Victoria Legal Aid

Lawyers And Legal Services

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

Submission to the Victorian Law Reform Commission

August 2013

Victoria Legal Aid

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About Victoria Legal Aid

Victoria Legal Aid (VLA) is an independent statutory authority with a mandate to promote social justice and protect legal rights in Victoria, particularly the rights of those who are marginalised or disadvantaged in our community. We do this through our access and equity, civil, criminal and family law programs.

VLA plays a vital role in assisting people who are facing prosecution for criminal offences.

For example, we:

- provide access to quality advice and representation for people charged with offences who cannot otherwise afford it, with a focus on those who are disadvantaged or at risk of social exclusion;
- influence the criminal justice system to provide timely justice, the fair hearing of charges and appropriate outcomes;
- ensure that people charged with offences are treated with dignity, are well informed and guided appropriately through the criminal justice system; and
- improve community understanding of criminal justice and behavioural issues.

VLA is a leader in the justice system in the provision of services to people who have a mental illness or disability. We ensure that people with mental health issues and disabilities are afforded fair and humane treatment under the law by providing timely information and representation and by protecting the right of people to participate in decisions that affect them.

Executive Summary

Victoria Legal Aid (VLA) has extensive experience working with people with mental illness, intellectual disability and cognitive impairment in the criminal and civil justice systems. One in six of our clients have a disability or mental illness.[1] Across all of our practice areas, we prioritise our services to this particularly vulnerable client group.

We regularly represent clients at every stage of the process established by the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (the Act). We support the principles underlying the Act, particularly the focus on connecting people with appropriate treatment and support to promote rehabilitation and recovery, rather than exposing vulnerable people to the more punitive elements of the criminal justice system. This in turn can improve community confidence in the justice system and reduce the likelihood of re-offending.

VLA's criminal and civil practice has developed an in-depth understanding of the Act and its application. As a result, we have been able to identify a number of measures and reforms that will further the objectives of the Act and support people with mental illness, intellectual disability and cognitive impairment as they progress through the criminal justice system. Our recommendations also provide for key efficiencies to be gained with some simplification in the application of the Act.

This paper focuses on key recommendations for reform to the Act and the administrative and therapeutic processes supporting its implementation. These relate to:

- improving the processes for assessing fitness to stand trial, including changes to the criteria for assessment and the introduction of consent fitness where the prosecution and defence are in agreement;
- refining the operation of the defence of mental impairment, by providing for an inclusive definition in the Act and an examination of the characterisation of offences where a person is not guilty by reason of mental impairment;
- extending the operation of the Act to the Magistrates' Court;
- enhancing the range of orders available after a finding, including consideration of less restrictive civil orders as an alternative to an order under the Act;
- better processes for review, leave and management of people subject to supervision; and
- better pathways and treatment for people with an intellectual disability.

This submission focuses on the key issues and concerns that arise in our practice. We have also included a brief response to each of the specific questions posed in the Consultation Paper at the end of the submission. We are available to discuss any aspect of this submission further with the Commission.

[1] VLA Seventeenth Statutory Annual Report 2011-2012, page 7.

Summary of Recommendations

Recommendation 1: That section 6 of the Act be amended to allow an accused to enter a plea of guilty (as long as they have the capacity to understand their rights and the consequences of their decision) even where they lack capacity to challenge jurors and the jury.

Recommendation 2: That section 6 of the Act be amended to include an accused person's decision-making capacity in consideration of their fitness.

Recommendation 3: That the Act be amended to explicitly permit an unfit accused to have the evidence against them tested by a defence lawyer at a committal hearing.

Recommendation 4: That investigations into fitness are able to be determined by judge alone in circumstances where both the prosecution and defence agree that the evidence established that the accused is currently unfit to be tried.

Recommendation 5: That matters where unfitness is not agreed should continue to proceed to an investigation of fitness before a jury, with the option for the accused to elect to have fitness determined by judge alone.

Recommendation 6: That section 21 of the Act be amended to include an express provision allowing for matters to proceed as consent mental impairment following a finding of unfitness, and that in such cases there be a requirement that a trial judge be satisfied that no properly instructed jury could acquit on the facts and evidence of the case.

Recommendation 7: That mental impairment be defined in the Act as including, but not being limited to, psychiatric illness, intellectual disability and cognitive and neurological impairments.

Recommendation 8: That the Act be amended to specify the process that should be adopted in determining whether an accused person is not guilty by reason of mental impairment, specifically that consideration first be given to physical elements; then mental impairment; and finally consideration of mental elements (or available defences).

Recommendation 9: That the Act be amended so that declarations of findings of mental impairment are referenced to a re-characterised offence category to more accurately describe the conduct that an accused has engaged in.

Recommendation 10: That the Act be amended to expand the Magistrates' Court jurisdiction to ensure faster, cheaper and more appropriate and just outcomes not only for an accused, but also for the community.

Recommendation 11: That the Act be amended to allow the Magistrates' Court to determine fitness.

Recommendation 12: The test for unfitness in Magistrates' Court proceedings should be outlined in an amended section 6, which should include contested hearings.

Recommendation 13: Fitness investigation in the Magistrates' Court should be conducted and determined by a single magistrate, either at a hearing where both parties indicate agreement to the accused being unfit, or in a contested hearing.

Recommendation 14: That section 29 of the *Criminal Procedure Act 2009* be amended to remove the requirement to consent to the jurisdiction where a person is determined to be unfit.

Recommendation 15: That the current requirement to discharge a person who has been found not guilty by reason of mental impairment continue for summary offences.

Recommendation 16: That the Act be amended to allow magistrates to make a range of diversionary and therapeutic orders when a person has been found not guilty because of mental impairment in respect to an indictable offence triable.

Recommendation 17: That the Act provide for a right to appeal to the County Court, and that the relevant process should follow that outlined in Part 6.1 of the *Criminal Procedure Act 2009*.

Recommendation 18: That section 23 of the Act be amended to include the ability for a court to investigate suitable orders under the *Mental Health Act 1986* and *Disability Act 2006*, specifically that there be an express requirement in the Act that the courts consider any less restrictive options available before making a supervision order and not declare someone liable for supervision unless satisfied on the evidence that the person would be likely to seriously endanger the community if not declared liable to supervision.

Recommendation 19: That the court be required to consider whether it may be appropriate for a person to receive, or continue to receive, treatment and support under the *Mental Health Act 1986* or the *Disability Act 2006*, when reviewing and varying an order under the Act.

Recommendation 20: That there be a rebuttable statutory presumption at review that a person can transition to a less restrictive order.

Recommendation 21: That consideration be given to amendments in Part 6 of the Act to better respond to the particular circumstances and needs of intellectually disabled and cognitively impaired persons.

Recommendation 22: That people with an intellectual disability on NCSOs be subject to the clinical oversight and responsibility of the Office of the Senior Practitioner.

Recommendation 23: That the phrase 'nominal term' used in the Act be replaced with the phrase 'major review period'.

Recommendation 24: That there be judicial discretion in the setting of the nominal term, and that the judicial discretion to set the timing for regular review of an order under the Act be retained.

Recommendation 25: That the three year restriction of applying for a review of an order in section 31(2) of the Act be removed, and that courts have the power to impose limitations on applications for reviews in cases of repeated, unreasonable or vexatious applicants.

Recommendation 26: That the Act be amended to remove the risk to self as a factor for consideration in section 40(1)(c) of the Act.

Recommendation 27: That the Act be amended to refer to the likelihood of *serious* endangerment, rather than simply likelihood of endangerment, in section 40(1)(c) of the Act.

Recommendation 28: That reviews confirming orders be conducted on the papers where all parties consent and the affected person has provided that consent through a legal representative.

Recommendation 29: That there be a requirement that reports are provided to all parties at least 14 days before any review hearing.

Recommendation 30: That the Forensic Leave Panel be subject to the principle of least restriction in section 39 of the Act.

Recommendation 31: That the functions of the Internal Leave Committee be reviewed to assess whether it promotes and supports the purposes of the Act and the statutory functions of the Forensic Leave Panel.

Recommendation 32: That all applications for leave be considered by the Forensic Leave Panel irrespective of whether they have been assessed and declined by the Leave Review Committee, and that a framework for disclosure of forensic patient applications be established to ensure the Leave Review Committee has all applications and documentation.

Recommendation 33: That a more therapeutic response be adopted for non-compliance by allowing temporary suspension of NCSOs and allowing courts to delay proceedings in relation to non-compliance.

Improving the processes for assessing fitness

When simplified, the concept of fitness relates to whether a person has sufficient mental capacity to understand the criminal trial process. VLA has identified a number of potential amendments to the Act that would enable the fitness regime to operate more effectively, efficiently and fairly.

In particular, minor changes to the fitness test in section 6 would see the test suitably apply to people who lack adequate decision making capacity, and would also allow people to enter pleas of guilty where they understand the consequences of this decision. Our recommendations would also see that unfit accused are not denied the right to a contested committal hearing.

Importantly, the changes we recommend concerning consent fitness proceedings would lead to efficiencies in the system through a streamlined process that is also less taxing on accused.

Establishing whether a person is fit to stand trial

Current issues relating to the assessment of fitness (the Presser criteria)

The Act provides that a person will be considered unfit if, because of an impairment or disorder in their mental processes, they satisfy one of the following six criteria:

(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.[2]

In relation to the second criteria, it is often the case that the ability of an accused to enter a plea and the ability to challenge jurors are conflated, which is problematic for accused able to do one but not the other. It is appropriate that an accused have the right to plead guilty (as long as they have the capacity to understand their rights and the consequences of their decision) even where they are not able to challenge jurors and the jury.

We support the separation of this criterion. This amendment will ensure that people who are unfit to challenge jurors but are able to enter a plea proceed through the ordinary court processes, which can often be quicker and less stressful for accused. This will also guide experts preparing reports about fitness to address an accused's fitness in varying contexts.

[2] Section 6 of the Act.

The potential benefit for an accused is demonstrated by the case example below.

Case example

Mario has been charged with criminal damage arising from an incident where he drove his bicycle into a parked car and ran away. Mario is 46 years old and has a significant intellectual disability. He has no criminal priors and is cared for on a full-time basis by his siblings.

A report was obtained which indicated that Mario was unfit to be tried but could plead guilty. Given the circumstances of the offence and the community supports in Mario's life, the lawyer decided, in consultation with Mario's family, that it would be in the best interests for Mario to plead guilty rather than go through a fitness investigation and special hearing.

