed that under the therapeutic approach inherent in the CMIA, it is ‘difficult to split a person’s problems up’. The participant said:
- There is some relationship between drug-taking and illness, trying to break a person down and treat one part as relevant to how the offence occurred is not treating the person as a whole person. We should be trying to assist and bring a therapeutic outcome to the whole person.²²⁴
- 10.245 Other participants agreed that it could be difficult to discern between offending behaviour or risk that was caused by a mental condition or some other factor. Participants also noted the relationship between drugs or alcohol use and mental illness.²²⁵ This point was also made by another stakeholder consulted by the Commission who noted that controls on drug and alcohol use were there to ensure the continued management and stability of the mental condition.²²⁶
- 10.246 One submission pointed out that introducing a requirement to link risk to the mental condition that led to the supervision order could lead to a small number of high-risk individuals being released from supervision or continuing to reside in the community.²²⁷

The Commission’s conclusion

- 10.247 The Commission notes the concerns regarding the scope of the risk assessment and how the inclusion of factors other than the underlying mental condition can have adverse results for a particular group of people subject to the CMIA.
- 10.248 However, the Commission also notes that the relationships between co-morbid factors, such as drug and alcohol use, personality and behavioural issues are complex and can be difficult to disentangle. An amendment to the CMIA that introduces a requirement to do so could require unrealistic decisions being made about the risk that some people pose.
- 10.249 On balance, the Commission does not propose that the legislation attempt to limit the risk assessment solely to the mental condition underlying further offending behaviour or breaches of non-custodial supervision orders.

222 Consultation 43 (Higher courts roundtable).

223 Ibid.

224 Ibid.

225 Ibid.

226 Consultation 26 (Office of the Chief Psychiatrist and Legal Branch, Department of Health).

227 Submission 6 (Associate Professor Andrew Carroll).

- 10.250 The Commission considers that some of the problems relating to this group can be more appropriately addressed by increasing the flexibility of the CMIA processes that occur when a non-custodial supervision order is breached. The Commission makes recommendations to this effect in Chapter 11.

Additional factors to guide decision making

- 10.251 Aside from the matters in section 40 of the CMIA and the likelihood of danger, decisions in CMIA matters provide further insight into the other factors that play a role in the court's decision making. These include:

- *The nature of the person's mental impairment*—While this is one of the matters section 40 includes, courts also consider related issues such as the person's responsiveness to treatment,²²⁸ control of any ongoing symptoms²²⁹ and the person's compliance with medical treatment.²³⁰
- *The person's insight*—The CMIA does not require the court to consider insight, however, courts often look into the level of insight the person has into their mental illness and into the circumstances of the offence.²³¹
- *The ability to monitor any re-emergence of symptoms*²³²—Courts have considered, for example, the ability of the treating team to apprehend the person or suspend leave if necessary.²³³
- *The views of psychiatrists*—The opinions of the supervising clinicians which they present through their reports and by giving evidence in court are influential in the court's decision making.²³⁴
- *A previous downgrading of supervision*—Courts consider, for example, development of rapport with treating team,²³⁵ tendency to use drugs and alcohol,²³⁶ and the willingness of the person to self-report to their area mental health service if they relapse.²³⁷
- *The likelihood of adequate care in the civil mental health system*²³⁸—Courts have also considered whether the person could be detained under the MHA 1986²³⁹ when deciding whether to vary an order.²⁴⁰

- 10.252 In the consultation paper, the Commission sought feedback on whether the CMIA should provide more guidance to the courts on the factors relevant to making, varying and revoking supervision orders and applications for leave.

228 See, eg, *Re PEL* [1999] VSC 532R (13 December 1999) [19] (Ashley J).

229 *Re NR* [2004] VSC 2R (16 January 2004).

230 *Re EKW* (No 2) [2001] VSC 122R (23 April 2001).

231 Freckelton, above n 9, 392. See also *Re PSG* [2005] VSC 325R (19 August 2005) [13] (Kaye J).

232 Freckelton, above n 18, 94.

233 *Re TEK* [2003] VSC 132R (6 May 2003) [58].

234 *Re GM* [2000] VSC 338R (29 August 2000) [67].

235 *Re TLB* (No 2) [2003] VSC 204R (11 June 2003).

236 Ibid.

237 *Re TDD* [2003] VSC 504R (12 November 2003) [50].

238 Freckelton, above n 9, 395.

239 The *Mental Health Act 1986* (Vic) was the relevant legislation in operation at the time of these decisions. As at 1 July 2014, the *Mental Health Act 1986* (Vic) will be replaced by the *Mental Health Act 2014* (Vic).

240 See, eg, *Re EKW* [1998] VSC 176R (8 December 1998); *Re TDD* [2004] VSC 504R (12 November 2003).

Links between the CMIA and the civil mental health and disability system

- 10.253 An issue that arose in submissions and consultations concerned the interaction between the CMIA system of supervision and the civil system, in particular:
- whether there should be a greater focus on transitioning supervised people under the CMIA to civil orders under the MHA 1986²⁴¹ or the *Disability Act 2006* (Vic), or
 - whether powers should be introduced to enable criminal courts to actively transition supervised people under the CMIA to such orders or make such orders.

Views in submissions and consultations

- 10.254 Those who did not support a greater emphasis on transitioning supervised people to the civil system expressed the following views:
- If a person still requires supervision, they should remain under the CMIA system.²⁴²
 - In practice, there is already a transition to the civil system for people with a mental illness subject to a non-custodial supervision order. Their day-to-day care lies with the area mental health service and not with the forensic system.²⁴³
 - There is already sufficient flexibility in the system for a person to be placed on a civil order when their non-custodial supervision order is revoked, even though there is no formal continuum between the CMIA system and the civil system.²⁴⁴
- 10.255 Other stakeholders were of the view that the civil system should have a greater interaction with the CMIA regime. They suggested, for example, that the court should consider whether it is appropriate for the person to receive or continue to receive treatment or support under the MHA 1986²⁴⁵ or the Disability Act when making and reviewing a supervision order.²⁴⁶ The following views were expressed:
- Civil involuntary treatment orders²⁴⁷ provide a less restrictive but equally effective alternative.²⁴⁸
 - Civil orders are more cost-efficient, as CMIA supervision orders are more expensive to monitor.²⁴⁹
- 10.256 Victoria Legal Aid suggested that the CMIA provide the court with the power to investigate suitable civil orders and that there be a requirement that courts consider less restrictive options before making a supervision order.²⁵⁰ It provided the Commission with a case study to demonstrate an effective way of relying on the civil system for people who would otherwise be supervised under the CMIA (a modified version is presented):

Case study: Ali

Ali has a low to moderate intellectual disability. Three years ago, Ali engaged in behaviour with a potentially sexual motive with children on two separate occasions. ... police charged Ali with child stealing and attempting to procure an indecent act with the children.

After the incidents occurred but before he was charged by police, Ali's disability service provider developed a Behaviour Support Plan for him, in consultation with the Office of Senior Practitioner. This included various behaviour support strategies and restrictive interventions, including supervision at all times in the community.

241 Since these views were expressed, the *Mental Health Act 2014* (Vic) has replaced the *Mental Health Act 1986* (Vic): see Chapter 1 n 14.
242 Consultation 24 (County Court of Victoria—judges).
243 Consultation 26 (Office of the Chief Psychiatrist and Legal Branch, Department of Health).
244 Ibid.
245 Since these views were expressed, the *Mental Health Act 2014* (Vic) has replaced the *Mental Health Act 1986* (Vic): see Chapter 1 n 14.
246 Submission 18 (Victoria Legal Aid).
247 Since these views were expressed, the *Mental Health Act 2014* (Vic) has replaced the *Mental Health Act 1986* (Vic): see Chapter 1 n 14.
248 Submission 18 (Victoria Legal Aid).
249 Ibid.
250 Ibid.

Ali was assessed as being unfit to be tried. Application was made on behalf of Ali to have the charges withdrawn ... It was also submitted that [a non-custodial supervision order] (the most likely order a court could have made) would not have provided any greater supports or risk reduction, and was unnecessarily burdensome in the circumstances – on both Ali and state resources. ... prosecutors ... agreed to withdraw the charges on the basis that the Behaviour Support Plan was sufficient to manage any future risk.²⁵¹

- 10.257 Some participants in the Commission's roundtable on the higher courts viewed the civil system as the first point of call in decisions about the supervision a person should receive.²⁵²
- 10.258 However, other participants noted the importance of recognising the differences in the operation of the civil mental health system, where detention times average 11 days in an acute unit. These participants were of the view that the civil system is not set up to detain people for the period that most people under the CMIA would need clinically. Further, they noted that many people who require supervision under the CMIA would not meet the criteria for involuntary treatment under the civil statutes.²⁵³

The Commission's conclusion

- 10.259 In the Commission's view, CMIA supervision orders should operate in a complementary manner with orders under the civil mental health or disability systems. The imposition of these orders is not mutually exclusive, and the current practice of imposing these orders separately or collectively on people subject to the CMIA, should be recognised in the legislation. As Justice Eames noted in *Re Authorised Psychiatrist v TKM*²⁵⁴ when considering the appropriateness of orders under the MHA 1986²⁵⁵ to address a deterioration of mental health of a supervised person subject to a non-custodial supervision order:

The two legislative enactments do not operate in competition, nor, applied sensibly, should their joint application cause any confusion or inconsistency. In fact, this case demonstrates that intelligent use of support mechanisms (both for the patient and the safety of the community) which are provided under both Acts ensures that the public safety and the welfare of the patient can be ensured whilst at the same time ensuring the proper review mechanisms which are in place under one or other of the Acts (involving either the Mental Health Review Board or the Court, under the respective Acts) will operate so as to ensure that the rights of the patient are not abused.²⁵⁶

- 10.260 The Commission recognises that there are limitations to the civil system and that these limitations mean that civil orders will not be suitable for people subject to the CMIA in every case (for example, average detention periods are more limited in the civil system and people subject to the CMIA may not meet the civil criteria for involuntary treatment). Further, people subject to the CMIA who are supervised by the Department of Human Services, may not meet the eligibility criteria for facilities as part of compulsory orders under the Disability Act.
- 10.261 However, where orders under the civil system can effectively address the risk a supervised person poses to the community, these orders should be considered and even preferred over CMIA supervision orders. This is consistent with the principle of least restriction. As demonstrated by Victoria Legal Aid's case study, the civil system can provide a less restrictive alternative than the CMIA that is still consistent with the safety of the public.

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Ibid.
Consultation 43 (Higher courts roundtable).
Ibid.
[2001] VSC 26R (2 February 2001).
Since this decision, the *Mental Health Act 2014* (Vic) has replaced the *Mental Health Act 1986* (Vic): see Chapter 1 n 14.
[2001] VSC 26R (2 February 2001) [20].

- 10.262 The Commission is not of the view that civil orders should be imposed directly by the courts when making, varying or revoking a supervision order. However, courts should consider whether the person is receiving treatment or services under a less restrictive order in the civil mental health or disability system. Considering less restrictive civil treatment and services already in place may negate the need for an imposition of a CMIA order or the continuance of a CMIA order and may facilitate the progress of the person through the system in these cases.
- 10.263 The Commission acknowledges that there is already a transition to the civil system for supervised people with a mental illness in practice, and there is existing flexibility in the system for supervised people to transition to civil orders. Further, the availability of support in the civil system appears to be a factor that courts consider when varying supervision orders.²⁵⁷ In the Commission's view, however, expressly providing for the consideration of civil orders in the CMIA will ensure that courts have regard to this factor in a more consistent manner.

Recommendation

- 90 Section 40(1) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to require that, for the purpose of considering whether a less restrictive order is more appropriate, the court is to have regard to whether the person is receiving treatment or services under a civil order under the *Mental Health Act 2014* (Vic) or the *Disability Act 2006* (Vic), and the conditions of any such order.

- 10.264 It is not intended that this recommendation apply to the new orders for mentally ill offenders in Part 5 of the Sentencing Act created by the MHA 2014.²⁵⁸

Recovery or progress made while under supervision

Views in submissions and consultations

- 10.265 It was suggested to the Commission that the court should consider more 'positive' factors in making decisions under the CMIA that demonstrate the recovery or progress a supervised person has made.²⁵⁹ Examples included behaviour and attitude change, treatment progression, personal improvement, the achievement of treatment outcomes and the utility of an ongoing order in the context of the recovery framework established by the CMIA.²⁶⁰

²⁵⁷ See, eg, *Re EKW* [1998] VSC 176R (8 December 1998).

²⁵⁸ See *Mental Health Act 2014* (Vic) pt 11, s 435. The court assessment orders and court secure treatment orders replace the four orders for mentally ill offenders currently in the *Sentencing Act 1991* (Vic).

²⁵⁹ Submission 13 (Australian Community Support Organisation Inc.). Consultation 1 (Consumer Advisory Group (CAG), Thomas Embling Hospital).

²⁶⁰ Submissions 13 (Australian Community Support Organisation Inc.); 18 (Victoria Legal Aid).

The Commission's conclusion

- 10.266 The Commission agrees that considering a supervised person's recovery and progress is more in line with the therapeutic focus of the CMIA. Case law indicates that courts already consider a supervised person's responsiveness to treatment,²⁶¹ control of any ongoing symptoms²⁶² and the person's compliance with medical treatment.²⁶³ However, the Commission considers that a broader consideration of the person's recovery or progress, in terms of treatment and personal improvement, may address some of the feedback the Commission received about reviews being traumatic and negative experiences for supervised people.
- 10.267 Further, courts have generally looked at the resolution of any symptoms, which is a factor that is more relevant for people with a mental illness than people with an intellectual disability or other cognitive impairment. A criterion that includes a consideration of personal improvement would ensure the factors in section 40 of the CMIA are more tailored to people with an intellectual disability or other cognitive impairment.
- 10.268 Finally, the Commission considers that taking into account a person's recovery or progress will also assist in providing continuity in decision making, for example, between the Forensic Leave Panel and the court.

Recommendation

- 91 Sections 40(1) and 54(4) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to require the court and the Forensic Leave Panel respectively to have regard to the supervised person's recovery or progress in terms of treatment progression and personal improvement.

Factors the Forensic Leave Panel should consider

- 10.269 The Vincent Review recommended that the government consider whether to amend the CMIA to ensure that the Forensic Leave Panel considers specific criteria before granting leave.²⁶⁴ Previously, the main criterion for deciding whether or not to grant leave were based on the dangerousness of the person. The Vincent Review noted that while the Supreme Court had provided some guidance on the statutory interpretation of that provision, there was still some uncertainty in its interpretation that would benefit from clarification.²⁶⁵
- 10.270 The legislature amended the CMIA to implement the recommendation by the Vincent Review. Now the CMIA also requires the Forensic Leave Panel to have regard to the person's current mental condition or pattern of behaviour, clinical history, social circumstances and the applicant profile and leave plan.²⁶⁶

²⁶¹ See, eg, *Re PEL* [1999] VSC 532R (13 December 1999) [19] (Ashley J).

²⁶² *Re NR* [2004] VSC 2R (16 January 2004).

²⁶³ *Re EKW* (No 2) [2001] VSC 122R (23 April 2001).

²⁶⁴ Review Panel Appointed to Consider Leave Arrangements for Patients at the Victorian Institute of Forensic Mental Health, above n 56, 22.

²⁶⁵ Ibid 21–2. The provision has changed since the Review Panel's report. The CMIA used to provide that the Forensic Leave Panel *must not* grant leave unless satisfied that the safety of the forensic patient or forensic resident and members of the public will not be seriously endangered as a result of their leave. Now the CMIA provides that the court *may* grant an application if satisfied on the evidence available that the safety of the forensic patient or resident or members of the public will not be seriously endangered as a result of their leave.

²⁶⁶ *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 54(4).

- 10.271 The Forensic Leave Panel may grant an application for on-ground or limited off-ground leave if it is satisfied on the evidence that:
- the proposed leave will contribute to the person's rehabilitation
 - the safety of the person or members of the public will not be seriously endangered as a result of the person's leave.²⁶⁷
- 10.272 The same criteria outlined in [10.271] apply to an application to vary a forensic patient or forensic resident's on-ground or limited off-ground leave. However, the Forensic Leave Panel must also be satisfied that there has been a significant alteration in the person's circumstances since it last granted or varied leave.²⁶⁸
- 10.273 In hearing any matter, the Forensic Leave Panel:
- must act according to 'equity and good conscience' without regard to technicalities and legal forms
 - is bound by the rules of natural justice
 - is not required to conduct any proceedings in a formal manner.²⁶⁹
- 10.274 While there is now more guidance for the Forensic Leave Panel following the amendments to the CMIA, this guidance is not as extensive as the guidance provided to courts in section 40 for a decision to make, vary or revoke a supervision order or to grant or revoke extended leave.²⁷⁰
- 10.275 In the consultation paper, the Commission asked whether the CMIA provides sufficient guidance to the Forensic Leave Panel for making decisions on leave.

Views in submissions and consultations

- 10.276 The Commission did not receive much feedback on whether the CMIA should provide more guidance to the Forensic Leave Panel in exercising its decision-making functions in relation to leave.
- 10.277 In its submission, Victoria Legal Aid stated that the Forensic Leave Panel may not grant leave if the treating team, who may consider operational factors outside the CMIA, do not support the leave application. Victoria Legal Aid proposed that the Panel should be subject to the principle of least restriction in the CMIA.²⁷¹
- 10.278 One stakeholder suggested that the Forensic Leave Panel would benefit from a stronger understanding of the nature of the person's mental condition and the available treatment in the community.²⁷² It was noted that people with an intellectual disability sometimes do not make progress as quickly as people with a mental illness, or may be more reluctant to take leave.²⁷³ Requiring the Panel to consider the specialist treatment available could assist the Panel in considering the leave applicant's risk and would increase accountability from service providers.²⁷⁴

267 Ibid s 54(2).

268 Ibid s 54(3)(c).

269 Ibid s 64(1).

270 Ibid s 40.

271 Submission 18 (Victoria Legal Aid). See also Submission 3 (Gunvant Patel).

272 Submission 13 (Australian Community Support Organisation Inc.).

273 Consultation 6 (Department of Human Services case managers, Disability Forensic Assessment and Treatment Service (DFATS) and Long Term Rehabilitation Program (LTRP)).

274 Submission 13 (Australian Community Support Organisation Inc.).

The Commission's conclusion

- 10.279 The Commission considers that the Forensic Leave Panel would benefit from more guidance in decision making so that its decisions are in line with the decision-making principles that underlie the CMIA.
- 10.280 Some factors listed in section 40(1) of the CMIA apply to extended leave decisions and therefore in the Commission's view should apply to less extensive grants of leave made by the Forensic Leave Panel.
- 10.281 A part of the information the court is required to consider in section 40(1) of the CMIA will already be available to the Forensic Leave Panel as part of the applicant profile or leave plan. For example, information on the person's mental impairment, condition or disability and information on the relationship between the impairment, condition or disability and the offending conduct. However, in the Commission's view there are additional factors that are relevant to leave decisions and that are not already covered by the applicant profile or leave plan.
- 10.282 These factors are encompassed in the recommendations already made by the Commission above that introduce additional factors into the decision-making process by the Forensic Leave Panel, consistent with the factors required to be considered by the court. These are:
- *Recommendation 3*—that the principle of least restriction in section 39 of the CMIA apply to all decisions being made under the CMIA, including decisions by the Forensic Leave Panel.
 - *Recommendation 80*—that the Panel considers previous leave granted to the leave applicant in making a decision whether to grant leave.
 - *Recommendation 87*—that the court and the Panel consider whether the person poses an unacceptable risk to another person or other people generally.
 - *Recommendation 91*—that the court and the Panel consider the person's recovery or progress in terms of treatment progression and personal improvement.
- 10.283 These recommendations cover the factors which, in the Commission's view, should govern decision making by the Forensic Leave Panel. Therefore, no further recommendations are made to require the Panel to have regard to additional factors.

Improvements to specific leave processes

Flexibility in Forensic Leave Panel procedure

- 10.284 In the consultation paper, the Commission set out in detail the processes for leave under the CMIA. The Commission sought feedback on how leave processes had affected people who had experience with the CMIA and whether changes were required to make them more just, efficient and consistent with the CMIA's underlying principles.
- 10.285 Overall, submissions and consultations suggested a need for more flexibility in leave procedures.

Increased flexibility for extending and suspending leave

Views in submissions and consultations

10.286 There was a suggestion in submissions that the Forensic Leave Panel should only make decisions about major leave transitions and there should be more flexibility in suspensions of leave.²⁷⁵ In particular:

- At present, where special leave is granted for the purpose of medical treatment, it cannot exceed seven days. The CMIA could clarify that where medical treatment is needed for more than seven days, further grants of special leave can be arranged to allow for this.²⁷⁶
- Under section 54 of the CMIA, the Panel can grant leave for a maximum of six months and impose any conditions it considers appropriate.²⁷⁷ After six months, the person is required to make a new application to renew the initial grant of leave.
- All leave items considered by the Forensic Leave Panel already allow a nurse or the treating doctor to determine whether leave should be granted on any given day. But the Chief Psychiatrist must still authorise suspensions of leave.

10.287 The following issues were identified in relation to the current process:

- There are significant resources involved in applying for and renewing a grant of leave. For 70 forensic patients it requires a minimum of 140 detailed applications and determinations each year.²⁷⁸
- Leave can be interrupted if Panel sittings are cancelled because leave cannot be resumed after it expires until the next Panel hearing. This can have significant consequences for supervised people who are attending education or employment while on leave.²⁷⁹

10.288 One participant at Thomas Embling's Consumer Advisory Group described the process for applying for leave as a 'bureaucratic jungle'.²⁸⁰

10.289 This was echoed by observations from Associate Professor Andrew Carroll, an experienced consultant psychiatrist in this area:

At the forensic leave panel level the current process involves micromanagement and an incredible amount of inefficiency and cost. A useful model is that of South Australia where, as I understand it, teams need only obtain permission from the authorities at times of major transitions for example when moving to unescorted leave from escorted leave, and the fine details of leave planning are left to the discretion of the treating team: the authorities merely have to be comfortable with the broad parameters set. The added benefits would be that this would free up time for the Panel to focus efforts on high risk cases.²⁸¹

10.290 Forensicare suggested that the Panel should focus on major leave transition points such as the first grant of escorted off-ground leave, the first grant of unescorted off-ground leave and the first unescorted overnight off-ground leave.²⁸²

275 Submissions 19 (Forensicare); 6 (Associate Professor Andrew Carroll).

276 Submission 19 (Forensicare).

277 Ibid.

278 Ibid.

279 Submission 19 (Forensicare). Consultation 1 (Consumer Advisory Group (CAG), Thomas Embling Hospital).

280 Consultation 1 (Consumer Advisory Group (CAG), Thomas Embling Hospital).

281 Submission 6 (Associate Professor Andrew Carroll). See also Submission 3 (Gunvant Patel).

282 Submission 19 (Forensicare).

- 10.291 In the Commission's consultation with the Forensic Leave Panel, Panel members expressed the view that it was important not to 'fragment' leave processes. It was thought that there were benefits in the Panel having oversight over most leave decisions, including renewals of leave already granted. Panel members also noted the value in having an independent body to decide all leave decisions. Further, it was noted that it is helpful for the Panel to see the person through their progress for the purpose of continuity. Panel members also saw themselves as having a role in encouraging a supervised person to apply for more leave. They noted that if a supervised person's leave renewal were to occur internally, the Panel would not be able to help supervised people in this way.
- 10.292 The Chief Psychiatrist suggested that where there is a temporary and undramatic change in leave, the Chief Psychiatrist need not authorise the change.²⁸³ It was suggested that the Chief Psychiatrist could delegate the Chief Psychiatrist's power to a class of people, for example, authorised psychiatrists.²⁸⁴

The Commission's conclusion

- 10.293 The Commission recognises that the leave process is administratively demanding. This administrative burden should be minimised as far as possible as long as it is consistent with the supervised person's rights and the safety of the community.
- 10.294 The Commission agrees with Forensicare's submission that a subsequent grant of leave to the same person on the same conditions does not warrant the high level consideration of a judicial member and two or three Panel members. Forensicare's resources are better targeted towards the supervised person's clinical progress rather than their leave applications. The Forensic Leave Panel can focus on the consideration of the supervised person's progress and risk at major leave transition points.
- 10.295 The Commission notes comments by the Forensic Leave Panel about the importance of continuity in leave decisions and the role of Panel members in encouraging a supervised person to apply for more leave entitlements. The Commission's Recommendations 81 (education and training for Panel members) and 91 (requirement to have regard to a person's recovery or progress under section 40(1) of the CMA) aim to address issues surrounding the continuity of leave decisions. However, the Commission considers that there should also be some monitoring of the supervised person's progress in place of the monitoring function that Panel hearings would serve. The Commission agrees with Forensicare's suggestion that the treating team should provide regular reports of the supervised person's progress on leave on a six-monthly basis. This will enable the supervised person to be brought before the Panel if their leave entitlements should be increased or decreased by the Panel.
- 10.296 The Commission also agrees that a power to delegate the Chief Psychiatrist's power to suspend leave would retain proper oversight over the leave process but would be less burdensome administratively.²⁸⁵ This is also consistent with general changes in the civil mental health regime under the MHA 2014, under which the Chief Psychiatrist remains responsible for overseeing the systemic provision of clinical treatment but has less direct responsibility in terms of monitoring treatment and management of people on non-custodial supervision orders than was the case under the MHA 1986. The MHA 2014 establishes a Mental Health Complaints Commissioner who has a range of functions including the management and resolution of complaints relating to mental health service providers.²⁸⁶

283 Consultation 26 (Office of the Chief Psychiatrist and Legal Branch, Department of Health).

284 Ibid.

285 Ibid.

286 *Mental Health Act 2014* (Vic) ss 120, 228. See Chapter 11 at [11.51]–[11.63] for a discussion of the changes to the Chief Psychiatrist's role under the 2014 Act.

