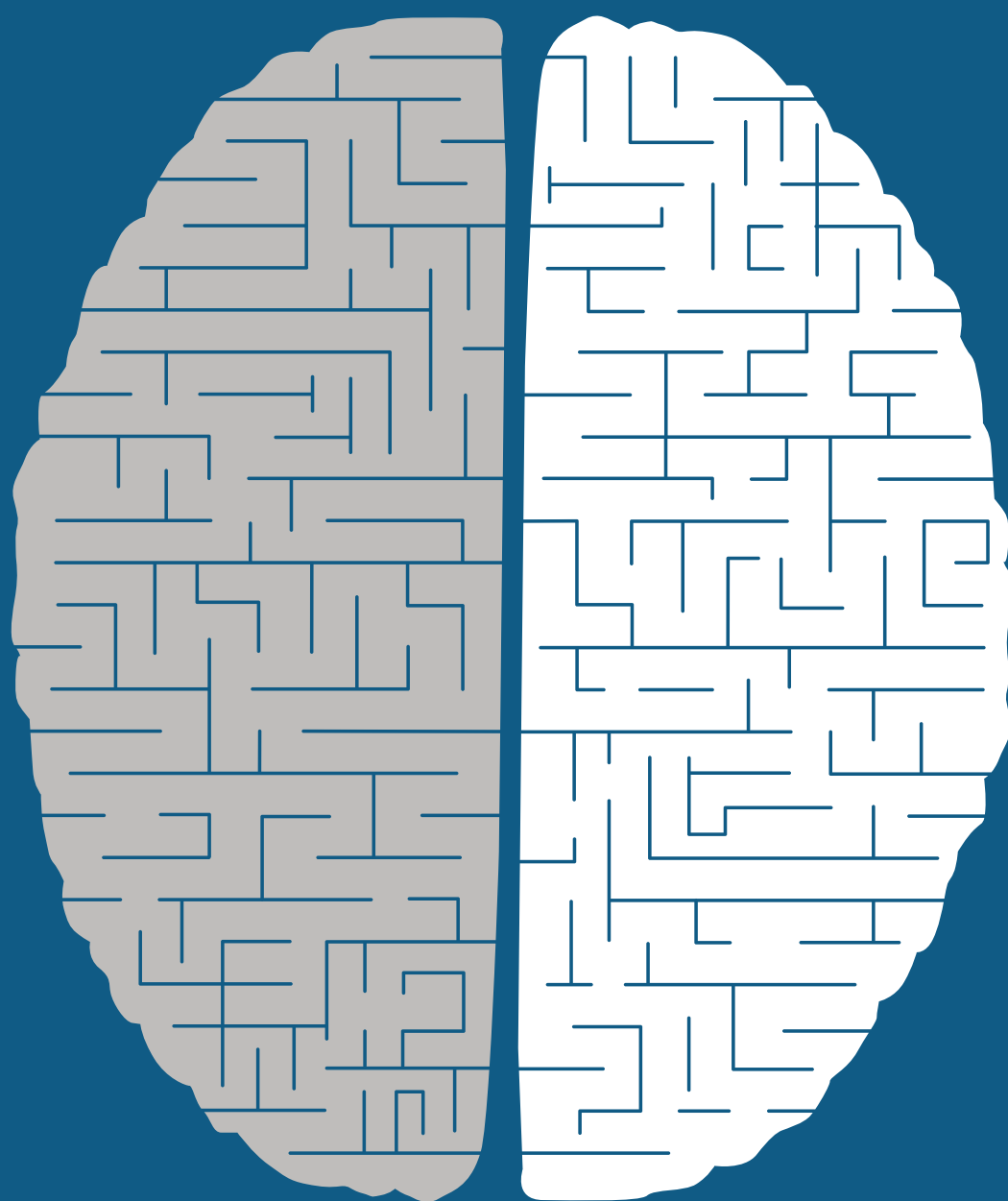




Victorian  
Law Reform  
Commission

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

CONSULTATION PAPER JUNE 2013





Victorian  
Law Reform  
Commission

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

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# Foreword

The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)* (CMIA) affects some of the most vulnerable members of our society. People charged with criminal offences may be vulnerable because of a mental condition, such as a mental illness, intellectual disability or some other form of cognitive impairment such as an acquired brain injury. The CMIA is also significantly concerned with community safety and affects other vulnerable people within our community, including victims of crime or family members of people subject to the CMIA.

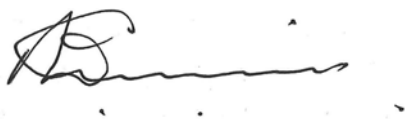
The CMIA sets out the law and process for determining whether a person is mentally unfit to stand trial and whether a person, because of a mental impairment, is not criminally responsible for offending. These laws and processes reflect long-standing legal principles that all people are entitled to a fair criminal hearing and that people should only be punished for behaviour for which they are criminally responsible.

The CMIA also provides a system for supervising and managing people subject to the Act. This system takes into account that a person found unfit to stand trial has not been tried in accordance with the usual criminal procedure and a person found not guilty because of mental impairment has not been found criminally responsible for their actions. However, the system also signals that the person has committed an offence, often a serious offence, and there may be necessary consequences that reflect the likely danger the person poses to other people or themselves without supervision and treatment of their mental condition.

The system thus seeks to strike a balance between the protection of the community, including victims and their families, and the rights and clinical needs of people found unfit to stand trial or not guilty because of mental impairment. The CMIA was introduced in 1997 to address problems that existed with the 'Governor's pleasure' regime that previously governed the law in this area. The CMIA has now been in operation for 15 years. While various reviews have looked at particular aspects of the CMIA, there has been no review of the operation of the Act as a whole since its enactment.

The Attorney-General has asked the Commission to review the CMIA. He has asked the Commission to report on whether changes are needed to ensure that the CMIA is operating in a way that is just, effective and consistent with its underlying principles. The Commission's task necessitates an understanding of a broad range of issues in the health, disability, law and justice sectors. Some of these issues are legal in nature, while others are more process-driven. The Commission will be consulting with a broad range of people from the community and professionals as part of this reference. This consultation paper is an important step in this consultation process.

I encourage everyone who has had experience with the CMIA or with an interest in the issues raised in the consultation paper to make a submission to the Commission by 23 August 2013.



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# Guide to this consultation paper

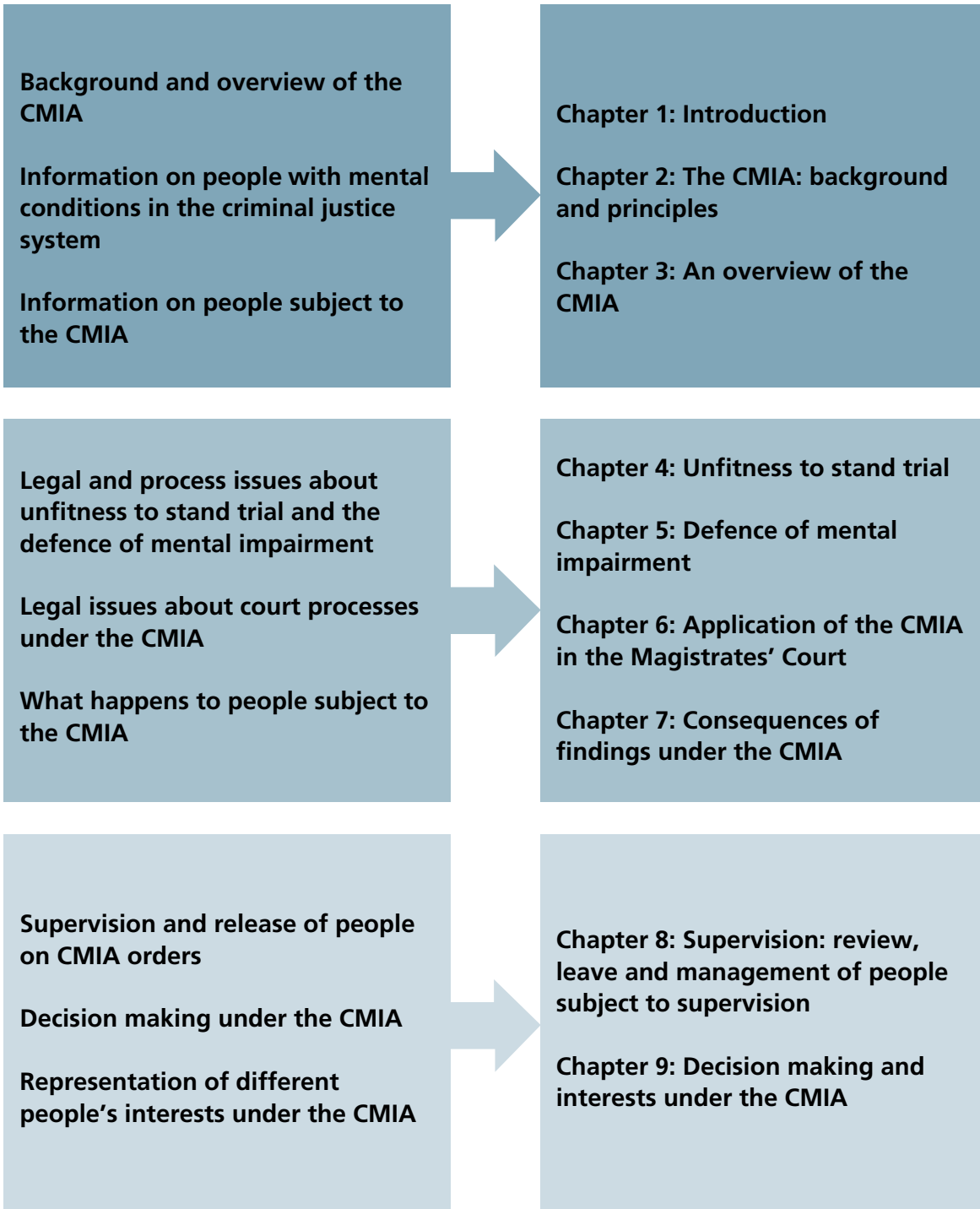
The CMIA canvasses a wide range of issues. Some of the issues are conceptual and legal in nature, while other issues are about process and procedures.

Chapter 1 contains introductory information about the Commission's approach to the reference and consultation processes. Chapter 2 contains an overview of the CMIA legislation, background (including the Governor's pleasure regime and previous reviews of the CMIA) and the CMIA's underlying principles. Chapter 3 contains a contextual examination of people with mental conditions in the criminal justice system and the pathway followed by people subject to the CMIA.

The laws regarding unfitness to stand trial in Chapter 4 and the mental impairment defence in Chapter 5 are technical areas that raise complex issues of law. These chapters also cover issues regarding the process for determining unfitness to stand trial and establishing the defence of mental impairment. Chapter 6 looks at a very specific policy issue: whether there should be a further expansion of the CMIA to the Magistrates' Court. Chapters 7–9 focus on the provisions governing the making of orders, leave, supervision and review and the representation of various interests across these areas of operation. Chapters 7 and 8 are focused entirely on discrete processes, while Chapter 9 looks at systemic issues that apply to the system of supervision and review as a whole.

**If I am looking for information on ...**

**What chapters should I read?**



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# Call for submissions

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

## What is a submission?

Submissions are your ideas or opinions about the law under review and how to improve it. This consultation paper contains a number of questions, listed on page 222, that seek to guide submissions.

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

## What is my submission used for?

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

## How do I make a submission?

You can make a submission in writing, or in the case of those requiring assistance, verbally, to one of the Commission staff. There is no required format. However, we encourage you to consider the questions on page 222 of this paper.

Submissions can be made by:

Email: [law.reform@lawreform.vic.gov.au](mailto:law.reform@lawreform.vic.gov.au)

Mail: GPO Box 4637, Melbourne Vic 3001

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

## Assistance

Please contact the Commission:

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

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## Publication of submissions

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

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

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

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

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

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

## Confidentiality

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

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

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

## Anonymous submissions

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

More information about the submission process and this reference is available on our website: [www.lawreform.vic.gov.au](http://www.lawreform.vic.gov.au).

**Submission deadline 23 August 2013**

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## Terms of reference

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

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

In particular, the Commission should consider whether:

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

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

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

The Commission is to report by 31 March 2014.

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# Glossary and abbreviations

<b>Accused person</b>	Person charged with a criminal offence.
<b>Adult Parole Board</b>	An independent statutory body that makes decisions regarding the granting and cancelling of parole and monitoring offenders on parole.
<b>AIHW</b>	Australian Institute of Health and Welfare.
<b>ARC List</b>	Assessment and Referral Court List.
<b>Balance of probabilities</b>	The standard of proof in civil proceedings. Often described as ‘more likely than not’ or ‘more probable than not’. Refers to a standard of proof or degree of certainty required to prove something. This is a lesser standard of proof than ‘beyond reasonable doubt’.
<b>Beyond reasonable doubt</b>	The standard of proof in criminal proceedings.
<b>CISP</b>	Courts Integrated Services Program.
<b>CMIA</b>	<i>Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic).</i>
<b>Cognitive impairment</b>	A term used in this paper to refer to the impact of any of a range of disabilities that may limit a person’s ability to think. These include intellectual disability, acquired brain injury, mental illness, autism spectrum disorder and dementia.
<b>Committal</b>	A preliminary examination by the Magistrates’ Court to determine whether the case against the accused person is sufficient to warrant the person being directed to stand trial before the County Court or the Supreme Court.
<b>Common law</b>	Law that derives its authority from decisions of the courts rather than from legislation.
<b>Custodial supervision order</b>	A supervision order that requires the detention of the person in a mental health service, residential institution or residential treatment facility.



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<b>Defence of mental impairment</b>	A defence in Victoria defined under the CMIA, replacing the common law defence of insanity. It requires that the accused person was suffering from a mental impairment at the time of the commission of the alleged offence, and that the mental impairment affected the accused person so that they either did not understand the nature and quality of their conduct, or did not know their conduct was wrong.
<b>Director of Public Prosecutions</b>	The Director of Public Prosecutions makes decisions about whether to prosecute serious criminal matters in the Supreme Court and County Court. The Director of Public Prosecutions is independent of government.
<b>Disability Forensic Assessment and Treatment Service</b>	A disability forensic service that delivers treatment, support and residential services for people with a disability who display high-risk anti-social behaviour and are involved, or at risk of being involved, in the criminal justice system.
<b>Discharge</b>	To release an accused person, usually because of an acquittal. A court can discharge a person with or without conditions.
<b>Fitness to plead</b>	Refers to the doctrine that existed before the CMIA which exempted an accused person from the usual criminal process because at the time of the trial they were unable to enter a plea or understand the nature of the proceedings.
<b>Forensic</b>	Relating to or used in courts of law.
<b>Forensic Leave Panel</b>	An independent statutory body with jurisdiction to consider applications for certain types of leave for forensic patients and forensic residents.
<b>Forensic patients</b>	People subject to a supervision order or on remand pending a determination under the CMIA, who are in detention at a mental health service.
<b>Forensic residents</b>	People subject to a supervision order or on remand pending a determination under the CMIA, who are in a residential institution or residential treatment facility.
<b>Governor in Council</b>	A body that comprises the Governor as Chair and members of the Executive Council (usually the Premier and Ministers). It implements aspects of government business, including appointing statutory officers and judges and proclaiming legislation.
<b>Indictable offences</b>	Serious crimes which attract higher maximum penalties, usually triable before a judge and a jury.
<b>Indictable offences triable summarily</b>	Indictable offences which can be heard before a magistrate.
<b>Intellectual disability</b>	An intellectual disability is a type of cognitive impairment. The <i>Disability Act 2006</i> (Vic) defines a person with an intellectual disability as a person with both significant sub-average general intellectual functioning and significant deficits in adaptive behaviours, which become apparent before the age of 18 years.

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<b>Leave</b>	Leave allows a forensic patient or forensic resident to be absent from the mental health service, residential institution or residential treatment facility for a duration of time, subject to conditions.
<b>MACNI</b>	Multiple and Complex Needs Initiative.
<b>Major review</b>	A review of a person’s supervision order at least three months before the end of the order’s nominal term, or at least every five years after that for the duration of the order. Its purpose is to determine whether the court can release the person subject to the supervision order.
<b>Mental condition</b>	In this paper, a mental condition means any condition that results in a person’s mental processes becoming disordered or impaired.
<b>Mental illness</b>	Mental illness is defined in the <i>Mental Health Act 1986 (Vic)</i> as ‘a medical condition that is characterised by a significant disturbance of thought, mood, perception or memory’. It can include conditions such as depression, schizophrenic disorders, bipolar affective disorder, obsessive-compulsive disorder and post traumatic stress disorder.
<b>Mental element</b>	The state of mind necessary to establish a particular crime, also referred to as <i>mens rea</i> . The mental element varies depending on the nature of the crime, but may include intention (for example, in the case of murder the intention to kill or cause serious bodily harm), recklessness, negligence, dishonesty or malice.
<b>MHCLS</b>	Mental Health Court Liaison Service.
<b>Nominal term</b>	A period of time specified in the CMIA which triggers a major review. In the case of homicide, for example, the nominal term is 25 years.
<b>Non-custodial supervision order</b>	A supervision order that does not require the detention of the person in a mental health service, residential institution or residential treatment facility, but requires the person to comply with certain conditions and be subject to supervision in the community.
<b>Office of the Public Advocate</b>	An independent statutory body that works to protect and promote the interests, rights and dignity of people with a disability.
<b>Office of Public Prosecutions</b>	The Office of Public Prosecutions is the independent statutory authority that institutes, prepares and conducts criminal prosecutions on behalf of the Director of Public Prosecutions.
<b>Order</b>	A direction by a court or tribunal that is final and binding unless overturned on appeal.
<b>Plea</b>	An accused person’s answer to a charge of an offence, which usually takes the form of ‘guilty’ or ‘not guilty’.
<b>Physical element</b>	The physical act necessary to establish a particular crime, also referred to as <i>actus reus</i> . The physical element varies depending on the nature of the crime, but may include the conduct (for example, rape requires the sexual penetration of a person), circumstance (for example, rape requires the absence of consent) or cause (for example, murder causes the death of a person) to establish the crime.

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<b>Police prosecutor</b>	A member of Victoria Police who prosecutes state summary offences in the Magistrates' Court.
<b>Residential institution</b>	A place where a person with an intellectual disability may be admitted.
<b>Residential treatment facility</b>	A place where a person with an intellectual disability receives compulsory treatment.
<b>Second reading speech</b>	The speech given by a member of parliament when a bill is introduced in parliament and considered for debate. A second reading speech outlines the reasons for the bill's introduction.
<b>Section 47 certificate</b>	A certificate under section 47 of the CMIA confirming the availability of the facilities or services necessary for the custody of or provision of services to a person.
<b>Special hearing</b>	A hearing before a jury, after the accused person has been found unfit to stand trial, to determine whether they are not guilty of the offence, not guilty because of mental impairment or committed the offence charged.
<b>Summary jurisdiction</b>	The power or right a court has to hear and determine summary offences. The Magistrates' Court is a court of summary jurisdiction.
<b>Summary offences</b>	Minor offences heard by a magistrate without a jury. Police prosecutors generally conduct the prosecution of state summary offences.
<b>Supervision order</b>	<p>An order a court can make under the CMIA if a court finds an accused person is one of the following:</p> <ul style="list-style-type: none"><li>• unfit to stand trial but has committed the offence charged</li><li>• unfit to stand trial and not guilty because of mental impairment</li><li>• not guilty because of mental impairment.</li></ul> <p>The order requires the person to be subject to supervision. It can be custodial or non-custodial.</p>
<b>Test</b>	In this paper, the legal requirements to establish unfitness to stand trial or the defence of mental impairment.
<b>Thomas Embling Hospital</b>	Thomas Embling Hospital is a 116-bed secure forensic mental health hospital managed by the Victorian Institute of Forensic Mental Health. The hospital provides advanced clinical treatment and programs to patients from the criminal justice system (either transferred from the prison system or ordered by the courts to be detained for psychiatric assessment, care or treatment).
<b>Unconditional release</b>	Release of a person without conditions.
<b>Unfitness to stand trial</b>	Refers to the doctrine under the CMIA which exempts an accused person from the usual criminal process because at the time of the trial they are unable to enter a plea, understand the nature of the proceedings or participate in the trial process.

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<b>Victoria Legal Aid</b>	An organisation that provides legal advice to and representation for accused persons who cannot otherwise afford legal assistance.
<b>Victorian Civil and Administrative Tribunal (VCAT)</b>	A decision-making body similar in some respects to a court. VCAT decisions can be appealed with leave to the Supreme Court of Victoria (on a point of law).
<b>Victorian Institute of Forensic Mental Health (Forensicare)</b>	Statutory authority with the responsibility for providing adult forensic mental health services in Victoria.
<b>Victorian Parliament Law Reform Committee (Law Reform Committee)</b>	A committee of government and non-government members of the Victorian Parliament, established to consider issues of law reform referred to it by the Victorian Government.



