



**Victorian Equal Opportunity
& Human Rights Commission**

Crimes (Mental Impairment)

Submission to the Victorian Law Reform Commission

23 August 2013

Introduction

The Victorian Equal Opportunity and Human Rights Commission ('Commission') welcomes the opportunity to comment on the Review of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* Consultation Paper prepared by the Victorian Law Reform Commission ('the VLRC').

The Commission is an independent statutory body that has functions under the *Equal Opportunity Act 2010* ('Equal Opportunity Act'), the *Racial and Religious Tolerance Act 2001* and the *Charter of Human Rights and Responsibilities Act 2006* ('Charter'). The Commission's functions include dispute resolution, providing education about human rights and equality of opportunity, undertaking projects and activities aimed at eliminating discrimination and promoting human rights, conducting research, and providing legal and policy advice. In addition, the Commission has a role in reporting to the Attorney-General on the operation of the Charter and, at the request of public authorities, conducting compliance reviews.

The Commission's interest in the Review

The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* ('CMIA') affects some of the most vulnerable members of the community. It sets out provisions for:

- assessing whether a person charged with a criminal offence is unfit to stand trial because of their cognitive impairment, which may be an intellectual disability,
- assessing whether their impairment makes them incapable of forming the required mental element to have committed the offence and are therefore not guilty on the grounds of mental impairment, and
- the detention, management and release of a person who has been found either unfit to stand trial or not guilty of an offence on the grounds of mental impairment.

The CMIA affects people who are charged with a criminal offence who may be vulnerable because of a mental illness, intellectual disability or other cognitive impairment.¹ The CMIA also affects the family members or carers of those individuals, victims of crime, and the families or carers of victims of crime.

The VLRC recognises that the CMIA sits within the broader human rights framework of the Charter and the international human rights framework governing the treatment of people with a cognitive disability or psycho-social disability.

The Commission seeks to outline the human rights framework that the VLRC must take into account in the Review.

The international framework includes the core treaties to which Australia is a party, which includes the International Covenant on Civil and Political Rights ('ICCPR'), the International Covenant on Economic, Social and Cultural Rights ('ICESCR'), the Convention on the Rights of Persons with Disabilities ('CRPD'), and the Convention on the Rights of the Child ('CRC'). As identified in the VLRC Consultation Paper, other relevant international instruments include the Declaration on the Rights of Disabled Persons, the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, and the Standard Minimum Rules for the Treatment of Prisoners.

The CRPD is the most relevant to this Review, it being the most recent of the United Nations conventions on human rights, and the first legally binding international document that specifically promotes and protects the rights of persons with disabilities. It is a comprehensive treaty that includes civil, political, economic, social and cultural rights

¹ The VLRC highlights that this 'cohort captured by the CMIA is a very small proportion of the total number of people who come into contact with the criminal justice system and have a mental condition.'

without distinction and protects them all equally. People with disabilities have the same rights as all other people, however, may often face social, legal and practical barriers in accessing and claiming their human rights on an equal basis with others.

The purpose of the CRPD is to 'promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.' It contains the following general principles in Article 3:

- (a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons,
- (b) Non-discrimination,
- (c) Full and effective participation and inclusion in society,
- (d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity,
- (e) Equality of opportunity,
- (f) Accessibility,
- (g) Equality between men and women, and
- (h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

In relation to people with disabilities, the rights in the Charter must be considered and characterised in light of the guiding principles and rights enshrined in the Convention on the Rights of Persons with Disabilities ('CRPD').² The Convention gives detail about what is required for the respect and promotion of the human rights of people with disabilities.

The VLRC's review of the CMIA after 15 years of operation is especially significant because it provides an opportunity to examine whether the CMIA is operating consistently with the human rights framework of the Charter, which has been in full operation since 1 January 2008, and to consider the legislation in light of the CRPD, which was ratified by Australia on 17 July 2008.³

In cases involving people with impaired cognitive capacity in the context of Victoria's guardianship laws, the Victorian Supreme Court has observed that 'both the [CRPD] and the [Charter] underline the changing contemporary response to citizens with impaired cognitive capacity'.⁴ Specifically, the CRPD 'marks a "paradigm shift" in approach to persons with disabilities'.⁵

It reflects a movement 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.⁶

Those observations and the principles underpinning the CRPD are no less relevant in the context of the CMIA.

The Equal Opportunity Act and the *Disability Discrimination Act 1992* (Cth) are also relevant to the way that people with disabilities are treated within all levels of the criminal justice system, including by the police, courts and corrections. Those Acts make it unlawful for providers of goods, services and facilities to discriminate against a person

² As well as informing our understanding of how the rights in the Charter apply to people with disabilities, the CRPD provides an authoritative reference point for Australian governments, including the Victorian Government, when reviewing and developing legislation affecting people with disabilities.

³ On 21 August 2009, Australia ratified the Optional Protocol to the CRPD, which allows individuals to make a complaint about violations of the CRPD.

⁴ *Erdogan v Ekici* [2012] VSC 256, [52].

⁵ *Patrick's Case* [2011] VSC 327, [130].

⁶ *Nicholson v Knaggs* [2009] VSC 64, [13].

because of their disabilities and require reasonable adjustments to be made so that a person can access a service or any substantial benefit from it.⁷

The VLRC must consider whether the CMIA is operating compatibly with the human rights protected and promoted in the Charter, as understood in light of the guiding principles and rights enshrined in the Convention on the Rights of Persons with Disabilities ('CRPD'). Any recommended changes to the CMIA must be grounded in this human rights framework that enshrines the principles of freedom, respect, equality, dignity and autonomy.