Recommendation

- 92 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended so that:
- (a) A grant of special leave, on-ground leave or off-ground leave can be extended for the same period and subject to the same conditions by the authorised psychiatrist of the approved mental health service or the Secretary to the Department of Human Services.
 - (b) The authorised psychiatrist for the approved mental health service or the Secretary to the Department of Human Services must provide the Forensic Leave Panel with a report of the person's progress while on leave and their compliance with the conditions of their leave for each period for which leave is extended.
 - (c) The Chief Psychiatrist may delegate the power to suspend a special leave of absence, on-ground leave or limited off-ground leave under section 55 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) to the authorised psychiatrist of the approved mental health service.

Increased flexibility in leave conditions

- 10.297 The Forensic Leave Panel can place any conditions on leave that it considers appropriate, including any escorts that may be required, where the forensic patient or forensic resident may go while on leave, who they may meet with, their travel arrangements or any requirement to undertake drug or alcohol testing after they return from leave.²⁸⁷

Views in submissions and consultations

- 10.298 Forensicare's Patient Consulting Group noted that the prescriptive wording of leave conditions sometimes means that forensic patients are unable to take leave. One forensic patient provided an example of being granted leave to be taken with his mother and stepfather. Because the condition of the order specified the attendance of both his mother and stepfather, he was not permitted to go on leave when his stepfather was unable to attend.²⁸⁸ Forensic Leave Panel members agreed that the family-type conditions are not always met.²⁸⁹

The Commission's conclusion

- 10.299 The Commission considers that this is an issue that is not appropriate to be addressed in legislation but recommends that training for Forensic Leave Panel members includes guidelines on making leave conditions flexible enough so that they are protective of the community but do not unduly restrict the supervised person's rights. This is consistent with the principle of least restriction that underlies the CMIA.

287 Forensic Leave Panel, above n 64, 3.
288 Submission 2 (Forensicare Patient Consulting Group).
289 Consultation 49 (Forensic Leave Panel—members).

Recommendation

- 93 Education and training for Forensic Leave Panel members in Recommendation 81 should include guidelines on making leave conditions sufficiently prescriptive so that they are consistent with the safety of the community but sufficiently flexible to not unduly restrict the person's freedom or personal autonomy.

Minor amendments to leave processes

Changes to who may provide the applicant profile

Views in submissions and consultations

- 10.300 In its submission, Forensicare noted that the CMIA requires that an applicant profile be provided to the Forensic Leave Panel in support of applications for on-ground leave, limited off-ground leave or a variation of leave.²⁹⁰ Although the CMIA requires that the applicant profile be provided by Forensicare's Clinical Director for forensic patients, in practice it is provided by the authorised psychiatrist or their delegate, because they are best placed to provide it.²⁹¹ Forensicare submitted that section 54A(1)(a) of the CMIA should be amended to reflect this practice.²⁹²

The Commission's conclusion

- 10.301 The Commission considers that the CMIA should reflect what occurs in practice to promote transparency and understanding of the processes concerning supervision orders. Further, amending the CMIA to allow the applicant profile to be provided by the authorised psychiatrist or their delegate will not be detrimental to the rights and interests of people subject to the CMIA or the safety of the community. The Commission therefore recommends that section 54A(1)(a) of the CMIA be amended to reflect Forensicare's practice.

Recommendation

- 94 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to reflect that the applicant profile may be provided by an authorised psychiatrist at the Victorian Institute of Forensic Mental Health (Forensicare) or their delegate under section 54A(1)(a).

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Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) s 54A. Submission 19 (Forensicare).
Submission 19 (Forensicare).
Ibid.

Allowing for a special leave of absence when leave is suspended

Views in submissions and consultations

- 10.302 Forensicare submitted that section 58(6) of the CMIA creates confusion regarding the types of leave that can be granted to a person during the period of suspension of their extended leave. It is unclear, for example, whether a person whose leave has been suspended can be granted special leave to receive medical treatment during the period of suspension.²⁹³

The Commission's conclusion

- 10.303 The Commission considers that even though there has been a suspension of leave, a person should be able to access medical treatment if necessary. This is consistent with the therapeutic focus of the CMIA, the state's obligation to people within their care and from a human rights perspective. The Commission therefore recommends an amendment to section 58(6) to clarify that a person whose leave is suspended may still apply for special leave of absence.

Recommendation

- 95 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to clarify that a person whose leave is suspended under section 58, or a person on their behalf, may apply for special leave of absence.

Improvements to specific review processes

Providing exceptions to the requirement to attend a review hearing

Views in submissions and consultations

- 10.304 Submissions and consultations pointed to the distressing effect of review hearings.²⁹⁴ This was attributed to the revisiting of the circumstances of the offence, the airing of deeply personal matters in a public forum and its tendency to focus on negative aspects rather than the progress the supervised person has made.²⁹⁵ One person subject to a non-custodial supervision order was reported by their supervising team to have described the review process as a 'painful experience'.²⁹⁶
- 10.305 Stakeholders noted the considerable resources involved in each review hearing, particularly in terms of travel time for people from regional areas.²⁹⁷ In one example provided to the Commission, the area mental health service staff had to leave at 5.30am to arrive in Melbourne in time for a 9am hearing, and then drive back to where they were based on the same day.²⁹⁸ Concerns were expressed for staff who made these long journeys in a day.²⁹⁹

293 Ibid.
294 Consultations 15 (Northern Area Mental Health Service); 6 (Department of Human Services case managers, Disability Forensic Assessment and Treatment Service (DFATS) and Long Term Rehabilitation Program (LTRP)); 2 (Department of Human Services case managers, Barwon); 9 (Department of Human Services case managers, Gippsland and Latrobe).
295 Consultation 18 (Goulburn Valley Area Mental Health Service).
296 Ibid.
297 Consultations 18 (Goulburn Valley Area Mental Health Service); 19 (Forensic Clinical Specialists); 9 (Department of Human Services case managers, Gippsland and Latrobe).
298 Consultation 18 (Goulburn Valley Area Mental Health Service).
299 Consultations 18 (Goulburn Valley Area Mental Health Service); 19 (Forensic Clinical Specialists); 9 (Department of Human Services case managers, Gippsland and Latrobe).

- 10.306 It was suggested that it is beneficial to allow for a supervised person not to attend court or for reviews to be conducted on the papers or via video link.³⁰⁰ In addition, Victoria Legal Aid suggested that where the order is being confirmed, resources would be saved if these matters could be dealt with on the papers with the consent of all parties. It would also avoid any counter-therapeutic effects of a review hearing.³⁰¹

The Commission's conclusion

- 10.307 The Commission notes that reviews are sometimes conducted by video link. The CMIA already provides that if the court is satisfied that the attendance of the person before the court would be detrimental to the person's health, the court may order that the person not attend the hearing.³⁰² This practice, however, may not be prevalent.
- 10.308 The Commission agrees that there are benefits in allowing supervised people and others involved in review hearings to attend hearings via video link, for the supervised person not to be required to attend the hearing at all and for some hearings to be conducted on the papers.
- 10.309 The Commission considers that these options can be made available by application of those involved in the review. Making these options accessible based on an application or the consent of the parties, instead of the court's discretion, will encourage the use of these options in cases where there are good reasons to do so.

Recommendation

- 96 The following amendments should be made to the review provisions in the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) to provide that:
- (a) If a supervised order is being confirmed, the court may order the review hearing to be conducted on the papers with the consent of all parties.
 - (b) The court may order that any person required to attend a review hearing attend via video link with the consent of all parties.
 - (c) If the attendance of the supervised person before the court would be detrimental to the person's health, the court may order that the person not attend the hearing or attend via video link with the consent of all parties.

300 Consultations 6 (Department of Human Services case managers, Disability Forensic Assessment and Treatment Service (DFATS) and Long Term Rehabilitation Program (LTRP)); 2 (Department of Human Services case managers, Barwon).

301 Submission 18 (Victoria Legal Aid).

302 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 36(4).

Participation in reviews by experts and case managers

- 10.310 It is quite common for someone to be both the person responsible for supervision (for example, the treating clinician) and the person responsible for preparing reports on the supervised person.
- 10.311 In consultations, case managers and clinicians noted the difficulty in giving evidence in front of the person they supervise.³⁰³ This can lead, for example, to the perception that information that is provided to case managers or clinicians on a confidential basis is then used in court to demonstrate why the supervision order should not be revoked.³⁰⁴ This is also an issue that arises for psychiatrists. Associate Professor Andrew Carroll observed that although it would be preferable for the risk assessment to be done by an entirely independent psychiatrist:

In practice, the costs of this would be prohibitive. Experience since the CMIA came in suggests that in practice the dual role of the treating psychiatrist is not a great problem in practice: the key reason for this I would suggest is that the “rules of engagement” are very clear to all parties throughout the treatment relationship. Patients are well [aware], certainly at the rehabilitation end of the hospital, that their treating psychiatrist may one day be called upon in court to provide a risk assessment. This fact permeates the treatment relationship but in my (completely biased) opinion does not poison that relationship. That said, it would be helpful if patients could more readily access high-quality 2nd opinions from independent forensic psychiatrists in the event that they are unhappy with the views of their treating doctor.³⁰⁵

- 10.312 The Commission acknowledges that psychiatrists, clinicians and case managers can be in a difficult position where they feel a duty to maintain a confidential and supportive relationship with the person subject to the supervision order but at the same time are relied on as the main source of information for the court on that person.
- 10.313 The Commission’s recommendations may go some way to addressing this concern, including:
- In Chapter 8, the Commission recommends reframing the role of the Department of Health and the Department of Human Services so that these organisations are no longer parties to review proceedings, but provide information to assist the court.
 - In this chapter, the Commission recommends that an education and training package be introduced to improve transparency and communication in the leave process and to emphasise to leave applicants the independent nature of the decision making by the Forensic Leave Panel.
 - In Chapter 11, the Commission recommends the development of workforce strategies to increase the capacity of the general mental health and disability sector to undertake forensic mental health and disability work. This could provide people who work in this area with the skills necessary to manage a relationship with a person subject to a supervision order.

303 Consultations 18 (Goulburn Valley Area Mental Health Service); 9 (Department of Human Services case managers, Gippsland and Latrobe); 19 (Forensic Clinical Specialists); 2 (Department of Human Services case managers, Barwon).
304 Consultations 18 (Goulburn Valley Area Mental Health Service); 2 (Department of Human Services case managers, Barwon).
305 Submission 6 (Associate Professor Andrew Carroll).

Removing the three-year restriction on applying for a variation of a custodial supervision order

- 10.314 If the court refuses an application to vary a custodial supervision order, a fresh application is barred for another three years or a lesser period as the court directs.³⁰⁶

Views in submissions and consultations

- 10.315 Victoria Legal Aid (VLA) submitted that this provision is a ‘barrier to effective and ongoing assessment of a person’s progress and suitability for reduced restrictions’.³⁰⁷ VLA submits that the three-year restriction should be removed but that the court should have the power to impose limitations on repeated, unreasonable or vexatious applications.³⁰⁸

The Commission’s conclusion

- 10.316 The Commission agrees with the view put forward by VLA. Preventing a supervised person from making an application to vary a custodial supervision order for three years is inconsistent with the Commission’s approach to the decision-making, review and leave framework. In particular, the Commission considers that the point at which a supervised person’s restrictions can be safely reduced should be identified as promptly as possible.
- 10.317 The Commission acknowledges that this recommendation may result in an increase in applications for a variation of a custodial supervision order. However, the Commission anticipates that this increase will not be substantial given the arrangements in place to filter out unreasonable applications. For example, an application usually has to be supported by the person’s treating team and VLA is unlikely to act in reviews that have no reasonable prospects of success.

Recommendation

- 97 Section 31(2) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be abolished.

306 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 31(2).
 307 Submission 18 (Victoria Legal Aid).
 308 Ibid.

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11. Management of people subject to supervision orders

Introduction

- 11.1 As part of its review of the provisions in the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ('CMIA') governing supervision and review, the Commission has examined how the CMIA operates in terms of the management of people subject to supervision orders.
- 11.2 In its *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997: consultation paper* ('the consultation paper'), the Commission examined the arrangements for monitoring people subject to supervision orders under the CMIA, including the:
- roles of organisations responsible for supervision
 - mechanisms for responding to breaches of supervision orders
 - processes for effecting interstate transfers of supervised people.
- 11.3 Stakeholders identified a number of areas where change was required in relation to these issues, both in relation to specific provisions in the CMIA and provisions in related legislation or sectors that form a broader part of its operation.
- 11.4 The overall approach that the Commission has taken in considering these issues is to examine and identify the barriers to effectively managing people on supervision orders. The Commission has recommended that changes be made to address those areas where, in its view, such barriers result in artificial decision making or in CMIA provisions operating in a manner that is unjust or inconsistent with its underlying principles.
- 11.5 In response to the significant concerns raised in preliminary consultations, the Commission also specifically examined the suitability of the model of supervision for people who are subject to the CMIA who have an intellectual disability or other cognitive impairment, such as acquired brain injury. A consistent feature of submissions and consultations was that changes are needed to the model of supervision to ensure that it operates in a more appropriate way for these groups. The Commission's recommendations seek to introduce more safeguards and facilitate a 'person-centred' approach to managing such vulnerable people subject to supervision orders.
- 11.6 This chapter deals with the following issues related to the management of people on supervision orders:
- *Accommodation for people with an intellectual disability or other cognitive impairment*—Effective supervision for people with an intellectual disability or other cognitive impairment subject to the CMIA is often limited by a lack of appropriate accommodation.

- *Flexibility in the processes for managing breaches for people with a mental illness subject to supervision orders*—There is limited flexibility in managing people who breach supervision orders due to the limited powers in the current CMIA provisions and a lack of secure facilities for people with a mental illness that provide an intermediate step between the high-secure facility of Thomas Embling Hospital and community accommodation.
- *Suitability of the system of supervision for people with an intellectual disability*—There is no mandated treatment pathway or clinical oversight for people with an intellectual disability under the CMIA, due to inconsistencies between the CMIA and other Victorian legislation governing supervision.
- *Interstate transfer orders*—The processes for a successful transfer of a person subject to a supervision order are overly bureaucratic and lengthy.
- *Police response to people on supervision orders*—There is no consistent way for police to easily access information that may assist them in responding appropriately to a person who has been apprehended while on a supervision order or who has breached a supervision order.

- 11.7 In considering these issues, a number of gaps in service provision have been identified, particularly for people with an intellectual disability or other cognitive impairment under the CMIA. The recommendations outlined in this chapter aim to address some of the gaps to ensure that the CMIA applies equally to all people on supervision orders.
- 11.8 This chapter concludes by noting additional operational issues that were raised in submissions and consultations that were not appropriate to be dealt with through recommendations by the Commission. These have been included so that they may inform internal policy and practice improvements for those who work within the supervision regime under the CMIA.

Current law

CMIA provisions setting out responsibilities for supervision

- 11.9 A person can become subject to supervision after a finding of not guilty because of mental impairment¹ or a finding that they committed the offence charged (after being found unfit to stand trial).² If a person is declared by a court to be liable to supervision after either finding, responsibility for supervision of that person is determined by both the type of supervision order imposed and the place where the person is to be detained or receive services.³
- 11.10 A person who is placed on a custodial supervision order is committed to custody in an ‘appropriate place’ (an approved mental health service, a residential treatment facility or a residential institution)⁴ or in a prison ‘if there is no practicable alternative in the circumstances’.⁵ Responsibility for supervision and management of people on supervision orders is shared across three government departments:
- A person who is detained in custody in an approved mental health service is in the custody of the Secretary to the Department of Health.⁶

1 The Commission has recommended in Chapter 9 of this report replacing the finding of ‘not guilty because of mental impairment’ with accused’s ‘conduct is proved but not criminally responsible because of mental impairment’: see Recommendation 69.

2 The Commission has recommended in Chapter 9 of this report replacing the finding in a special hearing of ‘committed the offence charged’ with the accused’s ‘conduct is proved on the evidence available’: Recommendation 68.

3 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 26.

4 *Ibid* s 3 (definition of ‘appropriate place’).

5 *Ibid* ss 26(2)–(4).

6 *Ibid* s 26(8).

- A person who is detained in custody in a residential treatment facility or a residential institution is in the custody of the Secretary of the Department of Human Services.⁷
 - A person who is detained in custody in a prison is in the custody of the Secretary of the Department of Justice.⁸
- 11.11 A person who is placed on a non-custodial supervision order can be subject to conditions, including a condition to receive services in an appropriate place or from a disability service provider, the Secretary of the Department of Human Services or the Secretary of the Department of Health.⁹
- 11.12 The actual responsibility for supervising a person subject to a custodial or non-custodial supervision order is designated according to the place of custody or services received:
- The Victorian Institute of Forensic Mental Health (Forensicare), a statutory agency in the Department of Health, is responsible for people who are in custody in, or receiving services from, an approved mental health service.
 - The Secretary of the Department of Human Services is responsible for people who are in custody in a residential treatment facility or a residential institution or receiving services from a disability service provider.

Legislation governing the management of people supervised under the CMIA

- 11.13 In the vast majority of cases, the management of people subject to supervision orders is governed by three separate pieces of legislation: the CMIA, the *Disability Act 2006* (Vic) and the *Mental Health Act 2014* (Vic) ('MHA 2014').¹⁰
- 11.14 The interactions between these different laws are complex. The MHA 2014 and the Disability Act primarily provide for voluntary treatment or services or compulsory civil orders for treatment or services for people with a mental illness or intellectual disability. However, by virtue of the responsibility for supervision that the CMIA imposes on the Secretaries of the Department of Health and Department of Human Services, some of the provisions of these Acts also apply to the management of people on supervision orders under the CMIA.

The Disability Act

- 11.15 The Disability Act defines an 'intellectual disability' as the concurrent existence of a significant sub-average general intellectual functioning and significant deficits in adaptive behaviour, each of which became manifest before the age of 18 years.¹¹ A person with an intellectual disability for the purposes of the Act must be over the age of five years.¹²

Voluntary disability services

- 11.16 Disability Services are services provided by 'disability service providers'. These services are voluntary, meaning that a person cannot be compelled to participate in services.

⁷ Ibid s 26(9).

⁸ Ibid s 6A.

⁹ Ibid ss 26(2)(b), (3)(b).

¹⁰ The *Mental Health Act 2014* (Vic) replaced the *Mental Health Act 1986* (Vic) on 1 July 2014: see Chapter 1 n 14. This chapter focuses largely on the 1986 provisions that were in operation at the time the reference was conducted, but where relevant, consideration is given to the law under the 2014 provisions and their interaction with the CMIA.

¹¹ *Disability Act 2006* (Vic) s 3 (definition of 'intellectual disability').

¹² Ibid.

Compulsory disability services

- 11.17 The Disability Act also provides for compulsory treatment for people with an intellectual disability through a supervised treatment order¹³ made by the Victorian Civil and Administrative Tribunal (VCAT) or as a person admitted to a residential treatment facility or residential institution.¹⁴ People who are subject to compulsory treatment under the Disability Act are required to have a treatment plan and are subject to the clinical oversight of the Senior Practitioner. There are safeguards in place for the use of restrictive interventions such as chemical or mechanical restraint and seclusion.¹⁵

The *Mental Health Act 1986* (Vic) and the *Mental Health Act 2014* (Vic)

- 11.18 Over the reference period, the *Mental Health Act 1986* (Vic) ('MHA 1986') was the relevant legislation governing the treatment and care of people with a mental illness in Victoria. The MHA 2014 came into operation in Victoria on 1 July 2014, repealing the previous 1986 Act and establishing a new mental health legislative framework.
- 11.19 The MHA 2014 provides 'a legislative scheme for the assessment of persons who appear to have mental illness and for the treatment of persons with mental illness'.¹⁶ The key objectives of the 2014 mental health legislation, outlined in the second reading speech, are to:
- embed supported decision making in the law
 - promote recovery-oriented practice
 - minimise the use and duration of compulsory treatment
 - require compulsory treatment to be provided in the least restrictive and least intrusive manner possible
 - better facilitate carer and family involvement in treatment and care
 - increase safeguards to protect patient rights and dignity
 - encourage public sector clinicians and service providers to engage in continuous service improvement and reforms to the mental health service system.¹⁷
- 11.20 While many of the changes made by the MHA 2014 will affect the operation of the CMIA, this chapter's focus is the law under the MHA 1986 as this is the legislation that was in operation throughout the reference period. Views expressed in submissions and consultations related to then-applicable law, the MHA 1986, and to practice under the 1986 Act.
- 11.21 The MHA 2014 commenced on 1 July 2014. Thus it is difficult to determine how its provisions will operate in practice and whether legislative changes it gives effect to will address some of the issues contained in this chapter. However, where a law or process under the MHA 1986 is explained in this chapter that differs significantly under the MHA 2014, this will be highlighted throughout the chapter.

13 Ibid s 193.

14 Ibid ss 152(1)(f), (2).

15 Ibid pt 8 div 6.

16 *Mental Health Act 2014* (Vic) s 1(a).

17 Victoria, *Parliamentary Debates*, Legislative Assembly, 20 February 2014, 471 (Mary Wooldridge, Minister for Mental Health).

Compulsory treatment and services for people with an intellectual disability

- 11.22 The CMIA and Disability Act provide for the compulsory treatment of, and services for, people with an intellectual disability subject to supervision orders under the CMIA.
- 11.23 The Department of Human Services has developed the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 Practice Guidelines* to assist in supervising people under the CMIA who are the responsibility of the Secretary of the Department of Human Services.¹⁸ The Commission has been advised by the Department of Human Services that new practice advice related to the CMIA is being updated for the purpose of implementation of an online practice framework. Two new Director instructions specific to supervision were released on 1 May 2014.

Status of forensic residents under the Disability Act

- 11.24 A 'forensic resident' is a person who is detained in custody under the CMIA in a residential treatment facility or residential institution under the supervision of the Secretary of the Department of Human Services.¹⁹
- 11.25 The Disability Act requires that forensic residents are provided with services under the Act in a residential treatment facility or residential institution.²⁰
- 11.26 There are two relevant facilities in Victoria that are currently used under the CMIA:
- Intensive Residential Treatment Program: a residential treatment facility provided by the Disability Forensic Assessment and Treatment Service (DFATS) which includes treatment, support and accommodation for people who display high-risk anti-social behaviour for a period not exceeding five years.
 - Long Term Rehabilitation Program: a residential institution located at the Plenty Residential Services, which comprises approximately 20 houses on 20 hectares for people who require intensive support in a semi-secure environment with staff present 24 hours a day.
- 11.27 A person can only be admitted to a residential treatment facility if the following criteria are met:²¹
- the person has an intellectual disability
 - the person presents a serious risk of violence to another person
 - all less restrictive options have been tried or considered and are not suitable
 - the residential treatment facility can provide services for the treatment of the person with a disability and that treatment is suitable for that person
 - the Senior Practitioner has been notified of the proposed admission
 - an order specified under section 152(2) of the Disability Act²² applies to the person enabling compulsory treatment to be provided.