Mario pleaded guilty and received an adjourned undertaking (commonly referred to as a good behaviour bond) in the County Court.[3]

As highlighted in the above example, proceeding to a plea of guilty where appropriate, can often lead to more favourable sentencing outcomes for the accused whilst also serving the many other benefits which flow from a plea of guilty to victims and the community.

Recommendation 1: That section 6 of the Act be amended to allow an accused to enter a plea of guilty (as long as they have the capacity to understand their rights and the consequences of their decision) even where they lack capacity to challenge jurors and the jury.

The relevance of decision-making capacity, effective participation and rationality to an assessment of fitness

VLA supports an amendment to the Act to include explicit consideration of an accused's decision making capacity in the context of their particular court matter when assessing fitness. VLA considers that there is benefit in having a decision making component imported into the fitness to stand trial test as it provides for an additional and conceptually easier way of describing and assessing unfitness.

We consider there is some merit in the factors proposed by the Law Commission of England and Wales[4] and would support their inclusion in an amended Act to provide guidance in navigating the concept of decision making capacity. Specifically, these factors relate to a person's capacity to:

- understand the information relevant to the decisions that they an accused 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 an accused decisions.

This additional criteria would capture people who are currently considered fit but who are unable to adequately instruct their lawyer, as demonstrated by the below example.

[3] All case examples reflect VLA's practice experience. Details have been changed to protect individual clients.
[4] Outlined at 4.37 of the Consultation Paper.

Case example

Robert has Autism Spectrum Disorder and has a mild intellectual disability. Robert has been charged with intentionally causing serious injury. Although Robert is able to instruct his lawyers about individual aspects of the evidence, he is unable to appreciate his case holistically and is unable to meaningfully instruct his lawyers about how to conduct his case. A fitness report that was prepared for Robert found him to be fit because he could provide basic instructions to his lawyers and challenge individual jurors. Robert's legal team were nonetheless required to make strategic decisions on Robert's behalf because of his inability to make abstract decisions.

If decision-making capacity were a consideration, it is likely that Robert would have suitably been found unfit.

VLA does not support other changes to the Presser criteria canvassed in the Consultation Paper.

For example, we do not support the introduction of a separate requirement for effective participation. In our view, this may result in people being unnecessarily brought into the fitness framework when they experience only minor challenges to their participation in the process but may still be able to participate to an acceptable standard.

In addition, VLA does not support the introduction of a separate further requirement of rationality as it would import subjective considerations into the assessment of fitness that should be resisted. In our view, tests that involve value based judgements or assessments of decisions made by an accused are inappropriate because of the individual and unique nature of mental incapacity and how it affects an individual.

Recommendation 2: That section 6 of the Act be amended to include an accused person's decision-making capacity in consideration of their fitness.

Improving committal proceedings where fitness is relevant

As identified in the Consultation Paper, there is no specific procedure in the Magistrates' Court to manage the issue of fitness where it arises during the course of a committal proceeding. Fitness must be reserved for the trial judge. Additionally, in our experience, magistrates can be unwilling to list a contested committal hearing if there are indications that an accused may be unfit at the committal mention stage of an indictable matter on the basis that it has limited utility and the matter is inevitably going to go before a superior court for determination of fitness.

In our view, the current situation may deprive an accused the opportunity to test the prosecution case at an early stage, obtain evidence from cross examination for use in a trial or special hearing, or even deprive an accused of the opportunity to make application for charges to be withdrawn at committal stage.

Case example

Gabriel has a cognitive impairment and is on a non-custodial supervision order. He is charged with indecent assault for hugging a female friend, Amy. In her statement Amy says that Gabriel touched her breast after the hug. In the following paragraph in her statement Amy also comments that Gabriel owed her $20. Gabriel is unfit but able to instruct that he did not touch Amy's breast. The lawyer forms the view that given the odd reference to the $20 debt in Amy's statement, there may be a motive to make a false complaint against Gabriel.

At committal mention stage, Gabriel's lawyer requests a committal hearing to be able to ask Amy some more questions about the incident. The magistrate refused to list a contested committal hearing because there is no point as Gabriel is already on a non custodial supervision order and challenging the current case would have no impact on his situation.

As a result, the lawyer was not able to test whether there was a motive to make a false complaint against Gabriel at this early stage.

VLA supports changes to ensure that there is no bar to unfit accused exercising their right to a committal hearing, and to explicitly allow lawyers to conduct committal proceedings to test the prosecution case on the accused's behalf.

VLA suggests that where unfitness is identified at an early stage of an indictable matter, the court would list a contested committal hearing.[5] If the defence report indicating that the accused is unfit is contested by the Crown, the court could order that a fitness assessment and report be prepared one week prior to a committal hearing.[6] Subject to the fitness report, a committal could then either proceed as normal if the accused is fit, or with the lawyer acting in the client's best interests if unfit.

This would establish a framework for ensuring an unfit accused is entitled to have the evidence against them tested by a defence lawyer. If the accused is committed, the question of fitness would be reserved for the superior court.[7]

We also support the extension of the substantive operation of the Act to the Magistrates' Court. This is discussed below at page 16.

Recommendation 3: That the Act be amended to explicitly permit an unfit accused to have the evidence against them tested by a defence lawyer at a committal hearing.

Jury involvement in investigations of unfitness to stand trial

The introduction of a consent mental impairment procedure[8], has delivered many benefits, including a reduction in the demand for jury pools and a consequent saving to the community, reduction in delay in our courts, and a process that is less formal and potentially less distressing to an accused person. In our experience, a majority of mental impairment matters now proceed under these provisions, with only a small number of matters requiring a jury to be empanelled.

Currently, the Act does not provide equivalent provisions for the determination of the fitness of the accused to be tried. This means that jury based trials are still required even where the prosecution, defence and the judge all agree that the evidence supports the finding that an accused is unfit to stand trial.

[5] Alternatively, the accused could waive their right to a committal and be committed to a superior court by way of straight hand up brief per section 141 of the *Criminal Procedure Act 2009.*

[6] We consider that there is benefit in the court ordering and funding the report, as opposed to one of the parties, as a court ordered report would be more likely to be accepted by the parties. VLA proposes that the Mental Health Liaison Officer in the Magistrates' Court conduct fitness assessments prior to a committal hearing. We note that this would have potential resourcing implications in remote rural areas. The court could either arrange an independent psychiatrist to conduct a report, or refer the matter to Melbourne or a suburban court serviced by a Mental Health Liaison Officer.

[7] VLA notes that in addition to the above proposed amendments, consideration will need to be given to the procedure to be followed for 'committal cautions' where an accused is unfit. (Section 144(2)(b)(i) of the *Criminal Procedure Act*, and rule 56 of the Magistrates' Court Criminal Procedure Rules 2009).

[8] In section 21(4) which essentially states that where the prosecution and defence agree that the defence of mental impairment is established, a jury is not empanelled and rather where the trial judge is satisfied that the evidence establishes mental impairment the trial judge records a verdict of not guilty because of mental impairment.

Case example

Quoc was charged with threats to kill against two chemist attendants who were not willing to give him certain medication. Quoc was remanded, and was unable to be bailed as he had a prior history for failing to appear and the magistrate was concerned about a lack of suitable supports in the community.

A report obtained by Quoc's lawyer within weeks of him being remanded concluded that Quoc had an acquired brain injury and an IQ of 62, and concluded that he was unfit to be tried.

Quoc's matter needed to be listed in the County Court for a fitness investigation. Although the Crown agreed that Quoc was unfit, the matter needed to proceed to a complete fitness investigation with a jury empanelled. A fitness hearing took one full day. A jury returned with a verdict of 'unfit to be tried' almost immediately upon retiring for deliberations. At the time of his fitness investigation, Quoc had been imprisoned for 137 days. Following the fitness investigation his matter was adjourned to a special hearing to consider mental impairment.

VLA supports the introduction of consent fitness where the prosecution and defence are in agreement about an accused's fitness. These matters should be able to proceed by judge alone.

VLA recommends that the provisions in the Act relating to the procedure of a fitness investigation[9] be amended to provide for judge alone hearings where both parties are in agreement that the accused is unfit. Where there is no agreement, an accused should continue to enjoy the right to proceed to an investigation of fitness before a jury, with the option of electing for a judge alone hearing. In our view, this approach would enable the limited resources of the justice system to be appropriately directed towards matters where the question of fitness is at issue.

Recommendation 4: That investigations into fitness are able to be determined by judge alone in circumstances where both the prosecution and defence agree that the evidence established that the accused is currently unfit to be tried.

Recommendation 5: That matters where unfitness is not agreed should continue to proceed to an investigation of fitness before a jury, with the option for the accused to elect to have fitness determined by judge alone.

Allowing consent mental impairment hearing following a finding of unfitness to stand trial

VLA supports the introduction of consent mental impairment hearings where an accused has been found unfit to stand trial. Where all parties are in agreement that the appropriate finding is not guilty because of mental impairment, VLA considers it unnecessarily burdensome for a special hearing[10] to proceed. There is little utility or benefit in court and jury resources being allocated to a special hearing in these circumstances.

[9] Section 11 of Part 2.

[10] A special hearing is held following a finding of unfitness to determine if someone is criminally responsible. The available findings at special hearing are either not guilty, not guilty because of mental impairment, or committed the offence.

To ensure there are appropriate safeguards for an accused, the provisions in the Act relating to 'consent mental impairment hearings' [11] should be amended to require a trial judge, where an accused has been found unfit, to be satisfied that no properly instructed jury could acquit the accused on the facts and admissible evidence of the case.

Example of proposed VLA approach:

Renee has been charged with arson and has been found unfit to stand trial. The charge of arson was in relation to setting alight a number of cars in a car park. A mental impairment defence is available as Renee said in her record of interview that voices told her to set some tyres that were in the boot of her car alight. After obtaining a report, the defence and prosecution agree that the defence of mental impairment is made out and agree to proceed by consent.

In her record of interview Renee also said that she was really only meaning to set light to a stack of old tyres in the boot of her car, and not her whole car or other cars. If the proposed VLA approach is followed, the judge in this case could intervene and query if the defence had considered whether Renee had the requisite intention to destroy or damage property other than the car tyres in her boot; and could suggest that the prosecution consider amending its case or withdrawing the charges.

Recommendation 6: That section 21 of the Act be amended to include an express provision allowing for matters to proceed as consent mental impairment following a finding of unfitness, and that in such cases there be a requirement that a trial judge be satisfied that no properly instructed jury could acquit on the facts and evidence of the case.

Refining the operation of the defence of mental impairment

The operation of the defence of mental impairment raises a number of conceptual complexities. We consider that there is a case for clarifying and refining the operation of the defence.