# Introduction

2 Referral to the Commission

3 The Commission's approach

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# 1. Introduction

## Referral to the Commission

- 1.1 In August 2012, the Attorney-General, the Honourable Robert Clark, MP asked the Commission, under section 5(1)(a) of the *Victorian Law Reform Commission Act 2000* (Vic), to review and report on the desirability of changes to the CMIA to improve its operation. Essentially, the terms of reference ask the Commission to consider whether changes are needed to ensure that the CMIA operates justly, effectively and consistently with the principles that underlie it. The Commission is asked to give consideration to a number of particular issues covering both legal and process aspects of the CMIA, set out in the terms of reference.
- 1.2 The Commission has also been asked, in undertaking this reference, to have regard to:
  - the cost implications of any recommendations it may make, including the costs of supervision and treatment services, and
  - any recommendations that may be made by the Victorian Parliament Law Reform Committee (referred to in this paper as the Law Reform Committee) in its *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers*.
- 1.3 The full terms of reference are set out on page xii.

## The Commission's approach

### Framework for reviewing the operation of the CMIA

- 1.4 In this review, the Commission has been asked to review the operation of the CMIA. Therefore, the Commission is focused on how the existing laws and procedures in the CMIA function in practice, not whether they should exist at all.
- 1.5 The terms of reference ask the Commission to review whether changes are needed to ensure the CMIA operates 'justly, effectively and consistently with its underlying principles'. This forms the principal framework within which the Commission will assess the operation of the CMIA, and will examine whether changes are needed.
- 1.6 Broadly speaking, the principles underlying the CMIA seek to strike a balance between the protection of the community and the rights and clinical needs of accused people adjudged unfit to stand trial or not guilty because of mental impairment. They include:
- *fairness to an accused person and the right to a fair trial*—a person should not enter a plea to an offence or be tried for an offence unless they are mentally fit to stand trial
  - *legitimate punishment*—a person should not be held criminally responsible and punished for an offence if they are not morally blameworthy for the behaviour
  - *least restrictive alternative*—when a person is subject to the CMIA, restrictions on the person's freedom and personal autonomy should be kept to the minimum consistent with the safety of the community
  - *community protection*—when a person is subject to the CMIA, the need to protect the community or the person from any likely danger because of their mental condition
  - *rights of victims and family members*—victims and family members of people subject to the CMIA have a right to be heard and to be informed
  - *gradual reintegration*—the treatment and reintegration of a person subject to the CMIA is considered on a gradual basis via a staggered system of management and supervision
  - *therapeutic focus*—the CMIA aims to promote an increased understanding of mental conditions among the community and processes to assist in the recovery of all people affected by an offence (including victims, the person subject to the CMIA and their family members)
  - *transparency and accountability*—the CMIA encourages procedural fairness, open and transparent decision making and rights of appeal.
- 1.7 These principles are either explicitly stated or reflected in the provisions of the CMIA. The CMIA also sits within a broader human rights framework as encapsulated in the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Also relevant are the principles in the *Mental Health Act 1986* (Vic) and *Disability Act 2006* (Vic).
- 1.8 The Commission will consider the operation of the CMIA and make recommendations to ensure it operates in a way that is just, effective and consistent with these principles.
- 1.9 The Commission will also have regard to the cost implications of its recommendations, including the cost of supervision and treatment services, and the recommendations of the Law Reform Committee in its *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers*.
- 1.10 Although not specified in the terms of reference, the Commission will consider equivalent regimes interstate and overseas, particularly New South Wales, New Zealand and the United Kingdom, where reviews are being or have recently been conducted.



## Scope of the review

- 1.11 The CMIA governs a specific area of the law where a person with a mental condition comes into contact with the criminal justice system and the condition is such that it warrants a deviation from the criminal law and procedure that normally applies. This can occur when:
- at the time the accused person appears in court on a charge for a criminal offence they are mentally unfit to be tried for the offence, and/or
  - at the time the offence was alleged to have been committed the accused person was suffering from a mental impairment which negated criminal responsibility for their actions.
- 1.12 The CMIA focuses on a specific intersection between criminal law, psychology and psychiatry. However, the CMIA's operation touches on a number of broader areas within the criminal justice system including:
- policing
  - diversion processes
  - usual criminal and sentencing law and procedure
  - mental health and disability systems, including the laws that govern services and treatment for people with a mental illness, intellectual disability or cognitive impairment.
- 1.13 The Commission's terms of reference are concerned with the operation of the CMIA. However, where relevant, the review may also include consideration of areas that operate alongside or as alternatives to the CMIA.
- 1.14 The Commission will refer to diversion and sentencing dispositions available in Victoria and where relevant, other jurisdictions, for people in the criminal justice system who have a mental illness, intellectual disability or cognitive impairment.
- 1.15 The Commission does not intend to examine the law on the relevance of mental illness, intellectual disability or cognitive impairment in sentencing. The issues involved in relation to sentencing are quite separate from the operation of the CMIA, are complex, and cannot properly be considered in the scope of a reference on the operation of the CMIA.
- 1.16 In examining the criminal responsibility of people with a mental illness, intellectual disability or cognitive impairment in the context of the CMIA, the Commission will not review other defences or exceptions to criminal responsibility available under the criminal law. A general examination of defences or exceptions to criminal responsibility is beyond the scope of the operation of the CMIA, as many defences are applicable to people who do not have a mental illness, intellectual disability or cognitive impairment. As such, it would not be appropriate to consider these matters within the context of this reference. In 2004, the Commission published a substantial report which addressed the matter of defences to homicide. However, the Commission may give consideration to other mental state related defences available in Victoria as part of the context of the defence of mental impairment.
- 1.17 While the Commission will consider whether the CMIA should be extended to the Magistrates' Court, the Commission will not consider whether the CMIA should be extended to the Children's Court. The Department of Justice is examining this issue separately.

## Advisory committee

- 1.18 The Commission has established an advisory committee comprising individuals with expertise in matters relevant to this reference. The role of the advisory committee is to meet as a group of individuals who have expertise and experience in the field and provide ongoing advice to the Commission on issues raised by the terms of reference. The advisory committee consists of:
- Professor James Ogloff, Director of Psychological Services, Forensicare and Director, Centre for Forensic Behavioural Science, Monash University
  - Dr Danny Sullivan, Assistant Clinical Director Community Operations, Forensicare, Adjunct Senior Lecturer, Monash University and Honorary Fellow, University of Melbourne
  - Dr Ian Freckelton SC, Deputy Director, Centre for the Advancement of Law and Mental Health and barrister
  - Gavin Silbert SC, Chief Crown Prosecutor, Office of Public Prosecutions
  - Tim Marsh, Senior Public Defender, Victoria Legal Aid
  - Isabell Collins, Director, Victorian Mental Illness Awareness Council
  - Phil Grano, Principal Legal Officer, Office of the Public Advocate.
- 1.19 The advisory committee met for the first time in April 2013 and will meet again after the close of submissions and the completion of formal consultations.

## Preliminary meetings

- 1.20 Any examination of the operation of the CMIA requires an understanding from both a criminal and health perspective and raises both legal and treatment issues.
- 1.21 As part of preliminary research on the reference, the Commission conducted a series of preliminary meetings with representatives from some of the key stakeholders in the criminal law sector and forensic mental health and disability sectors. The purpose of these meetings was for the Commission to gain a preliminary understanding of how the CMIA currently operates, to start the discussion on the issues identified in the terms of reference and identify other issues that may require examination.
- 1.22 The preliminary meetings do not form part of the Commission's formal consultations for this reference. Formal consultations will be conducted in conjunction with the publication of this consultation paper, along with a call for public submissions.

## Consultation paper

- 1.23 The preliminary consultations along with discussions with the advisory committee and other research undertaken by the Commission form the basis of this consultation paper.
- 1.24 The purpose of the consultation paper is to assist the Commission to understand how the CMIA has been operating since its introduction. The Commission seeks input from people who have experience with, or are affected by, the CMIA or who have an interest in the issues raised by the CMIA.
- 1.25 The paper provides information on the current law and procedure under the CMIA and the principles on which it is based. The paper raises and discusses the operational issues that have already been identified in the terms of reference and the Commission's preliminary research. The paper also asks for input on whether there are additional issues that ought to be considered by the Commission. The Commission may consider these issues if they are within the scope of the reference.
- 1.26 The Commission puts forward some broad questions about the operation of the CMIA and also asks specific questions to prompt discussion on the issues and the options for addressing them.
- 1.27 The Commission wants to hear your views and experiences of the operation of the CMIA. It seeks your comments on the questions asked in this consultation paper or any other issues you may have with the operation of the CMIA. Your responses to these questions will assist the Commission to better understand the nature of the issues and to determine the most appropriate response in its recommendations.
- 1.28 Information about how to provide the Commission with a submission is on page x. To allow the Commission time to consider your views before deciding on final recommendations, submissions are due by 23 August 2013.

## Formal consultation process

- 1.29 The next stage of the reference will involve consulting widely with interested organisations and people to gather information and comments on the operation of the CMIA, identify additional issues and develop and test any options for reform.
- 1.30 The Commission intends to consult with representatives in both the criminal law sector and forensic mental health and disability sector, including the judiciary, the courts, legal practitioners, forensic mental health and disability clinicians, mental health and disability treatment services and support service providers (government and non-government).
- 1.31 The CMIA also has the potential to affect a wide range of people in the general community. This includes people who may be subject to orders under the CMIA, family members or carers of people subject to the CMIA, and victims or family members of victims in CMIA matters. It could also include individuals or groups interested in issues relating to mental illness, intellectual disability or cognitive impairment and the criminal justice system. The Commission is also interested in hearing the views of individuals and groups interested in community safety.
- 1.32 As part of the consultation process, the Commission will be seeking to include analysis of quantitative data to assist in its understanding of how the CMIA operates and the issues that have been identified. The Commission encourages people making a submission to include any quantitative or qualitative data (for example, in the form of case examples) that may be available or collected. Quantitative data will be particularly useful in relation to the Commission's consideration of the issues regarding the further expansion of the CMIA to the Magistrates' Court and the possible cost implications of the Commission's recommendations, including the cost of supervision and treatment services.
- 1.33 The feedback and information that the Commission receives from submissions and formal consultations, combined with additional research, will inform its final recommendations to the Attorney-General. A report setting out the Commission's recommendations will be provided to the Attorney-General by the reporting date of 31 March 2014. The Attorney-General must table the report in the Victorian Parliament. The Victorian Government then decides whether to implement the Commission's recommendations.



# The CMIA: background and principles

- 10** Introduction
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- 15** Previous reviews of provisions in the CMIA
- 18** Principles of the CMIA
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## 2. The CMIA: background and principles

### Introduction

- 2.1 In Victoria, when a person is charged with an offence a particular process, governed by legislation and case law, usually follows under the criminal law. The purpose of the process is two-fold: to determine whether or not the person is guilty of the offence charged (or some other alternative offence) and, if the person is guilty, to determine what consequences should follow by way of a sentence.
- 2.2 The first stage of this process—the guilt or otherwise of a person—is focused on whether the person should be held criminally responsible for an offence. This requires proof to a particular standard that the person did certain acts (the physical elements of an offence) and that they did those acts with a particular mental state, knowledge or intention (the mental elements of an offence).
- 2.3 For example, for a person to be found guilty of the offence of murder, it must be proved beyond reasonable doubt that the person did an act that caused the death of the victim, and that the person did that act with the intention of killing the victim or intending to cause serious bodily harm, or while knowing that it was probable that death or serious bodily harm would result, and without lawful justification (self-defence).
- 2.4 If a person pleads not guilty to an offence, a jury in a criminal trial (in the Supreme Court or County Court) or a magistrate (in the Magistrates' Court) must decide the question of whether or not a person committed it. Alternatively, the person may choose to plead guilty to the offence, which negates the need for a trial. In order for a person to plead not guilty and stand trial for an offence or to plead guilty to an offence, they must be fit to stand trial, that is they must be mentally capable of entering a plea and understanding the trial process.
- 2.5 Under the usual criminal process, particular consequences flow from a finding of guilt. These primarily include a conviction and/or a sentence imposed by judges (in the Supreme Court and County Court) and magistrates (in the Magistrates' Court). Sentencing is governed by a statutory and common law framework which requires a court to have regard to a broad range of factors. A number of other consequences flow from a finding of guilt for an offence, such as orders for compensation of any victims of the offence, orders to confiscate certain property or licence suspension, disqualification or cancellation.

- 2.6 For the vast majority of people who come before the courts in Victoria charged with criminal offences, this general process is followed. However, where a person has been charged with an offence and they have a mental condition that affects their capacity to a particular degree, there can be a legitimate basis for exempting them from the usual criminal process and diverting them to a specialised process.
- 2.7 The bases for these exemptions are founded on long established principles in the criminal justice system. A person should not be tried for an offence if at the time of trial they are mentally unfit to stand trial. A person should not be held criminally responsible and punished for an offence if at the time the offence occurred they did not have the capacity to commit the offence because of a mental impairment.
- 2.8 These principles form the basis of different laws and procedures that apply to a person who falls into one or both of these categories. In Victoria, these laws and procedures were formerly contained in a system known as the Governor's pleasure regime. Since 1997, the system has been governed by the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (CMIA). The CMIA governs the law and procedure in relation to people charged with criminal offences ('accused people') who are found to be mentally unfit to stand trial for those offences and/or who are found not guilty of those offences because of mental impairment.
- 2.9 The Commission's review of the CMIA will necessarily take into account the history of the law and procedure in Victoria in this area.
- 2.10 This chapter of the consultation paper provides background and context to the Commission's reference to review the CMIA. This chapter:
- describes the Governor's pleasure regime that existed prior to the introduction of the CMIA
  - outlines the issues identified with the Governor's pleasure regime that led to the introduction of the CMIA and how the CMIA attempted to address those issues
  - summarises the relevant recommendations for change that have been made in reviews that have been conducted since the CMIA was introduced
  - sets out the principles underlying the CMIA that form the principal frame of reference for the Commission's review of the operation of the CMIA.



## The Governor's pleasure regime

### Background to the regime

- 2.11 Prior to the introduction of the CMIA, accused people who were found either 'unfit to plead'<sup>1</sup> to criminal charges or not guilty of criminal charges on the ground of 'insanity'<sup>2</sup> were ordered to be kept in strict custody until the Governor's pleasure was known. This system was referred to as the Governor's pleasure regime.
- 2.12 The Governor's pleasure regime was enacted in England in 1800 by the *Criminal Lunatics Act 1800*. Its enactment followed the trial of James Hadfield, where Hadfield, suffering from a delusion, attempted to kill King George III.<sup>3</sup> Hadfield was acquitted of treason on the ground of insanity and detained in custody as a dangerous person until his death.
- 2.13 The Governor's pleasure regime was developed to deal with two categories of accused people: those who were unfit to plead and those who, like Hadfield, were found not guilty on the ground of insanity. The regime recognised that an accused person could not be subject to an ordinary trial if they could not understand the charge (or were found 'unfit to plead'). It also recognised that an accused person could not be held criminally responsible for their crime if they did not understand what they were doing or did not understand that what they were doing was wrong (or were found 'not guilty on the ground of insanity').<sup>4</sup> An accused person could fall into one of these categories for various reasons, including mental illness, intellectual disability or cognitive impairment.
- 2.14 In Victoria, the Governor's pleasure regime was introduced through sections 393 and 420 of the *Crimes Act 1958* (Vic). These sections provided for the 'strict custody until the Governor's pleasure shall be known' of accused people tried for indictable offences in the Supreme Court or County Court and who were found unfit to plead or not guilty on the ground of insanity. The *Corrections Act 1986* (Vic), the *Mental Health Act 1986* (Vic) and the *Intellectually Disabled Persons' Services Act 1986* (Vic), provided for the management of these people during detention, including their leave arrangements. However, convention governed much of the procedure.<sup>5</sup>

### Problems identified in reviews of the regime

- 2.15 The development of the CMIA was influenced by a number of reviews:
- the Model Criminal Code Officers' Committee's model legislation, the Model Mental Impairment and Unfitness to be Tried (Criminal Proceedings) Bill 1995 for jurisdictions in Australia, and
  - the Victorian Parliamentary Community Development Committee's *Inquiry into Persons Detained at the Governor's Pleasure* tabled in 1995.<sup>6</sup>

1 The CMIA replaced the expression 'unfit to plead' with 'unfit to stand trial' to reflect that a person must be fit at any stage of the proceedings.

2 Section 25 of the CMIA abolished the defence of 'insanity' and section 20 of the CMIA introduced the defence of mental impairment.

3 *R v Hadfield* (1800) 27 State Tr 1281.

4 Generally, to commit an offence, an accused person must have committed the physical act itself (the physical element) and must have also had the state of mind to commit the act (the mental or fault element). The defence of insanity negated criminal responsibility and punishment for the offence because accused persons who established the defence did not have the capacity to commit the mental element of the offence.

5 Jessica Lightfoot, 'Striking the Balance - Abolition of the Victorian Governor's Pleasure System' (1998) 5(2) *Psychiatry, Psychology and Law* 265, 266.

6 Victoria, *Parliamentary Debates*, Legislative Assembly, 18 September 1997, 185 (Jan Wade, Attorney-General).

- 2.16 Prior to these reviews, the Law Reform Commission of Victoria also conducted work in this area and made a number of recommendations regarding the insanity defence in its report on *Mental Malfunction and Criminal Responsibility*.<sup>7</sup> An extensive review of sentencing in Victoria undertaken by the Victorian Sentencing Committee in 1998 also examined and made recommendations on the Governor's pleasure regime.<sup>8</sup>
- 2.17 These reviews, along with much academic commentary, highlighted a number of problems with the Governor's pleasure regime:
- *Lack of coherent framework*—the detention, management and release of people found to be either unfit to plead or not guilty on the ground of insanity under the Governor's pleasure regime was regulated by various pieces of legislation and convention. There was no single piece of legislation that set out the process that applied to people under Governor's pleasure orders.<sup>9</sup>
  - *Overlap with the criminal justice system of detention, supervision and review*—there was the possibility of people being detained in the prison system even though they were not criminally responsible for their crime.<sup>10</sup> The involvement of the Adult Parole Board, that generally makes decisions in relation to people found guilty of an offence, in making recommendations for the release of people under Governor's pleasure orders, also brought these people under the criminal justice system.<sup>11</sup>
  - *No testing of evidence*—people found unfit to plead to criminal offences would be detained at the Governor's pleasure without a further hearing to test the prosecution evidence against them and to determine whether or not they committed the criminal offences charged.<sup>12</sup>
  - *Involvement of the executive*—the executive<sup>13</sup> made decisions on the release of people under Governor's pleasure orders. A decision to release a person under a Governor's pleasure order could be influenced by political considerations that could favour community safety over the rights of the person subject to the order.<sup>14</sup>
  - *Duration of detention*—the process that was in place, particularly the involvement of the executive in decisions to revoke Governor's pleasure orders, resulted in periods of detention that were 'far in excess of the time required for effective treatment'.<sup>15</sup> A study by the Commission of all people subject to Governor's pleasure orders between 1959 and 1988 provided some indication that orders were based on a tariff system rather than a genuine assessment of dangerousness.<sup>16</sup>
  - *Lack of transparency and procedural fairness*—the Governor's pleasure regime lacked transparency, particularly in relation to the process behind the executive's decision to release a person subject to a Governor's pleasure order. Leave decisions were also not transparent, for example, the criteria for granting leave were not clear and had no legislative basis. The right to appear and to appeal leave decisions was limited.

7

Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility*, Report No 34 (1990).

8

Victorian Sentencing Committee, *Sentencing – Report of the Victorian Sentencing Committee*, Volume 2 (1988) 387–482.

9

Community Development Committee, Parliament of Victoria, *Inquiry into Persons Detained at the Governor's Pleasure* (1995) 29.

10

Ibid 48.

11

Ibid 94–5.

12

Ibid 119.

13

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

14

Community Development Committee, above n 9, 2.

15

Ibid 1.

16

Law Reform Commission of Victoria, above n 7, 6.

## The introduction of the CMIA

- 2.18 The Crimes (Mental Impairment and Fitness to Stand Trial) Bill 1997 sought to abolish the Governor's pleasure regime and establish new procedures for determining unfitness to stand trial, establishing the defence of mental impairment and a process dealing with accused people found unfit to be tried or not guilty because of mental impairment.
- 2.19 The Bill received bipartisan support and was heralded in parliamentary debates as progressive and groundbreaking. The then Attorney-General, the Honourable Jan Wade, MP, in outlining the reforms during the second reading speech, noted that the Bill:
- provided a new procedure to deal with accused people who may be unfit to stand trial by giving them the opportunity to become fit (during a 12-month adjournment) and to have the evidence against them tested (with a special hearing process)
  - gave trial judges the power and flexibility to make the most appropriate order in terms of treatment, the provision of services and the degree of supervision to which a person would be subject
  - provided for a new supervision regime that transferred responsibility for the release of people subject to supervision orders from the executive to the judiciary and that recognised that the treatment or reintegration of these people is most appropriately managed on a gradual basis
  - set a nominal term requiring the court to conduct a major review of a supervision order to determine whether the person should be released or have the conditions of their supervision changed
  - required the provision of regular expert reports to the trial court where the court had ordered that a person be subject to a supervision order to assist the court in determining whether to release a person and to ensure these people were not 'lost in the system'
  - provided for notice to, and consultation with, the next of kin of the person subject to a supervision order and the victim where the court was considering releasing the person or granting extended leave
  - required leave decisions to be made by a Forensic Leave Panel, chaired by a judicial member, to ensure the leave process was transparent and accessible
  - set out the matters to which a court should have regard in imposing and reviewing supervision orders to strike the appropriate balance between the protection of the community and the rights and clinical or therapeutic needs of the person subject to a supervision order.<sup>17</sup>
- 2.20 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (CMIA) was assented to on 18 November 1997. On 18 April 1998, the CMIA commenced full operation.
- 2.21 The CMIA uses the term 'mental impairment' in place of the outdated term 'insanity' and the expression 'unfit to stand trial' in place of 'unfit to plead' to reflect that an accused person must be fit at all stages of the proceedings.
- 2.22 The CMIA, however, does not alter the existing common law in relation to the test for determining unfitness to stand trial or the test for establishing the defence of mental impairment. The CMIA incorporated the common law test for fitness to plead, that derived from the Supreme Court of Victoria's decision in *R v Presser*,<sup>18</sup> and the test for the defence of insanity from *Daniel M'Naghten's case*.<sup>19</sup>
- 2.23 The procedures in the CMIA for investigating unfitness to stand trial, special hearings and the power to impose a supervision order were not made available to the Magistrates' Court.<sup>20</sup>

17 Victoria, *Parliamentary Debates*, Legislative Assembly, 18 September 1997, 185 (Jan Wade, Attorney-General).  
18 *R v Presser* [1958] VR 45.  
19 *Daniel M'Naghten's case* (1843) 8 ER 718.  
20 Victoria, *Parliamentary Debates*, Legislative Assembly, 18 September 1997, 185 (Jan Wade, Attorney-General).