18 Department of Human Services, *Disability Services Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 Practice Guidelines 2007* (2007).

19 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 3 (definition of a 'forensic resident'), 26(9).

20 *Disability Act 2006* (Vic) s 181.

21 *Ibid* s 152(1).

22 Orders include a residential treatment order under the *Sentencing Act 1991* (Vic), a parole order under the *Corrections Act 1986* (Vic), an extended supervision order under the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) or a custodial supervision order under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

- 11.28 The Disability Act states that a person can only be admitted to a residential institution if:
- the person requires services which can be provided by admission to the residential institution, and
 - admission to a residential institution provides the best possible choice of services for enhancing the person's independence and self-sufficiency and is least likely to produce regression, loss of skills or other harm to that person, or
 - admission to a residential institution is the option which is the least restrictive of the person as is possible in the circumstances, or
 - unless the person is admitted to a residential institution the person or any person with whom he or she resides will suffer serious physical or emotional harm.²³

Safeguards for people with an intellectual disability under the Disability Act

- 11.29 The Disability Act outlines clinical requirements and provides for a range of safeguards in supervising people who have been admitted to a residential treatment facility or residential institution.
- 11.30 A treatment plan must be provided within 28 days of admission to a residential institution or treatment facility that specifies the treatment to be provided, the expected benefit of that treatment to the person on the order and the proposed process for transition from the person being a resident of the facility or institution to living in the community.²⁴
- 11.31 A restrictive intervention is any intervention that is to restrict the rights or freedoms of movement of a person with a disability including chemical restraint, mechanical restraint or seclusion.²⁵ The treatment plan must specify any restrictive interventions that may be used, which are then subject to reporting and monitoring requirements and rights protection with the oversight of the Senior Practitioner.²⁶
- 11.32 The Senior Practitioner is responsible for ensuring that the rights of people who are subject to restrictive interventions and compulsory treatment are protected, and that appropriate standards in relation to restrictive interventions and compulsory treatment are complied with.²⁷ A person cannot be admitted to a residential facility or institution unless the Senior Practitioner has been notified.²⁸
- 11.33 A copy of the treatment plan must be provided to the Senior Practitioner who is required to consider the acceptability of the plan.²⁹ A report on the implementation of the treatment plan must be provided to the Senior Practitioner at least every six months.³⁰
- 11.34 The Senior Practitioner must approve any changes to the treatment plan but cannot approve changes to the treatment plan that increase the level of supervision or restriction except in an emergency.³¹
- 11.35 A person may apply to VCAT for a review of their treatment plan at any time.³² VCAT must review and determine the appropriateness of the treatment plan every 12 months. An application must be made to VCAT for a review within six months of a person being admitted to a residential treatment facility or institution.³³

23 *Disability Act 2006* (Vic) ss 87(1)–(2).

24 *Ibid* s 153(2).

25 *Ibid* s 3 (definition of 'restrictive intervention').

26 *Ibid* s 153(2)(c), pt 8 div 6.

27 *Ibid* s 23(2).

28 *Ibid* s 152(1)(e).

29 *Ibid* ss 153(3)(b), (3A).

30 *Ibid* s 153(4).

31 *Ibid* ss 153(3A), (7). If the Senior Practitioner approves changes to a treatment plan that increases the level of supervision or restriction in an emergency, they must immediately apply to VCAT for a variation of the treatment plan.

32 *Ibid* s 155(1).

33 *Ibid* s 154(1).

Barriers to accessing custodial facilities under the Disability Act

- 11.36 There are limited beds available at both the Intensive Residential Treatment Program and the Long Term Rehabilitation Program. The Intensive Residential Treatment Program has 14 beds and the Long Term Rehabilitation Program has five beds available. Where a person is unable to be accommodated in these facilities, the only other options are prison or to create a specialised accommodation solution for the person in the community, which is very resource-intensive.
- 11.37 A person on a custodial supervision order under the CMIA is unlikely to meet the admission criteria for a residential treatment facility or institution for a number of reasons. A person on a custodial supervision order may not meet the definition of an 'intellectual disability' (for example, people with acquired brain injury), may not pose a risk of serious violence to others or may not be suitable for the treatment provided. A further difficulty is that the Intensive Residential Treatment Program only provides accommodation for a period of five years and a custodial supervision order is for an indefinite period. While the Long Term Rehabilitation Program at Plenty Residential Services provides long-term accommodation, it does not provide treatment.
- 11.38 At 30 June 2013, there were 30 people who were supervised by the Department of Human Services on a CMIA supervision order. Of these, three were clients of and are supervised by the Department of Human Services on a custodial supervision order.³⁴ One of these clients had been admitted to the Intensive Residential Treatment Program at DFATS and two clients were in the Long Term Rehabilitation Program at Plenty Residential Services. One person on a non-custodial supervision order also resided at Plenty Residential Services as part of the Long Term Rehabilitation Program.³⁵

Supervised treatment orders under the Disability Act

- 11.39 The provisions governing compulsory treatment for people subject to custodial supervision orders under the CMIA can be compared with a 'supervised treatment order', a civil order providing for compulsory treatment under the Disability Act. These orders are underpinned by comprehensive safeguards and protections for people with an intellectual disability or other cognitive impairment receiving compulsory treatment under the Disability Act.
- 11.40 A person with an intellectual disability who is receiving residential services can be made subject to a supervised treatment order.³⁶ A supervised treatment order can be made by VCAT where:
- the person has previously exhibited a pattern of violent or dangerous behaviour causing serious harm to another person or exposing another person to a risk of serious harm
 - there is a significant risk of serious harm to another person which cannot be substantially reduced by using less restrictive means
 - the services to be provided to the person in accordance with the treatment plan will be of benefit to the person and substantially reduce the significant risk of harm to another person
 - the person is unable or unwilling to consent voluntarily to complying with a treatment plan to substantially reduce the risk of harm to another person
 - it is necessary to detain the person to ensure compliance with the treatment plan and to prevent a risk of serious harm to another person.³⁷

³⁴ Information provided by the Department of Human Services (DHS) (as at 30 June 2013).

³⁵ Consultation 6 (Department of Human Services case managers, Disability Forensic Assessment and Treatment Service (DFATS) and Long Term Rehabilitation Program (LTRP)).

³⁶ *Disability Act 2006* (Vic) ss 191(1)–(2).

³⁷ *Ibid* ss 191(6), 193.

- 11.41 A person on a supervised treatment order must have a treatment plan.³⁸ A treatment plan must:
- specify the treatment that will be provided
 - state the expected benefit of the treatment to the person
 - specify any restrictive interventions that are to be used
 - specify the level of supervision that will be required to ensure the person participates in the treatment
 - set out a proposed process for transition of the person to lower levels of supervision and if appropriate, to living in the community without a supervised treatment order being required.³⁹
- 11.42 The Senior Practitioner and VCAT play a similar role for people on supervised treatment orders to that described at [11.24]–[11.28] for people in a residential treatment facility or institution. They provide clinical oversight, monitor restrictive interventions, review treatment orders and safeguard rights.⁴⁰
- 11.43 One of the major differences for a person on a supervised treatment order compared with other compulsory orders under the Disability Act is the involvement of the Public Advocate. The Public Advocate must be notified at various stages and is able to make applications for a supervised treatment order and for a review, variation or revocation of the order.⁴¹

Status of people with an intellectual disability on non-custodial supervision orders under the CMIA

- 11.44 People on non-custodial orders supervised by the Department of Human Services do not have a legal status under the Disability Act. This means that there is no legal requirement to provide a treatment plan, clinical oversight, reviews of treatment plans or to safeguard the rights of people with an intellectual disability who are subject to a non-custodial supervision order. This is the case even though such people may be subject to 'compulsory' services, such as monitoring and restrictions on movement or treatment, that are provided by disability service providers as part of the conditions of a non-custodial supervision order.

Recent focus on the application of the law to people with an intellectual disability

- 11.45 Relevant to the examination of compulsory treatment of people with an intellectual disability under the CMIA is the recent and significant focus at the state and federal level in Australia on the treatment of people with an intellectual disability under the law. A number of reviews have examined how people with an intellectual disability are treated and called for improvements to ensure that they are treated with dignity and in accordance with their legal and human rights.

38 Ibid s 191(3)(c).

39 Ibid s 191(7).

40 See *Disability Act 2006* (Vic) pt 8 div 5.

41 Ibid ss 194, 196.

- 11.46 On 5 March 2013, the Victorian Parliament Law Reform Committee tabled its report on the *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and Their Families and Carers*.⁴² The terms of reference for this inquiry covered a range of issues including barriers to the justice system for people with an intellectual disability and asked the Committee to consider ways to enhance participation, supports and services. The terms of reference for the Commission's review of the CMIA specifically ask the Commission to have regard to the recommendations of the Victorian Parliament Law Reform Committee.
- 11.47 Also in Victoria, the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) is currently conducting research into the experience of people with disabilities when they report crime. The report on its research and recommendations for change is due mid-2014.⁴³
- 11.48 The Australian Human Rights Commission released the issues paper, *Equal Before the Law: Towards Disability Justice Strategies* in February 2014. The paper 'provides a snapshot of where that equality does not exist, highlights services and programs that improve equality before the law for people with disabilities, and sets some directions by which change may occur'.⁴⁴ The Australian Human Rights Commission identified a number of barriers that exist for people with a disability in the criminal justice system⁴⁵ and expressed the view that each Australian jurisdiction should respond to these in a holistic and overarching way through the development of a 'Disability Justice Strategy'.⁴⁶ Participation, accountability, equality and empowerment were identified as part of the 'human-rights-based approach' adopted in the paper.⁴⁷
- 11.49 The Australian Law Reform Commission's project on *Equality, Capacity and Disability in Commonwealth Laws* is a broad inquiry into 'Commonwealth laws and legal frameworks that deny or diminish the equal recognition of people with disability before the law, and their ability to exercise legal capacity'.⁴⁸
- 11.50 A number of state and federal government departments and agencies have developed disability action plans that set out strategies for reducing barriers to services (and sometimes employment) for people with disabilities. For example, the Department of Justice has developed a Disability Action Plan 2012–16 that aims to reduce barriers to the justice system for people with a disability.⁴⁹ This plan may assist in addressing some of the issues raised in the above reports and inquiries about the interaction of people with a disability with the justice system.

Compulsory treatment of people with a mental illness

- 11.51 At the time the Commission conducted the reference, the MHA 1986 governed the treatment and care of people receiving compulsory mental health treatment both in an inpatient setting and in the community. Together with the CMIA, the MHA 1986 provided for the compulsory treatment of and services for people with a mental illness subject to supervision orders under the CMIA.

42 Victorian Parliament Law Reform Committee, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (2013).

43 See Victorian Equal Opportunity and Human Rights Commission, *Experiences of People with Disabilities Reporting Crime* <<http://www.humanrightscsmission.vic.gov.au/index.php/about-us/item/619-experiences-of-people-with-disabilities-reporting-crime>>.

44 Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies* (2014) 4.

45 Ibid 5.

46 Ibid 6.

47 Ibid 9–10.

48 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Issues Paper No 44 (2013) 3; see also Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014).

49 Department of Justice, *Disability Action Plan 2012–16* (2012) <<http://www.justice.vic.gov.au/utility/about+the+department+of+justice/disability+action+plan+2012-16>>.

Status of forensic patients under the MHA 1986 and MHA 2014

- 11.52 A forensic patient is a person who is subject to a custodial supervision and is detained in custody in an approved mental health service under the CMIA and supervised by the Department of Health.⁵⁰ This means that the underlying mental condition for a forensic patient is usually a mental illness. In all but exceptional circumstances, Forensicare is the 'approved mental health service' that supervises people on a custodial supervision order with a mental illness.
- 11.53 All of the rights that applied to patients receiving compulsory treatment under the MHA 1986, and that now apply under the MHA 2014, also apply to forensic patients, as 'forensic patient' is included in the definition of 'patient'.⁵¹
- 11.54 Forensic patients are entitled to expect that mental health providers (including designated mental health services), as well as any person exercising a power or function under the relevant mental health legislation, will act consistently with the mental health principles.⁵²
- 11.55 The MHA 1986 required that forensic patients be provided with a treatment plan prepared by the authorised psychiatrist outlining the treatment to be provided. Treatment plans had to be reviewed on a regular basis and revised as required.⁵³
- 11.56 In preparing, reviewing or revising a treatment plan, the authorised psychiatrist had to take into account:
- the wishes of the patient, as far as they could be ascertained
 - unless the patient objected, the wishes of any guardian, family member or primary carer involved in providing ongoing care or support to the patient
 - whether the treatment to be carried out was only to promote and maintain the patient's health or well-being
 - any beneficial alternative treatments available
 - the nature and degree of any significant risks associated with the treatment or any alternative treatment
 - any prescribed matters or anything else the authorised psychiatrist thought was appropriate.⁵⁴

50 *Crimes (Mental Impairment and Unfitness to be Tried Act) 1997* (Vic) ss 3 (definition of 'forensic patient'), 26(8).

51 The definition of 'forensic patient' under the *Mental Health Act 2014* (Vic) is the same as the definition under the 1986 Act except that it also includes 'a person who is an international forensic patient within the meaning of section 730 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic): *Mental Health Act 1986* (Vic) s 3 (definition of 'patient'); *Mental Health Act 2014* (Vic) ss 3 (definition of 'patient'), 305(f).

52 *Mental Health Act 1986* (Vic) s 6A; *Mental Health Act 2014* (Vic) s 11.

53 *Ibid* ss 19A(1)–(3).

54 *Ibid* ss 19A(2), (5).

- 11.57 The MHA 1986 entitled patients, including forensic patients, to a statement that set out their rights under the Act, as well as information about their treatment.⁵⁵ The MHA 2014 provides a different and more flexible framework for the provision of a statement of rights. The MHA 2014 requires a statement of rights as part of the overall information to be provided to a patient so that they can make an informed decision about their treatment,⁵⁶ a factor that goes to establishing a person's capacity to give informed consent.⁵⁷ In relation to all treatment, the MHA 2014 requires a statement of rights to be provided to the patient so that the patient can provide informed consent,⁵⁸ which as a general requirement, must be given before treatment is provided, except where the patient does not have the capacity to give their consent or in other limited circumstances.⁵⁹
- 11.58 The MHA 1986 provided that the Chief Psychiatrist was responsible for the medical care and welfare of people receiving treatment or care for a mental illness, including providing clinical oversight for treatment.⁶⁰ Under the MHA 2014, the Chief Psychiatrist's role is framed with a greater focus on clinical oversight⁶¹ and includes:
- providing clinical leadership and expert clinical advice to mental health service providers in Victoria
 - promoting continuous improvement in the quality and safety of mental health services
 - promoting the rights of people receiving mental health services.⁶²
- 11.59 The Chief Psychiatrist remains responsible for overseeing the systemic provision of clinical treatment, which includes powers to, in specific circumstances, review treatment choices in light of the patient's interests⁶³ and the investigation of the provision of mental health services.⁶⁴

Status of people with a mental illness on non-custodial supervision orders under the CMIA

- 11.60 As with people with an intellectual disability on a non-custodial supervision order, a person with a mental illness on a non-custodial supervision order did not have a legal status under the MHA 1986. This remains the case under the MHA 2014.⁶⁵
- 11.61 While Forensicare has the ultimate responsibility for the supervision of people with a mental illness on non-custodial supervision orders, the day-to-day care and management of people with a mental illness on non-custodial supervision orders is carried out by area mental health services through individual services agreements.⁶⁶ Area mental health services are responsible for providing case management and treatment for people with a mental illness on a non-custodial supervision order who live in their area.

55 Ibid s 18.

56 See, eg, *Mental Health Act 2014* (Vic) ss 12–13, 69(2)(f).

57 *Mental Health Act 2014* (Vic) s 69(1)(b). Section 72 of the Act provides that patients (which includes forensic patients) are to be given treatment for their mental illness. The statutory requirements relating to capacity and informed consent therefore apply to forensic patients. Clinicians will therefore have an obligation to provide a statement of rights to forensic patients being assessed or treated under the 2014 Act in the same way that they would civil patients. The 2014 Act does not prescribe treatment planning obligations because these are considered part of the professional clinical obligations of the authorised psychiatrist and treatment—as documented on the patient's clinical file. The need for a statement of rights for a forensic patient can arise in a number of different contexts; for example, if the patient does not give informed consent to treatment or is subject to a transfer from a local service to Thomas Embling Hospital or made subject to security conditions.

58 Ibid ss 69(1)(b), (2)(f).

59 Ibid ss 70–1.

60 *Mental Health Act 1986* (Vic) ss 105(2)(a)–106AB.

61 Department of Health, *The Mental Health Bill 2014: An Explanatory Guide* (2014) 10.

62 *Mental Health Act 2014* (Vic) s 120. The fourth role of the Chief Psychiatrist is to provide advice to the Minister and the Secretary about the provision of mental health services by mental health service providers.

63 Ibid s 87–9.

64 Ibid s 122.

65 An exception to this under the *Mental Health Act 2014* (Vic) (as under the *Mental Health Act 1986* (Vic)) is when a person on a non-custodial supervision order fails to comply with the order. Such a person may be arrested, taken to a designated mental health service and designated as a 'forensic patient'. If the person is still in Victoria they may be so detained if 'the safety of the person subject to the order or members of the public will be seriously endangered if the person is not apprehended' and if the person has left Victoria they may be arrested and detained in a designated mental health service (with no need to find risk) to identical effect: *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 30–30A.

66 As outlined in Department of Health, *Program Management Circular—Protocol between Forensicare and Area Mental Health Services for People Subject to Non-Custodial Supervision Orders* (PMC07031, 2012).

- 11.62 As soon as possible after a person with a mental illness is made subject to a non-custodial supervision order, an individual service agreement is developed between Forensicare and a private practitioner or area mental health service. The individual service agreement provides for the supervision, management and treatment of the person on the non-custodial supervision order and outlines:
- the roles and responsibilities of all service providers who are partners in the supervision, treatment and management of the person subject to a non-custodial supervision order
 - the requirements of the 'Protocol between Forensicare and area mental health services for people subject to non-custodial supervision orders'⁶⁷ and the publication 'Non-custodial supervision orders—policy and procedure manual'⁶⁸
 - specific provisions tailored to meet the needs of the person having regard to the person's treatment plan, any conditions imposed by the court, the person's medical and psychiatric history, their family and social circumstances, any special needs, risk assessments and available services
 - provisions regarding periodic review, revision as required and dispute resolution.⁶⁹
- 11.63 Under the MHA 1986, the Chief Psychiatrist had a broad monitoring role in relation to the treatment and management of people on non-custodial supervision orders. The MHA 2014 establishes a Mental Health Complaints Commissioner who has a range of functions including the management and resolution of complaints relating to mental health service providers.⁷⁰

Barriers in managing people subject to supervision orders

- 11.64 A strong theme to emerge from submissions and consultations was that the availability of resources can be a barrier to effectively managing people on supervision orders under the CMIA.
- 11.65 The following section examines two areas of operation raised in submissions and consultations where resources can impact on decision making under the CMIA:
- a lack of appropriate secure accommodation for people with an intellectual disability or other cognitive impairment who are made subject to supervision, which can result in people being accommodated in prison or being placed on a non-custodial supervision order rather than a custodial supervision order
 - a lack of intermediate secure mental health facilities for forensic patients, which can result in people with a mental illness being returned to a high-secure mental health facility (Thomas Embling Hospital) due to a breach of a condition of their non-custodial supervision order.

67

Ibid.

68

Department of Health, *Non-custodial Supervision Orders: Policy and Procedure Manual* (2011).

69

Department of Health, *Program Management Circular—Protocol Between Forensicare and Area Mental Health Services for People Subject to Non-Custodial Supervision Orders* (PMC07031, 2012) 2.

70

Mental Health Act 2014 (Vic) s 228.

Accommodation for people with an intellectual disability or other cognitive impairment

- 11.66 As discussed at [11.24]–[11.28], to access accommodation facilities people with an intellectual disability or other cognitive impairment who are subject to a custodial supervision order need to meet the criteria for admission to a residential treatment facility or residential institution under the Disability Act.⁷¹ The admission criteria mean that a person may only be admitted to a residential treatment facility where they pose a risk of violence to others, have an intellectual disability and need to be detained for a period less than five years. A person will only be admitted to a residential institution where the residential institution provides the best possible choice of services for that person and they pose a risk of serious physical or emotional harm to the person with whom they currently reside unless they are admitted to the residential institution. Another issue related to accommodation is that people with an intellectual disability on a non-custodial supervision order may be subject to higher levels of restriction than people with a mental illness on a non-custodial supervision order because of the nature of available facilities in the disability system.

Lack of a specialised facility and limited appropriate options

- 11.67 There is no specialised facility for forensic residents and the appropriate accommodation options are limited for people with an intellectual disability or cognitive impairment under the CMIA. While secure accommodation facilities for people with an intellectual disability or cognitive impairment are provided by the Department of Human Services, people on supervision orders under the CMIA rarely meet the admission criteria because of their type of disability, level of risk, or because their need for services differs from what is provided.
- 11.68 Artificial decision making could occur where people who should be placed on a custodial supervision order are made subject to a non-custodial supervision order because of a lack of appropriate accommodation. In these circumstances, resources drive decision making rather than clinical practice and risk management. The following cases illustrate this problem.
- 11.69 In the recent case of *R v Coulter*,⁷² Mr Coulter, who has an acquired brain injury, was found unfit to stand trial by a jury and was then found to have committed the offence of murder at a special hearing. Coulter was made subject to a custodial supervision order after being assessed as a high to medium risk of violent reoffending. However, Coulter was also assessed as being unsuitable for a residential treatment facility or residential institution under the Disability Act. As there was no other appropriate accommodation, Coulter was committed to custody in prison, the judge stating that '[i]n the absence of an appropriate place, I am satisfied that there is no practicable alternative but to order that you be committed to custody in prison'.⁷³ In the Commission's view, this is not an appropriate outcome for a person with a cognitive impairment who has been found unfit to stand trial.

- 11.70 The case of *DPP v Bamblett*⁷⁴ involved an accused who was charged with armed robbery, found unfit to stand trial and found to have committed the offence at a special hearing. The judge was advised by the Department of Human Services that there were no appropriate custodial facilities for the accused. The judge took into account that the accused had committed armed robbery while subject to a previous non-custodial supervision order. However, given that prison was the only option if a custodial supervision order were to be imposed and given the court's view that the service where he was currently residing provided 'sufficient supervision and an extensive rehabilitative program', a non-custodial supervision order was imposed.⁷⁵
- 11.71 Another case example where there was no service available to provide supervision or services was provided by the Office of Public Prosecutions. This case involved a person who had a severe and permanent language disorder and was found unfit to stand trial, and found to have committed the offences charged at a special hearing. The person did not meet the eligibility criteria for disability services as they did not have an intellectual disability; the options open to the judge were to unconditionally release the person or declare them liable to supervision and impose a custodial supervision order. The effect of the latter order would have been that the person would be detained on an indefinite order in prison.

Views in submissions and consultations

Lack of appropriate accommodation options for people with an intellectual disability or other cognitive impairment under the CMIA

- 11.72 A number of consultation meetings conducted with Department of Human Services case workers highlighted concerns that many decisions about supervision orders for people with an intellectual disability are being made on the basis of resource availability rather than risk management and clinical advice.⁷⁶ The Commission was informed of a number of examples where secure supervision and services were required for a person but due to a lack of available facilities and services, they were placed on a non-custodial supervision order because this was the only alternative to prison.⁷⁷ The Commission was also informed in consultations with Department of Human Services staff that where existing accommodation options are not appropriate for people on supervision orders under the CMIA, all possible steps are taken to find or create individual accommodation solutions for people.⁷⁸
- 11.73 Almost all submissions and consultations on this issue voiced strong concerns about the lack of appropriate accommodation for people with an intellectual disability under the CMIA.⁷⁹

74 [2011] VCC (14 December 2011). Judgment provided as part of the data provided by the Sentencing Advisory Council, higher courts sentencing database.