In particular, we support the inclusion of a definition of mental impairment that clarifies the intended scope of the Act. In addition, given the implications of a defence of mental impairment, we consider that some attention should be given to the characterisation of court outcomes that follow a finding that an accused is not guilty by reason of mental impairment.

We also note that in the context of considering the defence of mental impairment, it is important to remember that an accused's right to put the prosecution to proof needs to be preserved and protected.

An inclusive definition of 'mental impairment'

There is some uncertainty regarding the scope of 'mental impairment' for the purposes of the Act.[12] In particular, there is some ambiguity about the availability of a mental impairment defence to intellectually disabled offenders.[13]

[11] Subsection 21(4) of the Act.

[12] The meaning of 'mental impairment' is understood to have annexed the common law term 'disease of the mind'. Whilst mental impairment is undefined in the Act and s25 abrogates the common law test of insanity, s20 of the Act is effectively a statutory expression of the M'Naghten rules governing the defence of insanity. The second reading speech makes it clear that the introduction of the CMIA was intended to change only the terminology, not the substance of the common-law test of insanity.

[13] Whilst we note that ambiguity also exists about severe personality disorders, we have not canvassed this difficult topic in our submission.

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[14]) and would reflect clearly how the Act generally operates in practice.

VLA recommends that an inclusive definition of mental impairment should be inserted into section 20 to state that:

> *mental impairment includes, but is not limited to, psychiatric illness, intellectual disability and cognitive and neurological impairments.*

The inclusion of the definition will assist to clarify the operation of the law.

We do not anticipate that this definition will disturb the current principle that impairment caused by an external and temporary phenomenon such as a drug-induced psychosis or acute intoxication does not attract the operation of mental impairment.

Recommendation 7: That mental impairment be defined in the Act as including, but not being limited to, psychiatric illness, intellectual disability and cognitive and neurological impairments.

Improving the order in which the elements of an offence are considered where the defence of mental impairment is raised

The law is currently ambiguous about the approach to be taken by the Crown (and consequently the defence and the courts) in matters where the defence of mental impairment is raised. Section 20(1) of the Act states that:

> 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-
>
> (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).

The inclusion of the words 'engaging in conduct' suggest that only the physical elements, that is the physical acts, need to be proved. However, it is open to interpretation that 'conduct constituting the offence' incorporates the mental elements and would therefore require the Crown to prove all the elements of an offence.

Although various approaches have been supported by the courts, the issue is not settled. The Judicial College Chargebook, a resource relied upon by lawyers and courts, acknowledges that the law in this area is unclear and does not identify a preferred approach.

This uncertainty about the approach to be taken reveals an inherent difficulty in determining the existence of mental elements of an offence, such as intention and recklessness, for a person who is mentally impaired.

At a practical level, the key challenge arises when considering how a court should direct a jury about what elements of the offence the Crown is required to prove beyond reasonable doubt – only the physical elements of an offence, or all elements of an offence? This also prompts consideration of

[14] For example, s26(3) of the Act states that a court must not make a supervision order providing for a person to receive services in an appropriate place or from a disability service provider, the Secretary of DHS or the Secretary of the Department of Health without a certificate stating that such facilities are available.

when the question of mental impairment should be settled – before consideration of the elements of the offence, or once the elements of the offence have been proven.

Ultimately, the issue is one of sequencing. If the prosecution is *only required to prove the physical elements***,** then a mentally impaired accused may be deprived of an acquittal because the jury would not get to consider possible issues of foreseeability or defences that would ordinarily be available to unimpaired persons. Alternatively, if the prosecution is required to prove *all the elements* of the offence, evidence of mental impairment would impede the ability of a jury to objectively and substantially consider the mental elements of the offence.

In our view, it is possible to reconcile the elements of an offence with a defence of mental impairment. VLA supports an approach that would:

- ensure that a mentally impaired person is afforded the same opportunity at an acquittal as a person of sound mind;
- prevent an accused obtaining a complete acquittal if offending is primarily explicable by reference to mental impairment; and
- prescribe a procedure for courts to adopt that is not unduly complicated for judges and juries.

A jury would be directed to consider the physical elements, then evidence concerning mental impairment, and finally any objective issues concerning mental elements (including the existence of potential defences).

Given the complexity of this area of the law, we have set out the application of this clearer process below:

Application of the proposed VLA approach

Lachlan, who has schizophrenia and a mild cognitive impairment, has been charged with child stealing.

He was sitting alone at a tram stop when a boy sat beside him. Lachlan assumed that the boy was his childhood friend, took him by the hand and started running away from the tram stop. The boy's mother ran after Lachlan and her son for a few hundred metres, until Lachlan took the son to a train station. The boy's mother caught up with the pair when they could not get through the ticket barriers.

Following the above process, the jury would be directed to consider the following question:

1. Have the Crown satisfied you, beyond a reasonable doubt, that the accused took the child out of the possession and against the will of the child's parent?

   If no, then you must acquit the accused.

2. If yes, based on the evidence presented concerning the accused's mental functioning, was the accused mentally impaired at the time of committing the offence?

   If no, then consider whether or not the accused intended to take the child. When doing this, you can refer to the evidence you have heard about the accused's mental function in coming to your answer.

3. If you find that the accused was mentally impaired, does an objective consideration of the evidence raise a question as to whether the accused had the requisite intention to take the child out of the parent's possession and against their will?

   a. If the evidence does call into question the accused's intention, the prosecution must satisfy you beyond a reasonable doubt that an unimpaired person in the position of the accused should have been aware that they were taking a child out of their parent's possession against their will.

   b. If an objective consideration of the evidence does not call into question issues concerning

the mental elements of the offence, then the accused is not guilty because of mental impairment.

i. If the prosecution does satisfy you that a person of sound mind would have realised that they were taking a child away from their parent against their will, then you must find the accused not guilty because of mental impairment.

ii. If the prosecution does not satisfy you that a person of sound mind would have realised that they were taking a child away from their parent against their will, then you must acquit the accused.

Recommendation 8: That the Act be amended to specify the process that should be adopted in determining whether an accused person is not guilty by reason of mental impairment, specifically that consideration first be given to physical elements; then mental impairment; and finally consideration of mental elements (or available defences).

Better characterisation of offences following findings under the Act

Every offence requires the proof of a physical element and a mental element. In mental impairment matters, it is difficult to discern what was on the mind of the accused at the time of the physical act, and often there will be a lack of intention, knowledge and foreseeability. Despite this difficulty in establishing mental elements for mentally impaired accused, they are nonetheless declared to be 'not guilty because of mental impairment' of offences with specific fault elements. For example, the offence of murder requires proof that the accused had a specific intention to kill or cause really serious injury to the victim; however, someone who is mentally impaired may not have formed the necessary intention.

A finding of mental impairment triggers the consideration of a supervision order regardless of the specific offence the person is not guilty of by reason of mental impairment. A declaration of liability to supervision means liability to indefinite supervision, and the only relevance of the offence and maximum penalty is in setting the outer limits for major reviews to take place.

Given the nature of the finding of mental impairment, we question whether an accused should be classified and declared liable to supervision according to a particular offence when the elements of the offence have strictly not been proven. The effect of the finding is that the person has only committed the physical act, and not the required mental element. To address this irregularity, VLA proposes that offences be characterised and categorised according to the physical conduct committed by the accused.

For example, the categories of offences could include:

Offence charged	Not guilty because of mental impairment of…
Murder, manslaughter or defensive homicide	Causing the death of another
Intentionally and recklessly causing serious injury	Causing serious injury to another
Indecent assault	Touching a person indecently without consent

Theft	Taking property that belonged to another

This approach may remove the need for the jury to engage in the difficult task of reconciling specific intent or knowledge with a disordered mind.

For sentencing purposes, the setting of the nominal term under this proposal would be determined using the most serious offence in the offence category. For example, if someone is found to be not guilty because of mental impairment of causing the death of another, the nominal term would be determined by the offence of murder.

Recommendation 9: That the Act be amended so that declarations of findings of mental impairment are referenced to a re-characterised offence category to more accurately describe the conduct that an accused has engaged in.

Extending the operation of the CMIA to the Magistrates' Court

Currently, there is no power in the Magistrates' Court to conduct a fitness hearing and no mechanism to determine an accused's fitness to be tried. Additionally, although the defence of mental impairment is available in the Magistrates' Court, the only outcome available is a complete discharge of a person who has been found not guilty on the grounds on mental impairment.

This poses challenges for magistrates, lawyers and people with mental illness, intellectual disability or cognitive impairment appearing in the Magistrates' Court. These challenges include:

- prosecutors often oppose the mental impairment defence even where evidence clearly demonstrates mental impairment;
- police suggest diversion for minor summary matters where a defence of mental impairment, and discharge, are available;
- prosecutors oppose summary jurisdiction for indictable offences triable summarily where a defence of mental impairment is raised;
- charges are laid for common law or indictable offences instead of (or in addition to) more appropriate summary offences to avoid the Magistrates' Court jurisdiction; and
- accused feel discouraged from contesting charges and instead plead guilty to avoid the onerous process of having their fitness investigated and/or have their matter heard in the County Court.

Case example

Tom has paranoid schizophrenia and stopped taking his medication, leading to deterioration in his mental state. 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 to cars that were parked in front of his house.

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. At committal mention the magistrate indicated that parties should negotiate a resolution. As a result, despite a defence being open to him, Tom ended up pleading to one charge of criminal damage.

Recommendation 10: That the Act be amended to expand the Magistrates' Court jurisdiction to ensure faster, cheaper and more appropriate and just outcomes not only for an accused, but also for the community.

Introducing a process for determining unfitness in the Magistrates' Court

VLA considers that the process for determining fitness to stand trial should be extended to the Magistrates' Court.

The extension of the fitness regime to the Magistrates' Court will allow appropriate matters to be dealt with summarily, with a commensurate reduction in such cases proceeding in the more formal and expensive County Court jurisdiction. An appropriate summary fitness regime would result in significant cost savings and delay reduction.

We do not consider that giving magistrates a broad discretionary power to make orders in relation to people with a mental illness, cognitive impairment or intellectual disability[15] is desirable, as this could potentially subject people to orders absent a finding about their fitness and without opportunity for prosecution evidence to be tested.

A process for assessing fitness should be available for summary offences as well as indictable offences which are triable summarily. It should be available for consent fitness and matters where parties are not in agreement about an accused's fitness.

This could be achieved through the creation of a dedicated fitness list to manage these matters. It could be a specialist list and draw on the principles and practices informing the implementation of the Assessment and Referral Court (ARC), or alternatively be a specialist list within ARC. Where an issue arises in a matter listed in the summary stream, the matter could be adjourned into the specialist fitness list. VLA supports the adoption of a model which could also be applied to regional and suburban courts.