## Previous reviews of provisions in the CMIA

- 2.24 A number of specific aspects of the CMIA have been reviewed since it commenced operation. The current reference by the Commission is the first comprehensive review of the operation of the CMIA as a whole. This section will outline the findings of these previous reviews that will be considered as part of this reference.

### Review of leave arrangements for patients at Forensicare

- 2.25 In March 2001, a review panel (the Vincent Review) was formed to consider leave arrangements for patients at the Victorian Institute of Forensic Mental Health (Forensicare) who are held at the Thomas Embling Hospital.<sup>21</sup> The Hon. Justice Frank Vincent AO QC chaired the panel.
- 2.26 The Vincent Review recommended that:
- Forensicare develop detailed leave plans that provide a comprehensive rehabilitation program for each forensic patient including proposed leave arrangements<sup>22</sup>
  - Forensicare establish an internal body to provide a quality check and endorse all leave requests to the Forensic Leave Panel or court<sup>23</sup>
  - the Forensic Leave Panel clearly set out in its orders all leave arrangements available to the forensic patient<sup>24</sup>
  - consideration be given to amending the CMIA to ensure that the Forensic Leave Panel considers specific criteria before granting leave and to strengthen the standard required for granting leave to forensic patients,<sup>25</sup> and
  - arrangements or mechanisms be put in place so patients absconding interstate could be apprehended and returned to Victoria as a matter of priority.<sup>26</sup>
- 2.27 The recommendations of the Vincent Review requiring legislative amendment were implemented by the *Forensic Health Legislation (Amendment) Act 2002* (Vic) and the *Sentencing and Mental Health Acts (Amendment) Act 2005* (Vic).

### People with intellectual disabilities at risk

- 2.28 In November 2003, the Commission published its report *People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care*. The Commission reviewed the provisions for the ‘compulsory treatment and care’ of people with an intellectual disability who are a risk to themselves and the community.
- 2.29 The Commission proposed amendments to the legislative framework for compulsory care. In doing so, the Commission examined some parts of the CMIA. The Commission recommended that where a magistrate finds a person with an intellectual disability or cognitive impairment not guilty because of mental impairment, the magistrate should be able to refer the person to the Office of the Senior Clinician.<sup>27</sup> At the time of writing this paper, this recommendation has not been adopted.

21 Thomas Embling is a 116-bed secure forensic mental health hospital for patients from the criminal justice system who require psychiatric assessment, care and management. These patients include persons subject to supervision orders under the CMIA.

22 Review Panel Appointed to Consider Leave Arrangements for Patients at the Victorian Institute of Forensic Health, *Report* (2001) 14.

23 Ibid 16.

24 Ibid 21.

25 Ibid 22.

26 Ibid 28.

27 Victorian Law Reform Commission, *People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care*, Report (2003) 124. The Office of the Senior Clinician became the Office of the Senior Practitioner following the introduction of the *Disability Act 2006* (Vic). The role of the Senior Practitioner is to ‘protect the rights of people with a disability who are subject to restrictive interventions and compulsory treatment’: Office of the Senior Practitioner, Department of Human Services, *Senior Practitioner Report 2010–11* (2012) 5.

## Defences to homicide

- 2.30 In 2001, the Commission commenced a review of the law on defences and partial excuses to homicide, including the defence of mental impairment under the CMIA. The Commission reported in November 2004 and recommended that:
- a new provision be inserted into the CMIA to make it clear that ‘mental impairment’ includes, but is not limited to, a disease of the mind, which is the common law basis for the defence of mental impairment<sup>28</sup>
  - the Department of Human Services, in conjunction with the Department of Justice, conduct an ongoing evaluation of the effectiveness of the CMIA,<sup>29</sup> and
  - agencies offering seminars and lectures for continuing professional development purposes should provide information on the operation of the CMIA, including the nominal term, to improve understanding within the legal community.<sup>30</sup>
- 2.31 The Commission also recommended a ‘consent mental impairment’ procedure for accused people who plead not guilty because of mental impairment. Under the procedure, if:
- a judge, having heard expert evidence, is satisfied that no jury properly instructed could find the accused person guilty of the offence due to the accused person’s mental impairment, and
  - the prosecution and the defence agree that the accused person was mentally impaired at the time of the crime,
- then the judge should be able to make a finding that the accused person is not guilty of the offence because of mental impairment.<sup>31</sup>
- 2.32 The Commission recommended that this evidence should be heard before a judge alone, but the judge should have the discretion to direct that a jury deal with the matter.<sup>32</sup> This recommendation was adopted in the *Crimes (Homicide) Act 2005* (Vic).

## Guardianship

- 2.33 In 2010–11, the Commission reviewed the *Guardianship and Administration Act 1986* (Vic) and a range of other laws that deal with substitute decision making for people with impaired decision-making ability. The purpose of the review was to report on any changes that were needed to the law to ensure that it responds to the current and future needs of people with impaired decision-making ability, and promotes their rights.
- 2.34 The Commission considered the relationship between the Guardianship and Administration Act and the CMIA. In 2012, the Commission recommended that:
- the role of guardians should not extend to substitute decision making about legal proceedings under the CMIA
  - people detained under the CMIA be provided with an advocate at particular times including during major reviews of a supervision order and when leave decisions are being made by the Forensic Leave Panel
  - there should be a legislative requirement for the automatic review of each custodial supervision order (CSO) under the CMIA at least every two years.
- 2.35 At the time of writing this paper, these recommendations have not been implemented.

28 Victorian Law Reform Commission, *Defences to Homicide*, Final Report (2004) 217.

29 Ibid.

30 Under the CMIA, a person who is found not guilty because of mental impairment or unfit to stand trial may be made subject to a custodial supervision order. Supervision orders, whether custodial or non-custodial, are for an indefinite period but the CMIA requires the court to set a nominal term for the supervision order. In the case of murder for example, the nominal term is 25 years.

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

32 Victorian Law Reform Commission, above n 28, 231.

## Victorian Parliament Law Reform Committee report

- 2.36 Most recently, the Victorian Parliament Law Reform Committee (Law Reform Committee) published a report resulting from its *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers*. The terms of reference for the current CMIA review request that the Commission have regard to the Law Reform Committee’s recommendations.
- 2.37 The Law Reform Committee’s report, released in March 2013, contained a range of recommendations. The following recommendations are directly relevant to this review:
- the Victorian Government consider allowing the trial judge to investigate an accused person’s fitness to stand trial, which currently must be determined by a jury<sup>33</sup>
  - the Victorian Government investigate procedures adopted in the United Kingdom that may expedite the process for determining fitness to stand trial<sup>34</sup>
  - the Victorian Government consider whether the ability of the accused person to understand or respond rationally to the charge or the ability of the accused person to exercise or to give rational instructions about the exercise of procedural rights, should be taken into account in determining fitness to stand trial<sup>35</sup>
  - the CMIA define ‘mental impairment’ to encompass mental illness, intellectual disability, acquired brain injuries and severe personality disorders<sup>36</sup>
  - the Victorian Government consider amending the CMIA to allow investigations into an accused person’s fitness to stand trial in the Magistrates’ Court and that uniform procedures be adopted in committal proceedings in the Magistrates’ Court when fitness to stand trial is in issue<sup>37</sup>
  - the CMIA clarify departmental responsibility for supervision and monitoring custodial supervision orders and non-custodial supervision orders.<sup>38</sup>
- 2.38 At the time of writing this paper, these recommendations have not been implemented.
- 2.39 The Law Reform Committee also made a number of findings relevant to the Commission’s review of the CMIA. In particular, the Law Reform Committee found that lawyers can enhance their client’s ability to understand and participate in the legal process by modifying their approaches to communication.<sup>39</sup> The Law Reform Committee also recognised the important role judicial officers play in ensuring that people with an intellectual disability or cognitive impairment receive fair and equal treatment when they come before the courts.<sup>40</sup>
- 2.40 The Commission discusses these recommendations and findings in detail in subsequent chapters of this paper.

33 Law Reform Committee, Parliament of Victoria, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (2013) 228.

34 Ibid 240.

35 Ibid 231.

36 Ibid 243.

37 Ibid 235–6.

38 Ibid 309.

39 Ibid 206.

40 Ibid 218.

## Principles of the CMIA

- 2.41 The Commission has been asked to examine whether the CMIA is operating justly, effectively and consistently with a number of principles that underlie it.
- 2.42 The CMIA governs an area of the law that requires an understanding from both a criminal and health perspective and raises both legal and treatment issues. A number of specific criminal law and human rights principles underpin the CMIA, as well as principles derived from forensic mental health and disability.<sup>41</sup>
- 2.43 Some of these principles are outlined specifically in the legislation. Other principles, while not referred to explicitly in the legislation, are implied through the aims and objectives of the CMIA, its processes and relevant case law on the interpretation of its provisions.

## Overarching aims and objectives of the CMIA

- 2.44 The CMIA was introduced in response to the various problems that had been identified by a number of reviews of the Governor's pleasure regime (discussed above at [2.17]). It sought to address these problems by:
- providing a coherent framework for people found unfit to stand trial or not guilty because of mental impairment
  - creating a specialised pathway that did not overlap with the normal criminal justice system
  - providing a fair hearing process for testing the evidence against an accused person who is found unfit to stand trial
  - removing the involvement of the executive in decisions regarding release and vesting it in an independent judiciary
  - establishing a system of review and gradual reintegration to prevent inappropriate or indefinite detention
  - ensuring transparency and procedural fairness in decision making regarding release and leave.
- 2.45 The Governor's pleasure regime was also criticised by the Victorian Parliamentary Community Development Committee. It was concerned that the regime unduly favoured the community's expectations of safety over the rights of people found unfit to stand trial or not guilty because of mental impairment.<sup>42</sup> The CMIA seeks to strike an appropriate balance between protection of the community and the rights and clinical needs of people found unfit to stand trial or not guilty because of mental impairment.

## Fairness to an accused person and the right to a fair trial

- 2.46 A key principle underpinning the CMIA founded in the historical origins of the law on unfitness to stand trial, is that the court should not require a person to enter a plea to a charge or be tried on a charge unless they are mentally competent, or 'fit', to do so.
- 2.47 This principle is based on the 'central precept of our criminal law ... that no person shall be convicted of a crime otherwise than after a fair trial according to law.'<sup>43</sup>
- 2.48 An accused person has a fundamental right to a fair trial. This accompanies various other rights relating to fairness in criminal proceedings. For example, accused people in criminal proceedings have the right to be given reasons for decisions made by a court and the right to appeal a decision made by a court to a higher court. The right to a fair trial is founded in

41 See, eg, *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 8, 21, 22, 24, 25.  
42 Community Development Committee, above n 9, 98–101.  
43 Anthony Mason, 'Fair Trial' (1995) 19 *Criminal Law Journal* 7, 7.

criminal law,<sup>44</sup> and is also recognised as a human right in Victorian<sup>45</sup> and international law.<sup>46</sup> Some of the key features of the right to a fair trial include the right to be given details of the allegations in a charge, the right to legal representation and the right to silence.

- 2.49 Implicit in the right to a fair criminal trial is the assumption that an accused person is mentally competent to exercise this right. For example, the person must be able to understand the allegations made against them, to instruct a lawyer and to enter a plea to the charge. If a person is not mentally competent to do this, then any trial of that person or hearing of a charge may not be fair. Also relevant is the right to recognition and equality before the law. A person with a mental condition is equally entitled to a fair hearing in criminal matters as a person without a mental condition.<sup>47</sup>
- 2.50 The requirement that a person be mentally fit to stand trial is justified on the need to avoid inaccurate verdicts, to maintain the integrity of the trial process and to avoid unfairness to the accused person.
- 2.51 The right to a fair trial is expressed in various aspects of the CMIA. For example, Part 3 of the CMIA provides for a special hearing of the evidence where the accused person is found unfit to stand trial. In a special hearing the accused person is entitled to legal representation, entitled to challenge jurors (through their legal representative) and raise any defence available at a usual criminal trial, for example the defence of mental impairment.<sup>48</sup>

### Legitimate punishment

- 2.52 Another key principle underlying the CMIA is that a person should not be held criminally responsible and punished for an offence if they are not morally blameworthy for the behaviour.
- 2.53 This legal principle is based on the notion, recognised in law for almost two thousand years,<sup>49</sup> that a person who is mentally ill should not be held criminally responsible due to the effect of their condition on their mental state.
- 2.54 Before it became part of the criminal law, the idea was based in philosophy that human beings exercised free will in their actions. Therefore, they should only be punished for wrongful acts that they 'willed' or intended to happen.<sup>50</sup> As articulated by Ruffles,
- [h]erein lies the justification for the mental illness defence – while a mentally ill person may commit a physical act that constitutes a crime – the *actus reus* – the “misfortune of their condition” may deprive that person of the free will to form the requisite *mens rea* or ‘guilty mind’. If there is no “guilty mind”, moral blame cannot attach to the act and the person cannot, therefore, be held criminally responsible. In turn, to be eligible for punishment, a person must not only have intentionally committed a criminal act, but must be considered responsible for having chosen to do so.<sup>51</sup>
- 2.55 The principle states that if a person, who commits the physical acts of an offence, does not possess the mental capacity required to form a guilty mind in committing the offence, then it is not logical or just to punish the person for what they have done. This has been described as the ‘fairness policy’.<sup>52</sup>

44 See, eg, *Walton v Gardiner* (1993) 177 CLR 378, 392–3 (Mason CJ, Deane and Dawson JJ).

45 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24.

46 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 10; *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14.

47 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 6; *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(10); *Charter of Human Rights and Responsibilities Act 2006* s 8.

48 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 16(2).

49 Janet Ruffles, *The Management of Forensic Patients in Victoria: The More Things Change, The More They Remain the Same* (PhD Thesis, Monash University, 2010) 4. Ruffles gives the examples of Jewish law from the second century and Roman law from around the sixth century.

50 *Ibid* 4.

51 *Ibid*.

52 Victorian Sentencing Committee, above n 8, 410–413.



- 2.56 The principle is also linked to the broad notion of proportionate punishment, which underpins fundamental common law sentencing principles in Victoria, such as proportionality and totality.<sup>53</sup> The primary purpose of proportionality is that ‘the punishment imposed on offenders by way of sentence is just and fair, is not arbitrary in its application and respects the basic human rights of those who are sentenced’.<sup>54</sup> By extension, it would not be fair to punish a person who is not criminally responsible for an offence because of a mental impairment.

### Least restrictive alternative

- 2.57 The CMIA explicitly states that the general principle to be applied by the court is that ‘restrictions on a person’s freedom and personal autonomy should be kept to the minimum consistent with the safety of the community’.<sup>55</sup> This principle applies to decisions by the court to make, vary or revoke a supervision order, to remand a person in custody and to grant a person extended leave.
- 2.58 The *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) provides that a human right may only be limited where it is ‘reasonable, necessary, justified and proportionate’.<sup>56</sup> This means any decision to limit human rights must take into account all relevant factors including any less restrictive means reasonably available to achieve the overall purpose of the limitation.<sup>57</sup> This principle is also underpinned by internationally recognised human rights to liberty and security of the person,<sup>58</sup> and the right to humane treatment when deprived of liberty.<sup>59</sup>
- 2.59 When a court makes a supervision order with respect to a person under the CMIA, the principle of least restriction aims to ensure ‘the interests of the safety of the community with the appropriate minimum restriction upon the freedom and autonomy of the reviewee’.<sup>60</sup> An example of this is the requirement under the CMIA that a person is not to be detained in prison unless there is no practicable alternative.<sup>61</sup>
- 2.60 The CMIA also allows the court to intervene in situations where a person subject to the CMIA is likely to cause harm to themselves. Section 40(1) of the CMIA requires the court to have regard to ‘the nature of the person’s mental impairment or other condition or disability’ and whether, ‘the person is, or would if released be, likely to endanger themselves, another person, or other people generally’ and ‘the need to protect people from such danger’.<sup>62</sup> In these cases, the decision to limit a person’s freedom and autonomy by placing them on a supervision order is consistent with the Charter requirement that it be ‘reasonable, necessary, justified and proportionate’ to prevent serious harm or death.
- 2.61 The principle of least restriction is also reflected in the CMIA in a number of safeguards against arbitrary detention. For example, the court must set a ‘nominal term’ when imposing a supervision order. A nominal term specifies the period of time that can elapse before a court must conduct a major review of the order.<sup>63</sup>

53 Totality and proportionality are separate but related principles that share the same purpose of ensuring that the punishment imposed on an offender is just, fair and proportionate to the offending behaviour for which they are criminally responsible.

54 Nina Hudson, ‘Sentencing, Parole Cancellation and Confiscation Orders’ (Report, Sentencing Advisory Council, November 2009) 8.

55 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 39.

56 Victorian Equal Opportunity and Human Rights Commission, *Talking Rights: 2010 Report on the Operation of the Charter of Human Rights and Responsibilities*, Report (2011).

57 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2)(e).

58 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 3; *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9(1); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 22. For example, the CMIA requires a person not be detained in prison unless there is no other practical alternative in the circumstances.

59 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 3; *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 10(1); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 22.

60 *Re DGC* [2000] VSC 284 (7 July 2000) [29].

61 This principle applies pending investigations into fitness to plead (s 10(3)), pending the making of a supervision order (s 19(3)), making orders pending the making of a supervision order (s 24(3)) and making a supervision order (s 26(4)).

62 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 40(1)(a),(c)–(d).

63 *Ibid* ss 28, 35.

## Protection of the community

- 2.62 Connected to the principle of least restriction, but also a principle in its own right, is the principle of protecting the community from the danger that will be posed or may be likely due to a person's mental condition. This has been described as the 'social control' policy.<sup>64</sup>
- 2.63 This principle is reflected throughout the CMIA by the notion of endangerment. Endangerment in this context is
- about the risk of harm. The gravity of the harm may be relevant to assessing the nature of the risk, but the probability of any risk, be it high or low, is the critical concept of endangerment ... The ordinary meaning of endangerment entails the concept of chance or risk.<sup>65</sup>
- 2.64 The concept underpins the CMIA in two different ways:
- *Likely endangerment*—the need to protect the community from the 'likely danger' posed by a person.
  - *Serious endangerment*—the need to protect the community from their safety being 'seriously endangered' by the person.
- 2.65 The terms 'likely endangerment' and 'serious endangerment' have different meanings under the CMIA but there is some overlap in application. Assessing the risk of serious endangerment encompasses both the likelihood of the danger and the gravity of the possible harm if the danger eventuates. This can be contrasted with assessing the risk of likelihood of endangerment, which only encompasses how likely it is that any danger may eventuate, irrespective of the gravity of the possible harm.<sup>66</sup>
- 2.66 A person subject to a supervision order under the CMIA is included in the term 'community' in terms of protection from danger, as well as any other specific people or members of the general community.
- 2.67 Implicit in the balancing of the competing interests is the requirement that the court engage in future assessment.<sup>67</sup> The court must try to make an assessment of the current or future risk of dangerousness posed by a person who is unfit to stand trial or not guilty because of mental impairment. This task requires the court to embrace notions of uncertainty and to consider the 'likelihood of such [future] risk becoming a reality'.<sup>68</sup> The Commission considers some of the potential issues regarding the approach taken to this difficult task in Chapter 9.

## Rights of victims and family members

- 2.68 The impact of decisions on victims and the family and carers of the person with a mental condition is also a significant consideration in the CMIA. This is relevant to the court's task of balancing the rights of the accused person with the protection and interests of the community and ensuring that the victims have an opportunity to exercise their rights to be heard and be informed in CMIA matters.

64 Victorian Sentencing Committee, above n 8, 413.

65 *NOM v DPP & Ors* [2012] VSCA 198 (24 August 2012) [58].

66 *Ibid* [64].

67 See *Re LN* [1999] VSC 144R (6 May 1999) [6] which describes the task of future assessment as 'forensic clairvoyance'.

68 *Ibid*.