Scope of the submission

The Commission looks at Victorian legislation through the lens of the Charter, the objectives of which are to protect and promote the human rights of all people, including those with a disability, and to ensure that any limitation on rights allowed under legislation is reasonable and proportionate in accordance with section 7(2) of the Charter.

The Charter promotes human rights dialogue between the executive, the legislature, the judiciary and the community.

- Section 28 of the Charter requires the Parliament, when enacting legislation, to consider the consistency of proposed legislation with human rights protected under the Charter and prepare a statement of compatibility explaining how the bill is compatible with the human rights protected by the Charter.
- Section 38 of the Charter requires public authorities to act in a way that is compatible with human rights and, in making a decision, to give proper consideration to human rights.
- Section 32 of the Charter directs that courts and tribunals must interpret all statutory provisions in a way that is compatible with human rights, so far as it is possible to do so consistently with their purpose. Section 32(2) specifically provides that international law relevant to a human right may be considered when interpreting statutory provisions. Consistently with section 32, Victorian courts are required to interpret the CMIA in a way that is compatible with human rights.

From this perspective, this submission highlights the relevant human rights protections under the Charter that the VLRC must take into account in reviewing whether the CMIA is operating justly, effectively and consistently with its underlying principles. The submission also highlights the relevant principles and rights in the CRPD that inform the human rights protections in the Charter as they relate to persons with a disability.

The submission sets out the human rights framework and its relevance to the CMIA under the following themes:

- equal recognition before the law, equality and non-discrimination
- right to a fair hearing, minimum rights in criminal proceedings and access to justice
- children's rights
- liberty and security of the person and humane treatment
- respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons, and

⁷ Section 44 of the Equal Opportunity Act prohibits discrimination in the provision of goods and services. Section 25 of the *Disability Discrimination Act 1992* (Cth) ('DDA') prohibits discrimination in the provision of goods, services and facilities. Both Acts include an express duty to make reasonable adjustments: see sections 5(2) and 6(2) of the DDA and section 45 of the Equal Opportunity Act.

- reasonable limitations on rights and the least restrictive principle (i.e. that the least-rights restrictive approach to dealing with an issue should be adopted).

The Commission acknowledges that this review of the CMIA raises a number of complex and specialist issues. The Commission only refers to those issues raised in the Consultation Paper on which the Commission has a view from the perspective of its responsibilities for human rights and equality.

Human rights and the CMIA

Equal recognition before the law, equality and non-discrimination

A number of provisions in the CMIA engage the equality rights in the Charter and the CRPD. Significantly, the CMIA deals with the rights of a person whose disability *may* limit their ability to understand court proceedings – this can include the affects of disabilities such as cognitive disabilities, including an intellectual disability, an acquired brain injury, or dementia, and psycho-social disabilities.

The fundamental value of the equality right is the equal dignity of every person. Human dignity is harmed by the unfair or different treatment of people because of their disability, rather than treatment relating to the needs and capacities of different individuals and taking into account the context underlying their differences.⁸ These rights require full consideration of a person's cognitive impairment in court proceedings, including advice, assistance, representation and reasonable adjustments required for a person to effectively participate in proceedings.

Section 8 of the Charter recognises:

- the right to recognition as a person before the law (section 8(1))
- the right to enjoy human rights without discrimination (section 8(2)), and
- the right to be equal before the law, have equal protection of the law without discrimination and the right to equal and effective protection against discrimination (section 8(3)).

Section 8(4) of the Charter recognises that ‘measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.’ The Charter defines ‘discrimination’ by reference to an attribute in section 6 of the Equal Opportunity Act, which includes ‘disability’ as defined in section 4 of that Act.⁹

In relation to people with disabilities, these equality rights must be understood with reference to the following rights in the CRPD:

Equality and non-discrimination. Article 5 of the CRPD provides that persons with disabilities:

- are equal before the law and are entitled without any discrimination to the equal protection and equal benefit of the law (Article 5(1)),
- are entitled to equal and effective legal protection against discrimination (Article 5(2)), and
- must be provided with the necessary and appropriate adjustments and support they need to enjoy their human rights on an equal basis with others (Article 5(3)).

Article 5(4) of the CRPD, like section 8(4) of the Charter, recognises that special measures taken for the purpose of achieving substantive equality of persons with disabilities will not be considered discrimination.

⁸ *Patrick's Case* [2011] VSC 327, [33].

⁹ Section 3 of the Charter.

Equal recognition before the law. Article 12 of the CRPD recognises the right to people with disabilities to equal recognition before the law. It sets out that persons with disabilities:

- shall enjoy legal capacity on an equal basis with others (Article 12(2))
- shall be provided with access to the support they may require in exercising their legal capacity (Article 12(3)), and
- shall have ‘appropriate and effective safeguards’ to ‘ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body’ (Article 12(4)).

Examples of relevance to the CMIA

The CMIA must operate in a way that is consistent with these rights. Examples of where the equality rights are engaged by the CMIA include:

- *The role of support measures*¹⁰

Section 6 of the CMIA sets out the test of when a person is unfit to stand trial.