If an accused is found to be unfit (and unlikely to be fit within 6 months[16]), then a special hearing could be conducted by a single magistrate. This could mirror the decision making process suggested for jury trials, at page 12.

To acknowledge the inherent inconsistency in an unfit accused consenting to certain court processes, VLA would also support an amendment to section 29 of the *Criminal Procedure Act 2009* to remove the requirement that an accused consent to the summary hearing of a charge for an indictable offence in circumstances where the accused is determined to be unfit (and unlikely to be fit within 6 months) following a fitness investigation.

Case example

Karoline has an intellectual disability. Her carer normally takes her grocery shopping however when her carer was sick Karoline went shopping by herself. Karoline panicked at the check out as she did not know what to do so ran past the checkout and away from the shops, with $40 worth of groceries. Police found her and charged her with theft.

[15] Consultation Paper at page 123.

[16] VLA considers that the period of 12 months currently prescribed for trials in section 12 of the Act should be amended to 6 months for the summary jurisdiction to reflect the less serious nature and consequences of that jurisdiction as well as the timeliness with which it currently operates.

The defence obtained medical material documenting Karoline's low IQ and that she was in receipt of disability services from DHS. Unfortunately, Karoline had engaged in similar conduct on two occasions in the previous four years and the police prosecutors were not willing to withdraw the charges.

Karoline was unable to understand why she had been charged as police took all the food from her home and she did not understand why they could nonetheless charge her with theft if she did not in fact keep any of the goods.

The defence lawyer obtained a report which indicated Karoline was unfit to stand trial. As the matter was unable to proceed in the summary jurisdiction the matter proceeded to be finalised in the County Court.

Recommendation 11: That the Act be amended to allow the Magistrates' Court to determine fitness.

Recommendation 12: The test for unfitness in Magistrates' Court proceedings should be outlined in an amended section 6, which should include contested hearings.

Recommendation 13: Fitness investigation in the Magistrates' Court should be conducted and determined by a single magistrate, either at a hearing where both parties indicate agreement to the accused being unfit, or in a contested hearing.

Recommendation 14: That section 29 of the *Criminal Procedure Act 2009* be amended to remove the requirement to consent to the jurisdiction where a person is determined to be unfit.

VLA acknowledges the lack of jurisdiction in the Children's Court raised in the Consultation Paper,[17] and recommends that consideration be given to extending the fitness framework to that jurisdiction.

Expanding the range of orders available following a finding of mental impairment in the Magistrates' Court

To encourage dispositions that are responsive and appropriate to an unwell accused, VLA considers that there should be a range of diversionary and therapeutic orders available to magistrates.

For the vast majority of summary offences, the current requirement for magistrates to discharge a mentally impaired accused continues to be appropriate due to the relatively minor nature of these offences. Where an accused is considered not guilty because of mental impairment of an indictable offence being tried summarily, magistrates should have the power to make orders that advance the person's treatment and rehabilitation needs, rather than the usual criminal sanctions.

Orders for indictable offences triable summarily could, for example, allow for a discharge in circumstances where a magistrate is satisfied that there are existing supports available in the community or where they are in the care of a responsible person. Alternatively, a magistrate could draw on the existing therapeutic architecture of the justice and health sectors and make an order, such as a Justice Plan,[18] that includes the provision of community supports and engagement programs for the person.

[17] Consultation Paper at page 118.

[18] A Justice Plan is developed by the Department of Human Services following Court order under section 80 of the *Sentencing Act 1991* and attaches as a condition to either an adjourned undertaking or community corrections order.

We also support examination of civil orders under the *Mental Health Act 1986* (Mental Health Act) and the *Disability Act 2006* (Disability Act) as an option for magistrates in these circumstances. Magistrates could be given the power to refer a person to the Office of the Senior Practitioner[19] or the Department of Human Services for assessment for suitability receive treatment and services under the Disability Act. Alternatively, a magistrate could refer a person to the Mental Health Court Liaison Service or local area mental health service for assessment as to suitability for treatment and services under the Mental Health Act.

We consider that magistrates should have the power to make orders of a maximum of two years duration. This is consistent with the current sentencing limit in the Magistrates' Court for terms of imprisonment. A person should have a right to appeal any orders in the County Court.[20]

Given that the primary purpose of these orders is to achieve therapeutic outcomes, we do not consider it to be appropriate for any sanctions to attach to the breach of these orders[21].

We do not consider that magistrates should have a power to make supervision orders under the Act as the onerous and indefinite nature of these orders would be disproportionate to matters determined in the jurisdiction of the Magistrates' Court. Where a supervision order is considered a desirable sentencing outcome, an application could be made for the matter to proceed in the County Court. This will ensure that people with mental illness or disability are not required to comply with onerous conditions that set them up to fail for relatively low level offending.

There are a number of advantages associated with the use of alternative and diversionary orders. By connecting people with appropriate treatment and support services there is greater opportunity for recovery and rehabilitation. This is likely to be more effective at addressing known risk factors for reoffending.

Moreover, there are likely to be resource savings associated with a reduction in the number of people on supervision orders. Naturally, the savings to the justice system will need to be balanced with increased investment in the provision of services through the Departments of Health and Human Services.

Recommendation 15: That the current requirement to discharge a person who has been found not guilty by reason of mental impairment continue for summary offences.

Recommendation 16: That the Act be amended to allow magistrates to make a range of diversionary and therapeutic orders when a person has been found not guilty because of mental impairment in respect to an indictable offence triable.

Recommendation 17: That the Act provide for a right to appeal to the County Court, and that the relevant process should follow that outlined in Part 6.1 of the *Criminal Procedure Act 2009*.

[19] As per the Commission's recommendation in 2003 in its report *People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care*, page 124.

[20] Any appeal should follow the process set out in Part 6.1 of the *Criminal Procedure Act 2009*.

[21] On this basis, we also consider that undertakings and community corrections orders with treatment conditions are not appropriate orders for this cohort of people, due to the breach consequences.

Expanding the range of orders available after a finding under the Act

Following a finding under the Act, the court can unconditionally discharge a person or declare a person liable to supervision and make an order for a custodial supervision (a CSO) or non-custodial supervision order (NCSO). As identified in the Consultation Paper, inflexibility of these orders could lead to mismatch between the supervision that a person needs and a supervision order that is actually made.[22]

As foreshadowed above in relation to findings of not guilty by mental impairment in the Magistrates' Court, VLA considers that the management and rehabilitation of offenders with mental illness, intellectual disability or a cognitive impairment would benefit from expanding the types of orders that may flow from a finding under the Act. This should include the exploration of orders under the Mental Health Act and the Disability Act.

Importantly, this approach is supported by section 39 of the Act and the requirement that the courts consider the least restrictive intervention:

> In deciding whether to make, vary or revoke a supervision order, to remand a person in custody, to grant a person extended leave or to revoke a grant of 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.

This approach would also be consistent with the Court of Appeal's decision in *NOM*[23] where it found that the availability of civil mechanisms under the Mental Health Act was a relevant matter to take into account when making a supervision order. It would also be consistent with the principles in the *Charter of Human Rights and Responsibilities Act 2006.*

In our experience, existing civil involuntary treatment orders are underutilised. The effect of this is that people are placed on supervision orders where less restrictive but equally effective alternatives are available through the Disability Act and Mental Health Act.

For this reason, in our view, one of the key considerations for the court should always be whether it may be more appropriate for a person to receive, or continue to receive, treatment and support through the civil regime. This is relevant when a person is declared liable to supervision and also when considering an application to vary or revoke an order under the Act. VLA recommends an expansion of the options available to a court in section 23 following a finding of not guilty by reason of mental impairment[24] beyond just discharge or liability to supervision.

There are a number of advantages associated with the use of less restrictive alternatives available under civil statutes, including:

- greater consistency with the purposes and principles underlying the Act;
- avoidance of the stigma of the criminal system;
- cost efficacy, as supervision orders under the Act are expensive to monitor;
- alleviation of some of the challenges associated with the management of supervision orders under the Act (see below at page 23); and

[22] Consultation Paper at page 187 at 9.6.
[23] *NOM v DPP & Ors* [2012] VSCA 198.
[24] And following a qualified finding of guilt subject to section 18(4) of the Act.

- a reduction in the number of people on supervision orders, which will enable resources to be more appropriately targeted to those people requiring intensive support.

The benefit of considering alternative orders is demonstrated in the below case example:

Case example

Ali has a low moderate intellectual disability. Three years ago, Ali engaged in behaviour with a potentially sexual motive with children on two separate occasions. After a long delay, 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[25] 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.

Ali was assessed as being unfit to be tried. Application was made on behalf of Ali to have the charges withdrawn on the basis that a Behaviour Support Plan was in place and was effectively addressing Ali's potential risk. It was also submitted that an NCSO (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. After providing considerable information about the operation of the Disability Act to convince prosecutors, they agreed to withdraw the charges on the basis that the Behaviour Support Plan was sufficient to manage any future risk.

Recommendation 18: That section 23 of the Act be amended to include the ability for a court to investigate suitable orders under the *Mental Health Act 1986* and *Disability Act 2006*, specifically that there be an express requirement in the Act that the courts consider any less restrictive options available before making a supervision order and not declare someone liable for supervision unless satisfied on the evidence that the person would be likely to seriously endanger the community if not declared liable to supervision.

Recommendation 19: That the court be required to consider whether it may be appropriate for a person to receive, or continue to receive, treatment and support under the *Mental Health Act 1986* or the *Disability Act 2006*, when reviewing and varying an order under the Act.

Presumption on review of less restrictive alternative

In light of the focus on rehabilitation, VLA considers that less restrictive alternatives should follow at review stage, through a rebuttable statutory presumption at review that a person will be transferred to a less restrictive order.

In our experience, there can be a lack of consistency in the level of judicial scrutiny of the treatment and restrictions attaching to an order during review processes.

We support more active consideration of less restrictive alternatives by the court. This would require more detailed consideration of the day to day treatment and interventions rather than accepting the uncontested advice of the treating team. The court would then be able to assess whether the existing order should be continued, varied or revoked. Increased coordination between the health

[25] A restrictive intervention formulated by DHS under Part 7 of the *Disability Act 2006.*

and justice systems may assist in informing this assessment by ensuring that the court has the best information, including what (if any) interventions may assist a person towards recovery.