## Victims in CMIA matters

- 2.69 The Second Reading Speech for the Crimes (Mental Impairment and Unfitness to be Tried) Bill highlighted that the legislation sought to give 'due consideration to the issue of victims' rights'.<sup>69</sup> These rights underpin various provisions of the CMIA relating to the Director of Public Prosecution's obligation to give notice of particular hearings and provide information about outcomes in hearings to victims of offences in matters under the CMIA.<sup>70</sup> They also underpin the right of victims under section 42 of the CMIA to provide information in a report to the court for various purposes.<sup>71</sup>
- 2.70 The *Victims' Charter Act 2006* (Vic) also underpins these provisions as the key piece of legislation in recognising the 'principles that govern the response to persons adversely affected by crime by investigatory agencies, prosecuting agencies and victims' services agencies'.<sup>72</sup>
- 2.71 The Victims' Charter Act sets out general principles governing the response to victims of crime. It states that:
- All persons adversely affected by crime are to be treated with courtesy, respect and dignity by investigatory agencies, prosecuting agencies and victims' services agencies.<sup>73</sup>
- 2.72 As part of the principles, the Victims' Charter Act also sets out the rights of victims of crime, including the right to have particular information about relevant processes and court proceedings and their outcomes.<sup>74</sup> The Victims' Charter Act also allows victims to provide information to the court via a process for making a 'victim impact statement' that may be considered by the court in determining the sentence of the offender.<sup>75</sup>
- 2.73 The *Sentencing Act 1991* (Vic) also recognises this right by allowing a victim to make a victim impact statement to assist the court in determining sentence. The statement may include information on the impact of the offence on the victim and any injury, loss or damage suffered by the victim as a direct result of the offence.<sup>76</sup>
- 2.74 Since the CMIA was introduced in 1997, there has been substantial development in the conceptualisation of victims' rights and interests in court procedures and decision making. A potential issue for consideration, discussed in Chapter 9 at [9.77]–[9.86], is whether the CMIA sufficiently reflects these developments.
- 2.75 The Office of Public Prosecutions has recently produced a guide for victims involved in CMIA matters to facilitate greater participation by them in the prosecution process.<sup>77</sup> This reflects the increasing recognition of the importance of victims' rights and participation in CMIA processes.
- 2.76 The guide explains the court process where people with a mental condition are prosecuted for serious crimes and outlines the circumstances under which a victim or family member report can be made. It is aimed at increasing the input from victims, both at the initial stages of the process in prosecution, but also at the stages when supervision orders are made and reviewed by the court. In launching the guide in November 2012, the Director of Public Prosecutions, John Champion SC said:
- The development of this brochure will give victims involved in mental impairment matters a voice; facilitate greater participation by them in the prosecution process; and will give the court a more complete picture of the circumstances of the offending and the impact of the crime that may not otherwise have been provided by the prosecution during various hearings.<sup>78</sup>

69 Victoria, *Parliamentary Debates*, Legislative Assembly, 18 September 1997, 185 (Jan Wade, Attorney-General).

70 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 38C, 38E, 74.

71 *Ibid* s 42(1).

72 *Victims' Charter Act 2006* (Vic) s 1(a).

73 *Ibid* s 6(1).

74 This includes the Victims Register, which is a tool that assists in providing information to victims on offenders: *Victims' Charter Act 2006* (Vic) s 17.

75 *Victims' Charter Act 2006* (Vic) s 17.

76 *Sentencing Act 1991* (Vic) ss 8K–8L.

77 Office of Public Prosecutions, *Prosecuting Mental Impairment Matters* (2012).

78 Office of Public Prosecutions, 'Guide to assist victims in mental impairment prosecutions' (Media Release, 28 November 2012) 1.

## Family members of people subject to the CMIA

- 2.77 Family members of people subject to the CMIA also have similar rights in recognition of the particular difficulties that can exist in the circumstances of matters under the CMIA. For example, it is quite common for the victims of offences in CMIA matters to be family members of the accused person, meaning that they are often victims of crime under the CMIA as well as family members of the accused person. Ruffles reported in 2010, that almost half (42.5 per cent) of the offences committed by the 146 people found not guilty because of mental impairment in her study were committed against an immediate family member, with 16.5 per cent of victims being a person's spouse or partner.<sup>79</sup> Therefore, in many cases family members of people subject to the CMIA can be experiencing trauma, loss and grief as victims.
- 2.78 The provisions relating to notice requirements and providing information to the court also apply to family members of a person who is subject to a supervision order under the CMIA.<sup>80</sup>
- 2.79 The guide on prosecuting mental impairment released by the Office of Public Prosecutions is also aimed at assisting family members of people subject to the CMIA in court processes under the CMIA.
- 2.80 Family members are also recognised as key support people in the treatment and gradual reintegration of people under the CMIA.<sup>81</sup> Forensicare's brochure for family members and carers of people subject to supervision orders describes their role as follows:

Families and carers are widely acknowledged as having a legitimate and appropriate role in supporting a person with a mental illness. Involvement of family and carers in the treatment and support of a person with a mental illness has been found to contribute to reducing the incidence of relapse, improving adherence to treatment and improving the consumer's quality of life and social adjustment.<sup>82</sup>

## Gradual reintegration

- 2.81 Another key principle underpinning the CMIA is the principle of gradual reintegration.
- 2.82 The CMIA creates a system for the management of people subject to supervision orders that has been characterised as 'gradualist'<sup>83</sup> or 'staggered',<sup>84</sup> in recognition 'that the treatment or reintegration of persons with a mental disorder is most appropriately considered on a gradual basis'.<sup>85</sup>
- 2.83 Unlike the Governor's pleasure regime before it, the CMIA envisages a pathway for release for a person subject to a supervision order through a system of treatment, management and supervision.
- 2.84 The system of gradual reintegration is reflected in a number of features of the CMIA, including:
- an application for variation or revocation of a supervision order can be made at any time
  - a custodial supervision order must be imposed for 12 months before a court can consider varying it to a non-custodial supervision order, and
  - a non-custodial supervision order is the only supervision order that can be revoked (not a custodial supervision order) and only after a period of at least 12 months extended leave.

79 Ruffles, above n 49, 122.

80 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 38C, 38E, 74.

81 Victorian Institute of Forensic Medicine (Forensicare), *Consumers and Carers* (2010) <<http://www.forensicare.vic.gov.au/page.aspx?o=conscare>>.

82 Victorian Institute of Forensic Medicine (Forensicare), *Family and Carer Advocate Brochure* (2012) <<http://www.forensicare.vic.gov.au/assets/pubs/FamilyCarerAdvocateBrochure2012.pdf>>.

83 Ian Freckelton, 'Applications for Release by Australians in Victoria Found Not Guilty of Offences of Violence by Reason of Mental Impairment' (2005) 28 *International Journal of Law and Psychiatry* 375.

84 Ruffles, above n 49.

85 Victoria, *Parliamentary Debates*, Legislative Assembly, 18 September 1997, 186 (Jan Wade, Attorney-General).

- 2.85 The CMIA is based on the assumption that this approach is appropriate and can be applied in practice to all people who come under the CMIA, including those with a mental illness and people with an intellectual disability or cognitive impairment. The Commission asks questions about how this approach operates in practice in Chapter 9 at [9.105]–[9.110].
- 2.86 Discretion is vested with the court to make the most appropriate order having regard to the matters set out in section 40 of the CMIA. This also provides for decisions to be made that reflect the progress and recovery of a person through their treatment and gradual reintegration.
- 2.87 The key role played by mental health and disability service providers also reflects the principle of gradual reintegration. These service providers are responsible for supervising and providing treatment to people subject to supervision orders and to provide information to the court and the Forensic Leave Panel. They provide information on a number of relevant matters, such as the person’s mental condition and behaviour and their response to treatment, therapy and counselling.<sup>86</sup> The role and influence of these service providers in decision-making processes is considered in Chapter 9.

### Therapeutic focus

- 2.88 Connected to the principle of gradual reintegration is the therapeutic focus that underpins the CMIA.
- 2.89 This is reflected in the philosophy that the best way of protecting the community from people who are subject to the CMIA is by their recovery or management of their mental condition and return to society.<sup>87</sup>
- 2.90 The CMIA seeks to achieve a therapeutic aim by promoting an increased understanding of and tolerance to mental illness that can give rise to a mental impairment.<sup>88</sup> This objective is reflected in changes to the language used in the CMIA, such as the replacement of the term ‘insanity’ with ‘mental impairment.’
- 2.91 The therapeutic focus is also reflected in the manner in which CMIA court proceedings are conducted. While working in an adversarial system, CMIA matters may more closely resemble an inquisitorial approach where the judge works with the prosecution and defence in order to determine the best outcome for all parties.
- 2.92 The media also have a role in community perceptions and the extent to which members of the community understand the nature of mental conditions and how they can affect the capacity and behaviour of people subject to the CMIA.<sup>89</sup> The accurate reporting of CMIA matters in the media can influence the way the community perceives the CMIA system, including the basis for having such a system and how it operates in practice. The question of preventing media reporting of CMIA proceedings by reason of suppression orders is considered in Chapter 9 at [9.111] and following paragraphs.
- 2.93 The CMIA’s therapeutic outcomes are reflected in the requirement that in making a range of orders the court is to have regard to the nature of the person’s ‘mental impairment or other condition or disability’ and ‘whether there are adequate resources available for the treatment and support of the person in the community’.<sup>90</sup> The express purpose of reports provided by victims and family members is to assist ‘counselling and treatment processes for all people affected by an offence’.<sup>91</sup> This also reflects the CMIA’s therapeutic focus.

86 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 40(1).

87 *Re PL* [1998] VSC 209 (15 December 1998) [15].

88 *Re LN (No 2)* [2000] VSC 159R (19 April 2000).

89 Meron Wondemaghen, *Frames of Mental Illness and Violent Crime: Perspectives from the Courts and Media* (PhD Thesis, Monash University, 2012) 64.

90 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 40(1)(a)–(e).

91 *Ibid* s 42(1).

2.94 The CMIA’s therapeutic aims are also reflected in the approach taken by the key service providers responsible for the supervision and treatment of people subject to orders under the CMIA. For example, Forensicare has a strong focus on the rights and roles of people who are subject to the CMIA, known as ‘consumers’. Forensicare has described this as follows:

Forensicare has made a commitment to delivering recovery-orientated mental health services and embedding recovery principles in our clinical practice. These principles acknowledge that consumers have a right and responsibility to be an integral part of their own treatment and recovery.<sup>92</sup>

2.95 Forensicare works to maximise opportunities for consumers to play a central role in decision making about service delivery and their personal treatment options.<sup>93</sup>

2.96 The Office of the Senior Practitioner in the Department of Human Services is responsible for protecting the rights of people with a disability who are subject to restrictive interventions and compulsory treatment. One of the Senior Practitioner’s stated values is to ‘promote wellbeing and social inclusion.’<sup>94</sup> The Senior Practitioner has a focus on promoting rights of people with an intellectual disability. For example, in 2010, a program was piloted that aimed to ‘empower people with a disability subject to restrictive interventions with knowledge about their rights and responsibilities.’<sup>95</sup> The Office of the Public Advocate also works to promote and protect the rights and dignity of people with disabilities.

2.97 A key issue identified by the Commission’s preliminary research is whether there are adequate safeguards for the protection of the rights and promotion of responsibilities for people with an intellectual disability under the CMIA.

2.98 The provisions on suppression orders in proceedings under the CMIA also reflect the notion that the process should be therapeutic if possible, rather than stigmatising. Section 75(1) provides that a court may make a suppression order in any proceeding under the CMIA, if it is ‘in the public interest to do so’.<sup>96</sup> Included in the public interest is the important interest of the person and their ‘progressive rehabilitation not being deflected or defeated’.<sup>97</sup>

2.99 However, the other important interest to be balanced in the concept of ‘public interest’ is openness of the judicial process. Under this principle:

The powerful and fundamental value of the community’s knowledge of the judicial process in its midst should not be whittled down by a developing habit of suppression.<sup>98</sup>

92 Victorian Institute of Forensic Medicine (Forensicare), above n 81.

93 There are a number of ways that Forensicare seeks to achieve this, including Consumer Advisory Groups, Patient Consulting Groups and Consumer Consultants: see Victorian Institute of Forensic Medicine (Forensicare), above n 81.

94 Office of the Senior Practitioner, Department of Human Services, *Senior Practitioner Report 2010–11* (2012) 5.

95 *Ibid* 24.

96 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 75(1).

97 *Re PL* [1998] VSC 209 (15 December 1998) [27].

98 *Ibid*.

## Transparency and accountability

- 2.100 Transparency and accountability is a key principle that runs through the CMIA, both for members of the community and the person subject to its processes. The introduction of the CMIA in place of the Governor's pleasure regime addressed the
- legitimate concern of the community for open process ... [The CMIA] is a signal advance in that it removes the determination of these matters from executive discretion in private to judicial decision in public ... It is of the essence of the judicial process that it is public. The courts, rightly, have always resisted pressure to function in private.<sup>99</sup>
- 2.101 To ensure transparency and accountability in proceedings where the accused person is unfit to stand trial and/or not guilty because of mental impairment, publicly acknowledging that an offence was committed is important. Even where the accused person is not criminally responsible for their actions, those actions have consequences and it should be remembered that it is likely that members of the community will have been significantly affected. The CMIA ensures that there is a fair hearing of the alleged offence and public record of the outcome.
- 2.102 Transparent decision-making processes regarding the leave provisions and accessibility of leave provisions to people subject to supervision orders are provided for under the CMIA in a number of ways, including:
- leave decisions are made by the Forensic Leave Panel, a judicial panel, specially constituted to hear leave applications<sup>100</sup>
  - the Forensic Leave Panel must give reasons for any decision and if the reasons are given orally, a person applying for leave may ask to have them put into writing<sup>101</sup>
  - the right of a person applying for leave to appear and be represented by a legal practitioner or any other person authorised by the person,<sup>102</sup> and
  - the requirement that grants of leave for longer periods (extended leave for less than 12 months) are only granted by the court to ensure decisions are made by an independent judiciary and subject to appeal rights.<sup>103</sup>
- 2.103 The Forensic Leave Panel 'may inform itself in relation to any matter in such manner as it thinks fit'.<sup>104</sup> It is not bound by the rules or practice of evidence that generally apply in proceedings, such as criminal trials. However, it is required to 'act according to equity and good conscience' and is 'bound by the rules of natural justice'.<sup>105</sup>
- 2.104 The right to a fair trial and other procedural rights, such as the right to appeal against a decision made by a court, also support the principle of transparency and accountability.
- 2.105 The appeal rights throughout the CMIA also reflect principles of transparency and accountability. The review of decisions strengthens the transparency and accountability of the process by protecting against miscarriages of justice, maintaining consistency between trial courts and providing legitimacy to the criminal justice system.<sup>106</sup>
- 2.106 People subject to supervision orders, the Director of Public Prosecutions, the Attorney-General, the Department of Health and the Department of Human Services all have appeal rights. The appropriateness of the roles of these different parties and the interests that each party represents are discussed in Chapter 9 at [9.71]–[9.104].

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99 Ibid [16], [18].  
100 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)* ss 59–60.  
101 Ibid s 66.  
102 Ibid s 70(1).  
103 Ibid s 57.  
104 Ibid s 65(1).  
105 Ibid s 64(1).  
106 See further Chapter 4 of this paper at [4.138].

## Principles governing the treatment of people with a mental condition

- 2.107 In addition to the principles identified as underpinning the CMIA, there are a number of general principles governing the treatment of people with a mental impairment who are subject to the provisions of the CMIA.
- 2.108 A number of international and national legal instruments set standards for protecting the rights of people with a mental impairment.

### Human rights

- 2.109 International legal instruments that govern the rights of people with a mental impairment include the following:
- *International Covenant on Civil and Political Rights*—provides general human rights protections to all people.<sup>107</sup>
  - *Convention on the Rights of Persons with Disabilities*<sup>108</sup>—promotes equality of people with a disability and includes measures to raise awareness regarding people with a disability including promoting ‘positive perceptions and greater social awareness towards people with disabilities’.<sup>109</sup>
  - *Principles for the protection of persons with mental illness and the improvement of mental health care*<sup>110</sup>—contains principles aimed to ensure that ‘a mentally ill person is to have all the rights of any other person, and is to be free from discrimination’.<sup>111</sup>
  - *Convention on the Rights of the Child*—provides among other rights, protections to children receiving treatment for illness or who have been deprived of their liberty.<sup>112</sup>
  - *Declaration on the Rights of Disabled Persons*<sup>113</sup>—promotes the rights of people with disabilities.
  - *Standard Minimum Rules for the Treatment of Prisoners*—provide guidance as to ‘what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions’.<sup>114</sup>

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

108 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, GA Res 61/106, UN GAOR, 61st sess, UN Doc A/61/49 (entered into force 3 May 2008).

109 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, GA Res 61/106, UN GAOR, 61st sess, UN Doc A/61/49 (entered into force 3 May 2008) art 8.

110 *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care*, GA Res 119, UN GAOR, 46th sess, A/RES/46/119, 75th plen mtg (17 December 1991).

111 National Inquiry Concerning the Human Rights of People with a Mental Illness, *Human Rights and Mental Illness: Report of the National Inquiry into Human Rights of People with Mental Illness/Human Rights and Equal Opportunity Commission* (1993) 21.

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

113 *Declaration on the Rights of Disabled Persons*, GA Res 3447 (XXX), UN Doc A/10034 (1975).

114 *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva (1955).



## National principles

- 2.110 The *National Mental Health Policy 2008* is part of the National Mental Health Strategy and was developed and endorsed by the Commonwealth and State and Territory governments with one of its aims being to assure the rights of people with a mental disorder.<sup>115</sup> The *Fourth National Mental Health Plan: An agenda for collaborative government action in mental health 2009–2014* supports this strategy and provides ‘an overarching vision and intent for the mental health system in Australia and embeds the whole of government approach to mental health reform’.<sup>116</sup>
- 2.111 The *National Statement of Principles for Forensic Mental Health* aims ‘to provide cohesion and credibility so that optimal diagnosis, treatment and rehabilitation can be provided to clients of forensic mental health services’.<sup>117</sup> This document contains 13 principles that cover a range of topics including the rights and responsibilities of patients and service providers, safety of patients, access to services, service quality and effectiveness, ethical standards, workforce skills and transparency and accountability in decision making.
- 2.112 The Commonwealth’s *Mental Health Statement of Rights and Responsibilities* was developed in 1991 to ensure that ‘consumers, carers, advocates, service providers and the community were aware of their rights and responsibilities’.<sup>118</sup>
- 2.113 Many changes in the law and clinical practice have occurred since the statement was developed and a review was therefore initiated to ensure it reflects contemporary mental health care and human rights law. The revised *Mental Health Statement of Rights and Responsibilities* was released in 2012. The revised statement provides that:
- Mental health consumers who come into contact with the criminal justice or the forensic mental health system have the right to access:
- (a) specialist justice programs that respond to their mental and physical health needs where this is reasonable and appropriate
  - (b) referral, assessment, individualised care planning, support, treatment, rehabilitation and services that facilitate or support recovery
  - (c) their carers and support persons.<sup>119</sup>
- 2.114 The *Principles for Recovery Oriented Practice* are contained within the *National Standards for Mental Health Services 2010* and aim to ensure that mental health services are being delivered in a way that supports the recovery of mental health consumers.<sup>120</sup>

115 Commonwealth of Australia, *National Mental Health Policy 2008* (2009).

116 Commonwealth of Australia, *Fourth National Mental Health Plan: An agenda for collaborative government action in mental health 2009–2014* (2009) ii.

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

118 Commonwealth of Australia, *Mental Health Statement of Rights and Responsibilities* (1991).

119 Commonwealth of Australia, *Mental Health Statement of Rights and Responsibilities* (2012), 27.

120 Commonwealth of Australia, *National Standards for Mental Health Services*, 2010, 42.

## Victorian law

### Mental Health Act 1986 (Vic)

- 2.115 The *Mental Health Act 1986* (Vic) outlines principles for the treatment and care of people with a mental disorder in Victoria. A therapeutic focus is evident in the principles of the legislation. It states that people with a mental disorder are to be involved in the development of their own treatment plan wherever possible and should be provided with comprehensive information about their mental disorder and proposed and alternative treatments.<sup>121</sup> It also states that treatment and care should promote and assist self-reliance.<sup>122</sup>
- 2.116 The Mental Health Act also provides for the principle of least restriction. Care and treatment is to be provided in ‘the least possible restrictive environment and least possible intrusive manner consistent with the effective giving of that care and treatment’.<sup>123</sup> Further it requires that ‘any restriction upon the liberty of patients and other people with a mental disorder and any interference with their rights, privacy, dignity and self-respect are kept to the minimum necessary in the circumstances’.<sup>124</sup>
- 2.117 Consistent with the principle of least restriction, other principles in the legislation state that wherever possible treatment should be provided in the community or near the home of the person with a mental disorder or the home of their friends or relatives.<sup>125</sup>
- 2.118 The Mental Health Act is currently under review. The new proposed legislative framework will seek to promote recovery-oriented practice. Central to the reforms is a supported decision-making model of treatment and care. The framework aims to ‘enable and support compulsory patients to make decisions about their treatment and determine their individual path to recovery’.<sup>126</sup>

### Disability Act 2006 (Vic)

- 2.119 The *Disability Act 2006* (Vic) outlines a number of principles to promote and protect the rights of people accessing disability services.
- 2.120 One of the principles provides that ‘persons with a disability have the same rights and responsibilities as other members of the community and should be empowered to exercise those rights and responsibilities’.<sup>127</sup> These rights include:
- the right to respect for their human worth and dignity as individuals
  - the right to live free from abuse, neglect or exploitation
  - the right to exercise control over their lives
  - the right to participate in decisions and access information and obtain services that support their quality of life.<sup>128</sup>
- 2.121 The Disability Act also outlines principles that disability services should adhere to in order to ensure the rights of people accessing services are protected. For example, that services should be flexible and responsive to the individual needs of a person with a disability.<sup>129</sup>
- 2.122 Consistent with the principles in the CMIA, the Disability Act provides for the principles of least restriction. The Disability Act states that ‘a restriction on the rights or opportunities of a person with a disability is necessary, the option chosen should be the option which is the least restrictive of the person as is possible in the circumstances’.<sup>130</sup>

121 *Mental Health Act 1986* (Vic) ss 6A(e), (j).