Appropriate levels of support in court proceedings are important to ensure that the test of when a person is unfit to stand trial does not capture a broader class of individuals than is intended. Evidence provided to the Victorian Parliamentary Law Reform Committee Inquiry indicated that increasing court support services for persons with an intellectual disability or cognitive impairment may minimise the potential for unfitness to plead findings in some circumstances.¹¹

Appropriate support measures for people with disabilities in court proceedings is necessary to ensure hearings comply with the rights to equality, as well as the right to a fair hearing and access to justice in the Charter and the CRPD. Where a person requires additional assistance or measures to be taken, because of the needs of his or her disability so that they can effectively participate in proceedings, such measures must be identified and taken.

Consistently with these rights, before assessing whether a person with a cognitive disability, psycho-social disability or other ‘cognitive impairment’ (as the term is used in the Consultation Paper) is unfit to stand trial, courts should consider whether that person requires procedural or practical accommodations to facilitate their ability to comprehend the proceeding.

Supports also need to be provided to people with other disabilities (including physical, sensory and communication disabilities) to ensure they can participate in proceedings affecting them.

Recommendation 1: Consistently with the rights to equality, a fair hearing and access to justice in the Charter and CRPD, reasonable support measures in court proceedings must be taken into account before a person is assessed to be unfit to stand trial.

¹⁰ The role of support measures is raised in Questions 11 and 13 of the Consultation Paper.

¹¹ Law Reform Committee, Parliament of Victoria, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (March 2013), p 230.

- *The procedure in committal proceedings where a question of unfitness to stand trial is raised*¹²

Section 8(1) of the CMIA provides that, where a question of the fitness of an accused to stand trial arises in a criminal proceeding for an indictable offence, the committal proceeding must be completed in accordance with Chapter 4 of the *Criminal Procedure Act 2009*.

Chapter 4 of the *Criminal Procedure Act 2009* sets out the procedure before and on committing an accused for trial. Its provisions require, among other things, that the court ask the accused whether he or she pleads guilty or not guilty to the offence and to inform him or her of provisions relating to alibis and the cross-examination of victims of sexual offences. Its provisions do not contain guidance as to whether or how a Magistrate should adapt these procedures to ensure that people with an intellectual disability or cognitive impairment are able to understand these directions. Evidence heard by the Victorian Parliamentary Law Reform Committee said that Magistrates' have been adopting different procedures when determining how to commit an accused person whose fitness to be tried has been questioned.¹³

A lack of procedural uniformity in how committal proceedings are conducted for people with a cognitive disability, and the failure to make reasonable adjustments to enable people with a cognitive disability to understand the court's directions in their proceedings, is inconsistent with the right to the equal protection and equal benefit of the law. Procedures should be consistent with the right to be provided with the necessary and appropriate adjustments to enjoy the human right to a fair hearing on an equal basis with others.

Recommendation 2: Consistently with the right to equal protection, equal benefit of the law and the right to a fair hearing on an equal basis with others, the CMIA (or related laws) should provide for appropriate uniform committal procedures where a question of unfitness to stand trial is raised.

- *'Consent mental impairment' hearings*¹⁴

Section 21(4) of the CMIA provides for 'consent mental impairment' hearings. It states that if a person is charged with an indictable offence, before the empanelment of a jury, the prosecution and defence can agree that the proposed evidence establishes the defence of mental impairment and the trial judge may hear the evidence. If the trial judge is satisfied the evidence establishes the defence, the judge will direct that a verdict of not guilty because of mental impairment will be recorded. If not, the judge will direct the person be tried by a jury. Unlike a jury trial, where the jury may be satisfied the evidence establishes the accused is not guilty of the offence charged, a trial judge can only reach a finding of not guilty by reason of mental impairment.

It is currently unclear as to whether this procedure is or should be available in relation to an accused person who has been found unfit to stand trial. The law in this area needs to be clear and accessible.

¹² Questions 15 and 16 of the Consultation Paper ask whether the procedure in committal proceedings where a question of unfitness to stand trial is raised needs to be changed.

¹³ Law Reform Committee, Parliament of Victoria, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (March 2013), pp 235-6.

¹⁴ Question 21 asks whether a 'consent mental impairment' hearing be available following a finding of unfitness to stand trial.

'Consent mental impairment' hearings: DPP v CJC and DPP v Watson

Justice Osborn in *DPP v CJC* decided that the procedure in section 21(4) did apply to an accused person who had been found not fit to be tried.¹⁵ The decision considered the power of the trial judge was 'strictly de-limited' because it did not enable a trial judge to direct a verdict other than one that the parties agreed the evidence establishes. His Honour also highlighted that the section 21(4) procedure may benefit an accused person who has been found unfit to stand trial by removing unnecessary 'stress and disturbance to a mentally impaired defendant'.¹⁶

However, Justice Bell in *DPP v Watson*¹⁷ expressed reservations as to whether the section 21(4) procedure could apply in circumstances where the accused person had been found unfit to make decisions. Justice Bell observed: '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 consequences would be that the accused would thereby lose the opportunity to test the prosecution case and obtain an acquittal.'¹⁸

Justice Bell raised the question as to whether the availability of the section 24(1) procedure in relation to a person found unfit to stand trial was consistent with the human rights to equality and recognition before the law in section 8 and to a fair hearing in sections 24 and 25 of the Charter. However because reliance on section 21(4) was abandoned, the question was not resolved.

In circumstances where a person has been found unfit to stand trial because they are unable to give instructions to a legal practitioner, allowing their legal representative to exercise this type of 'substituted decision-making' for their client that will change the course of their criminal proceedings is potentially inconsistent with a person's right to the equal protection and equal benefit of the law in section 8(3) of the Charter. In this context, section 8(3) must be understood with reference to Article 12 of the CRPD, which requires appropriate and effective safeguards to ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person.