One of the advantages of this approach is that it may shift the focus of the review process from the management of risk to an opportunity to ensure that treatments and supports remain appropriate and are the least restrictive, which is more consistent with section 39 of the Act.

In our view, this exercise should be supported by a presumption at every stage in the process that a person can transition to a less restrictive order, including transitioning from a NCSO to a civil order where appropriate.

Recommendation 20: That there be a rebuttable statutory presumption that at review, a person can transition to a less restrictive order.

Better pathways and treatment for people with an intellectual disability or cognitive impairment

As discussed earlier, VLA supports an amendment to the Act to contain an inclusive definition of mental impairment to clarify that people with intellectual disability and cognitive impairment fall within the framework of the Act.

In addition to the need for clarity, VLA has some concerns about the appropriateness of the current structure of the supervision order regime for people with an intellectual disability or cognitive impairment, many of whom have untreatable or relatively static conditions. In our experience, the jurisdiction raises particular challenges for people in these circumstances. We support reform of the Act to create better pathways to treatment for people with intellectual disability or cognitive impairment.

Appropriateness of supervision orders for people with intellectual disability or cognitive impairment

The framework of the Act supports a person's progress and responsiveness to treatment. This may disadvantage people with static and untreatable intellectual disabilities or cognitive impairments where, as identified in the Consultation Paper, there is difficulty in demonstrating that there has been an improvement in their mental impairment.[26] The current regime discriminates against this group as they are unlikely to qualify as having progressed sufficiently with treatment and accordingly remain subject to indefinite supervision orders.

We support an amendment to the Act to recognise the different experiences and characteristics of people with intellectual disabilities or cognitive impairment. In particular, we consider it is important that the suitability and utility of orders that are designed to facilitate support and treatment be evaluated to consider whether they are appropriate for people with relatively static conditions. The reality for these people is that they may never progress through the system and will languish on supervision orders for a potentially indefinite term.

At a minimum, section 40 of the Act should be amended to include an assessment of the utility of an ongoing order in the context of the recovery framework established by the Act and the likely benefit

[26] Consultation Paper at page 208.

or detriment to the person, acknowledging that risk assessments are less determinative for people with intellectual disabilities. Consideration should also be given to the requirements in section 41 around reporting on a person's responsiveness to treatment, therapy and counselling.

Recommendation 21: That consideration be given to amendments in Part 6 of the Act to better respond to the particular circumstances and needs of intellectually disabled and cognitively impaired persons.

Responsibility for people with intellectual disabilities subject to supervision

Where a person with a mental illness is placed on an NCSO, Forensicare continue the monitoring and supervision of that person, providing expert guidance and oversight to the area mental health service with the day to day responsibility for the person's treatment. This provides a solid framework for the continued supervision and treatment of people with a mental illness and promotes clear accountability.

VLA is concerned about the lack of equivalent clinical oversight for people with an intellectual disability on NCSOs.

Where a person with an intellectual disability is placed on an NCSO there is no requirement for the service provider to liaise with the Office of the Senior Practitioner. Under the Disability Act, the Office of 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 are complied with in relation to restrictive interventions and compulsory treatment.

For people with intellectual disabilities on NCSOs, this disconnect means that there is no approval or discussion of the treatment, interventions and restrictions applied to that person as part of their NCSO. This limits the capacity of the Office of the Senior Practitioner to exercise their statutory responsibility to protect the interests of people with intellectual disabilities.

As a result, people with intellectual disabilities who are subject to NCSOs experience less robust oversight of their treatment than people whose treatment is monitored by the Office of the Public Advocate or VCAT. They also enjoy less clinical oversight than the people with mental illness on NCSOs under the Act.

VLA supports better oversight from the Office of the Senior Practitioner for people with intellectual disabilities subject to orders under the Act. 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. Consideration should be given as to how this aim could be achieved within the current monitoring framework outlined in the Disability Act.

Recommendation 22: That people with an intellectual disability on NCSOs be subject to the clinical oversight and responsibility of the Office of the Senior Practitioner.

Improving processes for the review, leave and management of people subject to supervision

VLA supports the availability of processes for the review, variation and revocation of orders under the Act. These processes support the treatment, rehabilitation and transition of people subject to supervision through the system. In theory, these processes provide an important opportunity to assess whether the intervention remains appropriate or whether a different approach may promote greater therapeutic outcomes. Ultimately, this provides a broad benefit to the community by ensuring that resources are targeted appropriately to treat, manage and reduce risk.

Ensuring people do not get lost in the system

A supervision order is for an indefinite term.[27] The 'nominal term' prescribed by the courts is shorthand for the timing of a major review of the supervision order. In the second reading speech, the then Attorney-General described the purpose of the nominal term as "…a further safeguard against a person being forgotten". At the expiration of this term, the court must conduct a major review of the person's case to see whether the person should be released or at least have the level of supervision reduced.[28]

VLA supports replacement of the phrase 'nominal term' with a phrase that more accurately describes the nature and purpose of the period set by the court. We consider that the phrase 'major review period' would be more appropriate. This would overcome any existing misapprehensions as to the significance of this period.

Recommendation 23: That the phrase 'nominal term' used in the Act be replaced with the phrase 'major review period'.

In addition, VLA supports greater discretion for judges in setting a nominal period. Under the current arrangements, this is set by reference to the maximum penalty for the offence that the person has been found not guilty of, or found at a special hearing to have committed. As noted in the Consultation Paper, this approach avoids the need for the judge to embark upon a hypothetical sentencing exercise.[29]

We consider that a judge should have discretion to set the review period based on the evidence before the court, if it is considered that the time period prescribed in the Act[30] is not appropriate. An assessment of the appropriate review period could be made taking into account relevant factors including current and future risk, proposed treatment and anticipated outcomes and any risk to the community and the proposed approach to risk management. In our view, no additional risk is created by reducing the length of the nominal term, as the court can continue the order if satisfied on the evidence that it is necessary to do so.

A shorter review period assists more tangibly to achieve the objective of ensuring that people are not 'lost in the system'. It would also provide an opportunity to refocus the treatment and supervision

[27] Section 27(1) of the Act.
[28] Section 35 of the Act.
[29] Consultation Paper at page 147.
[30] A table for setting the nominal term is provided at section 28.

arrangements for people who will continue on orders under the Act, and would also enable the timely identification of less restrictive approaches to the management of the person, including through civil orders, in accordance with section 39 of the Act.

In addition, we support more regular access to judicial scrutiny of treatment and progress. While we acknowledge that more regular review hearings do not always benefit people on orders under the Act,[31] we ultimately support continued access to regular review processes as determined appropriate by the court to ensure that a person's treatment and progress can be appropriately supervised.

Recommendation 24: That there be judicial discretion in the setting of the nominal term, and that the judicial discretion to set the timing for regular review of an order under the Act be retained.

Access to review processes

Currently, where a person has applied for a variation of a CSO and that application is refused by the court, a person is not able to make a further application for a period of three years (or such lesser period as the court directs). This presumptive exclusion represents a barrier to effective and ongoing assessment of a person's progress and suitability for reduced restrictions.

In our view, a person should continue to have access to judicial consideration of the suitability of their order given that these orders can only be varied or revoked by the courts. Where a person makes vexatious or repeated unreasonable applications for variation, the courts could have the power to require that person to seek leave in advance of any further applications within a specified period of time not exceeding three years.

Recommendation 25: That the three year restriction of applying for a review of an order in section 31(2) be removed, and that courts have the power to impose limitations on applications for reviews in cases of repeated, unreasonable or vexatious applicants.

Assessment of risk in the review, variation and revocation of orders

VLA supports the policy framework underpinning the Act as one that recognises the importance of protecting both the person and the community. However, we contend that the objective of responding to the safety of the person (or the risk to self) can be met through other mechanisms, such as the Mental Health Act, and should not be a factor for consideration in reviewing and assessing applications regarding supervision orders under the Act.

We also support the consideration of community safety being linked to a high standard – likelihood of serious endangerment – in all considerations regarding the continuation of liberty restrictions and supervision orders, rather than an assessment that there is any residual likelihood of general harm to the community. In our experience, there is a lack of rigour in the application of this standard and the court may decline to vary an order where some level of risk is identified. This has the potential to disrupt the therapeutic outcomes by preventing people from progressing through the framework of supervision established by the Act.

[31] For example, reviews can be distressing and require a person to relive their offending conduct.

Recommendation 26: That the Act be amended to remove the risk to self as a factor for consideration in section 40(1)(c) of the Act.

Recommendation 27: That the Act be amended to refer to the likelihood of *serious* endangerment, rather than simply likelihood of endangerment, in section 40(1)(c) of the Act.

Procedural improvements to review processes

Given the intensity of resources associated with the review processes, we support some measures that will maximise the benefit of the review process while reducing resource pressures. These are:

- dealing with review hearings on the papers where there is consent from all parties in circumstances where the order is being confirmed; and
- requiring that all reports to be provided to all parties at least 14 days prior to any review hearing.

Confirmation of orders on the papers

In our experience, a full hearing of a review application is not always necessary. In many cases, no party to the proceeding is seeking a change to the order and there are no issues of concern to be addressed. Court time and the cost of representation at the hearing could be avoided if matters of this nature were dealt with on the papers where the status quo is to be preserved. This would also deflect any need for a client to attend a hearing in circumstances where it may be counter-therapeutic. Review hearings could proceed on the papers with the consent of all parties in circumstances where the order is being confirmed, and where the consent of the person has been provided through a legal representative. We do not consider it appropriate for revocations or variations of orders to be done by consent on the papers.

Provision of reports in advance of hearings

In addition, to ensure that any matters are properly discussed and considered at the review hearing, it is imperative that reports are provided to parties well in advance of the hearing date. Where reports are provided only a few days before a hearing it is difficult to obtain instructions from our clients, obtain independent reports and properly consider any alternative treatment options or dispositions that may be supported by the matters raised in the report. This can lead to unnecessary delays.

Recommendation 28: That reviews confirming orders be conducted on the papers where all parties consent and the affected person has provided that consent through a legal representative.

Recommendation 29: That there be a requirement that reports are provided to all parties at least 14 days before any review hearing.

Better processes for leave applications

VLA supports access to leave to promote therapeutic outcomes for people on orders. VLA supports changes to the leave processes to make them more just, efficient and consistent with the principles underlying the Act.

Forensic patients and forensic residents are entitled to apply for a leave of absence from their supervision order. The purpose of leave is to promote greater participation in the community and rehabilitation through the facilitation of reintegration and increased life skills. Leave from a supervision order enables people to:

- access services, including medical services;
- attend court;
- attend funerals and other significant events on humanitarian grounds;
- (re)establish family and other social connections;
- participate in educational and recreational activities;
- make preparations for discharge, including seeking employment and accommodation; and
- develop life skills and work towards reintegration.