122 *Ibid* s 6A(d).

123 *Ibid* s 4(2)(a).

124 *Ibid* s 4(2)(b).

125 *Ibid* ss 6A(b), 6A(f).

126 Department of Health, *A new Mental Health Act for Victoria - Summary of proposed reforms* (2012).

127 *Disability Act 2006* (Vic) s 5(1).

128 *Ibid* s 5(2).

129 *Ibid* s 5(3).

130 *Ibid* s 5(4).



# An overview of the CMIA

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## 3. An overview of the CMIA

### Introduction

- 3.1 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (CMIA) creates a specialised pathway for people charged with an offence and who have a mental impairment that affects their capacity to participate in the normal criminal process. A person is liable to be subject to a different supervision regime to the usual sentencing process if they are:
- unfit to stand trial and found to have committed the offence or to be not guilty because of mental impairment, or
  - found not guilty because of mental impairment.
- 3.2 This chapter provides a snapshot of the CMIA pathway. It commences with a brief overview of the legislation, including the purposes of the CMIA and the key process aspects. It then discusses the relevance of mental impairment to the criminal justice system generally, prior to focusing on the particular group of accused people who come within the CMIA. It then describes the CMIA process and the points in the criminal justice system where a person may enter and follow the specialised pathway created by the CMIA.

### Overview of the CMIA legislation

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

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

**Table 1: Process and timing of determining unfitness to stand trial and the mental impairment defence**

	<b>Time of trial</b>	<b>Time of offence</b>
<b>Issue to be determined</b>	Whether the accused person is unfit to stand trial	Whether the accused person is not guilty because of mental impairment
<b>Process</b>	Investigation into unfitness	Trial or special hearing (if the person is unfit)

- 3.7 The provisions of the CMIA largely apply to trials and proceedings for indictable offences in the higher courts (the Supreme Court and County Court).<sup>1</sup> The defence of mental impairment applies to summary offences and indictable offences heard and determined summarily in the Magistrates' Court.<sup>2</sup> However, the unfitness to stand trial process does not apply in the Magistrates' Court.

## Mental conditions and the criminal justice system

- 3.8 In examining the pathway created by the CMIA, it is important to understand the prevalence of mental conditions in the population of people who have contact with the criminal justice system. This cohort of people presents particular challenges, given their vulnerability and disadvantage. In recognition of this, specialised approaches are required in responding to people with a range of different mental conditions in the criminal justice system including in police practices, the provision of legal advice, court processes and sentencing.
- 3.9 Within this cohort, the CMIA has a very strict ambit of application. It only applies to people whose mental condition is such that it impairs their capacity to stand trial or provides a defence to a charge. The meaning of the term 'mental impairment' under the CMIA is discussed in Chapter 5.
- 3.10 The term 'mental impairment' is also used in a variety of other contexts, including mental health, human services and justice sectors. It can have a range of different meanings and there is significant variation in the definitions in each sector. The term can encompass a wide range of mental conditions that affect the mental processes or cognitive functioning of a person, including, but not limited to a mental illness, an intellectual disability or a cognitive impairment.
- 3.11 An intellectual disability is a type of cognitive impairment. The Commission's preliminary research has identified that there are different issues for people with an intellectual disability and for people with other cognitive impairments under the CMIA that require a separate discussion. Therefore, issues relating to intellectual disabilities are discussed separately to issues relating to cognitive impairments.
- 3.12 People with mental conditions, such as a mental illness, intellectual disability or cognitive impairment, that may give rise to a mental impairment are 'overrepresented' in the criminal justice system. This means that overall the prevalence of people with these impairments is higher than it is in the general population. It is estimated that 'approximately 55% of offenders at court suffer from some form of mental impairment'.<sup>3</sup> This population of people are often vulnerable and disadvantaged, which increases their risk of contact with the criminal justice system and leads to poorer outcomes.

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

2 *Ibid* s 5(1).

3 Magistrates' Court Victoria, Submission No IDAJ31 to Law Reform Committee, Parliament of Victoria, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and Their Families and Carers*, 16 September 2011, 5.

- 3.13 The policy of deinstitutionalisation that began in Victoria in the 1980s is also a relevant factor. Providing treatment in the community was an important step in giving people with mental illness and intellectual disabilities greater control over their own lives.<sup>4</sup> However, resources continued to be concentrated in hospital settings and:
- [f]or many persons – particularly those with mental illness – services have been difficult to access in the community, resulting in a lack of support and often a deterioration in mental health. The process of deinstitutionalisation has seen people with a mental impairment have increased contact with the criminal justice system. This contact appears to have been exacerbated by the over representation of this group in the homeless population.<sup>5</sup>
- 3.14 The concerning prevalence of and inherent difficulties caused by mental illness, intellectual disability or cognitive impairment in criminal justice populations have been the subject of discussion and comment in the media and by those working in the criminal justice, mental health and human services sectors.<sup>6</sup>
- 3.15 These issues are heightened when a person has more than one condition that affects their mental processes and behaviour. The Multiple and Complex Needs Initiative (MACNI) provides services for people who have combinations of mental illness, substance abuse issues, intellectual impairment, acquired brain injury and contact with the criminal justice system. This collaborative approach between the Department of Human Services, the Department of Justice and the Department of Health recognises that specialist services may be required for those people who are most vulnerable in society given their multiple and complex needs. MACNI is governed by provisions of the *Human Services (Complex Needs) Act 2009* (Vic).

## Mental illness

- 3.16 Mental illness is defined in the *Mental Health Act 1986* (Vic) as ‘a medical condition that is characterised by a significant disturbance of thought, mood, perception or memory’.<sup>7</sup> It can include conditions such as depression, schizophrenic disorders, bipolar affective disorder, obsessive-compulsive disorder and post traumatic stress disorder.<sup>8</sup>
- 3.17 The lifetime prevalence<sup>9</sup> of psychotic disorders in the Australian population has been estimated at 3.5 per cent for men and 2.2 per cent for women.<sup>10</sup>
- 3.18 An Australasian study, however, found that almost half (49 per cent) of police cell detainees were ‘experiencing a diagnosable mental disorder according to the diagnostic criteria of a validated screening instrument.’<sup>11</sup> Consistent with these figures, a Victorian study conducted in 2011 of detainees in police cells found that:

More than half of police cell detainees had previously had contact with public mental health services at some point during their lives ... The prevalence of diagnosed psychiatric illnesses was high with 10% suffering psychosis and another 10% suffering an affective illness.<sup>12</sup>

4 Victorian Law Reform Commission, *Guardianship*, Consultation Paper (2011) 53.

5 Community Development Committee, Parliament of Victoria, *Inquiry into Persons Detained at the Governor's Pleasure* (1995) 6.

6 See, eg, Mental Health Legal Centre Inc, *Experiences of the Criminal Justice System* (2010); Office of the Public Advocate, *Breaking the Cycle: Using Advocacy-Based Referrals to Assist People with Disabilities in the Criminal Justice System* (2012); Catherine Leslie, ‘Jeopardising access to justice for people experiencing mental illness’ on *Castan Centre for Human Rights: The official blog* (3 April 2013) <<http://castancentre.com/2013/04/03/jeopardising-access-to-justice-for-experiencing-mental-illness/>>; ‘Corrections policy fails for want of proper care’, *The Age* (online), 29 April 2013 <<http://www.theage.com.au/opinion/editorial/corrections-policy-fails-for-want-of-proper-care-20130428-2immmw.html>>.

7 *Mental Health Act 1986* (Vic) s 8(1A).

8 James R P Ogloff, ‘Identifying and Accommodating the Needs of Mentally Ill People in Gaols and Prisons’ (2002) 9(1) *Psychiatry, Psychology and Law* 1, 8. The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM) is the major accepted diagnostic tool for mental illness and other mental disorders. The fifth edition (DSM-5) was released on 22 May 2013.

9 A lifetime prevalence means the proportion of people in the general population that have a disorder currently or at any time in the past. See WD Thompson ‘Lifetime Psychiatric Diagnoses’ in Cynthia G Last and Michel Hersen (eds) *Issues in Diagnostic Research* (Plenum Press, 1987).

10 Tamsin Short et al, ‘Utilization of Public Mental Health Services in Random Community Sample’ (2010) 44 *Australian and New Zealand Journal of Psychiatry* 475.

11 Lubica Forsythe and Antoinette Gaffney, ‘Mental Disorder Prevalence at the Gateway to the Criminal Justice System’ (2012) 438 *Trends and Issues in Crime and Criminal Justice* 6.

12 James Ogloff et al, ‘Psychiatric symptoms and histories among people detained in police cells’ (2011) 46(9) *Social Psychiatry and Psychiatric Epidemiology* 871, 877.



- 3.19 Mental illness is also more prevalent among prisoners compared with the general population. In 2012, the Australian Institute of Health and Welfare (AIHW) reported that almost a third (31 per cent) of the 610 prison entrants in the 2010 Census across Australia (excluding New South Wales and Victoria) reported a history of mental disorders.<sup>13</sup> The AIHW compared this to the self-reported prevalence of mental and behavioural problems recorded by the Australian Bureau of Statistics in 2009 in the general population (11 per cent).<sup>14</sup> In 2011, the Victorian Ombudsman reported that '[a]lmost one third of Victoria's male prisoners have diagnosed mental health conditions'.<sup>15</sup>
- 3.20 This is consistent with many studies showing the overrepresentation of people with a major mental illness in prison populations. For example, Mullen, Holmquist and Ogloff reported that 'up to 8% of male and 14% of females in... (Australian) prisons have a major mental disorder with psychotic features'.<sup>16</sup> The comparative lifetime prevalence rates for schizophrenia and psychotic disorders in the general population are 0.3 per cent to one per cent.<sup>17</sup> In referring to these studies and other research, it has been observed that:
- Rates of the major mental illnesses, such as schizophrenia and depression, are between three and five times higher in offender populations than those expected in the general community ... The prevalence of mental illness is even higher in offenders remanded prior to trial.<sup>18</sup>
- 3.21 The overrepresentation of people with a mental illness in the criminal justice system does not mean that mental illness alone causes offending or a higher rate of re-offending:
- [W]hile most people with a mental illness do not offend, they are at greater risk for engaging in offending and violent offending than others in the community. Moreover, this risk elevates when the mentally ill person also has a co-occurring substance use disorder.<sup>19</sup>
- 3.22 Further, there are a number of factors that have been identified as contributing to the high numbers of people with mental illnesses in the criminal justice system, including:
- the deinstitutionalisation of mentally ill people, an increase in the use of drugs and alcohol by people with mental illnesses, and the limited capacity of community-based mental health services to address the needs of mentally ill offenders.<sup>20</sup>
- 3.23 The behavioural, emotional and cognitive problems that can be caused by a mental illness can present particular difficulties for people at various stages in the criminal justice system. These problems can make them more vulnerable and at greater risk of harm, particularly in the prison environment.<sup>21</sup> The disadvantages that are associated with mental illness, such as homelessness, poverty and risky behaviours, can also put people at greater risk of coming into contact with the criminal justice system.<sup>22</sup>

13 This was measured 'by the proportion that reported having been told at some time by a doctor, psychiatrist, psychologist or nurse that they have a mental health disorder': Australian Institute of Health and Welfare, *Australia's Health 2012* (Australia's Health series no 13 Cat no AUS 156, Canberra) 131.

14 Australian Institute of Health and Welfare, *Australia's Health 2012* (Australia's Health series no 13 Cat no AUS 156, Canberra) 131.

15 Victorian Ombudsman, *Investigation into prisoner access to health care* (2011) 5.

16 P E Mullen, C L Holmquist and J R P Ogloff, *National forensic mental health scoping study* (Department of Health and Ageing, 2003) 17.

17 James R P Ogloff et al, 'The Identification of Mental Disorders in the Criminal Justice System' *Trends and Issues in Criminal Justice*, Volume 334 (AIC, 2007) 2.

18 Ibid 1–2.

19 James R P Ogloff et al, 'Policing Services with Mentally Ill People: Developing Greater Understanding and Best Practice' (2013) 48 *Australian Psychologist* 57, 66.

20 Ogloff et al, 'The Identification of Mental Disorders in the Criminal Justice System' above n 17, 2.

21 Ogloff, 'Identifying and Accommodating the Needs of Mentally Ill People in Gaols and Prisons' above n 8, 2; Mental Health Legal Centre, *Fact Sheet for the UN Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health* (November 2009) Community Law <[http://www.communitylaw.org.au/mentalhealth/cb\\_pages/images/MH%20issues%20in%20Vic%20prisons\\_UN%20Spec%20Rap%20Health\\_fact%20sheet%20Nov%2009.doc](http://www.communitylaw.org.au/mentalhealth/cb_pages/images/MH%20issues%20in%20Vic%20prisons_UN%20Spec%20Rap%20Health_fact%20sheet%20Nov%2009.doc)> at 1 May 2013.

22 Eileen Baldry and Leanne Dowse, *People with Mental Health and Disorders & Cognitive Disabilities in the Criminal Justice System in NSW: Policy and Legislative Impacts* (2010) (New South Wales Department of Human Services: Ageing, Disability and Home Care) 1.

## Intellectual disability

- 3.24 In its recently published report, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers*, the Victorian Parliament Law Reform Committee (Law Reform Committee) described the term 'intellectual disability' as generally referring to 'a person who has difficulty learning or managing daily living ... a condition that is either evident at birth, or is expressed before a person reaches adulthood'.<sup>23</sup>
- 3.25 The *Disability Act 2006* (Vic) defines a person with an intellectual disability as a person with both significant sub-average general intellectual functioning and significant deficits in adaptive behaviours, which become apparent before the age of 18 years.<sup>24</sup> Generally, an intellectual disability is a permanent condition. However, a person with an intellectual disability may experience positive changes in the level of intellectual functioning and behavioural deficits with appropriate supports or programs.<sup>25</sup>
- 3.26 People with an intellectual disability are commonly over represented in prison populations when compared with the prevalence of intellectual disability in people in the general community.<sup>26</sup>
- 3.27 A study conducted in 2007 by the Department of Justice reported that during 1 July 2003 to 30 June 2006, the prevalence of intellectual disability among prisoners<sup>27</sup> in Victoria was 1.3 per cent. The study reported that this was only marginally higher than the prevalence of intellectual disability among the general Victorian population (estimated to be 1 per cent).
- 3.28 However, evidence given by Dr Peter Perrson, Manager of the Disability, Ageing and Youth portfolio in Corrections Victoria to the Law Reform Committee confirms that people with an intellectual disability are over represented in the prison population in Victoria. Dr Perrson said that 2.5 per cent of Victoria's prison population is currently identified as having an intellectual disability.<sup>28</sup>
- 3.29 It is clear from a number of sources that people with an intellectual disability have particular vulnerabilities in the criminal justice system and present challenges. The Department of Justice Corrections Research Paper 2007 included findings on a range of socio-demographic and criminological variables, of prisoners with an intellectual disability, which reveal that such prisoners are:
- characterised by significant involvement with the criminal justice system ... a high risk of re-offending, difficulties with moving to minimum security and obtaining parole, higher rates of involvement in incidents within prisons, and significant literacy, homelessness, employment and psychiatric issues.<sup>29</sup>
- 3.30 The study concluded on the basis of these findings that people with an intellectual disability in prison are 'a group with complex histories and needs, presenting considerable management and rehabilitation challenges for both the correctional system, the broader forensic disability and disability service systems, and the wider community'.<sup>30</sup>
- 3.31 The vulnerabilities and disadvantages faced by people with an intellectual disability when they come into contact with the criminal justice system was also strongly emphasised by many submissions to the Law Reform Committee in its recent inquiry.<sup>31</sup>

23 Law Reform Committee, Parliament of Victoria, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (2013) 14, 33.

24 *Disability Act 2006* (Vic) s 3(1).

25 Law Reform Committee, above n 23, 251.

26 Holland et al, 'Intellectual Disability in the Victorian Prison System: Characteristics of Prisoners with an Intellectual Disability Released from Prison in 2003-2006' (Corrections Research Paper Series, Paper No 02, Department of Justice, 2007) 9.

27 Defined as those people who were registered with the Department of Human Services as having an intellectual disability.

28 Law Reform Committee, above n 23, 14.

29 Holland et al, above n 26, 27. A Western Australian study also found that people with an intellectual disability who were charged with a criminal offence were more likely to be given a custodial sentence, including those who were arrested for the first time, compared with people who did not have an intellectual disability: Judith Cockram, 'People with an Intellectual Disability in the Prisons' (2005) 12(1) *Psychiatry, Psychology and Law* 163.

30 Holland et al, above n 26, 27.

31 Law Reform Committee, above n 23, 5. See also Victorian Law Reform Commission, *People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care*, Report (2003).

## Cognitive impairment

- 3.32 The term cognitive impairment is a broader term that can encompass a range of disabilities and conditions. Cognitive impairment is described by the Law Reform Committee as a term that is:
- generally used to refer to a person who has suffered from a loss of brain function that affects his or her judgement. Cognitive impairment is a broad concept that encompasses learning disabilities, acquired brain injuries (ABIs), drug or alcohol abuse, neurological disorders, tumours, and autism spectrum disorders. Often, although not always, the term ‘cognitive impairment’ refers to conditions acquired after maturity.<sup>32</sup>
- 3.33 The term cognitive impairment could also encompass other disabilities or conditions such as Alzheimer’s disease, dementia, multiple sclerosis,<sup>33</sup> a mental illness, personality disorder or an intellectual disability that ‘affect[s] insight or make[s] it difficult for a person to control his or her behaviour’.<sup>34</sup>
- 3.34 People with a cognitive impairment are over represented in the criminal justice system when compared with estimates of incidence of intellectual disability and cognitive impairment in the community.<sup>35</sup>

## Acquired brain injury

- 3.35 Significant concerns have recently been expressed about the prevalence of acquired brain injury in criminal justice populations. Acquired brain injury describes any type of brain injury that occurs after birth. Examples of brain injuries that can result in an acquired brain injury include those caused by motor vehicle accidents, chronic alcohol abuse and substance abuse. Brain injuries can also occur where there has been a loss of oxygen to the brain from events such as a stroke, heart attack or drug overdose.<sup>36</sup> Other common causes are infection and neurological disease.<sup>37</sup>
- 3.36 Acquired brain injury has been described as the “hidden” or “invisible” disability.<sup>38</sup> The reported prevalence rate of acquired brain injury in the Australian community is only 2.2 per cent.<sup>39</sup> However, a recent Victorian study has shown that ‘[o]n the basis of comprehensive neuropsychological assessment, 42 per cent of male prisoners and 33 per cent of female prisoners were assessed as having an [acquired brain injury]’.<sup>40</sup> A print media article on the issue highlighted the connection between acquired brain injury and substance use and the effects the condition can have on behaviour, including ‘disordered behaviour, poor organisation, propensity towards substance use’.<sup>41</sup> Traumatic brain injury has also been found to be highly prevalent among prisoners.<sup>42</sup>
- 3.37 In its submission to the Law Reform Committee, Villamanta Disability Legal Rights Centre stated that Victoria does not systematically identify and respond to prisoners with an acquired brain injury.<sup>43</sup>

32 Law Reform Committee, above n 23, 33.

33 Ibid 40.

34 Victorian Law Reform Commission, *People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care*, Report (2003) 115.

35 Law Reform Committee, above n 23, 14.

36 Suzanne Brown and Glenn Kelly, ‘Issues and Inequities Facing People with Acquired Brain Injury in the Criminal Justice System’ (Victorian Coalition of ABI Service Providers Inc, 2012) 7.

37 Nick Rushworth, ‘Out of Sight, Out of Mind: People with an Acquired Brain Injury and the Criminal Justice System’ (Policy Paper, Brain Injury Australia, Prepared for the Department of Families, Housing, Community Services and Indigenous Affairs, 2011) 4.

38 Ibid 4.

39 Australian Institute of Health and Welfare, *Disability in Australia: Acquired Brain Injury* (December 2007) <[www.aihw.gov.au/publications/aus/bulletin55/bulletin55.pdf](http://www.aihw.gov.au/publications/aus/bulletin55/bulletin55.pdf)>.

40 Department of Justice, ‘Acquired Brain Injury in the Victorian Prison System’ (Corrections Research Paper Series, Paper No 4, Department of Justice, April 2011) 22.

41 Jane Lee, ‘One in Two Inmates has Brain Injury’, *The Age* (Melbourne), 25 March 2013, 2.

42 Bill Slaughter, Jesse R Fann and Dawn Ehde, ‘Traumatic Brain Injury in a County Jail Population: Prevalence, Neuropsychological Functioning and Psychiatric Disorders’ (2003) 17 *Brain Injury* 731.