Recommendation 3: Consent mental impairment hearings should not be available when a person has been found to unfit to stand trial because they are unable to give instructions to a legal representative and the CMIA should be amended to clarify this.

- *The defence of mental impairment*¹⁹

Section 20 of the CMIA establishes the defence of mental impairment. In contrast to equivalent legislation in comparative jurisdictions, the CMIA does not define 'mental impairment' and the common law definition of a 'disease of the mind' is relied upon.²⁰

Evidence received by the Victorian Parliamentary Law Reform Committee Inquiry suggested that reliance on the common law definition tends to only allow the defence to be relied upon by people with mental health disabilities and can exclude people with a cognitive disability who did not understand their conduct was wrong.

¹⁵ *DPP v CJC* (2008) 21 VR 581.

¹⁶ *Ibid*, [35].

¹⁷ [2013] VSC 245.

¹⁸ *Ibid*, [9].

¹⁹ Questions 29, 30 and 31 of the Consultation Paper ask how the defence of mental impairment works with 'mental impairment' undefined, whether 'mental impairment' should be defined under the CMIA, and what are the advantages or disadvantages of including a definition of 'mental impairment' in the CMIA. Questions 32, 33 and 24 relate to how mental impairment should be defined, if it is defined.

²⁰ From the definition of insanity in *Daniel M'Naghten's Case* (1843) 8 ER 718, 722 [210].

The common law language 'disease of the mind' is no longer appropriate, clear or sufficient to capture the range of cognitive impairments that might have the effect that a person did not know the nature and quality of the conduct or understand the conduct was wrong. Distinguishing between the criminal responsibility of a person with a mental illness and a person with an intellectual disability is inconsistent with the right of all persons to equal protection of the law without discrimination and the right of persons with disabilities to the equal protection and equal benefit of the law.

Consistently with the right to equal protection of the law without discrimination, any definition of mental impairment, or guidance as to what the definition includes, should not be discriminatory in its application to different disabilities and should take into account current understandings of cognitive disabilities (including intellectual, learning, acquired and degenerative disabilities).

Regarding use of the term 'mental impairment' itself, the Consultation Paper recalls that the common law defence of insanity was replaced by the term 'mental impairment' because the former term was 'antiquated and carried a historical stigma'.²¹ In reviewing the CMIA's defence of criminal responsibility, the VLRC should also consider whether the term 'mental impairment' remains the most appropriate term for the defence in light of modern understanding of disability. A recent example of a shift from the word 'impairment' in Victorian legislation is in the Equal Opportunity Act. In 2011, the definition of 'impairment' in the Equal Opportunity Act was substituted for a definition of 'disability' 'for consistency with more common terminology used in human rights and discrimination law nationally and internationally.'²²

The CRPD recognises that disability is an evolving concept and that 'disability results from the interactions between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others'.²³

The CMIA applies to people with a range of disabilities, such as psycho-social disabilities, and cognitive disabilities including intellectual disabilities, learning disabilities, acquired brain injuries, and degenerative disabilities.

Recommendation 4: Consistently with the right to equal protection of the law without discrimination, the defence of mental impairment should be defined in the CMIA to take into account intellectual disabilities as well as mental health disabilities.

Recommendation 5: The language and terminology of the defence of criminal responsibility should be consistent with modern understanding of disability.

- *Appropriate and sufficient services for people subject to the CMIA*²⁴

In making a supervision order, section 26 of the CMIA allows a court to commit a person to custody in an appropriate place, being an approved mental health service, a residential treatment facility or a residential institution, and must not commit a person to custody in prison unless it is satisfied that there is no practicable alternative in the circumstances.

The requirement for section 47 certificates under the CMIA, which requires the court to receive a certificate confirming the availability of the facilities and services

²¹ Victoria, *Parliamentary Debates*, Legislative Assembly, 18 September 1997, p 187 (Jan Wade, Attorney-General).

²² Explanatory Memorandum to the Equal Opportunity Amendment Bill 2011, pp 2-3.

²³ Preamble, Convention on the Rights of Persons with Disabilities.

²⁴ Question 60 of the Consultation Paper asks whether there are appropriate and sufficient facilities and services for people subject to the CMIA.

necessary for the custody of that person, is an important safeguard in ensuring the court's decision appropriately caters to the needs and risks of the person and is consistent with their human rights. However it is ineffective if no appropriate facility exists and the court considers 'there is no practicable alternative' other than imprisonment.

The VLRC is right to highlight the vulnerability of people with mental health disabilities, intellectual disabilities or cognitive impairments in the criminal justice system, including the fact that prisons 'lack the specialised services required for managing and treating people subject to the CMIA and expose already vulnerable people to conditions that can be detrimental to their mental state and cause further harm.'²⁵

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 (Article 5(3)).

This can lead to unjustified limitations on human rights as demonstrated by the example an intellectually disabled man with early stages of dementia who was imprisoned for 371 days because no bail application was made due to a lack of appropriate supervised accommodation. He was subsequently found to be unfit to stand trial and not guilty because of a mental impairment.²⁶

This is not an isolated case. The case of *R v AO*²⁷ is another recent example of the lack of appropriate and sufficient facilities for vulnerable people subject to the CMIA.²⁸ At the hearing of that case, Judge Gullaci stated that it was in the interests of justice to publish his sentencing remarks so those outside the courtroom could know what happened to vulnerable people such as AO in the criminal justice system.