75 Ibid [50].

76 Consultations 17 (Department of Human Services case managers, Shepparton); 6 (Department of Human Services case managers, Disability Forensic Assessment and Treatment Service (DFATS) and Long Term Rehabilitation Program (LTRP)).

77 Consultations 6 (Department of Human Services case managers, Disability Forensic Assessment and Treatment Service (DFATS) and Long Term Rehabilitation Program (LTRP)); 17 (Department of Human Services case managers, Shepparton); 34 (Department of Human Services case managers, Bayside and Southern Melbourne).

78 Consultations 6 (Department of Human Services case managers, Disability Forensic Assessment and Treatment Service (DFATS) and Long Term Rehabilitation Program (LTRP)); 9 (Department of Human Services case managers, Gippsland and Latrobe).

79 Submission 10 (Victorian Equal Opportunity and Human Rights Commission). Consultations 17 (Department of Human Services case managers, Shepparton); 2 (Department of Human Services case managers, Barwon); 34 (Department of Human Services case managers, Bayside and Southern Melbourne); 9 (Department of Human Services case managers, Gippsland and Latrobe). The Office of the Public Advocate did not address this issue specifically in its submission, but referred to it in relation to other issues, for example, delay. See submission 4 (Office of the Public Advocate).

- 11.74 The Victorian Equal Opportunity and Human Rights Commission was of the view that a lack of appropriate accommodation for people with an intellectual disability under the CMIA constitutes a breach of Article 5(3) of the *Convention on the Rights of Persons with Disabilities*:

Placing a vulnerable person with a disability in an inappropriate place without the specialised services required for their management and treatment is inconsistent with the right to equality and to be provided with the necessary adjustments and support a person with a disability may need to enjoy their human rights on an equal basis with others.⁸⁰

- 11.75 A lack of accommodation was raised as an issue in both regional and metropolitan Victoria, and issues in finding appropriate accommodation were identified for people on both custodial and non-custodial supervision orders.⁸¹

- 11.76 This concern about the lack of appropriate accommodation for people on a non-custodial supervision order was highlighted in the following case example provided by the Office of the Public Advocate:

Case study: Mr D

Mr D, a man with a moderate to severe intellectual disability and paranoid schizophrenia was charged with minor offences. Mr D was found unfit to plead on the basis of mental impairment and was remanded in prison waiting for Disability Services supported accommodation. In prison, Mr D's behaviour became very difficult to manage because he was unable to understand why he was there or that he had to comply with prison regulations like providing a urine sample on demand. At regular hearings held during the months he spent in remand, Disability Services told the court they still had no supported accommodation for him. Mr D was being held in seclusion for 23 hours each day, was shackled during his one hour out of seclusion and was sedated to manage his behaviour. The judge threatened to subpoena the Department of Human Services Secretary if appropriate accommodation was not found within 10 days. Mr D was placed in supported accommodation a few days later. In total, Mr D was imprisoned for one year. As a result of his prison experiences, Mr D became agoraphobic, depressed and now shows signs of post-traumatic stress disorder.⁸²

- 11.77 The Office of Public Prosecutions identified that there are no custodial facilities for people with an intellectual disability who do not 'present a serious risk of violence' because this requirement is part of the admission criteria to a residential treatment facility or institution under the Disability Act.⁸³ This was noted in a consultation with Department of Human Services case workers, who explained that the only secure custodial facilities for people with an intellectual disability are the Intensive Residential Treatment Program provided by DFATS and the Long Term Rehabilitation Program at Plenty Residential Services or prison.⁸⁴

80 Submission 10 (Victorian Equal Opportunity and Human Rights Commission).

81 Consultations 17 (Department of Human Services case managers, Shepparton); 2 (Department of Human Services case managers, Barwon); 9 (Department of Human Services case managers, Gippsland and Latrobe); 6 (Department of Human Services case managers, Disability Forensic Assessment and Treatment Service (DFATS) and Long Term Rehabilitation Program (LTRP)).

82 Submission 14 (Office of the Public Advocate).

83 Submission 8 (Office of Public Prosecutions).

84 Consultation 6 (Department of Human Services case managers, Disability Forensic Assessment and Treatment Service (DFATS) and Long Term Rehabilitation Program (LTRP)).

- 11.78 In a consultation with Department of Human Services case managers, the Commission was informed that if a person does not meet the criteria for admission to the Intensive Residential Treatment Program provided by DFATS, another possible accommodation option is the Long Term Rehabilitation Program at Plenty Residential Service, where there are only five beds available. It was explained to the Commission that the Long Term Rehabilitation Program caters mainly for people on a non-custodial supervision order who are ‘problematic clients’ who require supervision but cannot be held in prison.⁸⁵ The only remaining options for people with an intellectual disability under the CMIA if they are not suitable for admission to either the Intensive Residential Treatment Program provided by DFATS or the Long Term Rehabilitation Services are prison, a limited number of houses provided by the Australian Community Support Organisation, or creating a solution for the person in the community.⁸⁶
- 11.79 The Commission was also informed that community-based accommodation is the only option for people on a non-custodial supervision order as ‘very few people are suitable for long-term residential placement at Plenty Residential Service’.⁸⁷

Unsuitability of group accommodation options for forensic residents

- 11.80 A number of other practical difficulties arise in finding appropriate accommodation for people with an intellectual disability under the CMIA. These include considerations about the need to keep the person close to their family, friends and local community, the person’s risk to the community, the vulnerability of the person on the order and the vulnerability of other people with a disability who are residing in the same accommodation.
- 11.81 The practical difficulties in finding appropriate accommodation for this group of people were outlined in consultations with staff of the Department of Human Services.
- 11.82 In particular, it was noted that the model in disability care is group home living, so in determining suitability of a service and issues of vulnerability, consideration may need to be given to the compatibility of residents.⁸⁸ If a person on a supervision order is non-social or violent, it is not appropriate for them to share accommodation with other vulnerable people with disabilities, and so group living may not always be suitable.⁸⁹
- 11.83 It was also noted that in relation to people with acquired brain injuries, it is unclear whether a residential treatment facility is a suitable model for them and that it is important to continue to monitor service models to ensure they respond to the people to whom they are targeted. The Commission was informed that the Department of Human Services takes an individualised approach to supports for all clients involved in the criminal justice system, but there is significant variability in the needs of people with acquired brain injury, and these are not always consistent with the approaches for people with an intellectual disability.⁹⁰
- 11.84 One Department of Human Services case worker explained that it is always difficult to find accommodation options for people on non-custodial supervision orders in terms of both the length of time that can be spent at the facility and the appropriateness of the accommodation for the person’s needs.⁹¹ The case worker also noted that accommodation options for people with an intellectual disability are scarce and it is important to find accommodation for people under the CMIA with other residents ‘who have more skills and communication ability and are less vulnerable’.⁹²

85 Ibid.

86 Ibid.

87 Consultation 9 (Department of Human Services case managers, Gippsland and Latrobe).

88 Consultation 53 (Head Office (Youth Justice, Forensic Disability, Child Protection and Senior Practitioner), Department of Human Services).

89 Consultation 6 (Department of Human Services case managers, Disability Forensic Assessment and Treatment Service (DFATS) and Long Term Rehabilitation Program (LTRP)).

90 Consultation 53 (Head Office (Youth Justice, Forensic Disability, Child Protection and Senior Practitioner), Department of Human Services).

91 Consultation 34 (Department of Human Services case managers, Bayside and Southern Melbourne).

92 Ibid.

Effects of the limited appropriate accommodation options

- 11.85 The Commission was informed in a consultation with the Department of Human Services case workers that there are particular difficulties finding appropriate services for people on non-custodial supervision orders in regional areas, and finding culturally appropriate services that may be required as part of the conditions of the supervision order, for example, drug and alcohol treatment services.⁹³
- 11.86 A participant in a meeting with the Disability Forensic Assessment and Treatment Service and the Long Term Rehabilitation Program explained that where a suitable accommodation option cannot be found, there is a need to create an option with the services available and that this ‘does not set the person up’ to have a good outcome.⁹⁴
- 11.87 Another Department of Human Services case worker explained that a lack of accommodation options can affect the overall supervision of people with an intellectual disability under the CMIA, particularly when they breach the conditions of the supervision order. Due to the lack of custodial accommodation options, when a person breaches their non-custodial supervision order, generally the only option is to continue with the existing level of supervision.⁹⁵
- 11.88 The Australian Community Support Organisation suggested that a lack of appropriate accommodation may be contributing to continuing offending behaviour, as without ‘targeted support’, such as facilities with the appropriate combination of specialist support services, resources and forensic experience to cater for this population’s criminogenic needs, a cycle of offending can result.⁹⁶
- 11.89 To illustrate the effect of the lack of appropriate accommodation options, the Victorian Equal Opportunity and Human Rights Commission provided a case study in their submission. A modified version is presented below:

Case study: *R v AO [2012] VCC 904*

AO was a young person with a permanent intellectual disability who was charged with 13 theft offences and was found unfit to be tried under the CMIA ... the County Court made AO subject to a non-custodial supervision order with a nominal period of five years, which included a condition that AO live in a residential care facility.

Shortly after the order was made, AO absconded from the facility, was arrested and charged with further shop theft offences and placed on remand in Port Phillip Prison. In March 2012, the Court varied the order but AO absconded again. In May 2012, AO was found unfit to stand trial under the CMIA and following a special hearing was found to have committed the offences charged. Following the plea hearing, the Court released AO on bail with a condition he reside at another residential care facility, however AO absconded again and bail was revoked.

In June 2012, in deciding whether to declare AO liable to supervision under section 26 of the CMIA, the judge observed that it had not been possible to find an accommodation facility that met AO’s needs or resulted in compliance with any residential conditions. AO was incapable of complying with a non-custodial order but because there was no appropriate custodial service, a custodial order would result in AO spending a nominal period of five years in an adult prison, which would not benefit him and only ‘add another layer to [his] potential institutionalisation in prison.’

93 Consultation 9 (Department of Human Services case managers, Gippsland and Latrobe).

94 Consultation 6 (Department of Human Services case managers, Disability Forensic Assessment and Treatment Service (DFATS) and Long Term Rehabilitation Program (LTRP)).

95 Consultation 34 (Department of Human Services case managers, Bayside and Southern Melbourne).

96 Submission 13 (Australian Community Support Organisation Inc.).

In the absence of an appropriate service, Judge Gullaci concluded the only appropriate sentence in the circumstances was to discharge AO unconditionally. Although AO's chronic offending was 'a constant thorn in the side of organisations which operate supermarkets and the police who are required to process him, if not daily then on a weekly basis', AO did not pose any danger to the community and was not a violent or sexual offender.⁹⁷

The need for specialised accommodation options for forensic residents

- 11.90 The Office of the Public Advocate proposed that the Department of Human Services provide additional resources to eliminate delays in prison or on remand for people with an intellectual disability.⁹⁸
- 11.91 In considering what is required in terms of accommodation for people with an intellectual disability under the CMIA, staff from the Disability Forensic Assessment and Treatment Service and the Long Term Rehabilitation Program suggested that there is a need for a 'strengthened model of accommodation' to address issues in the workforce and the environment to better support people on supervision orders.⁹⁹
- 11.92 In further considering the type of facility that may be required, staff consulted by the Commission from the Disability Forensic Assessment and Treatment Service and the Long Term Rehabilitation Program suggested that a locked facility may not be required but rather a specialised service to support people in the justice system whose staff have a good understanding of reporting requirements, legal processes and conditions of supervision orders.¹⁰⁰ One participant at the consultation commented that the Long Term Rehabilitation Program is well supported from both a clinical and departmental perspective and there is a large group of people who oversee the service and provide a high level of support which benefits the residents.¹⁰¹

The Commission's conclusion

- 11.93 The Commission is of the view that there are barriers to people with an intellectual disability or other cognitive impairment accessing existing facilities. Further, the accommodation options that are currently available are not always appropriate for people with an intellectual disability or other cognitive impairment.
- 11.94 The Commission supports the principle outlined in Article 14 of the *Convention on the Rights of Persons with Disabilities* which states that:
- if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, *including by provision of reasonable accommodation* [emphasis added].¹⁰²

97 Submission 10 (Victorian Equal Opportunity and Human Rights Commission).

98 Submission 14 (Office of the Public Advocate).

99 Consultation 6 (Department of Human Services case managers, Disability Forensic Assessment and Treatment Service (DFATS) and Long Term Rehabilitation Program (LTRP)).

100 Ibid.

101 Ibid.

102 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 14.

- 11.95 There is evidence that these barriers have had a number of consequences in cases that have involved people with an intellectual disability or other cognitive impairment under the CMIA. They have:
- affected decision making regarding the level of supervision of people subject to the CMIA
 - resulted in circumstances that are inconsistent with community safety
 - caused harm and trauma to vulnerable people in the criminal justice system.
- 11.96 The Commission's view is that such consequences are inconsistent with the just operation of the CMIA. They are inconsistent with the underlying principles of the CMIA to uphold community safety within a therapeutic approach. The Commission has therefore formed the view that change is required to address the lack of appropriate accommodation options for people in this cohort.
- 11.97 An increase in capacity in existing disability services does not present a complete solution to the problem. In some cases, the needs and risks of people who are subject to supervision orders cannot be adequately and appropriately addressed within existing disability services. In some cases, a specialised option that is appropriate to the treatment needs and risks posed in the particular case is required; for example, cases involving people with co-morbidity or dual diagnoses, such as an intellectual disability and a mental illness combined with substance use, or cases involving people with conditions that are not an intellectual disability, such as acquired brain injuries, autism spectrum disorder or dementia.
- 11.98 The Commission is of the view that further examination of this gap in services is required by the Department of Human Services to monitor current service models, develop new service models for the particular populations who become subject to the CMIA and to generally support cases where specialised service provision is required.
- 11.99 The Commission acknowledges that a significant amount of work is being undertaken, both in Victoria and at a federal level, to address the inequalities faced by people with an intellectual disability or other cognitive impairment in contact with the criminal justice system.
- 11.100 People with an intellectual disability or other cognitive impairment subject to supervision orders under the CMIA should be able to access appropriate accommodation and be provided with services and treatment tailored to their individualised needs. Access to appropriate accommodation is consistent with Article 14 of the *Convention on the Rights of Persons with Disabilities*. The establishment of an appropriate forensic facility would be a significant step towards equality under the law for people with an intellectual disability or other cognitive impairment, with people with a mental illness on a supervision order under the CMIA.

Recommendation

- 98 The Department of Human Services should commission a review of current forensic disability services to identify appropriate models of care and the accommodation needs of people with an intellectual disability or other cognitive impairment who are subject to supervision orders under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

The review should include an analysis of the cost of any recommendations regarding appropriate models of care and accommodation needs.

Cost implications

- 11.101 The Commission acknowledges that implementation of the above recommendations will have resource implications. However, the current practice that the Department of Human Services adopts in some cases, of building and resourcing individual accommodation solutions for people on supervision orders under the CMIA on an ad hoc basis, is also very resource-intensive.
- 11.102 The Commission is of the view that these resources can be better used by undertaking work to determine the needs of the forensic disability population and the most effective approach in deploying departmental resources to provide appropriate services and supervision.
- 11.103 Providing specific information on the cost of establishing appropriate accommodation for people with an intellectual disability or other cognitive impairment is beyond the scope of this reference. There are a number of complexities involved in establishing appropriate accommodation options including work on developing models of care for people with an intellectual disability or other cognitive impairment subject to supervision orders under the CMIA to address issues particular to the forensic disability population.

Managing breaches of supervision orders

CMIA provisions governing breaches of a supervision order

- 11.104 The CMIA outlines the process for managing a person who has breached a condition of their supervision order. Where it appears that a person has failed to comply with the conditions of a supervision order, the person responsible for their supervision may apply to the court for a variation of that order.¹⁰³ Once the court is satisfied that the person has failed to comply with the order, the court may confirm the order, vary the conditions of the order or vary the order to a custodial supervision order.¹⁰⁴
- 11.105 Where a person subject to a non-custodial supervision order becomes a serious risk to themselves or others, the CMIA provides that the person can be apprehended using an emergency power of apprehension. The person must:
- have failed to comply with the non-custodial supervision order, and
 - be a serious danger to their own safety or public safety.¹⁰⁵
- 11.106 People responsible for the supervision of the person subject to the supervision order ('supervisors') use the emergency power when they need to apprehend the person as a matter of urgency and it would be inappropriate to wait for a court decision.¹⁰⁶ Members of the police force, ambulance officers and other mental health service providers may also use the emergency power of apprehension.¹⁰⁷
- 11.107 If an application to vary an order is not made within 48 hours of the emergency apprehension or the person's arrest, the person must be released.¹⁰⁸
- 11.108 The court may order a warrant for the arrest of a person subject to a non-custodial supervision order if they fail to attend the hearing (in situations where the person is not already in detention).¹⁰⁹

103 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 29(1).

104 *Ibid* s 29(4).

105 *Ibid* s 30(1).

106 Department of Health, above n 68, 28.

107 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 30(6).

108 *Ibid* ss 30(4), 30A(4).

109 *Ibid* s 29(3).

- 11.109 People on non-custodial supervision orders may travel out of Victoria if they have the permission of their supervisor.¹¹⁰ However, where a person on a non-custodial supervision order leaves Victoria without permission, they fail to comply with the supervision order and can be arrested.¹¹¹ The supervisor, the Secretary to the Department of Health or the Secretary to the Department of Human Services may apply for a warrant to arrest the person subject to the non-custodial supervision order.¹¹²
- 11.110 The officers may also apply for a warrant of arrest if a person is absent without leave while on a custodial supervision order and has left Victoria.¹¹³

Managing breaches of non-custodial supervision orders

- 11.111 People with a mental illness on a custodial supervision order reside at Thomas Embling Hospital. The hospital is a 116-bed secure hospital with seven accommodation units covering acute, sub-acute, continuing care and rehabilitation, and includes a separate women's unit.¹¹⁴
- 11.112 Thomas Embling Hospital provides both secure accommodation and 16 low security beds that are used for stable patients who are accessing extended leave to assist in transitioning them back into the community.
- 11.113 Forensicare advised that 67 per cent of Thomas Embling's patients are forensic patients. However, many of these patients are stable and lower risk and could be accommodated in a medium-secure environment.¹¹⁵ There is currently no medium-secure environment for people with a mental illness who are subject to supervision orders under the CMIA.
- 11.114 A medium-secure facility may assist in transitioning people from Thomas Embling Hospital into the community. It may also provide an alternative for people who have breached the conditions of their non-custodial supervision order and are currently returned from the community to the secure environment of Thomas Embling Hospital.
- 11.115 This is particularly important when managing people who may have breached a condition of their non-custodial supervision order. A person can fail to comply with a non-custodial supervision order for various reasons, for example, by missing appointments with the treating team, refusing to participate in programs or using alcohol or illicit drugs (where this is in breach of a condition of the non-custodial supervision order).¹¹⁶
- 11.116 When Forensicare is supervising a person subject to a non-custodial supervision order and there is a concern that the person is breaching the conditions of their non-custodial supervision order, the approved mental health service providing treatment to the person must contact the authorised psychiatrist of Forensicare immediately.¹¹⁷ Forensicare and the area mental health service will then together decide how to deal with the issue.¹¹⁸
- 11.117 Where it is reasonably suspected that a person has failed to comply with the conditions of their non-custodial supervision order, they may be apprehended.¹¹⁹ Within 48 hours of apprehension, the person must either be released or an application must be made to have their non-custodial supervision order varied to a custodial supervision order. Where a custodial supervision order is made, the person must reside at the only secure facility currently available, Thomas Embling Hospital.

110 Department of Health, above n 68, 31.

111 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 30A.

112 *Ibid* s 30A(1).

113 *Ibid* s 30B.

114 Submission 19 (Forensicare).

115 *Ibid*.

116 Department of Health, above n 68, 25.

117 *Ibid*.

118 *Ibid*.

119 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 30.

- 11.118 The consultation paper sought feedback on whether there is a need for more guidance to those responsible for the supervision of people on supervision orders in dealing with the failure to comply with a non-custodial supervision order, and the best way for such guidance to be provided.

Forensic capacity in services which manage breaches of supervision orders

- 11.119 Forensic mental health services have expertise in managing people with a mental illness who have a history of criminal offending, and they aim to address the relationship between mental illness and crime. While Forensicare has forensic mental health expertise in supervising people on custodial supervision orders under the CMIA, area mental health services who supervise people on non-custodial supervision orders generally have expertise in managing mental illness rather than forensic mental health.
- 11.120 The Forensic Clinical Specialist Program aims to enhance the capacity and expertise of the mental health workforce to manage people with mental illness who engage in criminal offending. Forensic Clinical Specialists work with area mental health services to improve outcomes for this cohort and reduce the risk associated with their offending or re-offending by providing advice and consultation, education and training and quality improvement.¹²⁰
- 11.121 There is no equivalent Forensic Clinical Specialist Program in the disability sector.

Views in submissions and consultations

- 11.122 Submissions and consultations identified two main issues regarding the management of breaches of supervision orders by people with a mental illness:
- The current provisions of the CMIA are not sufficiently clear on the extent of the non-compliance required before action must be taken to apprehend the person subject to the supervision order. Making decisions about managing a person who may have breached a condition of their supervision order is difficult, and varying an order to a custodial supervision order has serious implications for the person's overall recovery.
 - Incorporating more flexibility in terms of accommodation options and the type of order that can be made may assist in supporting the person and be more consistent with recovery-orientated practice.

Flexibility in managing breaches of supervision orders

- 11.123 There was a strong view expressed in submissions and consultations that there should be greater flexibility in managing breaches of supervision orders under the CMIA.¹²¹
- 11.124 The need for a medium-secure facility for people with a mental illness to more effectively deal with breaches of non-custodial supervision orders was highlighted in submissions and consultations.¹²²
- 11.125 One participant in a meeting with Forensic Clinical Specialists explained that decisions about whether a person has breached the conditions of a non-custodial supervision order are difficult and an 'intermediate step' between Thomas Embling Hospital and the community would assist in better managing people in these circumstances.¹²³

120 Victorian Institute of Forensic Mental Health (Forensicare), 'Forensic Clinical Specialist Program: A Victorian Government Mental Health Initiative', Brochure (undated).

121 Submissions 1 (Associate Professor Ruth Vine); 18 (Victoria Legal Aid); 19 (Forensicare). Consultations 19 (Forensic Clinical Specialists); 2 (Forensicare Patient Consulting Group).

122 Submission 19 (Forensicare). Consultations 19 (Forensic Clinical Specialists); 24 (County Court of Victoria—judges); 2 (Forensicare Patient Consulting Group).

123 Consultation 19 (Forensic Clinical Specialists).

- 11.126 A judge of the County Court of Victoria expressed a view that a relapse does not in itself mean a person should be sent back to custody.¹²⁴
- 11.127 One person on a custodial supervision order commented that returning to a custodial environment after breaching the conditions of a non-custodial supervision order can have an unnecessarily negative effect on a patient's overall recovery. The person advocated for more flexibility in the system and developing more proportionate responses to breaches of orders. The person talked about the effect that returning to a custodial environment can have on recovery. If a person breaches an order they can 'end up back in an acute unit which may make [you] worse because you are with people who are more unwell than you are'. The person described the process as 'being under the microscope ... for little mistakes there are such big consequences—when you have worked so hard on your mental illness'.¹²⁵
- 11.128 Forensicare expressed a similar view:
- [a] variation to a custodial supervision order would effectively set the person back two stages in that, once on a custodial supervision order, the person would need to go through the graduated process of applying for extended leave before regaining a non-custodial supervision order.¹²⁶
- 11.129 Victoria Legal Aid was of the view that the requirement to vary a person's order back to a custodial supervision order following a breach disrupts the 'pathway towards gradual reintegration' and it can take years for the person to be placed on a non-custodial order again which results in delays that are costly and 'may ultimately be counter-therapeutic'.¹²⁷
- 11.130 A Forensic Clinical Specialist supported this view, stating that a lack of flexibility in conditions for non-custodial supervision orders can set people up for failure.¹²⁸ One participant in a separate meeting with Forensic Clinical Specialists also advocated for more flexibility in the system and explained that sometimes supervisors 'work around the system' to avoid a severe outcome.¹²⁹
- 11.131 Victoria Legal Aid suggested that section 30(4) of the CMIA should allow a court the discretion to 'delay or adjourn proceedings where a person has not complied with their non-custodial supervision order'.¹³⁰ Forensicare supported this view, arguing that the current process is 'artificial and inappropriate' and that the time provided by a delay or adjournment can provide the opportunity to stabilise a person and address the factors that led to the person breaching a condition of the order.¹³¹ Forensicare explained that in the majority of cases, a period of three months is sufficient to allow the treating team to determine the person's risk and treatment. In more complex cases, up to 12 months may be required to establish an appropriate treatment plan.
- 11.132 Forensicare and Victoria Legal Aid also supported changes to allow a non-custodial order to be suspended temporarily while the person is placed on a custodial order and assessed and for the supervision to be lifted where it is considered that the person can once again be managed in the community.¹³² Forensicare noted that the CMIA is unclear about whether they have the power to discharge a person back into the community on a non-custodial supervision order after they have been apprehended for a breach and assessed as manageable in the community. Forensicare noted that introducing similar provisions in the CMIA that allow a suspension of extended leave to be lifted would assist in managing these situations.¹³³

124 Consultation 24 (County Court of Victoria—judges).
125 Submission 2 (Forensicare Patient Consulting Group).
126 Submission 19 (Forensicare).
127 Submission 18 (Victoria Legal Aid).
128 Consultation 19 (Forensic Clinical Specialists).
129 Consultation 14 (Treating team, Mercy Health).
130 Submission 18 (Victoria Legal Aid).
131 Submission 19 (Forensicare).
132 Submissions 19 (Forensicare); 18 (Victoria Legal Aid).
133 Submission 19 (Forensicare).