43 Villamanta Disability Rights Legal Service, Submission No IDAJ55 to Law Reform Committee, Parliament of Victoria, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and Their Families and Carers*, 7 November 2011, 8.

- 3.38 People with a cognitive impairment, such as an acquired brain injury can experience a range of disadvantages, which can increase the risk that they will become involved in the criminal justice system. For example, many people with an acquired brain injury who have contact with the criminal justice system face a range of complex circumstances and have complex needs, which can be exacerbated by that contact. They may also experience co-existing mental illness, alcohol or drug dependence, health complaints, breakdown of the family unit or unstable accommodation.<sup>44</sup>
- 3.39 There is no clear causal link between acquired brain injury and offending. Nevertheless, some of the cognitive-behavioural changes that commonly occur with an acquired brain injury can increase the risk of a person's contact with the criminal justice system. These include disinhibition and impaired impulse control, poor social judgement, low-frustration tolerance and anger and aggression.<sup>45</sup> However, the Law Reform Committee noted that people with a cognitive impairment 'tend to have a more diverse range of lived experiences ... These experiences could include more formal education and training, employment, and long-term relationships with spouses and friends'.<sup>46</sup>

### Fetal alcohol spectrum disorder

- 3.40 Another cognitive impairment that has prompted recent concern regarding contact with the criminal justice system is fetal alcohol spectrum disorder. This impairment is associated with excessive consumption of alcohol by mothers during pregnancy. It can result in particular physical features and 'a complex pattern of cognitive impairments, including learning difficulties, poor impulse control and deficits in capacity to exercise judgment, social abstraction, language expression and memory'.<sup>47</sup>
- 3.41 Fetal alcohol spectrum disorder is a 'functional impairment' that affects the executive functions of a person such as decision making and interaction with others.<sup>48</sup> It is one of the foremost non-genetic causes of intellectual impairment.<sup>49</sup> Fetal alcohol spectrum disorder has been identified as a significant issue in some Indigenous communities in Australia,<sup>50</sup> although 'it is no means confined to them'.<sup>51</sup> In Victoria, it occurs equally in Indigenous and non-Indigenous births.<sup>52</sup>
- 3.42 There is little data on the prevalence of the disorder Australia-wide or in the criminal justice population in the Australian, or Victorian, context.<sup>53</sup> However, two Commonwealth Parliamentary Standing Committees have recognised the connection between fetal alcohol spectrum disorder and the involvement of young people with the criminal justice system.<sup>54</sup> Most recently, in 2012 the Standing Committee on Social Policy and Legal Affairs in its report on a national approach to the prevention, intervention and management of fetal alcohol spectrum disorder recommended that it be recognised that people with fetal alcohol spectrum disorder have a cognitive impairment.<sup>55</sup>

44 Brown and Kelly, above n 36, 5.

45 Edgar Miller, 'Head Injury and Offending' (1999) 10(1) *Journal of Forensic Psychiatry and Psychology* 157.

46 Law Reform Committee, above n 23, 40–1.

47 Ian Freckelton, 'Fetal Alcohol Spectrum Disorder and the Law in Australia: The Need for Urgent Awareness and Concern to Translate into Urgent Action' (2013) 20 *Journal of Law and Medicine* 481, 482.

48 Dr J Mein, Medical Officer, Apunipima Cape York Health Council, Committee Hansard, House Standing Committee on Social Policy and Legal Affairs, *Inquiry into Fetal Alcohol Spectrum Disorders*, 31 January 2012, 17.

49 Ernest L Abel and Robert J Sokol, 'Fetal Alcohol Syndrome is Now Leading Cause of Mental Retardation' (1986) 328 (8517) *Lancet* 1222.

50 Priscilla Pyettfor et al, *Fetal Alcohol Syndrome: A Literature Review for the 'Healthy pregnancies, healthy babies for Koori communities' project* (Premier's Drug Prevention Council, Department of Human Services, March 2007) 5.

51 Freckelton, above n 47, 484.

52 Kelly Allen et al, 'Estimating the Prevalence of Fetal Alcohol Syndrome in Victoria Using Routinely Collected Administrative Data' (2007) 31 *Australian and New Zealand Journal of Public Health*, 62–66.

53 Freckelton, above n 47, 485.

54 Parliament of Australia, House of Representatives, Standing Committee on Aboriginal and Torres Strait Islander Affairs; Parliament of Australia, House of Representatives, Standing Committee on Social Policy and Legal Affairs.

55 Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into Fetal Alcohol Spectrum Disorders* (2012) [5.139].

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## The CMIA cohort

- 3.43 The cohort captured by the CMIA is a very small proportion of the total number of people who come into contact with the criminal justice system and have a mental condition.
- 3.44 The CMIA applies to a particular group of people who are charged with a criminal offence and who because of a mental condition are found upon specific criteria to be unfit to stand trial or not guilty because of mental impairment.
- 3.45 Within the cohort of people subject to the CMIA, a further division can be made based on the particular mental condition that underlies a finding of unfitness to stand trial or the particular mental impairment that underlies a finding of not guilty because of mental impairment. The population of people who have a mental condition and are subject to the CMIA can be broken into two smaller cohorts based on the type of mental condition and the different assessment, treatment and support needs of each group. People in each cohort may also follow a different 'pathway' through the CMIA according to the nature of the mental condition, their ability to progress through the system and the services and treatment that may be available. They are:
- people with a mental illness, and
  - people with an intellectual disability or cognitive impairment.
- 3.46 Cases involving co-occurring mental conditions, such as an intellectual disability and mental illness, are also particularly complex in the CMIA cohort.

## Characteristics of the CMIA cohort

- 3.47 In 2010, Ruffles published a study of the period to November 2006, of people in Victoria who had been found not guilty because of mental impairment. The study included some people who were being supervised under both the Governor's pleasure regime and the CMIA. The study gave some indication of the characteristics of the cohort. However, the study did not include people found unfit to stand trial so it does not give a complete picture.
- 3.48 Of the 146 people included in the study:
- 98 had been detained under a custodial supervision order (45 were given a disposition under the Governor's pleasure regime and 53 were given a custodial supervision order under the CMIA)
  - 48 were given a non-custodial supervision order.

- 3.49 Based on an analysis of the socio-demographic, psychiatric and criminological characteristics of the 146 people included, Ruffles described the typical person found not guilty because of mental impairment as follows:
- a Caucasian single male with a disadvantaged and marginalised background
  - in his early to mid-40s and was in his mid-30s when he committed the offence in question
  - unemployed, unskilled and has not completed secondary schooling
  - a strong history of involvement with psychiatric services that is likely to have included at least one involuntary admission to a psychiatric service and a diagnosis of schizophrenia
  - a 50:50 chance of having a history of drug and/or alcohol misuse
  - a family history of mental illness
  - a one in three chance of having experienced some form of childhood abuse or violence within the family home
  - no history of prior convictions and the contact with the criminal justice system that resulted in the finding of not guilty because of mental impairment was an isolated event.<sup>56</sup>
- 3.50 Based on this, Ruffles concluded that:
- the picture of the typical NGRMI [not guilty by reason of mental impairment] acquittee that emerged was of a disenfranchised and seriously disordered individual with a strong history of contact with psychiatric services but whose contact with the criminal justice system resulting in the verdict of NGRMI was often an isolated event.<sup>57</sup>
- 3.51 While this study may provide a ‘typical’ profile of a person found not guilty because of mental impairment under the CMIA, there are a diverse range of people represented in this cohort. The age of people in Ruffles’ study ranged from 19 to 81 years and while only 15.8 per cent were female ‘they were over-represented when compared to all correctional admissions’.<sup>58</sup> Fourteen per cent of people in the study identified as having English as a second language, 26 per cent were born outside Australia and 2.7 per cent identified as being Aboriginal or Torres Strait Islander.<sup>59</sup>
- 3.52 The majority of the 146 people detained under a supervision order were forensic patients and 10 people (6.8 per cent) were forensic residents who were managed by Disability Services as they had an intellectual disability or cognitive impairment rather than a mental illness.<sup>60</sup>
- 3.53 The Ruffles study presents a picture of the CMIA ‘mental illness’ cohort and the pathway of people with a mental illness under the CMIA. Less is known about the characteristics of the ‘intellectual disability and cognitive impairment cohort’ and the pathway followed by such people under the CMIA.

56 Janet Ruffles, *The Management of Forensic Patients in Victoria: The More Things Change, the More They Remain the Same* (PhD Thesis, Monash University, 2010) 160.

57 Ibid ii.

58 Ibid 112.

59 Ibid 113.

60 Ibid 112.

## The CMIA pathway

- 3.54 The CMIA governs the process from the time a person charged with an offence appears in court. However, if a person has a mental condition, their pathway to the CMIA may commence at some point prior to their first contact with the criminal justice system and may in fact be precipitated by a lack of contact with other services, such as mental health or disability services.
- 3.55 This section provides an overview of the specialised pathway created by the CMIA. A flowchart of the CMIA pathway is contained in Appendix A.

### What is the first point of contact for a person under the CMIA?

- 3.56 For a person subject to the CMIA, police officers are likely to be the first point of contact with the justice system. Police have a 'gatekeeper' role in the exercise of their discretion in conducting investigations and in charging an accused person.
- 3.57 Police also play a pivotal role in the identification of people who come into contact with the justice system and may have a mental illness, intellectual disability or cognitive impairment. Early identification of these mental conditions is integral to the fairness of the investigation process and can be crucial to what happens to a person in later stages of the process.
- 3.58 The profile of the typical person who has been found not guilty because of mental impairment in Ruffles' study, suggests that many people who become subject to the CMIA will have had prior contact with mental health or disability services. However, in some cases, it may in fact be a lack of current contact with the appropriate services that has resulted in an unidentified or relapsed mental illness or a lack of supports around a person with an intellectual disability or cognitive impairment, which has ultimately resulted in behaviour that constitutes offending, often very serious.
- 3.59 A person's entry into the CMIA pathway provides an opportunity for a person who requires treatment and support from mental health and disability services to be connected, or re-connected, to those services.

### Identification of mental illness

- 3.60 Current police procedure for identifying people who may have a mental health issue or a cognitive impairment is through observation and investigation of previous contact with the justice and mental health system. Police will observe 'their words or actions, by asking the person directly, by checking police records of any previous interactions, or by contacting their nearest Mental Health Triage to check whether the person is, or has been, a patient of a mental health service'.<sup>61</sup>
- 3.61 A forensic medical officer can undertake an assessment and provide clinical advice on whether a person is fit for a police interview, fit for charging or fit to plead in court. The outcome of the assessment can be used as evidence in court.<sup>62</sup> In undertaking an assessment, the forensic medical officer will assess, among other things, the person's ability to understand the nature of the questioning, the ability to follow questioning, give instructions to legal representation and understand when they are being given a caution.<sup>63</sup>

61 Department of Health and Victoria Police, *Protocol for Mental Health* (Victorian Government, 2010) 10.

62 Ibid.

63 Ibid. To avoid unreasonable delay where a forensic medical officer is available, police may also request a forensic assessment from an Area Mental Health Service clinician.

## Police interviews and investigations

- 3.62 If police believe the person has a cognitive impairment, they must arrange for an independent third person to be present during the interview.<sup>64</sup> The Office of the Public Advocate administers the independent third person program. The role of the independent third person is to:
- facilitate communication between police and the person being interviewed
  - provide emotional support to the person being interviewed, and
  - ensure that the person understands their rights.<sup>65</sup>
- 3.63 This is one way of ensuring fairness and that a person understands their right to silence during a police interview. This is particularly important given the probability that:
- a large proportion of people with an intellectual disability or cognitive impairment who come before police will not understand the caution and the consequences of failing to exercise their right to silence.<sup>66</sup>
- 3.64 Cognitive behavioural problems commonly associated with acquired brain injury (ABI) can also impact on a person's ability to interact with the police, lawyers and the courts:
- Difficulties with memory are very common after a brain injury. During [a] police interview, a person with ABI may not be able to recall certain events, and may feel pressure to answer questions, despite having no effective recollection of the events. Some individuals will succumb under interrogation and offer information that is not based in fact, or admit to a crime they did not commit. Many people with [acquired brain injury] have difficulties with language and communication, and they may not be able to effectively express themselves, comprehend what is said to them or read written material. As a result, they need skilled communication support when being interviewed by Police.<sup>67</sup>
- 3.65 Intellectual disabilities and cognitive impairments require a different response from police to mental illness as these mental conditions each have different causes, effects and expressions.<sup>68</sup> While some studies show improvements in the way in which police manage people with mental illness, intellectual disability and cognitive impairments, others indicate further improvements are required.
- 3.66 A study exploring perspectives on police identification of and responses to people with an intellectual disability in Victoria suggested that:
- [P]olice are generally better at identifying and responding to ID [intellectual disability] than earlier literature has suggested. Overall, interactions at this interface were considered to be very positive, but further training needs were identified particularly with respect to providing the emotional support needs of interviewees.<sup>69</sup>
- 3.67 The Law Reform Committee report, however, recommended options for improving the identification of people with an intellectual or cognitive impairment by the police. These recommendations were in response to the finding that:
- [T]he amount of time it takes for police investigations to be conducted may adversely affect the ability of a person with an intellectual disability or cognitive impairment to recall events.<sup>70</sup>
- 3.68 The Law Reform Committee recommended more detailed guidance for police on how to improve communication with people with an intellectual disability or cognitive impairment. It was recommended that Victoria Police develop separate sections in the Victoria Police Manual for 'guidance on mental illness, intellectual disability and cognitive impairment respectively'.<sup>71</sup>

64 Ibid.

65 Office of Public Advocate, *Independent Third Persons* (15 October 2012) <<http://publicadvocate.vic.gov.au/services/108/>>.

66 Law Reform Committee, above n 23, 138.

67 Brown and Kelly, above n 36, 17.

68 Law Reform Committee, above n 23, 114.

69 B Spivak and D M Thomas, 'Police Contact with People with an Intellectual Disability' [2012] *Journal of Intellectual Disability Research* (forthcoming).

70 Law Reform Committee, above n 23, 135.

71 Ibid 114.



## Police discretion to charge a person

- 3.69 Once police have conducted any interviews and investigations, they may decide to charge a person whom they have questioned or taken into custody. In situations where the police have decided to charge the accused person, they may either:
- arrest and charge the accused person, or
  - send the accused person a summons to appear at court (usually where the offence is less serious).
- 3.70 In considering whether to charge a person with an offence, the police may also consider referring the person to a diversion program, or giving the person a warning.
- 3.71 A study involving Victoria Police officers found that ‘police officers are necessarily afforded considerable discretion when resolving encounters with members of the public, including those who experience mental illness’.<sup>72</sup> Data collected as part of the study indicated that:
- officers might demonstrate leniency when dealing with people experiencing mental illness who are involved in minor law infractions. These findings might not apply to situations involving more serious offending.<sup>73</sup>

## Bail and remand

- 3.72 Once a person is arrested, taken into custody and charged with an offence they must either be brought before a magistrate within a reasonable time or released on bail.<sup>74</sup>
- 3.73 The Commission identified a number of factors in its report on the Bail Act that may influence the ability of a person with a cognitive disability to be released on bail including unstable accommodation, poor decision-making capacity, impulsive behaviour and a lack of social support.<sup>75</sup>
- 3.74 This observation has also been made in relation to people with an acquired brain injury:
- A cycle of disadvantage is perpetuated because their disability contributes to impoverished circumstances that preclude eligibility for bail. A person may be in remand for extended periods, particularly if there are delays in going to court. In some cases, people awaiting trial have been held in custody longer than they would have if an early guilty plea had been made.<sup>76</sup>
- 3.75 Upon entry into prison on remand (if bail is refused or not applied for), a person may come into contact with forensic mental health or disability services by way of assessment. Forensic mental health is a specialised field that provides services for mentally disordered offenders. Forensic disability is a specialised field that provides services for people with an intellectual disability or cognitive impairment who come into contact with the criminal justice system.
- 3.76 All males who enter the prison system on or after sentence in Victoria are processed through Melbourne Assessment Prison. Forensic mental health clinicians (Forensicare) assess each person. Assessments are also made at Melbourne Assessment Prison in relation to cases heard before the Magistrates’ Court.<sup>77</sup> Forensicare provides a similar assessment service for women who enter the prison system at Dame Phyllis Frost.<sup>78</sup>

72 Joel W Godfredson et al, ‘Police Discretion and Encounters with People Experiencing Mental Illness: The Significant Factors’ (2010) 37(12) *Criminal Justice and Behaviour* 1392, 1399.

73 Ibid 1401.

74 *Crimes Act 1958* s 464A(1).

75 Victorian Law Reform Commission, *Review of the Bail Act*, Consultation Paper (2005) 103–4.

76 Brown and Kelly, above n 36, 29–30 (citation omitted).

77 Department of Health and Victoria Police, above n 61, 11.

78 Victorian Institute of Forensic Mental Health (Forensicare), *Report of Operations 2011–12* (2012) 3. Inside Access, a therapeutic justice program of the Mental Health Legal Centre, also operates in Melbourne Assessment Prison, Dame Phyllis Frost, Thomas Embling and other secure hospitals. It provides free legal services and advocacy for imprisoned people.

## Legal representation and advice

- 3.77 An accused person is likely to seek legal advice from a private practitioner or a legal service when they are arrested or charged with an offence. The Legal services available include Victoria Legal Aid, the Mental Health Legal Centre, Villamanta Disability Legal Rights Service, Disability Discrimination Legal Service or Youthlaw. If the person does not seek out legal advice of their own volition, they may be referred from forensic mental health or disability services. The majority of people who enter the CMIA pathway obtain legal advice and representation from Victoria Legal Aid or from a community legal centre.<sup>79</sup>
- 3.78 Legal practitioners play an important role in identifying the presence of a mental condition. Identification of mental illness, cognitive impairment or intellectual disability is crucial in making sure that appropriate supports are provided for all people interacting with the justice system. This was highlighted in the recent Law Reform Committee report which stated:
- It is essential for lawyers to identify the possibility that a client may have an intellectual disability or cognitive impairment, to ensure that they obtain instructions in an appropriate manner, and to ensure that appropriate matters are presented as evidence in court should it proceed further.<sup>80</sup>
- 3.79 Ethical issues may arise for legal practitioners where the client with a mental condition is unable to provide instructions. For example, where a lawyer is unable to obtain instructions from their client, they may be required to make decisions about whether to rely upon the defence of mental impairment on behalf of the accused. This can create significant ethical issues for the lawyer, particularly given the potentially onerous nature of the CMIA regime. When this occurs, a lawyer may be in 'a position of conflict when determining how to act in the client's best interests'.<sup>81</sup>

## Who decides whether a person is unfit to stand trial or has a defence of mental impairment?

### Appearing in court

- 3.80 Once an accused person is charged with an offence, they will be required to appear in court for a hearing. The categorisation of the offence will determine where it is heard.
- 3.81 Criminal offences are categorised as indictable offences (more serious offences) and summary offences (less serious offences).
- 3.82 Summary offences are heard in the Magistrates' Court and a magistrate, rather than a judge and jury, conducts hearings. Prosecutors at Victoria Police generally prosecute matters in the Magistrates' Court. Indictable offences are generally heard in the Supreme Court or County Court after a committal hearing in the Magistrates' Court. Prosecutors at the Office of Public Prosecutions are responsible for prosecuting offences on behalf of the Director of Public Prosecutions in the higher courts. Some indictable offences can be tried summarily in the Magistrates' Court with the consent of the person charged with the offence. A magistrate decides at a committal hearing whether this will occur.

79 For criminal cases (investigations of unfitness and the determination of the accused person's criminal responsibility for an offence), the vast majority of legal assistance available comes from Victoria Legal Aid's staff practice or private practitioner on grants of legal aid. A small minority are conducted by community legal centres. For cases involving review, variation, revocation and leave under supervision orders, community legal centres are much more prominent in providing legal assistance and representation to people subject to supervision orders under the CMIA. However, Victoria Legal Aid's staff practice also provides the majority of legal representation for people subject to supervision orders.

80 Law Reform Committee, above n 23, 204.

81 Ibid 209.

- 3.83 In some cases, a person may not have organised legal representation and may not have a lawyer on the day of their hearing. This may be particularly common for people with a mental condition due to the particular disadvantages that they may face. Victoria Legal Aid may provide the person with a duty lawyer, a service provided in Magistrates' Courts across Victoria. Victoria Legal Aid gives priority to people charged with more serious offences in the Magistrates' Court and those who have complex needs including those with intellectual disability, acquired brain injury or mental illness.<sup>82</sup>

### Unfitness to stand trial

- 3.84 The unfitness to stand trial process (outlined in Chapter 4) only applies in the Supreme Court or County Court.
- 3.85 A person is presumed fit to stand trial.<sup>83</sup>
- 3.86 If the issue of unfitness is raised throughout the course of a trial, the accused person will be assessed. Depending on the nature of the person's mental condition, this assessment will be conducted by a forensic psychiatrist and psychologist, or in some cases, a neuropsychologist.
- 3.87 Forensic psychiatrists and psychologists have a role in providing assessments and reports to both defence lawyers and the Office of Public Prosecutions on whether a person is unfit.<sup>84</sup> If the person has a mental illness, a psychiatrist will generally assess them. Psychologists generally assess people with an intellectual disability or cognitive impairment. Forensic psychiatrists and psychologists also provide evidence to the court during hearings to determine an accused person's unfitness and to determine whether the accused person may qualify for a defence of mental impairment.
- 3.88 The issue of unfitness to stand trial is about the accused person's mental processes at the time of the trial. A jury must decide whether it is more likely than not (on the balance of probabilities) that a person is fit or unfit to stand trial (the legal test is set out in Chapter 4 at [4.24]).
- 3.89 If a person is found unfit to stand trial, there is a second 'special hearing' to consider whether the person committed the offence as charged. A special hearing takes into account the fact that a person who is not fit to stand trial cannot fully participate in the trial process. Criminal procedure is therefore modified in a special hearing to make the trial process fair for a person who is not fit to stand trial.