The range of leave options available reflects the graduated approach to rehabilitation and release adopted in the Act.

Consideration by the Forensic Leave Panel

Section 54 of the Act sets out the criteria for consideration when assessing applications for off campus leave. The Forensic Leave Panel must be satisfied that:

- the proposed leave will contribute to the person's rehabilitation, and
- the safety of the person or members of the pubic will not be seriously endangered as a result of the person's leave.

In our experience, the Forensic Leave Panel may not exercise its discretion to grant leave if the treating team do not support the leave application. The treating team may not support the leave for reasons that fall outside the statutory criteria, such as operational considerations.

In our view, the Forensic Leave Panel should be subject to the guiding principle set out in section 39 of the Act requiring the consideration of the impacts of liberty and the adoption of the least restrictive approach to the management of risk. These considerations should be prioritised over operational considerations.

Consideration by the Leave Review Committee

The Leave Review Committee at Thomas Embling Hospital is an administrative committee that considers all applications that will go before the Forensic Leave Panel. In our experience, the administrative requirement that all applications for leave be considered by the Leave Review Committee in advance of consideration by the Forensic Leave Panel may result in applications being delayed or discontinued. In our experience, this can disadvantage clients and deprive them of access to the statutory mechanism tasked with the assessment of leave applications. It is also contrary to the purpose of such a panel which was to "ensure the leave process is transparent and accessible".[32]

For this reason, we support further consideration of the role of the Leave Review Committee to ensure it advances the purposes of the Act and supports the statutory functions of the Forensic Leave Panel.

[32] *Crimes (Mental Impairment and Unfitness to be Tried) Bill,* second reading speech, 18 September 1997.

Recommendation 30: That the Forensic Leave Panel be subject to the principle of least restriction in section 39 of the Act.

Recommendation 31: That the functions of the Internal Leave Committee be reviewed to assess whether it promotes and supports the purposes of the Act and the statutory functions of the Forensic Leave Panel.

Recommendation 32: That all applications for leave be considered by the Forensic Leave Panel irrespective of whether they have been assessed and declined by the Leave Review Committee, and that a framework for disclosure of forensic patient applications be established to ensure the Leave Review Committee has all applications and documentation.

More therapeutic responses to non-compliance with supervision orders

There are a range of matters that may constitute a breach of a supervision order. These may range from minor failures to comply with conditions attaching to an order, such as missing appointments or the occasional abuse of alcohol, or by more significant breaches such as being absent without leave while on a custodial supervision order.

In some circumstances, non-compliance with an order may be easily rectified and may not require a change to a person's order. However, in other circumstances there may be significant consequences for a person on an order – including detention under a CSO or arrest in the event that they fail to attend the hearing.

By shifting a person from an NCSO back to a CSO, the pathway towards gradual reintegration is disrupted. Once this occurs, it will typically take a number of years before the person can be placed on a NCSO again, due to the staggered leave processes whilst on a CSO and the requirement to have at least 12 months of extended leave prior to variation of a CSO to an NCSO. As well as being costly, this delay in progress may ultimately be counter-therapeutic.

In our view, the court should have discretion to delay or adjourn proceedings where a person has not complied with their NCSO. With a short delay, it may be possible for a person to re-establish compliance or mental stability and comply with their order.

These considerations apply equally to applications to revoke extended leave under section 58 of the Act.

Where a person's non-compliance justifies a short period of inpatient treatment, this can be addressed through the provisions of the Mental Health Act as an alternative to a revised order under the Act. However, if these provisions are considered inadequate, there a power could be inserted into the Act that enables an NCSO to be suspended and a person placed on a temporary CSO for a fixed duration of 6 months to assist them to re-establish compliance or mental stability. Upon expiration of the temporary CSO, the NCSO will be revived unless there is a further application made to extend the temporary CSO for a further 6 months.[33]

[33] The Office of the Chief Psychiatrist and Office of the Senior Practitioner could produce guidelines to assist practitioners working in this area to understand how best to manage non-compliance and potential increase in risk.

Case example

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 rehabilitations, 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 and commenced living with his parents and getting treatment form 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.

Recommendation 33: That a more therapeutic response be adopted for non-compliance by allowing temporary suspension of NCSOs and allowing courts to delay proceedings in relation to non-compliance.

Concluding remarks

VLA appreciates the opportunity to contribute to this important review.

Our advocacy on behalf of people with mental illness and disability gives us a unique insight into the way the justice system attempts to balance the often competing aims of managing the needs of vulnerable accused and the need for community safety.

The introduction of the Act in 1997 was a positive step in recognising that people with mental impairment should not be held criminally responsible for their actions.

Our practice experience has informed our proposals for reform, which are designed to improve the operation of the Act and facilitate improved outcomes in the management of vulnerable people who are subject to the Act.

We consider that the proposals in our submission have the potential to address current issues with the operation of the Act in the criminal jurisdiction, and also provide for improved management of the vulnerable people who become subject to orders under the Act. The administration of justice is best served where the balance between community protection, rehabilitation and reintegration is moderated by flexible and responsive criminal justice processes, given the complexities presented by mentally impaired accused.

While legislative amendments will go some way in improving the operation of the Act, VLA considers that there is also significant benefit in the development of training and resources for the professionals who are required to make difficult decisions under the Act. A practice guide could be developed to assist lawyers in navigating ethically challenging scenarios. Education could also be provided to medical experts and the judiciary to ensure that amendments that flow from this review are implemented in accordance with their intended purposes.

Our proposals for legislative change will ensure fairer participation in the justice system by those least equipped to do so, and will also provide a more robust and transparent system for reviewing their continued supervision and detention.

Appendix A – Summary of VLA response to questions in the Victorian Law Reform Commission Consultation Paper

No.	VLRC Question	VLA position
Unfitness to stand trial		
Threshold definition		
1.	Should the test for determining unfitness to stand trial include a threshold definition of the mental condition the accused person would have to satisfy to be found unfit to stand trial?	No. VLA does not support the inclusion of a threshold mental condition as this would unduly limit the availability of the Act.
2.	Does the current test for unfitness to stand trial, based on the Pritchard or Presser criteria, continue to be a suitable basis for determining unfitness to stand trial?	Yes, but modifications are required. See page 6.
3.	Should the test for unfitness to stand trial include a consideration of the accused person's decision-making capacity?	Yes. See page 8.
4.	If the test for unfitness to stand trial is changed to include a consideration of the accused person's decision-making capacity, what criteria, if any, should supplement this test?	See page 8. There is merit in the criteria proposed by the Law Commission of England and Wales, as 4.37 of the Consultation Paper.
5.	If the test for unfitness to stand trial is changed to include a consideration of the accused person's decision-making capacity, should the test also require that the lack of any decision-making capacity be due to a mental (or physical) condition?	No. VLA considers this would unfairly and unnecessarily limit the availability of the Act, and considers that the preamble in s.6(1) about mental processes continues to be appropriate.
6.	If not decision-making capacity, should the test for unfitness to stand trial include a consideration of the accused person's effective participation?	No. See page 9. VLA considers this would unnecessarily capture people who only present with minor challenges into the fitness framework.
Rationality		
7.	Should the accused person's capacity to be rational be taken into account in the test for unfitness to stand trial? If yes, is this best achieved: (a) by requiring that each of the Presser criteria, where relevant, be exercised rationally (b) by requiring that the accused person's decision-making capacity or effective participation be exercised rationally, if a new test based on either of these criteria is recommended, or (c) in some other way?	No. See page 9. VLA considers tests that involve value-based judgements of decisions made by an accused are inappropriate.

Issues specific to the Presser criteria		
8.	If the unfitness to stand trial test remains the same, are changes required to the Presser criteria?	Yes. See page 6. Changes are required to accommodate accused who are fit to plead.
9.	Should the criteria for unfitness to stand trial exclude the situation where an accused person is unable to understand the full trial process but is able to understand the nature of the charge, enter a plea and meaningfully give instructions to their legal adviser and the accused person wishes to plead guilty to the charge?	Yes. See page 6.
10.	Do any procedural, ethical or other issues arise in creating this exclusion from the unfitness to stand trial test?	No. VLA does not consider that there are substantial issues arising from such an amendment.
11.	Are changes required to improve the level of support currently provided in court in trials for people who may be unfit to stand trial?	VLA considers that the current practice in relation to supports remains appropriate. In our view, caution is preferred in expanding the role of the support person. Although support people can be of assistance to an accused in understanding the court process, VLA is cautious about the potential impact that this could have on the client/lawyer relationship, and the risk that legal meaning and consequences are confused by over simplification of language by an intermediary. VLA supports the development of educational materials aimed at accused to assist their understanding and participation in trial processes.
12.	What would be the cost implications of any increase in support measures?	N/A
13.	Should the availability of support measures be taken into consideration when determining unfitness to stand trial?	Yes. However, VLA considers that it is not suitable for social or support workers to be used as intermediaries and support measures.
14.	What changes can be made, if any, to enhance the ability of experts to assess an accused person's unfitness to stand trial?	See response to question 19.
Requirement to 'plead' in a committal proceeding		
15.	Is there a need for a uniform procedure in committal proceedings where a question of unfitness to stand trial is raised?	Yes. See page 8.