Enhancing the forensic capacity of the mental health and disability workforce

- 11.133 In consultations, mental health clinicians and Department of Human Services case workers raised concerns about the requirement for reporting breaches of supervision orders and about their expertise to undertake this task. There was also a general lack of clarity on the information that should be included in the annual mental condition report to the court.¹³⁴
- 11.134 One mental health clinician in a meeting with an area mental health service stated that the roles and responsibilities in supervising people on supervision orders are unclear and proposed that non-custodial supervision order plans should 'more robustly' set out the conditions of the order and what would happen if those conditions were breached.¹³⁵ Another mental health worker supported this view, suggesting that orders should advise the area mental health service what it should be reporting on in terms of breaches because it is unclear what triggers reporting of the breach, what issues should be dealt with by the service and what the service is responsible for should something go wrong.¹³⁶
- 11.135 An example was provided by a participant in consultations with staff of an area mental health service where a condition of a person's non-custodial supervision order was to abstain from alcohol. An area mental health service is only concerned about the person's mental health, and while they were aware that consumption of alcohol was a risk factor to the person's offending, it was not a risk factor for the person's mental health. The participant suggested that greater clarity is required as to whether services should report to Forensicare on mental health risk factors or all risk factors.¹³⁷
- 11.136 Similar views were expressed by Department of Human Services case workers who saw a conflict between their therapeutic role and their role in supervising the conditions of an order. They found managing breaches to be difficult because they are providing supervision but are not corrections officers.¹³⁸ For example:
- One case worker commented that they were not clear about what to do when their client breaches the conditions of their supervision order.¹³⁹ One case manager advised that usually they write up any breaches in their report and raise the issue at the client's 12-month review. However, at other times they may advise the legal team in the Department of Human Services or inform the judge's associate.
 - One case worker reported that they found that in many situations there were no consequences for a person who had breached a condition of their supervision order, describing the supervision process as 'meaningless'.¹⁴⁰
- 11.137 In a consultation with Department of Human Services staff, it was suggested that workforce development through policy and practice advice could assist to provide guidance on how to manage the interface between a therapeutic and supervisory role.¹⁴¹
- 11.138 Forensicare, however, suggested that there was no need to provide additional guidance to mental health workers who are supervising people on orders. This was because any attempt to further define the extent of non-compliance required before action must be taken:
- risks creating circumstances where Forensicare is legislatively required to apprehend a person or apply for variation of their order despite a clinical view that the person remains manageable on a non-custodial supervision order.¹⁴²

134 Consultations 8 (Latrobe Community Mental Health Service); 19 (Forensic Clinical Specialists).

135 Consultations 15 (Northern Area Mental Health Service); 18 (Goulburn Valley Area Mental Health Service); 9 (Department of Human Services case managers, Gippsland and Latrobe); 34 (Department of Human Services case managers, Bayside and Southern Melbourne).

136 Consultation 15 (Northern Area Mental Health Service).

137 Consultation 8 (Latrobe Community Mental Health Service).

138 Consultation 9 (Department of Human Services case managers, Gippsland and Latrobe).

139 Ibid.

140 Consultation 34 (Department of Human Services case managers, Bayside and Southern Melbourne).

141 Consultation 53 (Head Office (Youth Justice, Forensic Disability, Child Protection and Senior Practitioner), Department of Human Services).

142 Submission 19 (Forensicare).

- 11.139 Victoria Legal Aid recommended that a more therapeutic response be adopted for people who breach the conditions of a non-custodial supervision order. The following case example was provided to illustrate a possible approach to managing breaches under the CMIA that involves the use of civil mental health orders:

Case study: Jacob

Jacob was found not guilty because of mental impairment of intentionally causing serious injury and armed robbery, and was placed on a Non-custodial Supervision Order (NCSO) with a nominal term of 20 years.

While living in a supported facility, Jacob started binge drinking regularly in breach of his order, damaged property, was verbally threatening to staff, stopped participating in rehabilitation, had limited insight into his schizophrenia and experienced some psychotic symptoms.

He was admitted as an involuntary patient under the Mental Health Act to Thomas Embling Hospital, rather than Forensicare applying to vary back to a custodial order under section 29 of the Act.

He spent seven months as an inpatient. In June 2011, he was discharged straight back to NCSO [non-custodial supervision order] and commenced living with his parents and getting treatment from the local area mental health service. In August this year, his application to have his NCSO revoked was successful. He was mentally stable, had developed good insight, and was drinking much less alcohol. Had his NCSO been revoked he would have had to go right back to seeking leave from the Forensic Leave Panel, then extended leave, then a non-custodial order.¹⁴³

The Commission's conclusion

- 11.140 The Commission supports the view that greater flexibility is required in the CMIA system to manage breaches of conditions of supervision orders in a way that promotes the recovery of the person.
- 11.141 A medium-secure facility would assist in managing people who do not require a secure environment as they transition in and out of the community in their process of recovery. Establishing a medium-secure facility for people with mental illness would also allow resource-intensive services and facilities in a secure hospital environment to be directed to those most in need.
- 11.142 The Commission also supports changes to section 30(4) of the CMIA to allow for judicial discretion in varying a non-custodial supervision order to a custodial supervision order in response to a breach of a supervision orders. This will allow clinical decision making to occur in the best interests of both the patient and the community.
- 11.143 Allowing an application for variation of a non-custodial supervision order to be adjourned for a period of up to 12 months will allow for flexibility in managing people who have breached a condition of their non-custodial supervision order. Rather than the person going back onto a custodial supervision order immediately, the person can receive treatment, services or support to stabilise their condition so that they may return to the community. Where a person needs to be in a custodial or secure environment, they could be admitted to Thomas Embling Hospital under an order under the MHA 2014, or be made subject to a compulsory order under the Disability Act.

- 11.144 The Commission acknowledges the views of mental health workers and Department of Human Services case managers that greater clarity is needed in the requirements of supervising people on orders under the CMIA. The Commission also notes Forensicare's view that legislative guidance may further limit flexibility in managing people on supervision orders. The Commission is therefore of the view that guidelines are an appropriate mechanism to assist mental health workers and disability case workers supervising people under the CMIA in making decisions about breaches of supervision orders. The guidelines should be developed by the Department of Health and the Department of Human Services to provide guidance to people who may not have forensic mental health or forensic disability expertise but are responsible for supervising people under the CMIA.
- 11.145 The Commission also notes that work is currently being undertaken by the Department of Health and the Department of Justice in Victoria as part of the *Forensic Mental Health Service Planning Project*. The aim of this project is to 'recommend a service configuration for forensic mental health services, underpinned by a clinically effective and cost effective model of care, to appropriately respond to future service demand'.¹⁴⁴
- 11.146 The *Forensic Mental Health Service Planning Project* is looking at models of service provision that will affect people on supervision orders under the CMIA. Any recommendations made as part of this project will also affect recommendations made in this report.
- 11.147 The Commission is of the view that changes are required to improve the 'forensic capacity' of the mental health and disability sectors to better accommodate the needs and manage the risks of people subject to supervision orders under the CMIA. Improvements have already resulted from the Forensic Clinical Specialist Program and the forensic capacity of mental health workers could be further enhanced by expanding this program so that forensic clinical specialists are available in all area mental health services. The Commission also acknowledges the work that is currently being undertaken by the Department of Human Services to develop disability forensic expertise through implementation of initiatives such as the Online 'Disability Forensic Practice Framework', the Workforce Learning and Development program, dedicated liaison positions and the provision of funding for departmental frontline staff to undertake further studies in advanced disability practice. The Commission recommends that this work be built on to enhance the forensic capacity of disability services.¹⁴⁵

Recommendations

- 99 The following amendments should be made to the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) to allow for greater flexibility in managing people who have breached the conditions of their non-custodial supervision order:
- (a) Section 29(4) should be amended to allow the court to adjourn an application under section 29(1) for variation of a supervision order for a period not exceeding 12 months where the court is satisfied by evidence on oath, whether orally or by affidavit, from the supervisor, the Department of Human Services or the Department of Health that, having regard to the person's risk, a period of assessment and treatment is appropriate prior to consideration of the application to vary the non-custodial supervision order to a custodial supervision order.

Recommendations cont'd

- (b) Section 30(4) should be amended to create an exception to the requirement that a person detained under this section be released within 48 hours if an application has been made and a court has made an order adjourning the application to vary the supervision order.
 - (c) Section 30 should be amended to provide a power for the authorised psychiatrist of the approved mental health service or the Secretary to the Department of Human Services to authorise the release of a person from detention following an application under section 29(1) and prior to the court hearing an application under section 30(4).
- 100 A new medium-secure forensic mental health facility should be established as an approved mental health service for adults with a mental illness who are subject to supervision orders under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).
- 101 The Department of Health and the Department of Human Services should develop workforce strategies to increase the capacity of the general mental health and disability sectors to undertake forensic mental health and disability work. Such strategies could include the development of guidelines on decision making in relation to supervision orders.

Cost implications

- 11.148 The Commission acknowledges that the establishment of a medium-secure forensic mental health facility will have significant resource implications.
- 11.149 While the Commission is mindful of this, it is not in a position to cost such a facility given the variables involved, such as the location of the facility, the number of beds required, the needs of the patients and the security requirements. The work currently being undertaken as part of the *Forensic Mental Health Service Planning Project* may assist in providing greater detail on the accommodation needs of the forensic mental health population and the resources required to meet that need.
- 11.150 Given the potential for changes as a result of any recommendations that may be made in the *Forensic Mental Health Service Planning Project*, consideration of the resource implications of Recommendation 100 should occur after the report on the project has been provided to the Department of Health and Department of Justice. This will enable a full and proper consideration of this recommendation in the light of any changes that may be recommended on the model of service provision.
- 11.151 The changes proposed under Recommendation 99 to provide more flexibility in responding to breaches of supervision orders have the potential to produce resource savings through reducing the time supervised people spend in custody. If a person who breaches a supervision order can be stabilised after a period (of up to 12 months) of assessment and treatment while under detention without having their non-custodial supervision order varied to a custodial supervision order, such people may be detained for shorter periods. The provision of the power to adjourn the application to vary the non-custodial supervision order to a custodial supervision order means that the person can be released under the non-custodial supervision that has remained in place and will not be required to go through the extended leave process. In such cases, this could result in a significant reduction of the resources required for custodial supervision in Thomas Embling Hospital.

- 11.152 Forensicare advised the Commission that the cost per patient is \$588.83 per day for the year to February 2014. This covers both treatment and supervision.¹⁴⁶ No formal costing has been undertaken by Forensicare of the non-custodial supervision order program.
- 11.153 Further, if Recommendation 100 is adopted and there is a medium-secure facility, this could also provide a more economical custodial option for people who are detained following apprehension for a breach of a supervision order and who do not require the high security environment of Thomas Embling Hospital.

Police contact with people subject to supervision orders

- 11.154 Police officers may come into contact with people on supervision orders in apprehending a person who absconds from a facility without leave or who has breached the conditions of their supervision order. Police officers may also come into contact with people in the community on non-custodial supervision orders for a range of other reasons, for example, if the deterioration of their mental condition leads to behaviour that may pose a risk to themselves or others.

Views in submissions and consultations

- 11.155 An issue that arose in a consultation with representatives of Victoria Police was the lack of easily accessible information for police officers when interacting with people who may be on a supervision order.
- 11.156 A police officer may not be aware that a person is subject to a supervision order under the CMIA when they come into contact with them in the community. In a meeting with Victoria Police, the Commission was informed that the fact of a person being on a CMIA supervision order or finding of 'not guilty because of mental impairment' does not currently show up as a 'flag' on Victoria Police's Law Enforcement Assistance Program (LEAP) screen.¹⁴⁷
- 11.157 The LEAP system includes a module (the 'attendance module') whereby a person can be flagged as being on a particular sentence or on parole. The LEAP system is used by police officers in operational police work when they apprehend or arrest a person. By entering that person's name into the LEAP database, a flag will appear if they are on a particular order. As one member of Victoria Police explained, a police member would need to 'dig deeper' through LEAP to be alerted about a person being subject to a supervision order and this is not done in practice.¹⁴⁸ Victoria Police advised that the main way the police member can be made aware of the information is if the person volunteers it, and this can then be added to the LEAP system, but it does not provide an immediate flag.¹⁴⁹

¹⁴⁶ The Victorian Institute of Forensic Mental Health (Forensicare) advised the Commission that this figure was calculated over a one-year period from February 2013 to February 2014 and includes all the direct inpatient costs at the hospital, including clinical services provided by other agencies and non-medical services. It does not include an allocation for the indirect costs of running the hospital, such as the clinical and corporate management and support. The figure provided is an average produced from the total costs across the number of patients the hospital can accommodate. It does not take account of the different costs between units depending on their staffing models and programs and does not distinguish between the legal status of individual forensic patients and their leave requirements.

¹⁴⁷ Consultation 42 (Victoria Police—operational police).

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

- 11.158 A member of Victoria Police stated that this was important because such information had a number of implications, including:
- whether an application for remand is sought or bail opposed
 - where the person should be remanded (for example, in an ‘appropriate place’ such as Thomas Embling Hospital, a residential treatment facility or residential institution or prison)
 - how the person is interviewed by police
 - how the police officer assesses the risk of the situation
 - how the police officer approaches, responds and communicates with the person.¹⁵⁰

The Commission’s conclusion

- 11.159 Victoria Police already have access to information about whether a person has been subject to the CMIA finding and order. This information is included in the LEAP database, but it is not currently captured in a way that allows it to be easily accessed so that a police officer can be immediately aware that a person may be subject to a CMIA order.
- 11.160 While this is an operational issue, the Commission is of the view that it is important for Victoria Police to be aware that a person they are in contact with is subject to a supervision order under the CMIA. This information will assist Victoria Police to respond to the person in the most appropriate way and also to ensure the protection of the community.
- 11.161 The Commission’s recommendation is not intended to broaden the information that is available to Victoria Police on people who are subject to supervision orders, but only to make a change to enable it to be accessed more readily by operational police officers who may have contact with people subject to the CMIA.

Recommendation

- 102 Victoria Police should add a flag to the ‘attendance module’ in the Law Enforcement Assistance Program (LEAP) database to enable data to be entered and accessed that will immediately notify a police officer that a person is subject to a supervision order under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

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

Concerns about the system of management

- 11.162 There is relatively little information about the management and supervision of people with an intellectual disability or other cognitive impairment under the CMIA.
- 11.163 As at 30 June 2013, there were 30 people being supervised by the Department of Human Services (DHS) under the CMIA. Of these, there were 27 people on non-custodial supervision orders and three people on custodial supervision orders.¹⁵¹ Of these people, 63 per cent were clients who were already known to DHS prior to a supervision order being imposed¹⁵² and they range from 19 to 71 years of age.
- 11.164 Since the commencement of the CMIA there have been six revocations of supervision orders for people supervised by DHS, with one application for extended leave applied for and granted.¹⁵³
- 11.165 In 2011–12 there were five applications to the Forensic Leave Panel for a combination of on-ground and limited off-ground leave. All five applications for leave were approved.¹⁵⁴
- 11.166 Issues were raised in submissions and consultations about the supervision and management of people with an intellectual disability or other cognitive impairment under the CMIA.
- 11.167 In particular, concerns were raised about whether the principles of gradual reintegration, therapeutic focus and least restrictive alternative apply equally to people with an intellectual disability or other cognitive impairment. This position was explained by Ruffles who described people found not guilty because of mental impairment on the grounds of intellectual disability as ‘a forgotten sub-group of forensic patients for whom indefinite detention and supervision remains a likely consequence’.¹⁵⁵ Ruffles argued that this raises:
- serious questions as to whether it is appropriate to apply the same legal principles governing management and release to both mentally ill and intellectually disabled acquittees. The absence of research regarding intellectually disabled acquittees, in both Australia and overseas, further compounds this invisibility status.¹⁵⁶
- 11.168 While arrangements for mental health treatment for people on supervision orders are relatively well established, the same does not exist for people with an intellectual disability under the CMIA. Unlike people with a mental illness, people with an intellectual disability under the CMIA:
- rarely have their supervision order revoked
 - lack a clear treatment pathway
 - are not subject to clinical oversight by the Senior Practitioner
 - lack secure accommodation facilities and accommodation options in the community.
- 11.169 The Victorian Parliament Law Reform Committee recommended that the Victorian Government ensure resources are provided for programs and services directed toward reintegration into the community and rehabilitation of offenders with an intellectual disability or other cognitive impairment.¹⁵⁷

151 Data provided by DHS as at 30 June 2013.

152 As of 30 June 2013, 63% of clients with a disability subject to the CMIA were known to DHS prior to a section 47 certificate being requested under the CMIA.

153 Data provided by DHS as at 30 June 2013.

154 Forensic Leave Panel, *Annual Report 2011* (2012) 7.

155 Janet Ruffles, *The Management of Forensic Patients in Victoria: The More Things Change, The More They Remain the Same* (PhD Thesis, Monash University, 2010) 205.

156 Ibid.

157 Victorian Parliament Law Reform Committee, above n 42, 336.

- 11.170 The Commission makes recommendations in this report that seek to address some of the concerns about the suitability of the CMIA for people with an intellectual disability or other cognitive impairment. These include:
- *The power to determine unfitness in the Magistrates' Court*—A power to determine unfitness in the Magistrates' Court will mean that many people with an intellectual disability or cognitive impairment will no longer have to have their matters transferred to a higher court to be determined (Recommendation 27).
 - *Discharge requirements in the Magistrates' Court*—A recommendation that the magistrate consider discharging an accused where a real and substantial question of unfitness is raised prior to a special hearing where the accused is receiving treatment, supports or services in the community and does not pose an unacceptable risk of harm to the community (Recommendation 28).
 - *Modifications to the Presser criteria for determining unfitness*—A recommendation that in determining whether a person is unfit to stand trial, the court must consider the extent to which modifications can be made to the hearing process to assist the person's participation in the hearing. This recommendation aims to ensure that rather than finding a person unfit to stand trial, appropriate supports are provided to that person to enable them to participate in proceedings (Recommendation 18).
 - *Changes to the number of parties to review hearings*—DHS will no longer be required to adopt a legal position in relation to the review hearings and this will assist in maintaining the therapeutic relationship between DHS case managers and people with an intellectual disability or cognitive impairment (Recommendation 62).
 - *Defining mental impairment*—Providing a definition of mental impairment that includes intellectual disability and cognitive impairment clarifies the law in cases where it was previously unclear whether these conditions qualified for the defence of mental impairment (Recommendation 24).
- 11.171 This section includes the Commission's recommendations to:
- provide safeguards, a clear treatment pathway and clinical oversight for people with an intellectual disability on supervision orders
 - address inconsistencies between the Disability Act and the CMIA.

The staggered system of release and lack of a clear treatment pathway

- 11.172 The CMIA is modelled on a gradual or staggered system of release, based on the expectation that the person subject to the supervision order will recover and be reintegrated into the community. Some commentators have suggested that this gradual or staggered system of release was constructed for people with mental illnesses but is less suitable for people with an intellectual disability or other cognitive impairment.¹⁵⁸
- 11.173 As noted at [11.168], it is rare for a person with an intellectual disability to have their supervision order revoked under the CMIA. A study looking at the management of people on supervision orders under the CMIA found that of the 10 forensic residents included in the study, 'none had achieved revocation, despite three such acquittees being detained in a custodial setting for more than 10 years and two being detained for more than 15 years'.¹⁵⁹

- 11.174 The study suggested that there is a perception that applications to revoke an order under the CMIA for a person with an intellectual disability will be unsuccessful.¹⁶⁰ The reasoning for this was outlined as follows:

there is clearly a reluctance by intellectually disabled acquittees to even 'test the waters' which suggests there remains something about the machinery of the CMIA and/or its application that discriminates against the potential for intellectually disabled acquittees to move through its staggered system of release ... Given that demonstration of such factors is largely beyond the capacity of intellectually disabled forensic residents, it is hardly surprising and perhaps realistic that such acquittees appear to have assessed their prospects of moving through the CMIA system as negligible.¹⁶¹

- 11.175 One hypothesis proposed by Ruffles as the reason that people with an intellectual disability are less likely to progress through the system is the particular nature of the group of people with an intellectual disability who are made subject to supervision orders under the CMIA. Ruffles suggested that:

in the opinion of treatment providers who play a large role in determining when it is appropriate to apply for a variation in status, each individual forensic resident acquitted on the grounds of intellectual disability continues to pose a risk of serious endangerment either to themselves or the community and, therefore, continues to require judicial supervision at a particular level. This explanation may be supported by the fact that, interestingly, 50% of offences committed by intellectually disabled forensic residents occurred within an inpatient setting such as a hospital, institution or respite facility, as opposed to only 3.68% of offences committed by forensic patients found NGRMI [not guilty by reason of mental impairment] on the grounds on mental illness. Thus, in the case of half of the intellectually disabled forensic residents, it was deemed necessary and appropriate for them to be in care at the time leading up to the NGRMI offence, raising the possibility that the strict supervisory consequences of a NGRMI verdict simply represent a continuation of the status quo.¹⁶²

- 11.176 However, there are a number of treatment programs available for people with an intellectual disability or other cognitive impairment. Many of these programs are based on modifications of treatment programs for people who offend, but do not have a mental condition. They include group and individual cognitive behaviour therapy programs and positive behaviour support programs.¹⁶³

- 11.177 For example, one study looking at the long-term effects of cognitive behaviour therapy on people with acquired brain injury found that an 11-week cognitive behaviour therapy program can enhance community integration six months after cessation of treatment.¹⁶⁴ Another study looking at men with an intellectual disability who participated in group cognitive behavioural therapy for sexually abusive behaviours found evidence of long-term effectiveness.¹⁶⁵

160 Ibid 203–4.

161 Ibid 204–5.

162 Ibid 203.

163 See for example, April Arundine et al 'Cognitive Behaviour Therapy After Acquired Brain Injury: Maintenance of Therapeutic Benefits at 6 Months Posttreatment' (2012) 27(2) *Journal of Head Trauma Rehabilitation* 104; Kathryn M. Heaton and Glynis H. Murphy 'Men with Intellectual Disabilities who have Attended Sex Offender Treatment Groups: A Follow-Up' (2013) 26 *Journal of Applied Research in Intellectual Disabilities* 489.