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.

AO, who turned 18 in September 2011, was born in Somalia and came to Australia as a refugee as a young child. AO had little if no contact with his family and no support structures in the community apart from services available through DHS. He considered shoplifting as his job, persistently shoplifting expensive beauty products from supermarkets and on selling them. There were reports that this was likely under the manipulation of others. AO had a history of offending and detention in youth justice centres. While AO had never been convicted of any charge in the Children's Court, by the age of 13 he had spent 495 days on remand in pre-sentence detention.

In 2010, all outstanding charges were discontinued in the Children's Court and AO was committed to the County Court.

- In November 2011, the County Court made a non-custodial supervision order with a nominal period of 5-years, which included a condition that AO live in a residential care facility.

²⁵ Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997: Consultation Paper* (2013), [7.40].

²⁶ *Ibid*, [7.31].

²⁷ [2012] VCC 904.

²⁸ The Commission received a notice in *R v AO* [2012] VCC 904 under section 35 of the Charter that a question of law arose relating to the interpretation of section 26 of the CMIA consistently with AO's human rights. As the argument was subsequently abandoned and the question no longer relevant for the court to determine, the Commission did not intervene pursuant to section 40 of the Charter but did observe the proceedings.

- 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, Judge Gullaci 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.'

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.

Recommendation 6: The VLRC should note the effect on vulnerable people of the current lack of sufficient and appropriate facilities for people subject to the CMIA.

Right to a fair hearing, minimum rights in criminal proceedings and access to justice

The right to a fair hearing is a fundamental principle underlying the CMIA, in its recognition that a person should not enter a plea to an offence or be tried for an offence unless they are mentally fit to stand trial.

Section 24(1) of the Charter protects the right to a fair hearing, relevantly the right of a person charged with a criminal offence 'to have the charge decided by a competent, independent and impartial court after a fair and public hearing'.

What is 'fair' is broad and includes a number of implied elements that are further explained with reference to the equivalent rights in Article 14 of the ICCPR and Article 6 of the European Convention on Human Rights.²⁹ In the context of a criminal trial, many of these implied elements are expressly protected in section 25(2)(a)-(k).

In the context of criminal proceedings, the right to a fair trial includes the right of effective access to the courts in the determination of criminal charges.³⁰ It also includes the right to effective participation in criminal proceedings.

²⁹ Sections 24 and 25 of the Charter are modelled on Article 14 of the ICCPR. The Victorian Court of Appeal has observed the similarities between section 24(1) of the Charter and the equivalent right to a fair hearing in Article 6(1) of the European Convention on Human Rights, using Article 6(1) to inform the scope of section 24(1): *Slaveski v Smith & Anor* [2012] VSCA 25.

³⁰ The United Nations Human Rights Committee, the body responsible for monitoring compliance to the ICCPR, has stated that "Access to administration of justice must be effectively guaranteed in all such cases to ensure no individual is deprived, in procedural terms, of his/her right to claim justice.": General Comment 32 in *Article 14: Right to equality before courts and tribunals and to a fair trial* (2007). See also *Slaveski v Smith & Anor* [2012] VSCA 25 at [49]-[50] in which, with reference to

The right to effective participation is also the general principle underlying the minimum guarantees in criminal proceedings, 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 assistants and specialised communication tools if required.³¹ Those minimum guarantees in criminal proceedings are enshrined in section 25(2) of the Charter, along with others.

Minimum rights in criminal proceedings. A person charged with a criminal offence is entitled without discrimination to the minimum fair trial guarantees specified in sub-sections 25(1) and (2)(a)-(k) of the Charter. Where the guarantees are not accorded a person may be unable to receive a fair trial. The guarantees in section 25(2) are:

- (a) to be informed promptly and in detail of the nature and reason for the charge in a language that he or she speaks or understands,
- (b) to have adequate time and facilities to prepare a defence and communicate with a lawyer or advisor chosen by him or her,
- (c) to be tried without unreasonable delay,
- (d) to be tried in person, and to defend himself or herself personally or through legal assistance chosen by him or her, through legal aid (if eligible),
- (e) to be told, if he or she does not have legal assistance, about the right to legal aid (if eligible),
- (f) to have legal aid provided if the interests of justice require it (if eligible),
- (g) to examine, or have examined, witnesses against him or her,
- (h) to obtain the attendance and examination of witnesses under the same conditions as witnesses for the prosecution,
- (i) to have the free assistance of an interpreter,
- (j) to have the free assistance of assistants and specialised communication tools and technology if he or she has communication or speech difficulties that require such assistance, and
- (k) not to be compelled to testify against himself or herself or to confess guilt.

Access to justice. Article 13 of the CRPD sets out specific guarantees regarding access to justice for persons with disabilities. It provides that States Parties:

decisions of European Court of Human Rights and the English Court of Appeal on Article 6(1) of the European Convention on Human Rights, the Court of Appeal considered that one aspect of the right to a fair trial in section 24(1) of the Charter is the right to effective access to the courts.

³¹ See *Stanford v United Kingdom* (1994) (Application No 16757/90) and *T v United Kingdom* and *V v United Kingdom* (2000) 30 EHRR 121.

- shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including witnesses, in all legal proceedings, including at investigative and other preliminary stages (Article 13(1)), and
- in order to help ensure effective access to justice for persons with disabilities, shall promote appropriate training for those working in the field of administration of justice, including police and prison staff (Article 13(2)).