16.	What procedure should apply where a question of an accused person's unfitness to stand trial is raised in a committal proceeding?	See page 8. We support a procedure that enables lawyers to run committals on behalf of unfit accused to ensure there is an opportunity to challenge the prosecution case in circumstances where issues of unfitness arise.
The role of lawyers in the process for determining unfitness to stand trial		
17.	What ethical issues do lawyers face in the process for determining unfitness to stand trial?	The current framework established by the Act enlivens a number of ethical issues for lawyers. One of these relates to the extent to which an accused is able to provide instructions in these circumstances. As a result, lawyers may be required to independently make choices about the strategic direction of the case and to proceed with a defence if one is available.
18.	What is the best way of addressing these ethical issues from a legislative or policy perspective?	VLA supports the development of a resource to assist practitioners, lawyers and the judiciary in relation to these matters. We also consider that some of our recommendations for reform will go some way in addressing some of the key ethical concerns that may arise in practice.
The role of experts in the process for determining unfitness to stand trial		
19.	Are there any issues that arise in relation to the role of experts and expert reports in the process of determining unfitness to stand trial?	Yes. VLA considers that better support should be available to experts on their role in the process of determining unfitness to stand trial. We support the development of a best practice guide to assist practitioners, lawyers and the judiciary in relation to these matters. For experts, this guide could provide assistance in what should be included in a report, including explicitly addressing each element of the fitness assessment criteria in their reports. We also support the timely provision of reports in advance of hearings.
Jury involvement in all investigations of unfitness to stand trial		
20.	Should the CMIA provide for a procedure where unfitness to stand trial is determined by a judge instead of a jury? If yes: (a) should the process apply only where the prosecution and the defence agree that the accused person is unfit to stand trial or should a jury not be required in other circumstances? (b) what safeguards, if any, should be included in the process?	Yes. See Page 9. A 'consent fitness' procedure should be available.
A 'consent mental impairment' hearing following a finding of unfitness to stand trial		

21.	Should a 'consent mental impairment' hearing be available following a finding of unfitness to stand trial?	Yes. See page 10. This should be supported by the important safeguard that a judge must be satisfied that there are no reasonable prospects of acquittal on the admissible evidence.
The length of the process		
22.	In your experience as either a person subject to the CMIA, a family member of a person subject to the CMIA or a victim in a CMIA matter, how has the length of the unfitness process affected you?	N/A.
23.	Would removing the jury's involvement in investigations of unfitness to stand trial be likely to expedite the process?	Yes. See page 9. We support greater targeting of the role of juries in investigations into unfitness, particularly given the resource intensity associated with jury processes and trials.
24.	How frequent is it for an accused person to be acquitted at a special hearing, following a finding of unfitness?	VLA does not have data on this issue. Courts or prosecution agencies may be better placed to provide information about the frequency of this occurrence.
25.	What procedures could be implemented to expedite the unfitness to stand trial process?	Allowing for fitness to be determined by consent. Where parties are not in agreement for an accused to be able to elect for a 'judge alone' hearing.
Suitability of findings in special hearings		
26.	Should changes be made to the findings available in special hearings?	No. We agree that terminology can have a stigmatising effect. However, on balance we consider that changing the terminology will ultimately have little impact on a jury's verdict.
Directions to the jury on findings in special hearings		
27.	What is the most appropriate way of directing the jury on the findings in special hearings?	VLA considers that a jury should only be directed about what is relevant in the case they are deciding. VLA supports an amendment to align the Act with the legislative framework set out in the *Jury Directions Act 2013*. This would also be consistent with section 15 of the Act, which states that a special hearing should be run as close as possible to a criminal trial.
Principles underpinning appeals		
28.	Are there any barriers to accused people pursuing appeals in relation to unfitness to stand trial and findings in special hearings?	VLA has not identified any specific issues of concern regarding appeals for people who are found to be unfit. However VLA supports an amendment to provide an appeal right for people who are found to be fit.

Defence of mental impairment		
The meaning of 'mental impairment'		
29.	How does the defence of mental impairment work in practice with 'mental impairment' undefined?	See page 11.
30.	Should 'mental impairment' be defined under the CMIA?	Yes. See page 11. VLA supports the insertion of an inclusive definition of 'mental impairment' in the Act.
31.	What are the advantages or disadvantages of including a definition of mental impairment in the CMIA?	VLA considers that the insertion of an inclusive definition of mental impairment will clarify the scope and intended operation of the Act. We have not identified any disadvantages associated with the insertion of an inclusive definition, as proposed at page 11.
32.	If mental impairment is to be defined in the CMIA, how should it be defined?	See page 11. Our suggested definition is 'mental impairment includes, but is not limited to, psychiatric illness, intellectual disability and cognitive and neurological impairments'.
33.	What conditions should constitute a 'mental impairment'? Are there any conditions currently not within the scope of a mental impairment defence that should be included? If so, what are these conditions?	See page 11. Proposed conditions are outlined in our suggested definition: psychiatric illness, intellectual disability and cognitive and neurological impairments.
34.	If a statutory definition of mental impairment is not required, what other measures could be taken to ensure the term is applied appropriately, consistently and fairly?	N/A. VLA supports a statutory definition.
The test for establishing the defence of mental impairment		
35.	How does the test establishing the defence of mental impairment in the CMIA operate in practice? Are the current provisions interpreted consistently by the courts?	See page 11.
36.	If a definition of mental impairment were to be included in the CMIA, should it also include the operational elements of the M'Naghten test for the defence of mental impairment? If so, should changes be made to either of the operational elements?	VLA considers that a definition should be included in the Act and that no changes would be required for the operational elements.
37.	Are there any issues with interpretation of the requirement that a person be able to reason with a 'moderate sense of composure'?	No. In our view, the Queensland approached outlined in the Consultation Paper is consistent with the current Victorian practice adopted by experts. We do not consider that any change is required.

The role of lawyers in the process for establishing the defence of mental impairment		
38.	What ethical issues do lawyers face in the process for establishing the defence of mental impairment?	Lawyers often approach the decision to run a mental impairment defence with caution given the potential for a client to be subject to the serious and indefinite supervision order regime if the defence is accepted.
39.	What is the best way of addressing these ethical issues from a legislative or policy perspective?	See question 18.
The role of experts in the process for establishing the defence of mental impairment		
40.	Are there any issues that arise in relation to the role of experts and expert reports in the process for establishing the defence of mental impairment?	See above question 18.
Jury involvement in the process and consent mental impairment hearings		
41.	Should there be any changes to the current processes for jury involvement in hearings and consent mental impairment hearings?	No. VLA considers that the current processes for consent mental impairment hearings and jury special hearings where parties are not in agreement remain appropriate.
Order of considering the elements of an offence		
42.	What approach should be adopted in directing juries on the order of the elements of an offence in cases where mental impairment is an issue?	See page 12. VLA proposes that the order of considering elements should be: 1. Physical elements; 2. Mental impairment; 3. Mental elements and defences.
43.	Should the trial judge be required to direct the jury on the elements of an offence in a particular order where mental impairment is an issue?	Yes. See page 12. VLA proposes that the order of considering elements should be: 1. Physical elements; 2. Mental impairment; 3. Mental elements and defences.
The relevance of mental impairment to the jury's consideration of the mental element of an offence		
44.	What approach should be adopted in determining the relevance of mental impairment to the jury's consideration of the mental element of an offence?	See page 12.
Legal consequences of the findings		
45.	Are changes required to the provision governing the explanation to the jury of the legal consequences of a finding of not guilty because of mental impairment?	As the Consultation Paper notes, the possibility of discharge upon finding of not guilty by reason of mental impairment may influence the deliberations of a jury. In these circumstances, 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.

Principles underpinning appeals		
46.	Are there any barriers to accused persons pursuing appeals in relation to findings of not guilty because of mental impairment?	VLA has not identified any specific issues of concern regarding appeals in relation to findings of not guilty because of mental impairment.
Application of the CMIA in the Magistrates' Court		
Issues with the lack of jurisdiction		
47.	What issues arise in relation to the Magistrates' Court's lack of jurisdiction to determine unfitness to stand trial?	See page 15.
The power to determine unfitness to stand trial		
48.	Should the Magistrates' Court have the power to determine unfitness to stand trial? If yes, consider: (a) Should the power to determine unfitness to stand trial be limited to indictable offences triable summarily or include certain summary offences? (b) When can the question of unfitness to stand trial be raised to bring it within the Magistrates' Court's jurisdiction? (c) What should trigger the Magistrates' Court's investigation into unfitness? (d) Should the Magistrates' Court retain a discretion not to proceed with the investigation into unfitness to stand trial? (e) What test for determining unfitness to stand trial should apply in the Magistrates' Court?	Yes. See page 16. The power should be available for summary offences and indictable offences triable summarily. The question can be raised at anytime, as triggered by lawyers, prosecutors or magistrates. Magistrates should not retain a discretion to decline to proceed with a fitness investigation if there is expert evidence indicating unfitness. The appropriate test would be outlined in an amended section 6, which would accommodate pleas of guilty and contested hearings.
49.	What are the cost implications of giving the Magistrates' Court the power to determine unfitness to stand trial?	See page 16. Allowing fitness to be determined in the Magistrates' Court rather than the County Court will result in overall resource savings. However, there would need to be specific investment in the establishment of a specialist list and court support programs to support the intended therapeutic outcomes.
50.	Is a broad, discretionary power to make orders in relation to people with a mental illness, intellectual disability or cognitive impairment a better alternative to giving the Magistrates' Court an express power to determine unfitness?	No. VLA supports an express power rather than a broad discretion.
51.	If considered, should such a power be framed or limited in any way (for example, limited to indictable offences triable summarily)?	N/A.

52.	What are the cost implications of introducing a broad, discretionary power to make orders in relation to people with a mental illness, intellectual disability or cognitive impairment?	N/A.
53.	If the Magistrates' Court is given the power to determine unfitness to stand trial, what process should apply to determine whether the accused person committed the offence charged?	See page 16. The process should be similar to that proposed in the superior courts, that is: 1. Physical elements; 2. Mental impairment; 3. Mental elements and defences.
54.	If the Magistrates' Court is given the power to determine whether the accused person committed the offence charged, should the process be limited to indictable offences triable summarily or include certain summary offences?	VLA supports the process being available for indictable offences triable summarily and summary offences.
Defence of mental impairment in the Magistrates' Court		
55.	What issues arise because of the Magistrates' Court's lack of power to make orders in relation to people found not guilty because of mental impairment?	See page 15.
The power to make orders following a finding of not guilty because of mental impairment		
56.	Should the Magistrates' Court have the power to make orders in relation to people found not guilty because of mental impairment?	Yes. See page 17.
57.	If yes, should the power to make orders be limited to indictable offences triable summarily or include certain summary offences?	See page 17. For summary offences, VLA considers complete discharge is appropriate. For indictable offences triable summarily, orders that are diversionary and therapeutic would be appropriate.
Options for expanding the orders available in the Magistrates' Court		
58.	If the application of the CMIA is expanded in the Magistrates' Court, what orders should be available: (a) if the Magistrates' Court is given the power to determine unfitness to stand trial and the criminal responsibility of an accused person found unfit to stand trial? (b) in relation to people found not guilty because of mental impairment? (c) if the Magistrates' Court is given a broad discretionary power to make orders in relation to people with a mental illness, intellectual disability or cognitive impairment?	See page 17. Magistrates should have the power to discharge or to make therapeutic and diversionary orders. They should not be able to impose criminal sanctions or supervision orders.
59.	What are the cost implications of the options for expanding orders available in the Magistrates' Court?	The orders proposed are less costly alternatives to supervision orders. There is also a long-term community gain in treating people suitably and ultimately diverting them from offending.