### The defence of mental impairment

- 3.90 The defence of mental impairment (outlined in detail in Chapter 5) may be raised at any time during a trial.
- 3.91 The issue of mental impairment is about the accused person's mental processes at the time of the alleged offending. It is essentially focused on whether the person had the capacity to commit the offence as charged. This focuses on whether they had a mental impairment (formerly referred to as a 'disease of the mind') and whether it had affected their ability to control or understand their thoughts and actions. A person is presumed not to be mentally impaired at the time of committing the alleged offence.

82 Victoria Legal Aid, *Changes to duty lawyer services for adult criminal offences* (12 July 2012) <<http://www.legalaid.vic.gov.au/4443.htm>>.  
83 *Crimes (Mental Impairment and Unfitness to be Tried Act) 1997* (Vic) s 7(1).  
84 These include professionals employed at Forensicare as well as private practitioners who act on a consultancy basis.

## What happens to a person found unfit to stand trial or not guilty because of mental impairment?

- 3.92 When a person has been found either unfit to stand trial and to have committed the offence or not guilty because of mental impairment or to have committed the offence, the court must choose one of the following two options:
- declare that the person is liable to supervision, or
  - order that the person be released unconditionally.
- 3.93 Where a person is found not guilty because of mental impairment in the Magistrates' Court (for less serious offences), the court must discharge the person.
- 3.94 If a court has declared a person to be liable to supervision, they must then place that person on a supervision order.
- 3.95 Victims of the offences and family members of the person can also provide input to the court at this stage via a report. The Office of Public Prosecutions provides information and support to victims and family members throughout the whole process, including notice of hearings, information about the outcome of hearings and assistance to make a report to the court prior to it making a supervision order.
- 3.96 The court must then decide whether to impose either:
- a custodial supervision order—under which the person is detained in custody and receives treatment in an approved mental health service or disability residential or treatment service, or
  - a non-custodial supervision order—under which a person can live in the community and receive treatment under supervision from an approved mental health service or disability residential or treatment service and be subject to any other conditions ordered by the court.
- 3.97 In both cases, the length of the supervision order is always indefinite. This means that the order has no definite length and can last for the rest of the person's life. A 'nominal term' is imposed by the court to indicate when the order must be reviewed by the court.

## How does a person progress through the supervision regime?

- 3.98 Once a person becomes subject to a supervision order under the CMIA they are supervised and receive treatment and commence a long process that is designed to provide a 'staggered' system of progress towards recovery and eventual release.
- 3.99 This process includes monitoring and reviews of supervision orders by the court and/or applications to make changes to the order, depending on the progress and condition of the person.
- 3.100 As part of the gradual reintegration of a person under a custodial supervision order, he or she can apply for a leave of absence from the place of custody. These are designed to assist a person to prepare for transition from a custodial setting to the community on a non-custodial supervision order. There are consequences for people who do not comply with the conditions of a non-custodial supervision order or leave.

## People with a mental illness

- 3.101 The Victorian Institute of Forensic Mental Health (Forensicare), a statutory agency in the Department of Health, is responsible for supervising people with a mental illness under the CMIA. At the end of June 2012, there were 156 people with a mental illness on a supervision order. Of these, there were 69 people on custodial supervision orders and 78 people were on non-custodial supervision orders. A further nine people were in the community on extended leave.<sup>85</sup> Forensicare supervises all but one of these orders.<sup>86</sup>
- 3.102 People on a custodial supervision order are detained at Thomas Embling Hospital and managed and treated by Forensicare. The Forensic Leave Panel who hears applications for leave under supervision orders by all people supervised under the CMIA reported that in the calendar year of 2011, there were 67 forensic patients at Thomas Embling.<sup>87</sup>
- 3.103 The Community Operations arm of Forensicare supervises people on a non-custodial supervision order. However, a number of different services can carry out the management and treatment of a person under supervision. Forensicare has the primary responsibility for the treatment and management of people on a custodial supervision order. An area mental health service or private practitioners may have the responsibility for the treatment and management of people subject to a non-custodial supervision order.<sup>88</sup> They are also responsible for monitoring whether the person is complying with the conditions of their non-custodial supervision order and identifying and managing any risks.
- 3.104 A person's progress on the supervision will depend, among other factors, on their mental condition and the extent to which they recover. Mental illness is not necessarily a permanent condition. In some cases, a person can have a mental illness for a particular period and recover. In other cases, a person may continue to have the mental condition or the symptoms could fluctuate.

## People with an intellectual disability or cognitive impairment

- 3.105 Disability services (through the Department of Human Services) supervise people with an intellectual disability or cognitive impairment who are subject to a supervision order under the CMIA. At the end of June 2012, there were 26 people on supervision orders managed by the Department of Human Services.<sup>89</sup>
- 3.106 Disability Forensic Assessment and Treatment Services provide a range of treatment to offenders with an intellectual disability in a residential setting. The Intensive Residential Treatment Program is provided under Disability Forensic Assessment and Treatment Services and is a residential treatment facility under the Disability Act. Another program is the Long Term Rehabilitation Program, which is a residential institution under the Disability Act managed by the Department of Human Services. However, people must meet the eligibility criteria under the Disability Act to receive treatment in these programs.<sup>90</sup>

85 Data provided to the Commission by the Victorian Institute of Forensic Mental Health (Forensicare).

86 Victorian Institute of Forensic Mental Health (Forensicare), above n 78, 31.

87 Forensic Leave Panel, *Annual Report 2011* (2012) 11. A forensic patient is a person with a mental illness detained under a supervision order in an 'approved mental health service' under the *Mental Health Act 1986* (Vic).

88 Department of Health, *Protocol between Forensicare and Area Mental Health Services for People Subject to Non-custodial Supervision Orders – Program management circular* (January 2012) 1.

89 Data provided to the Commission by the Department of Human Services.

90 The criteria for a residential institution is in section 87 of the *Disability Act 2006* (Vic) and the criteria for a residential treatment facility is in section 152 of the *Disability Act 2006* (Vic).

- 3.107 The Secretary to the Department of Human Services has custody of and responsibility for people detained under a supervision order in a residential treatment facility or residential institution.<sup>91</sup> Of the 26 people on supervision orders as at end of June 2012, two were on custodial supervision orders accommodated at the Long Term Rehabilitation Program.<sup>92</sup> The Forensic Leave Panel also reported that in the calendar year of 2011, there were two forensic residents within the disability stream detained under a custodial supervision order.<sup>93</sup>
- 3.108 The Secretary to the Department of Human Services also has responsibility for supervising people with an intellectual disability or cognitive impairment subject to a non-custodial supervision order. Case management is delivered across the state by the Department of Human Services. As at end of June 2012, there 24 people on a non-custodial supervision order under the CMIA receiving disability services from the Department of Human Services.<sup>94</sup>
- 3.109 The conditions, such as intellectual disability and acquired brain injury that underlie cognitive impairments are different in terms of their causes and their impact on levels of functioning. They are generally permanent in nature. Therefore, a person with an intellectual disability or cognitive impairment, may experience an increase in functioning, but will not 'recover' from that condition in the same way as a person with a mental illness.

### How long does the CMIA supervision process last?

- 3.110 The supervision process can be very onerous and last for a significant period. It involves continual assessment and review of the person's progress under the order.
- 3.111 The length of time that people are ultimately detained can vary. Some research conducted on this in 2006 showed that under the CMIA, detention has ranged from three months to 36 years (with some people continuing in detention). The average length of detention was just over eight years and the median length of detention was almost four years.
- 3.112 Once a person has moved from a custodial supervision order with increasing leave to a non-custodial supervision order, they may eventually be released from the order and no longer be subject to supervision. Some people will be detained or under supervision for the rest of their lives. The court considers a range of factors in making this decision including the nature of their mental condition, their ability to recover and progress through the system, the extent to which they pose a risk to themselves or other people in the community and reports from victims in the case and the person's family members.

91 *Crimes (Mental Impairment and Unfitness to be Tried Act) 1997* (Vic) s 26(9).

92 Data provided to the Commission by the Department of Human Services.

93 Forensic Leave Panel, above n 87, 11. A 'forensic resident' is a person who is detained by a supervision order in a 'residential treatment facility' or 'residential institution' under the *Disability Act 2006* (Vic).

94 Data provided to the Commission by the Department of Human Services.



# Unfitness to stand trial

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## 4. Unfitness to stand trial

### Introduction

- 4.1 'Unfitness to stand trial' refers to the doctrine which exempts an accused person from a usual trial, sometimes temporarily, because at the time of the trial they cannot understand the trial or participate in it, or are, in other words, 'unfit to stand trial'.<sup>1</sup> Unlike the defence of mental impairment, discussed in Chapter 5, which concerns the accused person's mental condition at the time of the offence, unfitness to stand trial relates to the accused person's mental condition at the time they are involved in court proceedings.
- 4.2 There are a number of justifications for the requirement that an accused person is fit to stand trial:
- *To avoid inaccurate verdicts*—Forcing an accused person to be answerable for their actions where they are incapable of doing so could lead to an inaccurate verdict.<sup>2</sup>
  - *To maintain the 'moral dignity' of the trial process*—Requiring that an accused person is fit to stand trial recognises the importance of maintaining the moral dignity of the trial process. It ensures that the person is able to form a link between their alleged crime and their trial or punishment and be accountable for their actions.<sup>3</sup>
  - *To avoid unfairness*—The final justification often cited for the requirement that an accused person is fit to stand trial is that it would be unfair or inhumane to subject someone who is unfit to the trial process.<sup>4</sup>
- 4.3 This chapter examines the determination of unfitness to stand trial under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)* (CMIA). It briefly explores the historical foundations of the law on unfitness to stand trial and the current law governing the process. The chapter discusses a number of specific aspects of the law on unfitness to stand trial, such as the unfitness to stand trial test and the conduct of special hearings, and seeks to identify whether there are any issues in relation to the way the law operates. The terms of reference specifically ask the Commission to consider whether the process of determining unfitness to stand trial can be improved. This chapter also considers issues relating to the process of determining unfitness to stand trial, including procedural requirements, the role of lawyers and experts, jury involvement, special hearings and the length of the process.
- 4.4 Throughout the chapter, the Commission asks a number of questions about possible changes to the law and what form any changes should take.

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

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

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

4 *R v Cumming* [2006] 2 NZLR 597, 608.

- 4.5 As stated in [4.11] below, under section 7(1) of the CMIA an accused person is presumed to be fit to stand trial. Thus, strictly speaking, the issue if it arises is not an issue of fitness to stand trial but is an issue of unfitness to stand trial. Doubtless for that reason Part 2 of the CMIA is headed 'Unfitness to stand trial', and the pivotal section of Part 2, section 6, lays down the statutory test of unfitness to stand trial. Despite this, Part 2 goes on repeatedly to refer to 'the question of a person's fitness to stand trial'. In order to be conceptually correct, this paper will refer to 'unfitness to stand trial' unless the context requires otherwise (for example, in referring to the law prior to the CMIA and quoting a section of the CMIA which uses the expression 'the question of a person's fitness to stand trial' or decisions of courts which use that expression).

### Unfitness to stand trial prior to the CMIA: 'fitness to plead'

- 4.6 From at least as early as the fourteenth century, the question of whether an accused person was fit to plead was a concern for courts.<sup>5</sup> Medieval court procedure required an accused person to enter a plea of guilty or not guilty to an offence. The inability or refusal to do so would prevent the trial from proceeding.
- 4.7 To circumvent this procedural hurdle, an alternative procedure was devised that required a jury to decide between whether the failure to plead was due to a genuine inability to enter a plea ('mute by visitation of God') or out of choice ('mute by malice'). Those who were found by the jury to be 'mute by visitation of God' would have a plea of not guilty entered on their behalf, based on the assumption that it would have been the plea they would have entered had they been able. Those who were found by the jury to be 'mute by malice', on the other hand, would be subject to the practice of *peine forte et dure* ('strong and hard suffering'). These people were starved and gradually crushed under increasing weights, in an attempt to force them to plead, or until they died.
- 4.8 The law in relation to those who were 'mute by visitation of God' that forms the basis of the modern law on unfitness to stand trial remained unclear until the decisions of *R v Dyson*<sup>6</sup> and *R v Pritchard*<sup>7</sup> in the 1830s. These cases are discussed in more detail at [4.21]–[4.23].
- 4.9 In Victoria, the law on fitness to plead was adopted through the introduction of section 393(1) of the *Crimes Act 1958* (Vic) that provided for the 'strict custody until the Governor's pleasure shall be known' of accused people tried for indictable offences in the Supreme Court or County Court and who were found unfit to plead. Section 393(1) was based on the wording of section 2 of the *Criminal Lunatics Act 1800*, the first statutory provision introduced in Great Britain concerning the process in relation to accused people who may be unfit to plead. Section 393(2) of the *Crimes Act* also provided the court with the option of making any order it thinks fit to enable the accused person to receive appropriate services under mental health legislation, after having regard to any evidence before it relating to the person's mental health or intellectual disability.
- 4.10 The process in relation to unfitness to stand trial was not set out in detail in legislation until the abolition of the Governor's pleasure system and the introduction of the CMIA. The CMIA expanded the expression 'unfitness to plead' to 'unfitness to stand trial' to reflect that an accused person must be fit at any stage of the proceedings. The CMIA did not alter the common law test for unfitness to plead, but made a number of important changes to the process. It gave accused people, who may be unfit to stand trial, the opportunity of becoming fit (during a 12-month adjournment). It also introduced a procedure to have the evidence against them tested (with a special hearing process). Under the Governor's pleasure system, people were neither given the opportunity to become fit nor to have the evidence against them tested.

5 Warren J Brookbanks, 'Fitness to Plead and the Intellectually Disabled Offender' (1994) 1(2) *Psychiatry, Psychology and Law* 171, 172.  
6 (1831) 1 Lewin 62; 168 Eng Rep 960.  
7 (1836) 7 C&P 303; 173 ER 135.

## Unfitness to stand trial under the CMIA

### Law

- 4.11 The CMIA introduced a new process to determine an accused person's unfitness to stand trial and provides for the system in Victoria today. Under the CMIA, an accused person is presumed to be fit to stand trial.<sup>8</sup> This is the case even where an accused person has previously been found unfit to stand trial. The presumption is rebutted if it is established, following an investigation by a jury, that the accused person is unfit to stand trial.<sup>9</sup> Under the CMIA, an accused person is unfit to stand trial for an offence if, because their mental processes are disordered or impaired, they are or, at some time during the trial, will be:
- unable to understand the nature of the charge
  - unable to enter a plea to the charge and to exercise the right to challenge jurors or the jury
  - unable to understand the nature of the trial
  - unable to follow the course of the trial
  - unable to understand the substantial effect of any evidence given against them
  - unable to give instructions to their legal practitioner.<sup>10</sup>
- 4.12 Each of these criteria stands alone. An accused person need only satisfy one of the above criteria to be found unfit to stand trial.

### Process

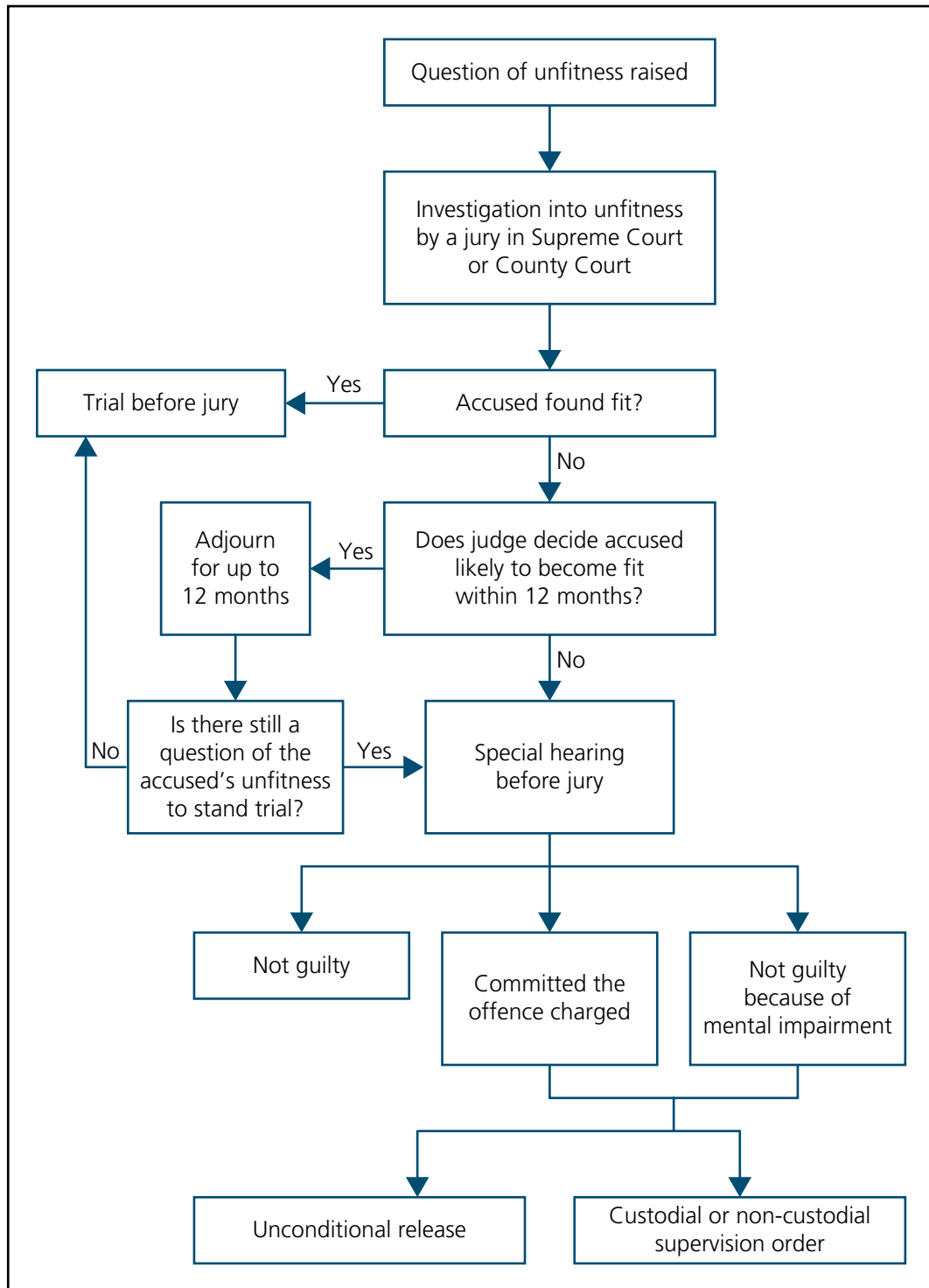
- 4.13 Figure 1 shows the key stages of the unfitness to stand trial process under the CMIA. A question of an accused person's unfitness may be raised at any stage in a court proceeding. If raised, the question of whether a person is unfit to stand trial is a question of fact for determination by a jury on the balance of probabilities in an unfitness investigation in either the Supreme Court or County Court. The jury must make a finding that the accused person is fit or unfit to stand trial for the offence charged.
- 4.14 If a jury finds the accused person unfit to stand trial, the judge must determine whether that person is likely to become fit to stand trial within 12 months.<sup>11</sup> If the judge determines that the accused person is likely to become fit and they do become fit after a period of adjournment, the trial will proceed.<sup>12</sup> If a jury finds that the accused person is unfit, the person has a right to appeal the finding of unfitness to the Court of Appeal.<sup>13</sup> If the judge determines that the accused person is not likely to become fit within 12 months, or remains unfit after the period of adjournment,<sup>14</sup> a special hearing must be conducted before a jury to determine whether the person:
- is not guilty of the offence (a complete acquittal)
  - is not guilty of the offence because of mental impairment, or
  - committed the offence.<sup>15</sup>
- 4.15 A special hearing is conducted as closely as possible to a criminal trial.<sup>16</sup> The accused person found unfit to stand trial is assumed to have pleaded not guilty to the offence.<sup>17</sup>

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8 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)* s 7(1).  
9 *Ibid* ss 7(2), (3).  
10 *Ibid* s 6.  
11 *Ibid* s 11(4).  
12 *Ibid* s 14(4).  
13 *Ibid* s 14A.  
14 *Ibid* ss 12(5), 14(2).  
15 *Ibid* s 17(1).  
16 *Ibid* s 16(1).  
17 *Ibid* s 16(2)(a).