Examples of relevance to the CMIA

The CMIA must operate in a way that is consistent with the right to a fair hearing. The right is engaged in a number of ways by the Act, for example:

- *Test for determining unfitness to stand trial*³²

Section 6 of the CMIA provides that a person is 'unfit to stand trial for an offence' if their mental processes are so disordered or impaired during the trial that they are unable to: understand the nature of the charge; enter a plea to the charge and exercise the right to challenge the jury; understand the nature of the trial; follow the course of the trial; understand the substantial effect of any evidence that may be given in support of the prosecution; or give instructions to a legal practitioner.

By affecting the way a person with a cognitive impairment participates in their criminal proceedings, the test engages the right to a fair hearing and its requirement that a person be able to participate effectively in proceedings.

A useful comparative example of where the requirements of the fair hearing right have been taken into account in reviewing the test for determining unfitness to stand trial is in the Law Commission of England and Wales Consultation Paper on Unfitness to Plead, to which the VLRC Consultation refers.³³ With reference to the fair hearing requirement of 'effective participation' in Article 6 of the European Convention on Human Rights, the Law Commission reached the view that 'an accused cannot participate meaningfully in his or her trial unless he or she has the capacity to make decisions. For example, meaningful participation in terms of giving evidence is predicated on the ability of the accused to decide to give evidence. Such a decision involves an understanding of the advantages and disadvantages of giving evidence in the circumstances of the particular case.'³⁴

While the Law Commission's proposed changes to the United Kingdom's comparative unfitness to stand trial test are not necessarily applicable in the Victorian context, its consideration of the fair hearing right components are useful and highlight how the right is engaged in this context.

Recommendation 7: The VLRC must consider the requirements of the right to a fair hearing – including the right of a person to effective participation in his or her trial – when making any recommendations regarding the test for determining unfitness to stand trial.

³² Question 7 asks whether the accused person's capacity to be rational should be taken into account in the test for unfitness to stand trial.

³³ Law Commission of England and Wales, *Unfitness to Plead, Consultation paper No 197* (2012), pp 43-50.

³⁴ *Ibid*, p 39.

Children's rights

Children's rights. In circumstances where the CMIA applies to an accused person that is under 18-years of age, the specific rights in the Charter that apply to children will be relevant. These include:

- the right of every child, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child (section 17(2)),
- the right of a child charged with a criminal offence to a procedure that takes account of his or her age and the desirability of promoting the child's rehabilitation (section 25(3)), and
- the right of a child who has been convicted of an offence to be treated in a way that is appropriate for his or her age (section 23(3)).

Rights of children with disabilities. Article 7 of the CRPD sets out that in all matters concerning children with disabilities, the best interests of a child shall be a primary consideration. Children with disabilities should be provided with disability and age-appropriate assistance to realise their right to express their views freely on all matters affecting them, with their views being given due weight in accordance with their age and maturity.

Best interests of the child to be a primary consideration. Article 3 of the Convention on the Rights of the Child provides that, 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'

Examples of relevance to the CMIA

The CMIA must operate consistently with these children's rights. A key area where the rights are engaged is in relation to the Children's Court's jurisdiction to determine unfitness to plead proceedings.

- *Children's Court's lack of jurisdiction to determine unfitness to stand trial*³⁵

Neither the CMIA nor the *Children Youth and Families Act 2005* confer jurisdiction on the Children's Court to determine whether an accused person is unfit to plead. Where a question arises that a child may be unfit to plead, the child will be directed to stand trial and have the matter investigated by a jury empanelled for the purpose in the County Court.

Where no question is raised as to a child's unfitness to stand trial, he or she will be tried in the Criminal Division of the Children's Court in accordance with the procedural guidelines in section 522 of the *Children Youth and Families Act 2005*. Section 522 sets out adaptations to trial procedures to ensure that children can understand the proceedings and participate effectively (consistently with their right to a fair hearing in section 24(1)). It requires the Court to take steps to make the proceeding comprehensible to the child, the child's parents and other parties who have a direct interest in the proceeding. It also requires the Court: seek to satisfy itself that the child understands the nature and implications of the proceeding and any orders made, allow the child to participate fully and consider any wishes expressed by the child, respect their cultural identity and needs and minimise any stigma to the child and his or her family.

These procedural guidelines acknowledge the particular vulnerabilities of children in court proceedings. They help ensure the protection of the right of a child to a

³⁵ Question 47 asks what issues arise in relation to the Magistrates' Court's lack of jurisdiction to determine unfitness to stand trial.

procedure that takes into account his or her age (as protected in section 25(3) of the Charter), the right of children to such protection in their best interests and is needed by reason of being a child (section 17(2) of the Charter), and the right to a fair hearing without discrimination (section 24(1) and section 8(2) of the Charter). They are also consistent with the rights of children with disabilities in Article 7 of the CRPD.

In *CL (a minor) v Lee & Ors*, Justice Lasry observed that the Children's Court's lack of jurisdiction prevents the Court from fulfilling its purpose of providing children with this specialist jurisdiction and recommended a change to the law to give the Children's Court jurisdiction to determine fitness to plead.³⁶ His Honour recommended that in any County Court case where the accused is a child, section 522 should be adhered to when possible. At present, such procedural safeguards are not mandatory in proceedings before the County Court. Even where procedural safeguards may be adopted on a case-by-case basis, the relative informality of the Children's Court, which is designed to make the judicial process less intimidating for children, may be difficult to establish and maintain in the setting of a superior court. Unlike the Children's Court, the County Court and its processes are not designed to meet the needs of child defendants.