Consequences of findings under the CMIA		
Section 47 certificates on availability of facilities and services		
60.	Are there appropriate and sufficient facilities and services for people subject to the CMIA?	Not always. VLA supports the assessment of whether appropriate services are available when a person is placed on either a CSO or an NCSO. This will require closer collaboration between the health and justice sectors. In addition, while section 47 certificates (certificates outlining available services) are used when a person is placed on a CSO, the same process is not followed where a person is placed on an NCSO. We support consistency in this regard.
Reports on the mental condition of people declared liable to supervision		
61.	Are changes needed to the provisions under the CMIA governing mental condition reports and/or section 47 certificates to ensure adequate and timely information is provided to the courts?	VLA supports the timely provision of reports and certificates to support decision-making under the Act.
Indefinite nature of the order with a 'nominal term'		
62.	Is the use of a nominal term an effective safeguard in balancing the protection of the community with the rights of the person subject to a supervision order?	See page 23. It is a necessary safeguard, however improvements could be made.
The method for setting a nominal term		
63.	Should the method for setting the nominal term be changed? If so, how should it be changed?	Yes. See page 23.
Possible effects of the indefinite nature of supervision orders		
64.	What steps should be undertaken for people involved in CMIA proceedings to better understand the expression 'nominal term'?	See page 23.
65.	What factors affect the advice of lawyers and decisions of accused people in raising the issue of unfitness to stand trial or the defence of mental impairment?	There are numerous factors affecting these decisions, the most prominent one being the likely outcome of pursuing (or not pursuing) unfitness or/and mental impairment.
66.	In your experience as either a person subject to a supervision order, a family member of a person subject to a supervision order or a victim in a CMIA matter, how has the indefinite nature of a supervision order affected you?	N/A
Principles underpinning appeals		
67.	Are there any barriers to people subject to supervision orders and other parties pursuing appeals against supervision orders?	VLA has not identified any specific issues with the operation of the appeal provisions.

Ancillary orders and other consequence of findings under the CMIA		
68.	Should the ancillary orders and administrative consequences that follow in usual criminal proceedings apply to findings made under the CMIA?	VLA considers that making punitive orders following a finding of not guilty by reason of mental impairment or a qualified finding of guilt would be inconsistent with the policy intention underpinning the Act.
69.	Which ancillary orders and administrative consequences are appropriate and why?	VLA consider that restitution orders, compensation orders, Victims of Crime Assistance recovery orders and cost recovery orders should not be available where someone has proceeded under the Act. Orders which impact on community safety (license disqualification and cancellation) may be appropriate. Orders in relation to confiscation and forfeiture should be discretionary in all circumstances following CMIA proceedings, as should orders concerning forensic samples. VLA supports the Commission's recommendation in their Sex Offender Registration Report (2012) that a court should be permitted to decline to make a registration order in circumstances where the person would be unable to comply with reporting obligations due to physical or cognitive impairment. VLA would add that courts should also be permitted to decline to make a registration order in circumstances where the person is already subject to a supervisory regime.
Supervision: review, leave and management of people subject to supervision		
Review, variation and revocation of orders		
70.	Are changes required to the provisions for reviewing, varying and revoking supervision orders to make them more just, effective and consistent with the principles underlying the CMIA? If so, what changes are required?	Yes. See pages 24.
71.	In your experience as either a person subject to a supervision order, a family member of a person subject to a supervision order or a victim in a CMIA matter, how has the frequency of reviews affected you?	N/A
72.	What effect does the current frequency of reviews have on court resources and the resources of other parties involved?	See page 25. VLA recommends some improvements to the processes for review hearings to promote greater efficiency.

73.	Does the CMIA strike the right balance between allowing for flexibility in the frequency of reviews and ensuring that people subject to supervision orders are reviewed whenever appropriate?	See page 23. VLA supports additional flexibility in the frequency of the reviews to ensure there is continuing judicial oversight of treatment and recovery.
Leave of absence under supervision orders		
74.	Are changes required to the leave processes to make them more just, efficient and consistent with the principles underlying the CMIA? If so, what changes are required?	Yes. See page 25.
75.	In your experience as either a person subject to a supervision order, a family member of a person subject to a supervision order or a victim in a CMIA matter how have leave processes affected you?	N/A
Leave decision-making bodies		
76.	Should the CMIA provide the Forensic Leave Panel with more flexibility in its operation?	VLA does not have a view on this.
77.	Is the composition of the Forensic Leave Panel appropriate?	VLA does not have a view on this.
78.	Are changes required to the operation of the Internal Leave Committee? If so, what changes are required?	Yes. See page 25.
Responsibility for people subject to supervision orders		
79.	Is there sufficient clarity in the arrangements for monitoring people subject to non-custodial supervision orders?	No. See page 22. VLA supports greater clinical oversight for people on NCSOs.
80.	If no, what changes should be made to ensure that people on non-custodial supervision orders are adequately monitored?	See page 22.
Breaches of supervision orders		
81.	Is there is a need for guidance on failures to comply with or breaches of supervision orders?	Yes. VLA supports some changes to the approach to dealing with non-compliance with orders. See page 27.
82.	If so, what is the best mechanism for providing more guidance on failures to comply with or breaches of supervision orders?	As above, see page 27.
Interstate transfer orders		
83.	What are the barriers to effecting interstate transfers under the CMIA?	Interstate transfers are crucial to the successful treatment and support of people subject to supervision orders. Unfortunately the ability for transfer interstate relies on reciprocal legislation in other states.
84.	If there are barriers, what changes should be made to make the process more efficient?	VLA recommends that interstate agreements be reviewed and promoted to facilitate interstate transfer orders.

Decision making and interests under the CMIA		
The flexibility in the system		
85.	Is there a need for more flexibility in making and reviewing supervision orders and addressing non-compliance under the CMIA?	Yes. See pages 23-27.
86.	What changes should be made to give the system more flexibility where needed?	As above, see pages 23-27.
Application of the principles and matters the court is to consider		
87.	Are the current presumptions in varying and revoking supervision orders appropriate?	No. VLA supports a general presumption in the Act that a person will transition to a less restrictive order upon review. This should include less restrictive civil orders in appropriate circumstances.
88.	Should the court continue to consider the 'dangerousness' of the person subject to the supervision order?	Yes. VLA considers that this assessment of risk is necessary, and that it is applied appropriately with consideration of the guiding principle in section 39.
89.	Should the court continue to consider the likelihood of the person endangering themselves?	No. See page 24.
90.	What role should the seriousness of the offence play in the making, varying and revocation of orders and applications of leave?	None. The assessment should be based on the current risk profile of the person and the least restrictive approach to the management of that risk.
91.	Should the CMIA provide more guidance to the courts on the factors relevant to making, varying and revoking orders and applications of leave? If so, what guidance should be provided?	See pages 23 and 24.
Principles and matters the Forensic Leave Panel considers		
92.	Is there a need for additional legislative guidance for the Forensic Leave Panel in making leave decisions? If so, what guidance should be provided?	Yes. The Forensic Leave Panel should be guided by the s39 least restrictive principal and the matters contained in s40.
Role of experts and people responsible for supervision		
93.	Are changes required to improve the way in which expert reports are provided to the courts? If so, what changes are required?	See page 25. VLA considers that a best practice guide should be developed by key stakeholders to assist medical practitioners in approaching CMIA matters.

Influence of decision making on length of detention		
94.	Is the current approach to decision making in relation to people subject to supervision orders overly cautious?	No, VLA considers that the approach adopted by the courts is appropriate. However, the approaches governing leave can be overly cautious. See page 25.
Other models of decision making		
95.	Should there be a change in the judicial model of decision making under the CMIA?	No. VLA considers there are significant benefits in maintaining a judicial model, especially as these decisions often involve the detention and continued detention of a person.
Representation of people subject to supervision orders		
96.	Is the level of legal representation for people subject to supervision orders in hearings to make, vary or revoke a supervision order, and leave hearings appropriate?	VLA considers that there is benefit in providing information to people subject to supervision orders about their legal rights, and the availability of free legal advice and representation from VLA. Direct representation will not be required at all hearings. However, where a leave application is contested or not supported there is benefit in legal representation. These matters are routinely referred to VLA by staff at Thomas Embling Hospital.
97.	Is there a need for more advocacy or support, in addition to legal representation, for people subject to supervision orders when they are in detention or in hearings?	VLA does not have a view on this.
The role and interests of victims and family members		
98.	Do the CMIA provisions allow for effective participation by victims and family members?	N/A
Representation of community interests		
99.	Should community interests be represented in the CMIA system of supervision?	Yes. VLA supports the interests of the community being considered in decisions made under the Act; however, we consider that the Act already achieves this and that no further measures are required.
100.	Does the involvement of a number of agencies representing the community's interests increase costs unnecessarily?	VLA considers that the consideration of community interests is implicit in the existing judicial model of decision-making under the Act. VLA considers that review processes are already resource intensive. Any increase in the number of agencies specifically representing the community's interests will further increase these costs.

101.	What is the most appropriate way of representing the community's interests in the CMIA?	VLA considers that the consideration of community interests is implicit in the existing judicial model of decision-making under the Act.
Suitability of the system for people with an intellectual disability or cognitive impairment		
102.	Is the current CMIA model of supervision appropriate for people with an intellectual disability or cognitive impairment?	No. See page 21. In our view, the current system could be amended to be better suited to people with an intellectual disability or cognitive impairment.
103.	Are changes needed to the CMIA model of supervision to better meet the needs of people with an intellectual disability or cognitive impairment?	Yes. See page 21. We support amendments to the Act to make the current supervision framework more appropriate for people with an intellectual disability or cognitive impairment.
104.	Are changes needed to the processes and services that support the CMIA model of supervision to ensure that it meets the needs of people with an intellectual disability or cognitive impairment?	Yes. See page 21.
Suppression orders and the principle of open justice		
105.	What matters should the court consider when making suppression orders?	We support the availability and making of suppression orders in relation to these matters. In our experience, publication of cases can be detrimental to the wellbeing and therapeutic outcomes of people on orders under the Act. VLA supports consideration of these impacts when making suppression orders.
106.	What issues arise concerning suppression orders under the CMIA?	There are some current issues with the consistency in the application of section 75 of the Act. This includes the ability to make 'stand alone' suppression orders under section 75 of the Act at any time during a proceeding.
107.	What is the appropriate balance between therapeutic considerations (pointing to suppression) and open proceedings (pointing to publication)?	VLA supports a presumption in favour of suppression of a person's name or any identifying information in these matters. The ability to apply for broader orders should be available. However we note that it is not common for there to be cause to apply for suppression of other matters beyond information capable of identifying someone.