164 Arundine et al, above n 163, 111.

165 Heaton and Murphy, above n 163.

Views in submissions and consultations

- 11.178 There was an overwhelming view expressed in submissions and consultations that people with an intellectual disability are not afforded the same treatment that is provided to people with a mental illness. One participant in the higher courts roundtable argued that the CMIA creates significant differences between the way that people with a mental illness are treated under the legislation and the treatment of people with an intellectual disability.¹⁶⁶
- 11.179 It was suggested that people with an intellectual disability on a non-custodial supervision order tended to be on orders for a longer period of time than people with a mental illness. The Department of Human Services Senior Practitioner commented to this effect and said that there is a 'lack of rigour' in applying the system to people with an intellectual disability and that the system needs to 'mirror the pathway' of people with a mental illness for people with an intellectual disability under the CMIA.¹⁶⁷
- 11.180 Concerns were also raised about the suitability of the staggered system of release under the CMIA for people with an intellectual disability. One participant in a consultation with judges of the Supreme Court commented that the system does not cater well for people with an intellectual disability and assessments and outcomes clearly differ between mental illness and intellectual disability.¹⁶⁸
- 11.181 The static nature of an intellectual disability was also discussed. Concerns were raised about the appropriateness of the staggered or gradual system of release under the CMIA for a person with an intellectual disability. As Victoria Legal Aid highlighted, the current system discriminates against people with an intellectual disability as they are unlikely to be able to demonstrate that they have sufficiently progressed with treatment and therefore may never progress through the system and 'will languish on supervision orders for a potentially indefinite term'.¹⁶⁹
- 11.182 Victoria Legal Aid therefore recommended that Part 6 of the CMIA be amended to 'better respond to the particular circumstances and needs of intellectually disabled and cognitively impaired persons'.¹⁷⁰
- 11.183 The Office of the Public Advocate supported this position, stating that a gradual or staggered system of release 'does not necessarily suit persons with an intellectual disability' or the 'best interests of people with cognitive impairment of a progressive nature (e.g. dementia)' and that a system focussed on recovery may be inappropriate for these groups.¹⁷¹
- 11.184 People consulted also identified, and in some cases argued strongly for, the need to develop a clear treatment pathway for people with an intellectual disability under the CMIA.
- 11.185 The Senior Practitioner, Department of Human Services, commented that the treatment and service pathways are not clear under the CMIA for people with an intellectual disability and that this can result in the restrictions on the person and the level of supervision not being appropriately reduced over time.¹⁷²

166 Consultation 43 (Higher courts roundtable).

167 Consultation 28 (Senior Practitioner—Disability Practice Leader, Office of Professional Practice, Department of Human Services).

168 Consultation 23 (Supreme Court of Victoria—judges).

169 Submission 18 (Victoria Legal Aid).

170 Ibid. In particular, Victoria Legal Aid recommended amendments to sections 40 and 41 of the CMIA.

171 Submission 14 (Office of the Public Advocate).

172 Consultation 28 (Senior Practitioner—Disability Practice Leader, Office of Professional Practice, Department of Human Services).

- 11.186 In a consultation meeting with staff from the Disability Forensic Assessment and Treatment Service and the Long Term Rehabilitation Program it was suggested that there is a lack of guidance in the Disability Act about treatment pathways for people with an intellectual disability under the CMIA.¹⁷³ One Department of Human Services case worker suggested that the CMIA needs to 'speak to' other key pieces of legislation.¹⁷⁴
- 11.187 In considering how to address the inconsistencies between the CMIA and the Disability Act, submissions argued that the framework and provisions outlined in the Disability Act regarding treatment should be applied to people with an intellectual disability who are subject to non-custodial supervision orders.¹⁷⁵

The Commission's conclusion

- 11.188 The Commission is of the view that people with an intellectual disability do not currently have a treatment pathway under the CMIA and are not subject to the same legislated protections in relation to clinical oversight and rights safeguards as people with a mental illness. While the Department of Human Services may provide treatment plans and other safeguards in some cases, people with an intellectual disability or other cognitive impairment under the CMIA are not equal under the law to people with a mental illness subject to orders under the CMIA or to people on other compulsory orders under the Disability Act, who have legislated safeguards and clinical oversight.
- 11.189 Providing a treatment pathway for people with an intellectual disability under the CMIA is consistent with the approach of *Services Connect*, a new integrated human services model of the Department of Human Services. *Services Connect* aims to 'shift the focus of service delivery so that services are built around people and tailored to their unique needs, goals and aspirations, rather than around rigid program eligibility'.¹⁷⁶
- 11.190 The Commission acknowledges that people with an intellectual disability who are subject to both custodial and non-custodial supervision orders may also be subject to detention and restrictions on their liberty. The *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Charter') provides that a human right may only be limited where it is 'reasonable, necessary, justified and proportionate'.¹⁷⁷
- 11.191 People with an intellectual disability on a non-custodial supervision order often reside in accommodation that places significant limits on their liberty; for example, 24-hour-a-day supervision. This is not the case for people with a mental illness on a non-custodial supervision order who are living independently in the community.
- 11.192 The CMIA should make it clear which department is responsible for a person on a non-custodial supervision order. The Commission therefore supports an amendment to the CMIA to provide that a non-custodial supervision must specify the government department that is responsible for the supervision of a person.
- 11.193 Ensuring that a particular department is responsible for the supervision of a person on a non-custodial supervision order will provide accountability for supervision decisions for all people subject to the CMIA. This is of the utmost importance in circumstances where a person's liberty is significantly restricted or the person is being provided with compulsory treatment or services.
- 11.194 Providing accountability for the supervision of all people subject to the CMIA will require supervisors to take an active role in the supervision of people to ensure that they are being provided with services or treatment to move through the CMIA system as appropriate.

173 Consultation 6 (Department of Human Services case managers, Disability Forensic Assessment and Treatment Service (DFATS) and Long Term Rehabilitation Program (LTRP)).

174 Consultation 17 (Department of Human Services case managers services, Shepparton).

175 Submissions 14 (Office of the Public Advocate); 18 (Victoria Legal Aid).

176 Department of Human Services, *Services Connect: Better Services for Victorians in Need* (2013) 3.

177 Victorian Equal Opportunity and Human Rights Commission, *Talking Rights: 2010 Report on the Operation of the Charter of Human Rights and Responsibilities*, Report (2011) 7.

- 11.195 The Commission also supports an amendment to the CMIA that requires that the department responsible prepare a treatment plan for every person who is subject to a supervision order under the CMIA, to ensure that this right is made clear under the CMIA provisions.¹⁷⁸
- 11.196 While information obtained during submissions and consultations indicated that some people supervised by the Department of Human Services under the CMIA receive a treatment plan, this was not consistent across all cases. This requirement should be legislated.
- 11.197 In almost all cases, the Department of Health or the Department of Human Services will be designated as responsible for a person on a non-custodial supervision order under the CMIA. In very limited circumstances, a person under the CMIA may be detained in a prison and in these cases, the Department of Justice will be responsible for the person's supervision. There will be difficulties in requiring that a treatment plan is provided for people who are supervised by the Department of Justice because compulsory treatment cannot be provided to people in a prison environment. This is a significant problem, which has also been recognised in other jurisdictions such as the Northern Territory and Western Australia.¹⁷⁹
- 11.198 Reforms to the decision-making model under the CMIA will also assist people with an intellectual disability to move through the CMIA system when appropriate. Recommendation 85 outlined at [10.168]–[10.173] will create a presumption at a person's second progress review that the court must vary the custodial supervision order to a non-custodial supervision order, unless satisfied on the evidence available that the person will pose an unacceptable risk of causing serious physical or psychological harm to members of the public.
- 11.199 Section 40(e) of the CMIA requires the court to consider whether there are adequate resources available for the 'treatment and support' of the person in the community when making decisions to make, vary or revoke a supervision order. This provision may make it difficult for a person with an intellectual disability or other cognitive impairment to demonstrate progress, given that they may not be receiving treatment or support in the community. The inclusion of 'services' in section 40(e) of the CMIA would provide greater scope for the disability forensic population to demonstrate progress under the CMIA. This amendment is consistent with Recommendation 28 which allows a magistrate to discharge an accused after determining that there is a real and substantial question of unfitness, if the magistrate considers that the accused is receiving treatment, support or services in the community and does not pose an unacceptable risk of harm.
- 11.200 The Victorian Parliament Law Reform Committee recommended in its report *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* that the Victorian Government consider amending the CMIA to clarify departmental responsibility for supervising and monitoring custodial supervision orders and non-custodial supervision orders.¹⁸⁰

178 See [11.57] regarding the changes to the framework for the provision of a statement of rights to patients, including forensic patients, under the *Mental Health Act 2014* (Vic).

179 Australian Broadcasting Corporation, 'Indefinite Detention and Mental Impairment in NT', *The Law Report*, Tuesday 1 May 2012 (Damien Carrick) <<http://www.abc.net.au/radionational/programs/lawreport/indefinite-detention-in-nt/3983208>>; Natasha Robinson, 'Legal Limbo as unconvicted disabled held in prisons' *The Australian* (online), 23 April 2013 <<http://www.theaustralian.com.au/national-affairs/policy/legal-limbo-as-unconvicted-disabled-held-in-prisons/story-fn9hm1pm-1226626219801>>.

180 Victorian Parliament Law Reform Committee, above n 42, 309.

Recommendations

- 103 Section 26 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to require a court, when making a supervision order in respect of a person, to specify the department that is responsible for the person's supervision (the supervisor).
- 104 A requirement should be added to section 26 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) that the department that is specified as having responsibility for the person's supervision must prepare a treatment plan for the person on the supervision order.
- 105 Section 40(e) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to require that the court have regard to 'whether there are adequate resources available for treatment, support or services in the community'.

Lack of clinical oversight

- 11.201 A person who is subject to a supervision order under the CMIA may have their rights limited in a number of ways. Restrictions on a person's liberty can result from a custodial supervision order requiring a person to be detained in a specified place or their liberty may be restricted through the imposition of restrictive interventions or compulsory treatment.
- 11.202 A restrictive intervention is defined in the Disability Act as any intervention that is used to restrict the rights or freedom of movement of a person with a disability, including chemical restraint, mechanical restraint or seclusion.¹⁸¹ These terms are further defined in the Act as follows:
 - *Chemical restraint*—the use, for the primary purpose of behavioural control of a person with a disability, of a chemical substance to control or subdue the person but does not include the use of a drug prescribed for treatment or to enable treatment of a mental illness or a physical illness or the condition.¹⁸²
 - *Mechanical restraint*—the use, for the primary purpose of behavioural control of a person with a disability, of devices to prevent, restrict or subdue a person's movement but does not include the use of devices for therapeutic purposes or to enable the safe transportation on the person.¹⁸³
 - *Seclusion*—the sole confinement of a person with a disability at any hour of the day or night in any room in the premises where disability services are being provided of which the doors and windows cannot be opened by the person from the inside, or of which the doors and windows are locked from the outside or to any part of the premises in which disability services are being provided.¹⁸⁴

181 *Disability Act 2006* (Vic) s 3.

182 Ibid.

183 Ibid.

184 Ibid.

- 11.203 As noted at [11.32], the Senior Practitioner has a role under the Disability Act to protect the rights of people who are subject to restrictive interventions and to determine the appropriateness of treatment plans. The Chief Psychiatrist undertakes a similar role for people with a mental illness under the MHA 2014¹⁸⁵ and exercises a range of powers which include, in specific circumstances, the review of treatment choices in light of a patient's interests¹⁸⁶ and the investigation of the provision of mental health services.¹⁸⁷
- 11.204 People detained as forensic residents in a residential treatment facility or residential institution under the Disability Act are subject to the clinical oversight of the Senior Practitioner.¹⁸⁸ People with an intellectual disability on non-custodial supervision orders may also be subject to restrictive interventions or other limitations on their liberty depending on the supervision requirements of the accommodation.
- 11.205 People with an intellectual disability on a non-custodial supervision order are not subject to the clinical oversight of the Senior Practitioner.

Views in submissions and consultations

- 11.206 The Office of the Public Advocate raised concerns about the lack of clinical oversight for people with an intellectual disability under the CMIA:
- treatment of people under the CMIA should be subject to the same level of independent scrutiny that applies to people being treated involuntarily under the *Mental Health Act 1986* and the *Disability Act 2006*. This raises questions about whether the Act is sufficiently focussed on treatment as there is a lack of specific provisions relating to treatment planning and review in the CMIA unlike the Mental Health Act and the Disability Act.¹⁸⁹
- 11.207 Department of Human Services (DHS) case workers raised concerns that the requirement for the Senior Practitioner to approve restrictive practices did not apply to people on a non-custodial supervision order under the CMIA. One DHS case worker expressed the view that there is a lack of scrutiny of supervisors under the CMIA.¹⁹⁰
- 11.208 Concerns were also raised about there being no requirement for a person on a non-custodial supervision order to have a treatment plan. One DHS case worker noted that while there is no compulsory treatment plan for people on supervision orders who are supervised by the department, a treatment plan is usually developed and either set out in the section 47 certificate¹⁹¹ or developed from the information in the section 47 certificate.¹⁹²
- 11.209 The Office of the Public Advocate proposed minimum considerations that should be taken into account prior to treatment of people with an intellectual disability, including:
- the nature of the treatment that is to be used
 - the circumstances in which the proposed form of treatment is to be used
 - how the treatment will be of benefit to the person, and
 - the expected duration of the treatment.

185 The *Mental Health Act 2014* (Vic) s 120(c) describes one of the four roles of the Chief Psychiatrist as being to 'promote the rights of persons receiving mental health services from mental health service providers'.

186 Ibid ss 87–9.

187 Ibid s 122.

188 *Disability Act 2006* (Vic) ss 24(1)(e), 153(3)(b), 153(3A)–(8).

189 Submission 14 (Office of the Public Advocate).

190 Consultation 9 (Department of Human Services case managers, Gippsland and Latrobe).

191 A section 47 certificate of available services is provided to the court by the Secretary of the Department of Health or DHS if the court is considering imposing a supervision order. The section 47 certificate must state whether there are facilities available for the custody, care or treatment of the person and if they are available, the certificate must outline those facilities or services.

192 Consultation 2 (Department of Human Services case managers, Barwon).

- 11.210 The Office of the Public Advocate also considered that the treatment should be:
- the least restrictive of the person as is possible in the circumstances
 - subject to external monitoring and scrutiny
 - carried out in consultation with the person with the disability and, where appropriate, their guardian, representatives of disability service providers, and any other person considered to be integral to the treatment.
- 11.211 One DHS case worker compared a supervised treatment order under the Disability Act to a non-custodial supervision order. The case worker raised concerns that non-custodial supervision orders do not have the same ‘checks and balances’ and by contrast, supervised treatment orders under the Disability Act are much more rights-based, have the oversight of the Senior Practitioner and can be revoked more quickly.¹⁹³
- 11.212 Concern about the implications of the lack of clinical oversight for people with an intellectual disability subject to a non-custodial supervision order was shared by Victoria Legal Aid. Victoria Legal Aid explained that because of this ‘disconnect’, people with an intellectual disability under the CMIA experience ‘less robust oversight’ of their treatment than people under Disability Act orders, whose treatment is monitored by the Office of the Public Advocate or VCAT, and people with a mental illness on non-custodial supervision orders.¹⁹⁴
- 11.213 Victoria Legal Aid suggested that Forensicare’s role in monitoring and supervising people with a mental illness on a non-custodial supervision order, and their expert guidance and clinical oversight role in supporting area mental health services ‘provides a solid framework for the continued supervision and treatment of people with a mental illness and promotes clear accountability’.¹⁹⁵
- 11.214 Victoria Legal Aid therefore recommended that people with a disability on a non-custodial supervision order be made subject to the clinical oversight and responsibility of the Senior Practitioner within the current monitoring framework outlined in the Disability Act, stating that:
- Through the contribution of the clinical expertise of the Office of the Senior Practitioner, the interventions are more likely to achieve therapeutic objectives and people are more likely to access effective treatments and interventions and reduce the duration of restrictions under a NCSO [non-custodial supervision order]. Consideration should be given as to how this aim could be achieved within the current monitoring framework outlined in the Disability Act.¹⁹⁶
- 11.215 In a consultation with staff from DHS, it was suggested that the most appropriate way of ensuring people subject to supervision orders under the CMIA receive clinical oversight is through strengthening DHS policy in this area. It was noted that ‘[u]tilising policy ensures that any arrangements can be better adapted to reflect current disability practice developments and to support an individual approach’.¹⁹⁷

193 Consultation 34 (Department of Human Services case managers, Bayside and Southern Melbourne).

194 Submission 18 (Victoria Legal Aid).

195 Ibid.

196 Ibid.

197 Consultation 53 (Head Office (Youth Justice, Forensic Disability, Child Protection and Senior Practitioner), Department of Human Services).

The Commission's conclusion

- 11.216 The Commission supports legislative amendment to ensure that people who are supervised by DHS are subject to the same protections and rights as those people who are supervised by Forensicare through the Department of Health.
- 11.217 As discussed at [11.44], people with an intellectual disability on a non-custodial supervision order are often subject to 'detention' due to the supervision requirements of the accommodation in which they reside. There is no clinical oversight on the restrictions that may be imposed on the person. The Commission is of the view that this is inconsistent with the Charter.¹⁹⁸
- 11.218 The Commission acknowledges that it is the preference of DHS that clinical oversight be provided to people subject to the CMIA through policy and procedure. However, given the current inequalities between people with an intellectual disability under the CMIA and people both with a mental illness under the CMIA and people subject to a supervised treatment order under the Disability Act, the Commission is of the view that clinical oversight should be a legislative requirement.
- 11.219 The Commission therefore supports making an amendment to the Disability Act to include people on a supervision order under the CMIA in the definition of compulsory treatment. This amendment will ensure that people on a supervision order under the CMIA will be subject to the clinical oversight of the Senior Practitioner.

Recommendation

- 106 The definition of 'compulsory treatment' in the *Disability Act 2006* (Vic) should be amended to include people subject to a supervision order that designates the Secretary to the Department of Human Services as responsible for the person's supervision.

Interstate transfer orders

Current law

- 11.220 There are two main requirements for a person subject to a supervision order to transfer from Victoria to another state. These are:
- the laws of the state the person would like to transfer to must allow the transfer
 - the Minister administering the transfer must allow the transfer by making an order.¹⁹⁹
- 11.221 The Minister may only allow a person to transfer to another state if they are satisfied that:
- the Chief Psychiatrist has provided a written statement that the transfer is of benefit to the person subject to a supervision order, and
 - the Minister is satisfied that the transfer is allowed by laws of the state the person would like to transfer to, and the person subject to the supervision order has given informed consent to the transfer or, if unable to give informed consent, their guardian has given informed consent to the transfer.²⁰⁰

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In particular, sections 8, 21 and 22 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).
Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) s 73D(1).
Ibid s 73D(2).

- 11.222 Many of these cases attract quite a lot of negative media attention and so decisions to allow a person to transfer from another state to Victoria have the potential to be quite political in nature.²⁰¹ There has only been one transfer to the Victoria under the CMIA which was reported to have occurred as a result of the National Mental Health Plan, which recommended that mental health and related legislation be reviewed and where necessary, amended, to 'support cross-border agreements and transfers of people under civil and forensic orders, and scope requirements for the development of nationally consistent mental health legislation'.²⁰²
- 11.223 In order to transfer to Victoria, a person subject to a supervision order in another state must meet the requirements outlined and must also satisfy the following additional requirements:
- The Minister must be satisfied that 'the transfer is necessary for the maintenance or re-establishment of family relationships or relationships with people who can assist in supporting the person'.²⁰³
 - The Chief Psychiatrist must provide a written statement that there are facilities or services available for the custody, care and treatment of the person.²⁰⁴
- 11.224 The provisions governing transfer to Victoria and transfer to another state require a certification from the Chief Psychiatrist that the transfer is of benefit to the person and in the case of a person transferring to Victoria, that there are services and facilities available for the custody, care and treatment of the person. These provisions do not seem to contemplate the transfer of a person with an intellectual disability or other cognitive impairment, given the Chief Psychiatrist would not be in a position to determine these matters for the forensic disability population. The Secretary of the Department of Human Services would be the appropriate person to advise on matters relevant to the transfer of a person with an intellectual disability or other cognitive impairment.
- 11.225 Upon arrival in Victoria, the person is placed on an 'interim order' and within six months, an application must be made to the Supreme Court for a review.²⁰⁵ At the review, the Court may place the person on a supervision order or order the person's unconditional release.²⁰⁶ If the person is placed on a supervision order, the Court must set a nominal term.²⁰⁷ The Supreme Court cannot make an order that is 'more restrictive on the person's freedom and personal autonomy' than the order the person was on interstate, unless the safety of the person or members of the public would be seriously endangered if a more restrictive order is not made.²⁰⁸
- 11.226 The consultation paper asked whether there are any barriers to effecting interstate transfer orders under the CMIA and if so, what changes could be made to make the interstate transfer process more effective.

201 For example, one newspaper reporting the interstate transfer of a person to Victoria had the headline 'Victoria powerless to stop return of a murderer' and the article stated that 'An insane killer is returning to Victoria': Anne Wright and Dwayne Grant, 'Victoria powerless to stop return of a murderer' *Herald Sun* (online), 8 October 2012 <<http://www.heraldsun.com.au/news/law-order/victoria-powerless-to-stop-return-of-murderer/story-fnat7jnn-1226490221472>>

202 Department of Health (Cth), *Fourth National Mental Health Plan: An Agenda for Collaborative Government Action in Mental Health 2009–2014* (2009) 48 <<http://www.health.gov.au/internet/publications/publishing.nsf/Content/mental-pubs-f-plan09-toc>>.

203 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 73E(2)(b).

204 *Ibid* s 73E(2)(a).

205 *Ibid* s 73F(1).

206 *Ibid* s 73F(4).

207 *Ibid* s 73F(6).

208 *Ibid* s 73F(5).

Views in submissions and consultations

- 11.227 A number of issues were raised in submissions and consultations in relation to interstate transfer orders. The main concern was about the political nature of the decision to transfer a patient interstate.
- 11.228 Forensicare argued in its submission that the current system for interstate transfers is not working well and that it 'does not appear that these provisions have been used effectively or frequently to effect interstate transfers'.²⁰⁹
- 11.229 Victoria Legal Aid, while acknowledging that interstate transfer orders depend on reciprocal legislation in other states, was of the view that interstate agreements should be reviewed to facilitate interstate transfer orders because they are 'crucial to the successful treatment and support of people subject to supervision orders'.²¹⁰
- 11.230 Associate Professor Andrew Carroll raised the political aspect of decision making in relation to interstate transfer orders and highlighted that the need to involve politicians 'means that these are inevitably subject to long drawn out procedures' and that 'current arrangements often compromise patients' access to family support'.²¹¹
- 11.231 Forensicare supported this view, describing the process of interstate transfer as 'lengthy, bureaucratic, and likely to take several years'.²¹² Forensicare argued that the problem with the current process for interstate transfers is that there has been 'limited political will' to resolve the issue and that it is 'particularly unfortunate' that there are not clearer arrangements in place between neighbouring states, given people may be required to remain indefinitely in another state 'by accident of geography' to which they have 'no practical connection, such as family and social supports, accommodation and employment'.²¹³

The Commission's conclusion

- 11.232 The Commission is of the view that the decision to transfer a patient interstate should not be a political one. Consistent with the national mental health plan, decisions should be made in the best interests of the patients, while also considering the safety of the community.
- 11.233 The Commission notes that there is currently no reference in the interstate transfer provisions for people with an intellectual disability who are supervised by the Department of Human Services.
- 11.234 The Secretary of the Department of Health or the Secretary of the Department of Human Services would be in the best position to make decisions about the need for an interstate transfer of a person under the CMIA.
- 11.235 The Commission acknowledges that decisions about interstate transfers are limited by the laws in operation in other states, but is of the view that it is important to ensure that the laws in Victoria facilitate interstate transfers and where possible, limit delays and lengthy administrative processes.

209 Submission 19 (Forensicare).
210 Submission 18 (Victoria Legal Aid).
211 Submission 6 (Associate Professor Andrew Carroll).
212 Submission 19 (Forensicare).
213 Ibid.

Recommendation

- 107 Sections 73D and 73E of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to provide that:
- (a) the relevant Secretary has the power to make an order authorising the interstate transfer of a person, and
 - (b) sections 73D(2)(a) and 73E(2)(a) allow either the Chief Psychiatrist or the Secretary of the Department of Human Services to certify that the transfer is of benefit to the person and that facilities and services are available.

Operational issues related to the management of people subject to supervision orders

- 11.236 Throughout submissions and consultations, a range of operational issues were raised about the CMIA. While these issues were not appropriate to be dealt with through legislative amendment, the Commission is of the view that it is important to include them in this report to bring them to the attention of those involved in implementing the CMIA in their work so that they may be addressed in modifications to policy and procedures.