CL (a minor) v Lee & Ors illustrates that the Children's Court's lack of jurisdiction to determine whether a child is unfit to plead may mean the specialist needs of children, specifically children with a cognitive disability, are not appropriately met and that these proceedings are not consistent with the children's rights protected in sections 25(3) and 17(2) of the Charter.

Recommendation 8: The Children's Court should have jurisdiction to determine unfitness to stand trial and this should be clearly provided for in the CMIA.

Liberty and security of the person and humane treatment

Liberty and security of the person. This includes the right to liberty and security of the person, not to be subject to arbitrary arrest or detention, and not to be deprived of liberty except on grounds, and in accordance with procedures, established by law (section 21 of the Charter). Custodial supervision orders clearly engage the right to liberty as might the range of conditions that may be placed on a non-custodial supervision order. The right requires:

- that a person not be deprived of liberty in accordance with procedures established by law, requires the CMIA to have transparent, accessible and predictable tests as to when a custodial supervision order will be made
- that supervision orders not continue beyond a period for which there is appropriate justification and there must be procedures for review
- that review procedures to enable the question of justification for the supervision orders be accessible if circumstances change during the period of the order, and
- that there are safeguards in place to protect against arbitrary detention, including regular periodic review and an accessible ability to challenge the lawfulness of detention. (This is given express recognition in section 21(7) of the Charter). Detention that may initially be legal may later become arbitrary if it is unduly prolonged and not subject to the safeguard of periodic review to assess its justification.

The right to liberty and security of the person is also set out in Article 14 of the CRPD.

³⁶ *CL (a minor) v Lee & ors* [2010] VSC 517, [80]. While the *Children, Youth and Families Act 2005* does contemplate that homicide offences and some others need to be tried in the County Court, the clear intention of the *Children, Youth and Families Act 2005* is that children should be dealt with in the specialist jurisdiction of the Children's Court wherever possible.

Humane treatment when deprived of liberty. Section 22 of the Charter requires that all persons deprived of liberty be treated with humanity and with respect for the inherent dignity of the human person. It requires an accused or person detained without charge to be segregated from people who have been convicted and treated in an appropriate way for a person who has not been convicted. Consistently with this right, the method of detention should not be more restrictive than is necessary in the circumstances.

Examples of relevance to the CMIA

The CMIA provisions relating to custodial and non-custodial supervision orders seek to strike a balance between the need to protect the community from danger and the rights and needs of the accused. These rights to liberty and security of the person and humane treatment when deprived of liberty are relevant in considering the CMIA provisions relating to supervision orders, review, leave and management of people subject to supervision. For example, they are engaged in the following areas:

- *Nominal terms: balancing the protection of the community with the rights*³⁷

The requirement in the CMIA for the court to set a nominal term of a supervision order, and to conduct a major review of the order at least 3 months before the end of the nominal term, is an important and necessary safeguard against arbitrary detention.

Under section 27 of the CMIA, a supervision order is for an indefinite term. The risk of arbitrary detention is significantly heightened when there is no time limit on the term of a supervision order. For example, if a court reviewing a person's custodial supervision order considers that detention is no longer necessary or proportionate but there are no non-custodial alternatives that are appropriate for the person, there is a risk that a person could spend an unduly prolonged period imprisoned.

Detention under a supervision order for an indefinite term in the absence of independent court review may also be a breach of section 22 of the Charter, which requires humane treatment during detention.

Consistently with the right to liberty and humane treatment when deprived of liberty, supervision orders must be no more restrictive than is necessary in the circumstances. Section 35 of the CMIA – which provides for a 'major review' at least 3 months before the end of the nominal term (and thereafter at intervals not exceeding 5 years) at which the court *must* vary a custodial supervision order to a non-custodial one unless it is satisfied that community safety would be seriously endangered – helps to ensure supervision orders are the least restrictive necessary to achieve the purpose of community protection.

Whether the nominal term is serving as an effective safeguard against arbitrary detention, it must be assessed with reference to evidence as to how the scheme is currently operating.

³⁷ Question 62 asks whether the use of a nominal term is an effective safeguard in balancing the protection of the community with the rights of the person subject to a supervision order.

- *Review of supervision orders*³⁸

Consistency with the above rights requires a combination of periodic and flexible reviews in addition to major reviews that happen at the end of the supervision order's specified nominal term and thereafter at intervals of not more than five years.

Providing judges with flexibility to decide how often to review a person's supervision order is important in light of the very different needs and requirements of the individuals subject to supervision under the CMIA.

However, automatic reviews that do not depend on the initiation of the court or the person subject to the order are also 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'.

Recommendation 9: Consistently with the rights to liberty and security of the person and to humane treatment when deprived of liberty, the CMIA must continue to provide that supervision orders have a nominal term and are subject to both flexible and regular periodic reviews.

Respect for inherent dignity, individual autonomy including the freedom to make one's own choices

Respect for the inherent dignity and individual autonomy of the person including the freedom to make one's own choices, is the first general principle in the CRPD (Article 3(a)). It is also protected by the right to privacy and reputation under the Charter. The right to privacy protects people in Victoria from unlawful and arbitrary interferences with their privacy. Any restriction on a person's privacy or autonomy must be lawful, reasonable, necessary and proportionate in accordance with section 7(2) of the Charter.