Transportation of people in custody

- 11.237 A person on a supervision order raised the issue of the inappropriateness of the process for transporting people with a mental condition to court:

Transport to court can be overwhelming—the mode of transportation does not factor in the different needs of people with a mental condition. Up until the time of sentencing no distinction is made between patients and prisoners and patients are treated as prisoners. There is very little space in the vehicle and the journey is quite long (it goes around to all the different prisons) ... It is also stressful and mentally draining.²¹⁴

Taking leave under supervision orders

- 11.238 A number of people on supervision orders also raised operational issues in relation to taking leave. One person on a supervision order raised the issue of leave sometimes not being able to be taken when staff are unavailable to escort a patient on leave.²¹⁵ To address this issue, participants at a meeting of the Consumer Advisory Group in Thomas Embling Hospital suggested that peer support workers should be able to accompany patients on leave or that 'there should be staff employed, dedicated and trained for accompanying people on leave.' It was suggested that this would free up nursing staff.²¹⁶

214 Submission 2 (Forensicare Patient Consulting Group).
 215 Consultation 1 (Consumer Advisory Group (CAG), Thomas Embling Hospital).
 216 Ibid.

Information sharing

- 11.239 A number of issues were raised in submissions and consultations in relation to information sharing for people involved in supervising people subject to orders under the CMIA.
- 11.240 One participant in consultations with area mental health services raised concerns about the limited amount of information that is provided to a service when a person is transitioning from a custodial supervision order to a non-custodial supervision order.²¹⁷ The participant commented that it is difficult to obtain information on the person about to be supervised and the information that is provided often includes only information about the person's mental health and treatment or medication.
- 11.241 A participant in a meeting with another area mental health service agreed with this view, stating that information sharing is most limited during the transition from the forensic system to the mental health service, but that once a person is on a non-custodial supervision order, information sharing works 'really well'.²¹⁸
- 11.242 The relationship with the police was considered an important part of obtaining information to effectively manage a person on a supervision order in the community, as the area mental health service will only be advised about prior contact with the justice system if this information is volunteered by the person on the supervision order.²¹⁹ One participant in a consultation with an area mental health service commented that this means that the 'potential [is] always there that things could go really pear shaped because of our lack of knowledge'.²²⁰
- 11.243 It was noted by the Chief Psychiatrist in a consultation with the Commission that the MHA 1986 authorised information sharing to facilitate future treatment of people subject to non-custodial supervision orders under the CMIA.²²¹ This continues under the MHA 2014.²²²

217 Consultation 8 (Latrobe Community Mental Health Service).

218 Consultation 18 (Goulburn Valley Area Mental Health Service).

219 Consultation 8 (Latrobe Community Mental Health Service).

220 Ibid.

221 *Mental Health Act 1986* (Vic) s 120A(3)(e); Consultation 26 (Office of the Chief Psychiatrist and Legal Branch, Department of Health).

222 *Mental Health Act 2014* (Vic) pt 15 div 1.

PART V CONCLUSION

Conclusion

12. Conclusion

- 12.1 This report presents the Commission's findings and recommendations following its extensive review of the operation of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ('CMIA'). The Commission has considered and responded to the issues in the terms of reference and supplementary terms of reference for the review. The report contains a package of recommendations aimed to improve the operation of the CMIA as a whole across all levels of Victorian courts, as well as recommendations to address discrete legal and process issues.
- 12.2 The CMIA governs an important area of the law where a person has been charged with an offence but their capacity to stand trial or their criminal responsibility is significantly limited by mental illness or disorder or impaired cognitive functioning. It seeks to ensure an appropriate response in terms of protection of the community, through supervision, treatment and support of that person with the aim that they can be restored as a functioning member of society. It is critical in this area that the right balance is struck to acknowledge the harms that have occurred, ensure protection of the community and monitor the restrictions placed on the liberty of a person subject to the CMIA. The Commission is therefore pleased to have had the opportunity to consider and make proposals on how to improve the operation of the CMIA. Improvements have been proposed for the benefit of the community, in particular people who are directly affected by these laws. This includes people subject to the CMIA and their family members, and victims and their families. Proposals for reform are also made to improve the functioning of the systems and services that support the operation of the court legislation, including the courts, legal profession, and forensic mental health and disability service and treatment providers.
- 12.3 A number of the Commission's recommendations in this report echo the recommendations 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*. They reinforce the need, identified by the Law Reform Committee, for reform to improve the operation of the CMIA on people with an intellectual disability or other cognitive impairment.
- 12.4 In making its recommendations, the Commission has had regard to the cost implications of the changes proposed to the CMIA, without them being determinative of the Commission's views and decisions. Where the resource implications of a recommendation can be identified and quantified, the Commission has done so throughout the report. While it is not possible, nor within the terms of reference, for the Commission to have undertaken a comprehensive costing of its recommendations as a whole, some key resource implications are noted.

- 12.5 The University of Melbourne's work estimates that the significant changes recommended by the Commission to extend the operation of the CMIA in the Magistrates' and Children's Courts will result in significant cost savings through the creation of a more economical court hearing process, where appropriate, that does not involve committal stages, jury involvement and the higher personnel and legal costs in the County Court jurisdiction. While it has not been possible to predict whether there will be increases in CMIA matters under its expanded jurisdiction, it is estimated that significant 'net widening' would be required to diminish these cost savings. It is acknowledged that resources will be required to establish and maintain the operation of the CMIA in the Magistrates' Court and Children's Court, which may offset some of the identified cost savings. However, establishing processes that support the operation of the CMIA to deliver an early and appropriate response will maximise the opportunities to address issues such as mental illness and cognitive impairment including intellectual disability underlying offending behaviour. This will have long-term benefits in terms of reducing government costs associated with later interventions, increasing individual well-being and preventing entrenchment in forensic mental health and disability pathways.
- 12.6 The Commission has made recommendations on the basis of principle to change the process by which issues of unfitness to stand trial and the defence of mental impairment are determined, and to give effect to the Commission's view about the proper role of the jury in the criminal process under the CMIA. However, the Commission notes cost implications of changing the role of the jury. The removal of the jury in determinations of unfitness to stand trial will result in significant cost savings by reducing the specific costs associated with jurors, as well as reducing the broader costs incurred to employers through a loss of productivity. However, costs saved through this process are likely be offset by the Commission's recommendation to remove the provisions allowing a judge-alone determination of the defence of mental impairment and to require a jury in all cases.
- 12.7 The Commission has made a number of recommendations for the delivery of education and training to increase the expertise and awareness of people who work under the CMIA provisions, including judges, legal practitioners, clinicians who provide expert services and service providers who supervise people on orders. These will have cost implications for a range of organisations who will deliver and support such training, including the Judicial College of Victoria, Law Institute of Victoria, the Victorian Bar, the Victorian Institute of Forensic Mental Health (Forensicare), the Department of Health and the Department of Human Services.
- 12.8 A number of the recommendations made by the Commission address the gaps identified in the support or assistance provided to individuals affected by CMIA processes, in particular:
- in-court support measures and education programs for people to optimise the fitness of those who are charged with offences
 - the continuation and expansion of the Mental Health Court Liaison Services (MHCLS) program in the Magistrates' Court
 - a case worker program for the diversion of young people appearing in the Children's Court who raise issues of unfitness to stand trial or the defence of mental impairment
 - a specialised victim support scheme for victims of crime in CMIA matters.

- 12.9 The Commission acknowledges that these recommendations will have cost implications. However, almost all recommendations seek to introduce a reform aimed at preventing a person from proceeding down the current costly CMIA pathway. For example, if a person is provided with in-court support and proceedings can be modified in a way which enables them to become fit to go through the trial process, this will avoid a finding of unfitness and possible indefinite supervision order.
- 12.10 Resources will be required for the Commission's recommendations that address the gaps in the facilities and services that support the supervision and management of people subject to the CMIA. In particular, there will be cost implications for government to:
- commission work to develop a model of care and establish a youth forensic facility to address the critical gap in forensic mental health and disability services for young people under the CMIA
 - commission a review of current forensic disability services for adults to identify appropriate models of care for people with an intellectual disability or other cognitive impairment who are subject to the CMIA
 - establish a new medium-secure mental health facility for adults with a mental illness subject to the CMIA.
- 12.11 Despite the cost implication, the Commission's view is that an appropriate youth forensic facility is needed to ensure that the operation of the CMIA is consistent with community protection, the principle of least restriction and the specialised approach required for vulnerable young people in the criminal justice system. A review of the current forensic disability services for adults seeks to ensure proper planning around the service needs for people under the CMIA and to avoid the current costly ad hoc approaches that have been required when there is no appropriate accommodation. The establishment of a new medium-secure facility for adults with a mental illness will provide a more economic and flexible alternative for people who are not required to be accommodated in the high-secure environment of Thomas Embling Hospital and who require a short period of custodial supervision after breaching a supervision order.
- 12.12 In conclusion, while many of the recommendations in this report will require resources in their implementation, the Commission's view is that their implementation will have lasting benefits from both a financial and human perspective, through early and appropriate intervention of the law, and importantly for community safety.

Appendices

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Appendix A: Advisory committee

The Commission formed a small committee with expertise in the operation of the CMIA to assist in identifying and exploring issues, largely those arising from the terms of reference. Members contributed as individual experts, not as representatives of any organisation.

The committee met twice, on 16 April 2013 and 16 September 2013. Two members met with the Commission separately on 21 November 2013, in lieu of their attendance at the 16 September 2013 meeting. The following attended one or more meetings:

- Isabell Collins, Director, Victorian Mental Illness Awareness Council
- Dr Ian Freckelton QC, barrister
- Phil Grano OAM, Principal Legal Officer, Office of the Public Advocate
- Tim Marsh, Chief Counsel, Victoria Legal Aid
- Professor James Ogloff, Director of Psychological Services, Forensicare and Director, Centre for Forensic Behavioural Science, Monash University
- Gavin Silbert QC, Chief Crown Prosecutor, Office of Public Prosecutions, and
- Dr Danny Sullivan, Assistant Clinical Director Community Operations, Forensicare, Adjunct Senior Lecturer, Monash University and Honorary Fellow, University of Melbourne.

Appendix B: Submissions

The Commission received the following submissions. Those who submitted to both the terms of reference and supplementary terms of reference have been listed twice.

Submissions to the terms of reference

1	Associate Professor Ruth Vine
2	Forensicare Patient Consulting Group
3	Gunvant Patel
4	The Australian Clinical Psychology Association
5	Patricia Farnell
6	Associate Professor Andrew Carroll
7	Meron Wondemaghen
8	Office of Public Prosecutions
9	Raymond Rudd
10	Victorian Equal Opportunity and Human Rights Commission
11	Jamie Walvisch
12	Progressive Law Network
13	Australian Community Support Organisation Inc.
14	Office of the Public Advocate
15	Name withheld
16	Australian Psychological Society
17	Name withheld
18	Victoria Legal Aid
19	Victorian Institute of Forensic Mental Health (Forensicare) (referred to as 'Forensicare' in citations).
20	Law Institute of Victoria
21	Criminal Bar Association
22	Liberty Victoria

Submissions to the supplementary terms of reference

23	Dr Robert G Adler
24	Office of Public Prosecutions
25	Criminal Bar Association
26	Youthlaw
27	Victoria Legal Aid
28	The Australian Clinical Psychology Association
29	Victorian Equal Opportunity and Human Rights Commission
30	Victoria Police (submission to both the terms of reference and supplementary terms of reference)
31	Australian Psychological Society
32	Liberty Victoria
33	Commission for Children and Young People
34	Confidential

Appendix C: Consultations

Consultations about the questions raised in both consultation papers were held with these people and organisations.

1	Consumer Advisory Group (CAG), Thomas Embling Hospital
2	Department of Human Services case managers, Barwon
3	Villamanta Disability Rights Legal Service
4	Family and Friends Support Group, Forensicare
5	Consumer Advisory Group (CAG), Community Forensic Mental Health Service
6	Department of Human Services case managers, Disability Forensic Assessment and Treatment Service (DFATS) and Long Term Rehabilitation Program (LTRP)
7	Morwell Magistrates' Court
8	Latrobe Community Mental Health Service
9	Department of Human Services case managers, Gippsland and Latrobe
10	Patient Consulting Group (PCG), Thomas Embling Hospital
11	Melbourne Magistrates' Court
12	Judicial College of Victoria
13	Mental Health Court Liaison Service officer
14	Treating team, Mercy Health
15	Northern Area Mental Health Service
16	Shepparton Magistrates' Court
17	Department of Human Services case managers, Shepparton
18	Goulburn Valley Area Mental Health Service
19	Forensic Clinical Specialists
20	Geelong Magistrates' Court
21	Consultant psychiatrists, Forensicare
22	Partner of a victim in a CMIA matter
23	Supreme Court of Victoria—judges
24	County Court of Victoria—judges

25	Victoria Legal Aid—criminal lawyers
26	Office of the Chief Psychiatrist and Legal Branch, Department of Health
27	Victoria Police—police prosecutors
28	Senior Practitioner—Disability Practice Leader, Office of Professional Practice, Department of Human Services
29	Person previously subject to a non-custodial supervision order under the CMIA
30	Person subject to a non-custodial supervision order under the CMIA and family member
31	Queensland Mental Health Court
32	Director of Mental Health and Director of Forensic Disability
33	Queensland Mental Health Review Tribunal
34	Department of Human Services case managers, Bayside and Southern Melbourne
35	Dandenong Magistrates' Court
36	Family member of person subject to a non-custodial supervision order under the CMIA
37	Partner of a victim of crime
38	Person subject to a non-custodial supervision order under the CMIA
39	Justice Health
40	Communication Resource Centre, Scope
41	Supreme Court of Victoria—judge
42	Victoria Police—operational police
43	Higher courts roundtable
44	Victoria Police—Children's Court police prosecutor and policy staff
45	Youthlaw
46	County Court of Victoria—judges
47	Magistrates' Court roundtable
48	Children's Court—President and magistrates, Melbourne
49	Forensic Leave Panel—members
50	Parkville Youth Justice Centre, Department of Human Services
51	Children's Court roundtable—legal practitioners
52	Dr Adam Deacon
53	Head Office (Youth Justice, Forensic Disability, Child Protection and Senior Practitioner), Department of Human Services
54	Dr Katinka Morton
55	Children's Court roundtable—clinicians

Appendix D: Data

CMIA cases in the higher courts, 2000–01 to 2011–12

The Sentencing Advisory Council (SAC) provided the Commission with data from its higher courts sentencing database on cases that were dealt with in the Supreme Court and County Court and resulted in the imposition of an order under the CMIA.

Methodology

Higher courts sentencing database

SAC maintains a database of sentencing data from Victorian courts, via Courts Services. SAC provided the Commission with an extract of data from this database for the purposes of its review of the CMIA.

The extract comprised data on orders imposed in the higher courts under the CMIA for the period 2000–01 to 2011–12. Variables included in the data were:

- number per financial year
- type of order (custodial supervision order, non-custodial supervision order, unconditional release)
- offence type
- age and gender of person
- length of nominal term.

Identification of indictable offences triable summarily determined in the County Court

The database was analysed to estimate the number of CMIA cases that were determined in the County Court that could have been determined in the Magistrates' Court under the CMIA, had it had power to determine unfitness or to impose orders following a finding of not guilty because of mental impairment.

Information provided on the offence type identified the ‘principal offence’. This relates to the offence in the case which has the highest maximum penalty. Cases were selected that involved accused 21 years and over,¹ determined in the County Court² and had a principal offence (or a form of that offence) that was indictable triable summarily. In relation to some offences, whether or not the particular offence is indictable triable summarily depends on the value of the damage caused or property stolen or the particular level of intention associated with the commission of an offence.³

Of the total 159 cases, there were 59 that involved adults aged 21 years or over where the principal offence was indictable triable summarily and that were determined in the County Court. See **Table 7** for offence types and orders imposed.

Identification of indictable offences involving young people determined in the Children’s Court

The database was analysed to estimate the number of CMIA cases involving young people that were determined in the County Court that could have been determined in the Children’s Court under the CMIA, had it had power to determine unfitness or to impose orders following a finding of not guilty because of mental impairment.

Information provided on the offence type identified the ‘principal offence’ and was used to identify cases involving indictable offences within the Children’s Court jurisdiction. Information on the age of the person was used to identify nine cases where the person was aged under 21 years when the CMIA order was imposed.

Given the time that matters take to proceed, it was assumed that these cases involved accused who had been children at the time of the offence and would have come within the criminal jurisdiction of the Children’s Court. This was used to provide an indication of the number of cases that could have been dealt with in the Children’s Court had it had the power to deal with unfitness or impose orders after a finding of not guilty because of mental impairment. See **Table 8** for offence types and orders.

Access to judgments for CMIA cases in the database

The data included access to electronic judgments for some cases and links to judgments published on the Australasian Legal Information Institute (AustLII) website. The Commission sought and received a number of additional judgments direct from the Supreme Court and County Court for cases in the database that were missing from the original dataset.

Of the 159 cases in which a CMIA order was imposed over the relevant period, the Commission had access to 65 judgments in total.

1 Five cases were excluded as they involved accused who were under 21 years at the time the order was imposed and were therefore included in the cases estimated to have the potential to be heard in the Children’s Court if its jurisdiction under the CMIA were to be extended. These are detailed in this appendix at **Table 8**.

2 Two cases that had a principal offence that was indictable triable summarily were determined in the Supreme Court involving the offences of intentionally causing injury and unlawful assault.

3 This includes the following offences: arson (if the property alleged to be destroyed or damaged does not exceed \$100,000), robbery and attempted robbery (if the property alleged to have been stolen is of a value less than \$100,000), aggravated burglary (if the offence involves an intent to steal property of value less than \$100,000), theft (if either the amount or the value of the property alleged to have been stolen does not exceed \$100,000 or the property alleged to have been stolen is a motor vehicle), criminal damage (unless the damage was intended to endanger the life of another), attempted burglary (if the intention was to steal property of a value less than \$100,000) and obtaining financial advantage by deception (if the amount or value of the financial advantage alleged to have been obtained does not exceed \$100,000).

Analysis of judgments

The judgments were analysed by Commission staff and data collected from them according to the variables listed below:

- History of mental illness (yes/no)
- Details of history (free text)
- Unfitness raised (yes/no)
- Fitness finding (unfit/fit)
- Contested (yes/no)
- Mental condition (underlying unfitness)
- Mental impairment raised (yes/no)
- Mental impairment finding (not guilty because of mental impairment/guilty/not guilty)
- Basis of finding for test (nature/quality or right/wrong or both)
- Consent (yes/no)
- Mental condition (underlying mental impairment)
- Section 47 certificate present (yes/no)
- Section 41 report present (yes/no)
- Order imposed (custodial supervision order/non-custodial supervision order/unconditional release)
- Victim known or related (yes/no)
- Relationship (free text)
- Court report from victim or family member (yes/no)
- Info from court report (free text)
- Circumstances of offender/other (free text)

In many cases there was insufficient information in the judgment or the judgment was silent on the specified variable. As a general rule, 'Yes' was used when the variable was present. 'No' was used when the content of the variable was not apparent from the transcript of the judgment, and so does not indicate that the variable was not present but rather that there was no information to support the presence of the variable.

Given that judgments were not available for all 159 cases and many of the 65 judgments did not include information on all the variables sought to be measured, the analysis is not relied on as representative of all CMIA cases in the database.

Raw data—higher courts sentencing database

Table 5: Number and type of supervision order by age

Age	Custodial supervision order	Non-custodial supervision order	Unconditional release	Total
Under 20	3	8	—	11
21–24	7	7	2	16
25–29	6	19	1	26
30–34	8	17	—	25
35–39	3	7	—	10
40–44	7	20	—	27
45–49	2	11	1	14
50–54	4	4	—	8
55 and over	7	9	6	22
Total	47	102	10	159

Mean	37.6	36.9	58.6	38.5
Minimum	19	17	23	17
Maximum	76	79	85	85

Table 6: Number and type of supervision order by principal offence (in order of total number of orders imposed) in higher courts

No.	Offence	Custodial supervision order	Non-custodial supervision order	Unconditional release	Total
1	Intentionally causing serious injury	8	25	1	34
2	Murder (common law)	22	3	–	25
3	Attempted murder	9	5	–	14
4	Indecent act with a child under 16	–	8	4	12
5	Intentionally causing injury	2	7	–	9
6	Recklessly causing serious injury	2	6	–	8
7	Reckless conduct endangering life	1	3	1	5
8	Sexual penetration of a child under 16 years*	–	4	1	5
9	Armed robbery	1	4	–	5
10	Arson	–	4	–	4
11	Indecent assault	–	3	1	4
12	Recklessly causing injury	–	3	–	3
13	Reckless conduct endangering persons	–	3	–	3
14	Culpable driving causing death	–	3	–	3
15	Rape	–	3	–	3
16	Robbery	–	2	–	2
17	Stalking	–	2	–	2
18	Aggravated burglary	–	2	–	2
19	Assault (common law)	–	2	–	2
20	Theft	–	1	–	1
21	Theft of a motor vehicle	–	1	–	1

* Includes superseded offences of sexual penetration of a child between 10 and 16 (two cases) and sexual penetration of a child under 10 (one case)

Table 6 cont'd

No.	Offence	Custodial supervision order	Non-custodial supervision order	Unconditional release	Total
22	Unlawful assault	1	–	–	1
23	Criminal damage	–	1	–	1
24	Unauthorised modification of data to cause impairment	–	–	1	1
25	Assault police	–	1	–	1
26	Attempted armed robbery	–	1	–	1
27	Attempted burglary	–	1	–	1
28	Attempted incest (step-parent)	–	–	1	1
29	Attempted robbery	–	1	–	1
30	Incest (step-parent)	–	1	–	1
31	Obtaining financial advantage by deception	–	1	–	1
32	Wilful and obscene exposure (common law)	–	1	–	1
33	Kidnapping (common law)	1	–	–	1
	Total	47	102	10	159

Table 7: Number and type of supervision order for indictable offences triable summarily determined in the County Court involving people 21 years or over

Offence	Custodial supervision order	Non-custodial supervision order	Unconditional release	Total
Indecent act with a child under 16	–	7	4	11
Recklessly causing serious injury	2	6	–	8
Intentionally causing injury	1	7	–	8
Reckless conduct endangering life	1	3	1	5
Arson	–	4	–	4
Aggravated burglary	–	3	–	3
Reckless conduct endangering persons	–	3	–	3
Recklessly causing injury	–	2	–	2
Robbery	–	2	–	2
Stalking	–	2	–	2
Assault (common law)	–	2	–	2
Indecent assault	–	1	1	2
Theft of a motor vehicle	–	1	–	1
Criminal damage	–	1	–	1
Unauthorised modify data	–	–	1	1
Assault police	–	1	–	1
Attempted robbery	–	1	–	1
Obtain financial advantage by deception	–	1	–	1
Wilful and obscene exposure (common law)	–	1	–	1
Total	4	48	7	59

Table 8: Number and type of supervision order for indictable offences within the Children's Court's criminal jurisdiction determined in the County Court involving people under 21 years

Offence	Custodial supervision order	Non-custodial supervision order	Unconditional release	Total
Armed robbery	1	1	–	2
Intentionally causing serious injury	–	2	–	2
Attempted burglary	–	1	–	1
Indecent assault	–	1	–	1
Indecent act with a child under 16	–	1	–	1
Theft	–	1	–	1
Recklessly causing injury	–	1	–	1
Total	1	8	0	9

CMIA cases involving young people

Source of data and methodology

The Department of Human Services (DHS) provided de-identified information to the Commission to assist it to understand the population of young people who had some involvement in CMIA processes (as currently limited by the law) over the period from 1 July 2012 to 31 October 2013.⁴

The information was initially collated by the Office of Public Prosecutions (OPP), which identified approximately 21 cases where it had been asked to provide advice regarding the jurisdiction of matters involving young people and the CMIA. The information was then added to by DHS, including the addition of four young people known by DHS to be involved in the CMIA, and according to the known previous or current involvement of the 25 young people with its programs.

The dataset therefore concerned 25 young people of whom DHS and the OPP were aware and who had been charged with criminal offences, and where there had been an issue as to their unfitness to stand trial or a defence of mental impairment.

This does not cover all the young people where such issues may have arisen. In some cases, young people charged with a criminal offence may have raised unfitness and police prosecutors may have withdrawn the charges. There may also be cases where young people are charged with criminal offences and appear in the Children's Court and raise the defence of mental impairment. As the Children's Court has the power to determine such matters, if the young person was found not guilty because of mental impairment, under the current requirements of the CMIA, it would have had no option but to discharge the young person, which is not recorded as an outcome by the court.

This data does not present a complete picture of the population of young people who have been involved in CMIA proceedings. However, it provides a snapshot of the cohort of young people who have recently raised issues that have brought them under the jurisdiction of the CMIA and due to its current limited application, forced a decision to be made about whether the matter was to be transferred and proceed under the CMIA by way of committal and determination in the County Court.

⁴ De-identified data provided by the Department of Human Services, collated by the Office of Public Prosecutions and the Department of Human Services.

Raw data

Table 9: Jurisdiction in cases involving young people in the dataset according to issue raised

Issue raised	Jurisdiction	Number
Unfitness (n=13)	Transferred to County Court	12
	Information not available	1
Unfitness and mental impairment (n=2)	Transferred to County Court	2
Mental impairment (n=1)	Not transferred	1
Information not available (n=9)	Information not available	2
	Not transferred	5
	Uplifted to County Court	2
Total		25

Table 10: Cases involving young people in the dataset according to issue raised and outcome

Issue raised	Outcome	Total
Unfitness (n=13)	Charges dismissed	1
	Found fit and guilty plea	1
	NCSO imposed ⁵	3
	Not finalised	2
	Guilty plea	3
	Transfer back to Children's Court	1
	Found unfit ⁶	1
	Found unfit and found not guilty	1
Unfitness and mental impairment (n=2)	Charges withdrawn	1
	Not finalised	1
Mental impairment (n=1)	Charges dismissed	1
Information not available (n=9)	Charges withdrawn	5
	Information not available	3
	Non-custodial supervision order ⁷	1
Total		25

⁵ There was no information in these three cases in relation to the finding on the issue of unfitness to stand trial or criminal responsibility.

⁶ In this case, the young person had been found unfit, declared liable for supervision and the court was awaiting a certificate of available services under section 47 of the CMIA.

⁷ There was no information in this case in relation to the finding on the issue of unfitness to stand trial or criminal responsibility.

Table 11: Outcome of cases involving young people in the dataset according to jurisdiction

Jurisdiction	Outcome	Number
Not transferred (n=6)	Charges dismissed	1
	Charges withdrawn	4
	Information not available	1
Transferred to County Court (n=16)	Charges dismissed	1
	Charges withdrawn	2
	Found fit and guilty plea	1
	Non-custodial supervision order ⁸	4
	Not finalised	2
	Plea of guilty	3
	Transfer back to Children's Court	1
	Found unfit ⁹	1
Information not available (n=3)	Found unfit and found not guilty	1
	Information not available	2
Information not available (n=3)	Not finalised	1
Total		25

8
9

There was no information in these four cases in relation to the finding on the issue of unfitness to stand trial or criminal responsibility.
In this case, the young person had been found unfit, declared liable for supervision and the court was awaiting a certificate of available services under section 47 of the CMIA.

Appendix E: Jurisdictional comparison of the mental impairment defence

Jurisdiction	Legislation	Definition
Victoria	<i>Crimes (Mental Impairment and Unfitness to be Tried) Act 1997</i> (Vic)	<p>s 20(1)—The defence of mental impairment is established for a person charged with an offence if, at the time of engaging in conduct constituting the offence, the person was suffering from a mental impairment that had the effect that—</p> <ul style="list-style-type: none"> (a) he or she did not know the nature and quality of the conduct; or (b) he or she did not know that the conduct was wrong (that is, he or she could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong). <p>The term ‘mental impairment’ has the common law meaning of ‘disease of the mind’.</p>
Commonwealth	<i>Criminal Code Act 1995</i> (Cth)	<p>s 7.3(1)—A person is not criminally responsible for an offence if, at the time of carrying out the conduct constituting the offence, the person was suffering from a mental impairment that had the effect that:</p> <ul style="list-style-type: none"> a) the person did not know the nature and quality of the conduct; or b) the person did not know that the conduct was wrong (that is, the person could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong); or c) the person was unable to control the conduct. <p>s 7.3(8)—Mental impairment includes senility, intellectual disability, mental illness, brain damage and severe personality disorder.</p> <p>s 7.3(9)—Mental illness is a reference to an underlying pathological infirmity of the mind, whether of long or short duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary external stimuli. However, such a condition may be evidence of a mental illness if it involves some abnormality and is prone to recur.</p>

Jurisdiction	Legislation	Definition
New South Wales	<i>Mental Health (Forensic Provisions) Act 1990</i> (NSW)	<p>'mentally ill'</p> <p>s 38(1)—If, in an indictment or information, an act or omission is charged against a person as an offence and it is given in evidence on the trial of the person for the offence that the person was mentally ill, so as not to be responsible, according to law, for his or her action at the time when the act was done or omission made, then, if it appears to the jury before which the person is tried that the person did the act or made the omission charged, but was mentally ill at the time when the person did or made the same, the jury must return a special verdict that the accused person is not guilty by reason of mental illness.</p>
Queensland	<i>Criminal Code Act 1899</i> (Qld)	<p>'mental disease' or 'natural mental infirmity'</p> <p>s 27(1)—A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission the person is in such a state of mental disease or natural mental infirmity as to deprive the person of capacity to understand what the person is doing, or of capacity to control the person's actions, or of capacity to know that the person ought not to do the act or make the omission.</p> <p>s 27(2)—A person whose mind, at the time of the person's doing or omitting to do an act, is affected by delusions on some specific matter or matters, but who is not otherwise entitled to the benefit of subsection (1), is criminally responsible for the act or omission to the same extent as if the real state of things had been such as the person was induced by the delusions to believe to exist.</p>

Jurisdiction	Legislation	Definition
Tasmania	<i>Criminal Code Act 1924</i> (Tas)	<p>'mental disease' includes 'natural imbecility'</p> <p>s 16(1)—A person is not criminally responsible for an act done or an omission made by him—</p> <ul style="list-style-type: none"> (a) when afflicted with mental disease to such an extent as to render him incapable of— <ul style="list-style-type: none"> (i) understanding the physical character of such act or omission, or; (ii) knowing that such act or omission was one which he ought not to do or make, or; (b) when such act or omission was done or made under an impulse which, by reason of mental disease, he was in substance deprived of any power to resist. <p>s 16(2)—The fact that a person was, at the time at which he is alleged to have done an act or made an omission, incapable of controlling his conduct generally, is relevant to the question whether he did such act or made such omission under an impulse which by reason of mental disease he was in substance deprived of any power to resist.</p> <p>s 16(3)—A person whose mind at the time of his doing an act or making an omission is affected by a delusion on some specific matter, but who is not otherwise exempted from criminal responsibility under the foregoing provisions of this section, is criminally responsible for the act or omission to the same extent as if the fact which he was induced by such delusion to believe to exist really existed.</p>
South Australia	<i>Criminal Law Consolidation Act 1935</i> (SA)	<p>'mental impairment'</p> <p>s 269A—Mental illness means a pathological infirmity of the mind (including a temporary one of short duration) and includes a mental illness, an intellectual disability or a disability or impairment of the mind resulting from senility but does not include intoxication.</p> <p>s 269C—A person is mentally incompetent to commit an offence if, at the time of the conduct alleged to give rise to the offence, the person is suffering from a mental impairment and, in consequence of the mental impairment—</p> <ul style="list-style-type: none"> (a) does not know the nature and quality of the conduct; or (b) does not know that the conduct is wrong; or (c) is unable to control the conduct.

Jurisdiction	Legislation	Definition
Western Australia	<i>Criminal Code Act Compilation Act 1913</i> (WA)	<p>'mental impairment'</p> <p>s 1(1)—The term mental impairment means intellectual disability, mental illness, brain damage or senility.</p> <p>s 27(1)—A person is not criminally responsible for an act or omission on account of unsoundness of mind if at the time of doing the act or making the omission he is in such a state of mental impairment as to deprive him of capacity to understand what he is doing, or of capacity to control his actions, or of capacity to know that he ought not to do the act or make the omission.</p> <p>s 27(2)—A person whose mind, at the time of his doing or omitting to do an act, is affected by delusions on some specific matter or matters, but who is not otherwise entitled to the benefit of subsection (1), is criminally responsible for the act or omission to the same extent as if the real state of things had been such as he was induced by the delusions to believe to exist.</p>
Australian Capital Territory	<i>Criminal Code 2002</i> (ACT)	<p>s 27(1)—Mental impairment includes senility, intellectual disability, mental illness, brain damage and severe personality disorder.</p> <p>s 27(2)—Mental illness is an underlying pathological infirmity of the mind, whether of long or short duration and whether permanent or temporary, but does not include a condition (a reactive condition) resulting from the reaction of a healthy mind to extraordinary external stimuli.</p> <p>s 28(1)—A person is not criminally responsible for an offence if, when carrying out the conduct required for the offence, the person was suffering from a mental impairment that had the effect that—</p> <ul style="list-style-type: none"> (a) the person did not know the nature and quality of the conduct; or (b) the person did not know that the conduct was wrong; or (c) the person could not control the conduct. <p>s 28(2)—A person does not know that conduct is wrong if the person cannot reason with a moderate degree of sense and composure about whether the conduct, as seen by a reasonable person, is wrong.</p>

Jurisdiction	Legislation	Definition
Northern Territory	<i>Criminal Code Act</i> (NT)	<p>s 43A—‘Mental illness’ means an underlying pathological infirmity of the mind, whether of long or short duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary stimuli (although such a condition may be evidence of a mental illness if it involves some abnormality and is prone to recur).</p> <p>‘Mental impairment’ includes senility, intellectual disability, mental illness, brain damage and involuntary intoxication.</p> <p>s 43C(1)—The defence of mental impairment is established if the court finds that a person charged with an offence was, at the time of carrying out the conduct constituting the offence, suffering from a mental impairment and as a consequence of that impairment:</p> <ul style="list-style-type: none"> (a) he or she did not know the nature and quality of the conduct; (b) he or she did not know that the conduct was wrong (that is he or she could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong); or (c) he or she was not able to control his or her actions.
New Zealand	<i>Crimes Act 1961</i> (NZ)	<p>‘natural imbecility’ or ‘disease of the mind’</p> <p>s 23(2)—No person shall be convicted of an offence by reason of an act done or omitted by him when labouring under natural imbecility or disease of the mind to such an extent as to render him incapable—</p> <ul style="list-style-type: none"> (a) of understanding the nature and quality of the act or omission; or (b) of knowing that the act or omission was morally wrong, having regard to the commonly accepted standards of right and wrong.

Jurisdiction	Legislation	Definition
Scotland	<i>Criminal Procedure (Scotland) Act 1995</i> (Scot) c 46	<p>'mental disorder'</p> <p>s 51A(1)—A person is not criminally responsible for conduct constituting an offence, and is to be acquitted of the offence, if the person was at the time of the conduct unable by reason of mental disorder to appreciate the nature or wrongfulness of the conduct.</p> <p>s 51A(2)—A person does not lack criminal responsibility for such conduct if the mental disorder in question consists only of a personality disorder which is characterised solely or principally by abnormally aggressive or seriously irresponsible conduct.</p>
United Kingdom	<i>Mental Health Act 2007</i> (UK) c 12	<p>'mental disorder' means any disorder or disability of the mind</p> <p>Section 1(2) of the <i>Mental Health Act 2007</i> (UK) amended section 1(2) <i>Mental Health Act 1983</i> (UK) and defines mental disorder as 'any disorder or disability of the mind'.</p> <p>The former categories of mental disorder (mental illness, mental impairment, severe mental impairment and psychopathic disorder) were abolished and the single definition applies throughout the <i>Mental Health Act 1983</i>.</p>
Canada	<i>Criminal Code</i> , RSC 1985, c C-46, pt 1	<p>s 2—'mental disorder' means a disease of the mind</p> <p>s 16(1)—No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.</p>

Appendix F: Presumptions and endangerment tests in the CMIA

Current presumptions in reviewing, varying and revoking orders in the CMIA

Stage	Presumption
Variation of custodial supervision order (CSO) during nominal term (ss 32(1) and 32(2))	<p>No presumption to vary the order</p> <p>Court must either confirm the order, vary the place of custody or vary the order to a non-custodial supervision order (NCSO).</p> <p>Court must not vary a CSO to a NCSO unless satisfied on the evidence available that the safety of the person subject to the order or members of the public will not be seriously endangered.</p> <p>Court must not vary a CSO to a NCSO unless the forensic patient or resident has completed a period of 12 months extended leave. This applies whether during or after the nominal term.</p>
Variation or revocation of NCSO during nominal term (s 33(1))	<p>No presumption to vary or revoke the order</p> <p>Court must either confirm the order, or vary the conditions of the order, or vary the order to a CSO, or revoke the order.</p>
Major review of CSO (s 35(3)(a))	<p>Presumption that the order will be varied</p> <p>Court must vary the order to a NCSO unless satisfied on the evidence available that the safety of the person subject to the order or members of the public will be seriously endangered.</p>
Major review of NCSO (s 35(3)(b))	<p>No presumption to vary or revoke the order</p> <p>The court may confirm the order, vary the conditions of the order or revoke the order.</p>
Granting special leave (s 50(3))	<p>Presumption that special leave will be granted</p> <p>The authorised psychiatrist or Secretary to the Department of Human Services must grant the special leave of absence if satisfied that there are special circumstances and the safety of members of the public will not be seriously endangered.</p>

Stage	Presumption
Granting or varying on-ground or limited off-ground leave (ss 54(2), 54(3))	<p>No presumption to grant or vary on-ground or limited off-ground leave</p> <p>The Panel may grant on-ground or limited off-ground leave if satisfied that the proposed leave will contribute to the person's rehabilitation and the safety of the person or members of the public will not be seriously endangered as a result of the person being allowed leave. Similar considerations for the variation of on-ground or limited off-ground leave.</p>
Granting extended leave (s 57(2))	<p>No presumption to grant extended leave</p> <p>The court may grant an application if satisfied on the evidence available that the safety of the forensic patient or forensic resident or members of the public will not be seriously endangered as a result of the forensic patient or forensic resident being allowed extended leave.</p>

Current tests for endangerment in the CMIA

Stage	Test
Making, varying and revoking an order (s 40(1)(c))	<p>Likely to endanger</p> <p>Court must consider whether the person is, or would if released be, likely to endanger themselves, another person, or other people generally because of his or her mental impairment.</p>
Variation of CSO during nominal term (s 32(2))	<p>Serious endangerment</p> <p>Court must not vary a custodial supervision order to a non-custodial supervision order during the nominal term unless satisfied on the evidence available that the safety of the person subject to the order or members of the public will not be seriously endangered as a result of the release of the person on a non-custodial supervision order.</p>
Major review of CSO (s 35(3)(a)(i))	<p>Serious endangerment</p> <p>Court must vary the order to a non-custodial supervision order, unless satisfied on the evidence available that the safety of the person subject to the order or members of the public will be seriously endangered as a result of the release of the person on a non custodial supervision order.</p>
Granting special leave (s 50(3)(b))	<p>Serious endangerment</p> <p>The authorised psychiatrist or Secretary to the Department of Human Services must grant an application for special leave of absence if satisfied the safety of members of the public will not be seriously endangered.</p>

Stage	Test
Granting and varying on-ground leave or limited off-ground leave (ss 54(2)(b) and 54(3)(b))	<p>Serious endangerment</p> <p>The Panel may grant an application for or vary on-ground leave or limited off-ground leave if satisfied the safety of the person or members of the public will not be seriously endangered as a result of the person being allowed leave.</p>
Suspending special leave, on-ground leave or limited off-ground leave (s 55(1))	<p>Serious endangerment</p> <p>Special leave of absence, on-ground leave or limited off-ground leave may be suspended wholly or partly at any time by the Chief Psychiatrist (in the case of a forensic patient) or the Secretary to the Department of Human Services (in the case of a forensic resident) if the Chief Psychiatrist or Secretary is satisfied on the evidence available that the safety of the person on leave or members of the public will be seriously endangered if leave, or part of the leave is not suspended.</p>
Granting extended leave (s 57(2))	<p>Serious endangerment</p> <p>The court may grant an application if satisfied on the evidence available that the safety of the forensic patient or forensic resident or members of the public will not be seriously endangered as a result of the forensic patient or forensic resident being allowed extended leave.</p>
Granting extended leave (s 40(1)(c))	<p>Likely to endanger</p> <p>Court must consider whether the person is, or would if released be, likely to endanger themselves, another person, or other people generally because of his or her mental impairment.</p>
Suspending or revoking extended leave (ss 58(1) and 58(4)(a))	<p>Serious endangerment</p> <p>Extended leave may be suspended at any time by the Chief Psychiatrist (in the case of a forensic patient) or the Secretary to the Department of Human Services (in the case of a forensic resident) if the Chief Psychiatrist or Secretary is satisfied on the evidence available that the safety of the person on leave or members of the public will be seriously endangered if leave is not suspended.</p> <p>The court may then revoke the leave if satisfied on the evidence available that the safety of the forensic patient or forensic resident or members of the public will be seriously endangered if the suspension is not confirmed or leave is not revoked.</p>
Revoking grant of extended leave (s 40(1)(c))	<p>Likely to endanger</p> <p>Court must consider whether the person is, or would if released be, likely to endanger themselves, another person, or other people generally because of his or her mental impairment.</p>

Stage	Test
Emergency power of apprehension (s 30(1)(b))	Serious endangerment The safety of the person subject to the order or members of the public will be seriously endangered if the person is not apprehended.
Review of persons transferred to Victoria (s 74F(5))	Serious endangerment The court cannot make a supervision order that is more restrictive on the person's freedom and personal autonomy than the interstate supervision order to which the person was subject, unless satisfied that the safety of the person or members of the public would be seriously endangered if a more restrictive order is not made.
Revocation of Governor's pleasure orders (sch 3 cl 4(2))	Serious endangerment The court may revoke the supervision order if satisfied on the evidence available that the safety of the existing detainee or members of the public will not be seriously endangered as a result of the revocation of the order.

Appendix G: Recommended factors to guide decision making in supervision, review, release and leave decisions

The following factors should be applied by the higher courts, Magistrates' Court, Children's Court and the Forensic Leave Panel in decision making. In addition, the Commission has recommended a number of statutory principles that should inform the powers and functions exercised under the CMIA (Recommendation 3) and principles specific to young people (Recommendation 4). The principle of least restriction in section 39 of the CMIA should also apply to these decisions, including decisions of the Forensic Leave Panel (Recommendation 3).

Matters to which higher courts are to have regard

Declaring a person liable to supervision or ordering an unconditional release

In deciding whether to declare the person liable to supervision or to unconditionally release the person, the court must have regard to whether the person poses an unacceptable risk of causing physical or psychological harm to another person or other people generally.

Section 40(2) also applies to this decision.

Making, varying or revoking a supervision order

In deciding whether or not to make, vary or revoke an order under Parts 3, 4 or 5, the court must have regard to:

- the nature of the person's mental impairment or other condition or disability
- the relationship between the impairment, condition or disability and the offending conduct
- whether the person would if released pose an unacceptable risk of causing physical or psychological harm to another person or other people generally because of his or her mental impairment
- the need to protect people from such a risk
- the supervised person's recovery or progress in terms of treatment progression and personal improvement
- whether there are adequate resources available for treatment, support or services in the community
- any other matters the court thinks relevant.

For the purpose of considering whether a less restrictive order is more appropriate, the court must have regard to whether the person is receiving treatment or services under a civil order under the *Mental Health Act 2014* (Vic) or the *Disability Act 2006* (Vic), and the conditions of any such order.

Granting extended leave

In deciding whether or not to grant extended leave to a person or to revoke a grant of extended leave the court must have regard to:

- the nature of the person's mental impairment or other condition or disability
- the relationship between the impairment, condition or disability and the offending conduct
- whether the person would if granted extended leave or if extended leave continued pose an unacceptable risk of causing physical or psychological harm to another person or other people generally because of his or her mental impairment
- the need to protect people from such a risk
- the supervised person's recovery or progress in terms of treatment progression and personal improvement
- whether there are adequate resources available for treatment, support or services in the community
- any on-ground or off-ground leave the person has been granted and their compliance with the conditions of their leave
- any other matters the court thinks relevant.

For the purpose of considering whether a less restrictive order is more appropriate, the court must have regard to whether the person is receiving treatment or services under a civil order under the *Mental Health Act 2014* (Vic) or the *Disability Act 2006* (Vic), and the conditions of any such order.

Matters to which the Forensic Leave Panel is to have regard

In determining whether or not to grant an application for leave or variation of leave, the Panel must:

- have regard primarily to the person's current mental condition or pattern of behaviour
- consider the person's clinical history and social circumstances
- the supervised person's recovery or progress in terms of treatment progression and personal improvement
- have regard to any on-ground or off-ground leave the person has been granted and their compliance with the conditions of their leave
- have regard to the applicant profile provided under section 54A and the leave plan or statement provided under section 54B.

Consideration of whether the person is an 'unacceptable risk' is provided in various other provisions in the CMIA.

Matters to which the Children's Court is to have regard

Presumption in favour of diversion and community treatment and support

In matters in the Children's Court involving young people where unfitness or the defence of mental impairment is raised, there are presumptions in favour of:

- diverting the young person from the criminal justice system, and
- the young person's treatment and support taking place in the community.

Discharging an accused

At any time during the course of proceedings, after the President or magistrate determines there is a real and substantial question as to the unfitness of the accused, and before the special hearing, the President or magistrate may discharge the accused with or without conditions if they consider:

- that the accused does not pose an unacceptable risk of causing physical or psychological harm to another person or other people generally as a result of the discharge, and
- the accused is receiving treatment, support or services in the community.

Declaring a person liable to supervision or ordering an unconditional release

In deciding whether to declare a young person liable to supervision or to unconditionally release the young person, a young person is to be unconditionally released unless the court is satisfied that they pose an unacceptable risk of causing physical or psychological harm to another person or other people generally.

Making, varying or revoking a supervision order

In considering whether to act on an assessment order or to make, vary or revoke a therapeutic supervision order, the Children's Court must have regard to:

- the nature of the young person's mental impairment, other condition or disability
- the relationship between the impairment, condition or disability and the offending conduct
- whether the young person would if released pose an unacceptable risk of causing physical or psychological harm to another person or other people generally because of his or her mental impairment
- the need to protect people from such a risk
- the young person's recovery or progress in terms of treatment progression and personal improvement
- whether there are adequate resources available for treatment, support or services in the community (or custody)
- any other matters the court thinks relevant.

For the purpose of considering whether a less restrictive order is more appropriate, the court must have regard to whether the person is receiving treatment or services under a civil order under the *Mental Health Act 2014* (Vic) or the *Disability Act 2006* (Vic), and the conditions of any such order.

Matters to which the Magistrates' Court is to have regard

Discharging an accused

At any time during the course of proceedings in the summary stream (or where summary jurisdiction has been granted), after the magistrate determines there is a real and substantial question as to the unfitness of the accused, and before the special hearing, the magistrate may discharge the accused with or without conditions if the magistrate considers:

- that the accused does not pose an unacceptable risk of causing physical or psychological harm to another person or other people generally as a result of the discharge, and
- the accused is receiving treatment, support or services in the community.

Declaring a person liable to supervision or ordering an unconditional release

In deciding whether to declare the person liable to supervision or to unconditionally release the person, the Magistrates' Court must have regard to whether the person would pose an unacceptable risk of causing physical or psychological harm to another person or other people generally.

Section 40(2) also applies to this decision.

Making, varying or revoking a supervision order

In deciding whether or not to make, vary or revoke an order the court must have regard to:

- the nature of the person's mental impairment or other condition or disability;
- the relationship between the impairment, condition or disability and the offending conduct;
- whether the person would if released pose an unacceptable risk of causing physical or psychological harm to another person or other people generally because of his or her mental impairment;
- the need to protect people from such a risk;
- the supervised person's recovery or progress in terms of treatment progression and personal improvement;
- whether there are adequate resources available for treatment, support or services in the community;
- any other matters the court thinks relevant.

For the purpose of considering whether a less restrictive order is more appropriate, the court must have regard to whether the person is receiving treatment or services under a civil order under the *Mental Health Act 2014* (Vic) or the *Disability Act 2006* (Vic), and the conditions of any such order.



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Victorian
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**Review of the Crimes
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REPORT

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