Privacy and reputation. The right in section 13 of the Charter includes the protection from arbitrary interference with privacy, family life, home or correspondence.

Protecting the integrity of the person. Article 17 of the CRPD recognises that every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.

Examples of relevance to the CMIA

These rights are engaged by the CMIA where its provisions impact on the ability of people to exercise their autonomy and make decisions in relation to their proceedings. For example:

- *Test for determining unfitness to stand trial*

Consideration of whether the test should include a requirement that the court consider the ability of a person to understand or respond rationally to a charge, or give rational instructions about the exercise of procedural rights, engages these rights. The impact of any proposals to amend the test must ensure that any requirement is framed so as not to amount to an unjustifiable limit on the rights of a person to personal autonomy and their choice to make decisions, including 'unwise' decisions.

³⁸ Question 73 asks whether the CMIA strikes the right balance between allowing for flexibility in the frequency of reviews and ensuring that people subject to supervision orders are reviewed whenever appropriate.

Recommendation 10: The VLRC must ensure that any recommendation regarding changes to the test for determining unfitness to stand trial does not unjustifiably limit the rights of a person to personal autonomy and their choice to make decisions.

Reasonable limitations on rights and the least restrictive principle

Section 7(2) of the Charter sets out the test for when human rights in the Charter can be limited. It is a general limitations provision, which gives effect to the principle that human rights are not absolute and can be limited where there is a reasonable and demonstrable justification for the restriction. It provides that a human right:

may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including-

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

Once a human right is identified as limited, whether the limitation is reasonable and can be demonstrably justified under the s 7(2) test requires an evaluation of each human right and a balancing of the countervailing interests and obligations. In summary, a limitation on a person's right must be reasonable, justifiable and proportionate, taking into account the nature of the right, the purpose of the interference and applying the least restrictive means of limiting the right. For example, interference with rights may be a reasonable limitation of those Charter rights in circumstances where it is necessary to protect the community.

Examples of relevance to the CMIA

The 'least restrictive' principle is recognised as a decision-making principle in section 39 of the CMIA, which states that 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' when making, varying or revoking a supervision order or remanding a person in custody. It also requires decisions about whether to grant or revoke extended leave to be made in accordance with that principle.

Because supervision orders are a clear limit on rights, the inclusion of this principle is important. However, the section 39 principle could be stated in clearer terms and language that is more consistent with the Charter's expression of the principle for restrictions to be 'necessary' to achieve their purpose.

Although in a different context, an example of more recent Victorian legislation that sets out a similar decision-making principle in the context of supervision orders is the *Serious Sex Offenders (Detention and Supervision) Act 2009*. Section 15(6) relevantly provides:

The court must ensure that any conditions of a supervision order (other than the core conditions)—

- (a) 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
- (b) are reasonably related to the gravity of the risk of the offender re-offending.

Also relevant is the statement of the least restrictive principle in the objectives and principles of the *Disability Act 2006*, which are to be given effect wherever possible in the

administration of the *Disability Act 2006* and the provision of disability services. Section 5(4) relevantly states:

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.

That any restriction on rights must be the least restrictive as is possible in the circumstances is repeated throughout the *Disability Act 2006* in relation to admission to residential institutions, the use of restrictive interventions and compulsory treatment.

Recommendation 11: Consistently with the Charter's requirement that limitations on human rights should be the least restrictive means reasonably available to achieve their purpose, the VLRC should have regard to other recent expressions of the 'least restrictive' principle in reviewing section 39 of the CMIA.

Recommendations

Recommendation 1: Consistently with the rights to equality, a fair hearing and access to justice in the Charter and CRPD, reasonable support measures in court proceedings must be taken into account before a person is assessed to be unfit to stand trial.

Recommendation 2: Consistently with the right to equal protection, equal benefit of the law and the right to a fair hearing on an equal basis with others, the CMIA (or related laws) should provide for appropriate uniform committal procedures where a question of unfitness to stand trial is raised.

Recommendation 3: Consent mental impairment hearings should not be available when a person has been found to unfit to stand trial because they are unable to give instructions to a legal representative and the CMIA should be amended to clarify this.

Recommendation 4: Consistently with the right to equal protection of the law without discrimination, the defence of mental impairment should be defined in the CMIA to take into account intellectual disabilities as well as mental health disabilities.

Recommendation 5: The language and terminology of the defence of criminal responsibility should be consistent with modern understandings of disability.

Recommendation 6: The VLRC should note the effect on vulnerable people of the current lack of sufficient and appropriate facilities for people subject to the CMIA.

Recommendation 7: The VLRC must consider the requirements of the right to a fair hearing – including the right of a person to effective participation in his or her trial – when making any recommendations regarding the test for determining unfitness to stand trial.

Recommendation 8: The Children’s Court should have jurisdiction to determine unfitness to stand trial and this should be clearly provided for in the CMIA.

Recommendation 9: Consistently with the rights to liberty and security of the person and to humane treatment when deprived of liberty, the CMIA must continue to provide that supervision orders have a nominal term and are subject to both flexible and regular periodic reviews.

Recommendation 10: The VLRC must ensure that any recommendation regarding changes to the test for determining unfitness to stand trial does not unjustifiably limit the rights of a person to personal autonomy and their choice to make decisions.

Recommendation 11: Consistently with the Charter’s requirement that limitations on human rights should be the least restrictive means reasonably available to achieve their purpose, the VLRC should have regard to other recent expressions of the ‘least restrictive’ principle in reviewing section 39 of the CMIA.