- 4.16 If an accused person is found to have committed the offence at a special hearing, this constitutes a qualified finding of guilt.<sup>18</sup> A qualified finding of guilt does not amount to a conviction. There can be no further prosecution of the person in respect of the same offence and the finding is subject to appeal as if the person had been found guilty in a usual criminal trial.<sup>19</sup>

**Figure 1: Unfitness to stand trial under the CMA in the Supreme Court and County Court**



- 4.17 The person is taken to have been found not guilty at a usual criminal trial and must be released if there is a finding of not guilty at a special hearing.<sup>20</sup>
- 4.18 Where a person is found to be either not guilty because of mental impairment or to have committed the offence, the judge may either unconditionally release the person or order that the person be liable to supervision.<sup>21</sup> An accused person can appeal a finding of not guilty because of mental impairment to the Court of Appeal.<sup>22</sup>
- 4.19 If the judge orders that the person is liable to supervision, the court may make an order that is custodial or non-custodial.<sup>23</sup> Chapter 7 discusses in more detail the process of imposing a supervision order.
- 4.20 The unfitness to stand trial process, at present, only applies in the Supreme Court or County Court. Where the question of unfitness to stand trial is raised in the Magistrates' Court in relation to an indictable offence triable summarily, the matter must be uplifted to a higher court for an investigation of unfitness and if appropriate, a special hearing. In cases involving summary offences, there is no option of uplifting the matter to a higher court to determine the question of unfitness and the case must be discontinued.<sup>24</sup> Chapter 6 discusses this issue in more detail.

## Test for determining unfitness to stand trial

### Origin of the test

- 4.21 The question of whether an accused person was fit to plead was a concern for courts from as early as the fourteenth century. However, it was not until the nineteenth century that the law provided some clarification on the test for fitness to plead.<sup>25</sup> The first significant case on the subject was *R v Dyson*.<sup>26</sup> In 1831, Dyson, a woman who was deaf and mute, was accused of cutting off her child's head. On the issue of Dyson's fitness to plead, Justice Parke directed the jury to consider whether Dyson had 'sufficient reason to understand the nature of this proceeding, so as to be able to conduct her defence with discretion'.<sup>27</sup> Dyson was ultimately found to be 'insane' and was detained under the *Criminal Lunatics Act 1800*.<sup>28</sup>
- 4.22 Following *R v Dyson*,<sup>29</sup> the next significant case on fitness to plead was *R v Pritchard*.<sup>30</sup> Pritchard, a man who was also deaf and mute, was charged with bestiality, that at the time was punishable by death. Baron Alderson, in that case, set out what is now regarded as the legal basis for determining unfitness to stand trial, or the 'Pritchard criteria':<sup>31</sup>
- There are three points to be inquired into:— First, whether the prisoner was mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper defence — to know that he might challenge any of you to whom he may object — and to comprehend the details of the evidence, which in a case of this nature must constitute a minute investigation.<sup>32</sup>
- 4.23 Like Dyson, Pritchard was also ultimately detained under the *Criminal Lunatics Act 1800*.

20 Ibid s 18(1).

21 Ibid ss 18(4), 23.

22 Ibid ss 18(2), 24AA.

23 Ibid s 26(2).

24 Office of Public Prosecutions, Submission No 20 to Law Reform Committee, Parliament of Victoria, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers*, 9 September 2011, 3–4.

25 Brookbanks, above n 5, 173.

26 (1831) 1 Lewin 62; 168 Eng Rep 960.

27 Brookbanks, above n 5, 173.

28 Ibid.

29 (1831) 1 Lewin 62; 168 Eng Rep 960.

30 Brookbanks, above n 5, 173.

31 Ibid.

32 (1836) 7 C&P 303, 304; 173 Eng Rep 135 (1688-1867).

### The test in Victoria: the ‘Presser criteria’

4.24 In Victoria, the test for unfitness to stand trial derives from the judgment of Justice TW Smith in the case of *R v Presser* (Presser).<sup>33</sup> Justice TW Smith expanding on the Pritchard criteria, identified seven criteria (the ‘Presser criteria’), to determine unfitness to stand trial:

- ability to understand the charge
- ability to plead to the charge and to exercise the right to challenge jurors
- ability to understand generally the nature of the proceedings (that it is an inquiry as to whether the accused person did what they are charged with)
- ability to follow the course of the proceedings
- ability to understand the substantial effect of any evidence that may be given against them
- ability to make their defence or answer to the charge, or
- ability to give any necessary instructions to their legal counsel.<sup>34</sup>

4.25 The CMIA incorporates the test for unfitness to stand trial as set out in the decision of Presser.<sup>35</sup> The CMIA provides that an accused person is unfit to stand trial for an offence if, because their mental processes are disordered or impaired, they are or, at some time during the trial, will be:

- unable to understand the nature of the charge
- unable to enter a plea to the charge and to exercise the right to challenge jurors or the jury
- unable to understand the nature of the trial (that it is an inquiry as to whether the accused person committed the offence)
- unable to follow the course of the trial
- unable to understand the substantial effect of any evidence that may be given in support of the prosecution, or
- unable to give instructions to their legal practitioner.<sup>36</sup>

### Issues in relation to the test for determining unfitness to stand trial

4.26 In its preliminary research, the Commission identified a number of possible issues concerning the current operation of the test and criteria for determining unfitness to stand trial. These include:

- whether the test should define the mental condition the accused person must have to be found unfit to stand trial
- whether the test should be based on the decision-making capacity or effective participation of the accused person
- whether the accused person’s rationality should be taken into consideration in some way in the test for unfitness to stand trial
- whether the existing Presser criteria should be changed
- the role of support measures in assessments of unfitness to stand trial
- whether the current Presser criteria are sufficiently clear for experts to assess unfitness to stand trial.

33 *R v Presser* [1958] VR 45.

34 *Ibid* 48.

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

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

- 4.27 These issues prompt an examination of the current test on unfitness to stand trial, particularly the criteria that form the basis of the test. The purpose of this section is to provide an overview of these issues and to ask where the threshold for unfitness to stand trial should be set, what capacities should be implied in reaching this threshold and whether any changes can be made to assist experts in assessing unfitness to stand trial.<sup>37</sup> Consideration of these issues centres on the role of the accused person in the trial process, in particular, whether they should be an active player or a bare participant, or whether their role instead is not a static one but fluctuates according to the nature of the criterion they are required to meet.

### Threshold definition

- 4.28 The CMIA provides that an accused person is unfit to stand trial if ‘because the person’s mental processes are disordered or impaired ...’ the person is unable to satisfy a number of criteria.
- 4.29 One issue that has been raised is whether a threshold definition, or a definition of the mental condition the accused person would have to satisfy to be found unfit to stand trial, should be included as part of the test for determining unfitness to stand trial.
- 4.30 Providing for a threshold definition would require the existence of some sort of mental condition (for example, a mental illness, intellectual disability or cognitive impairment, depending on what form the definition takes) in addition to an inability to satisfy one of the capacity-based criteria in the test to be found unfit to stand trial. A threshold definition may make it easier for juries to understand and apply the test for unfitness to stand trial because it would provide a link between the accused person’s mental condition and the criteria for unfitness to stand trial. However, not all accused people who should be found unfit to stand trial would necessarily have a mental illness, intellectual disability or cognitive impairment. Some accused people may have a physical condition that would affect their mental processes to such an extent that they would be unfit to stand trial. In those cases, including a threshold definition based on mental diagnoses may unduly limit the application of the unfitness to stand trial test.
- 4.31 Further, it would be important to exercise caution if introducing a threshold definition for the unfitness to stand trial test that is similar to the notion of defining ‘mental impairment’ in the mental impairment defence (discussed in Chapter 5). Applying the same definition to unfitness to stand trial as the mental impairment defence could blur the conceptual distinction between the unfitness to stand trial and mental impairment defence doctrines. For example, there may be certain mental conditions that would have an effect on a person’s mental processes to the extent that they would be unfit to stand trial, such as an acquired brain injury. However, the same mental condition may not have the effect required for the mental impairment defence. An accused person who is unfit to stand trial does not necessarily qualify for the mental impairment defence, and vice versa. If a definition was introduced, it would be important to have regard to the different purpose of each doctrine.

### Question

- 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?

## Decision-making capacity or effective participation

4.32 The current test of unfitness to stand trial that focuses on the intellectual ability of the accused person may be problematic for a number of reasons. First, the current criteria are difficult to apply in relation to accused people with a mental illness because these criteria were not designed for them.<sup>38</sup> The criteria developed through experience with accused people who were deaf and mute like Dyson and Pritchard, and by extension accused people with an intellectual disability, but not accused people with a mental illness.<sup>39</sup> However, to compound the confusion, orders were made in relation to these accused people as if they were ‘insane’.<sup>40</sup> Brookbanks observes:

The fitness to plead rules have developed without proper regard for the distinctive characteristics and needs of the people whose very interests they are designed to protect.

As a consequence of this development, subsequent legislation in many jurisdictions also failed to distinguish intellectually disabled from insane offenders .... At the same time legislation has often failed to provide an appropriate range of dispositional options suited to the particular developmental, medical and social needs of the respective groups.<sup>41</sup>

4.33 An accused person with a mental illness, for example, may have no trouble having a factual or an intellectual understanding of their right to challenge a juror, but their delusional beliefs may hinder them from making decisions to exercise that right (or having a ‘decision-making capacity’). On the other hand, an accused person with a cognitive impairment or intellectual disability may have more trouble than an accused person with a mental illness to understand this right. This raises the question of whether the current criteria are suitable for people with a mental illness and whether the threshold for unfitness to stand trial is currently set at the right level for these people.

4.34 There is also a question of whether the test continues to be a ‘suitable modern basis for determining the issue [of unfitness to stand trial]’ and whether it sets too high a threshold for a finding of unfitness to stand trial.<sup>42</sup> In some jurisdictions, debate has focused on whether the test for unfitness to stand trial should be based on the Pritchard or Presser criteria (that rely on the intellectual understanding of the accused person), or something more than this (such as the decision-making capacity or effective participation of the accused person).<sup>43</sup> The test for competency in the United States of America (that is the equivalent of the unfitness to stand trial test) already requires a stricter standard. In that jurisdiction the test requires a ‘sufficient present ability to consult his lawyer with reasonable degree of rational understanding – and whether he has a rational as well as a factual understanding of the proceedings against him’.<sup>44</sup> Although the discussion in other jurisdictions is yet to result in legislative change, this debate signals a potential shift from the current emphasis on passive participation, based on mere factual understanding, to a requirement that the accused person be able to more actively participate in the trial, for example, by making decisions.

4.35 In Victoria, the Presser criteria do not necessarily exclude a consideration of a person’s decision-making capacity. However a clear link has not yet been expressed. Adopting a test where decision-making capacity or effective participation is considered would change the threshold for unfitness to stand trial and would likely result in more people being found unfit to stand trial. Whether Victoria should adopt this formulation depends on whether the threshold for unfitness to stand trial should change, and what capacities should be implied in reaching a new threshold.<sup>45</sup>

38 Ibid 271.

39 Brookbanks, above n 5, 173–4.

40 Ibid.

41 Ibid 174.

42 Law Commission, *Unfitness to Plead*, Consultation Paper No 197 (2012) 27–32.

43 See, eg, Law Commission, *Unfitness to Plead*, Consultation Paper No 197 (2012) 51–67; W J Brookbanks and R D Mackay, ‘Decisional Competence and ‘Best Interests’: Establishing the Threshold for Fitness to Stand Trial’ (2010) 12(2) *Otago Law Review* 265; New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Consultation Paper No 6 (2010) 7–12.

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

45 Brookbanks and Mackay, above n 37, 265.



## Question

- 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?

### Decision-making capacity

- 4.36 The Law Commission of England and Wales has proposed replacing the test based on the Pritchard criteria<sup>46</sup> with a new legal test that assesses whether the accused person has the decision-making capacity for trial. In its view, an accused person cannot participate meaningfully in their trial unless they have the capacity to make decisions relating to the trial that the current test fails to take into account.<sup>47</sup> The Law Commission of England and Wales anticipates that if a person has decision-making capacity, then they would also satisfy the requirements of the current test based on the Pritchard criteria because these criteria set a higher threshold for unfitness to stand trial than a test that is based on decision-making capacity.<sup>48</sup>
- 4.37 The test proposed by the Law Commission of England and Wales would bring the unfitness to stand trial test in line with the civil mental capacity test in the *Mental Capacity Act 2005* (UK). The new test would require an accused person to:
- *Understand the information relevant to the decisions that they will have to make in the course of the trial*—for example, an accused person with an acquired brain injury who has very low cognitive ability and is unable to understand new or unfamiliar information would be unfit to stand trial.<sup>49</sup>
  - *Retain that information*—for example, someone with Attention-Deficit Hyperactivity Disorder (ADHD) who cannot focus and finds it almost impossible to remember any new information given to them would be unfit to stand trial.<sup>50</sup>
  - *Use or weigh that information as part of a decision-making process*—for example, an accused person who suffers from paranoid schizophrenia who has a factual understanding of the charge, but indicates to the court that he wants to plead guilty because he sees no point in pleading not guilty as everyone in court is part of a conspiracy, would be unfit to stand trial.<sup>51</sup>
  - *Communicate their decisions*—for example, an accused person with autism who is able to understand information and process it but does not acknowledge others, may be unfit to stand trial.<sup>52</sup>
- 4.38 The test proposed by the Law Commission of England and Wales therefore relies less on basic competencies (such as the competence to assist counsel) that might equip a person with the ability to communicate with counsel in a rudimentary fashion. The new test relies more on sophisticated competencies (decision-making capacity) that equip an accused person with the ability to understand and retain information and use that information to process alternative courses of action and to express a choice among alternatives.<sup>53</sup> The Law Commission of England and Wales is of the view that bringing the test in line with the civil mental capacity test will remove the discrepancy between the two tests. It will also avoid situations where a person can be found to have the capacity to stand trial but not have the capacity to make more minor civil decisions.<sup>54</sup>

46 Law Commission, above n 42, 62.

47 Ibid 39.

48 Ibid 62.

49 Ibid 55.

50 Ibid.

51 Ibid.

52 Ibid 54.

53 W Brookbanks and J Skipworth, 'Fitness to Plead' in Brookbanks and Simpson (eds) *Psychiatry and the Law* (LexisNexis New Zealand, Wellington, 2007) 157.

54 Law Commission, above n 42, 63–4.

## Question

- 3 Should the test for unfitness to stand trial include a consideration of the accused person's decision-making capacity?

- 4.39 The Law Commission of England and Wales anticipates that a new test based on decision-making capacity would implicitly require that the Pritchard criteria be satisfied as well. It is arguable, however, that an accused person could have decision-making capacity without the basic competencies important for a trial. For example, a person with paranoid delusions could have the ability to use and weigh information as part of a decision-making process (the third criterion in the proposed test by the Law Commission of England and Wales) but might not have the basic competency of instructing their lawyer because of their delusions.<sup>55</sup>
- 4.40 Instead of replacing the Presser criteria with a new test, it may be preferable to supplement the current criteria with an additional requirement that an accused person have the capacity to make decisions to be fit for trial. Alternatively, there could be a two-stage approach. This would involve first an investigation into the basic competencies of the accused person. If they have the basic competencies, the investigation of unfitness then considers their decision-making capacity.<sup>56</sup>

## Question

- 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?

- 4.41 The formulation put forward by the Law Commission of England and Wales may operate too widely. It has the capacity to include accused people who have no recognised mental illness but are unable to use or weigh information as part of a decision-making process, for example, because of stress, overwhelming tiredness or poor education or social background.<sup>57</sup> Howard recommends qualifying the test by requiring that the lack of decision-making capacity must be 'due to mental or physical illness, whether temporary or permanent'.<sup>58</sup> This is similar to the Scottish Law Commission's recommendation that what makes the accused person unfit to stand trial must be a clinically recognised condition.<sup>59</sup> If a threshold definition of the mental condition the accused person would have to satisfy is introduced (discussed at [4.28]–[4.31]), this would also limit the test.

## Question

- 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?

55 Bonnie, above n 3, 293–4.

56 Ibid 303. See also, R Mackay, 'Unfitness to Plead – Some Observations of the Law Commission's Consultation Paper' (2011) 6 *Criminal Law Review* 433.

57 Helen Howard, 'Unfitness to Plead and the Vulnerable Defendant: An Examination of the Law Commission's Proposals for a New Capacity Test' (2011) 75 *Journal of Criminal Law* 194, 201–2.

58 Ibid.

59 Scottish Law Commission, *Discussion Paper on Insanity and Diminished Responsibility*, Discussion Paper No 122 (2003) 49.

## Effective participation

4.42 Scotland, in contrast to England and Wales, has introduced legislation based on an accused person's effective participation. The approach captures 'the notion of full or rational appreciation by the accused of the proceedings'.<sup>60</sup> The New South Wales Law Reform Commission in its consultation paper *People with Cognitive and Mental Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, however, noted a number of weaknesses with this approach including the risk that it would be overly inclusive and require a level of knowledge or competence that would go beyond rational decision making.<sup>61</sup>

### Question

6 If not decision-making capacity, should the test for unfitness to stand trial include a consideration of the accused person's effective participation?

## Rationality

- 4.43 The terms of reference ask the Commission to consider recommendations made by the Victorian Parliament Law Reform Committee in its *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers*. The Law Reform Committee recommended that the Victorian Government consider amending the CMIA to require the court, when considering unfitness to stand trial, to determine:
- the ability of the accused person to understand or respond *rationally* to the charge, or
  - the ability of the accused person to exercise or to give *rational* instructions about the exercise of procedural rights.<sup>62</sup>
- 4.44 The Law Reform Committee noted that the current test in Victoria, that focuses on the ability of the accused person to understand court processes and give instructions to a lawyer, 'sets a low threshold for determining the fitness' of the accused person.
- 4.45 This section considers whether an accused person's rationality should be taken into account in some way in an assessment of unfitness to stand trial. The Commission is interested, in particular, whether:
- the existing Presser criteria for unfitness to stand trial in the CMIA should be qualified by a requirement that an accused person must, where relevant, exercise these rationally (for example, an accused person's inability to give *rational* instructions to their legal practitioner would make them unfit to stand trial)
  - any new test based on a person's decision-making capacity or effective participation should require that capacity or participation to be exercised rationally
  - rationality should be taken into account in determining unfitness to stand trial in some other way.
- 4.46 As discussed earlier, the test in the United States requires the ability to instruct a lawyer with a reasonable degree of rational understanding. In Scotland, the Scottish Law Commission, which formulated its test based on the European Convention of Human Rights, recommended that effective participation should capture the notion of full

60 Scottish Law Commission, *Report on Insanity and Diminished Responsibility*, Report No 195 (2004) 48.

61 New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Consultation Paper No 6 (2010) 10.

62 Law Reform Committee, Parliament of Victoria, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (2013) 231.

or rational appreciation of the proceedings.<sup>63</sup> This recommendation was adopted in section 170 of the *Criminal Justice and Licensing (Scotland) Act 2010* (Scot).<sup>64</sup>

- 4.47 The South Australian test for unfitness to stand trial incorporates the requirement of rationality in each criterion for fitness to stand trial. Section 269H of the *Criminal Law Consolidation Act 1935* (SA) provides that an accused person is not fit to stand trial if they are unable to
- understand, or to respond *rationaly* to, the charge
  - exercise (or to give *rational* instructions about the exercise of) procedural rights, or
  - understand the nature of the proceedings, or to follow the evidence.
- 4.48 The New South Wales Law Reform Commission expressed a preliminary view that the current test for determining unfitness to stand trial, that does not require an accused person's decisions to be rational, is unsatisfactory because it sets too low a standard for a fair trial.<sup>65</sup> The New South Wales Law Reform Commission put forward two options:
- amend relevant criteria to indicate the need for rationality in respect of those criteria, in a similar way to South Australia, or
  - introduce a general legislative requirement that an accused person be able to make rational decisions in relation to their participation in the trial before being considered fit to stand trial.<sup>66</sup>
- 4.49 The Law Commission of England and Wales, on the other hand, did not propose that any new test be qualified with a requirement for rationality in respect of that test. Its proposed test focuses on the 'process of understanding and reasoning as opposed to the content of the decision that is eventually arrived at'.<sup>67</sup> However, the test does not necessarily exclude rationality. It requires a person to have the capacity to engage in a rational thought process but does not require a person to arrive at a rational decision. In this way, the test respects a person's autonomy and their choice to make unwise decisions. The irrationality that would find a person unfit to stand trial would therefore be driven by the mental illness, intellectual disability or cognitive impairment.<sup>68</sup>
- 4.50 In Victoria, the argument that the requirement of rationality is inherent in the Presser criteria remains open, however, the link between them has not been expressly articulated.<sup>69</sup>

## Question

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?

63 Scottish Law Commission, above n 59, 48–9.

64 Section 170 of the *Criminal Justice and Licensing (Scotland) Act 2010* (Scot) inserts a new section 53F into the *Criminal Procedure (Scotland) Act 1995* (Scot).

65 New South Wales Law Reform Commission, above n 61, 9.

66 Ibid.

67 Law Commission, above n 42, 65.

68 Ian Freckelton, 'Rationality and Flexibility in Assessments of Fitness to Stand Trial' (1996) 19(1) *International Journal of Law and Psychiatry* 39, 51.

69 Ibid 45.

## Issues specific to the Presser criteria

- 4.51 The next section discusses a number of potential issues concerning the current Presser criteria and in particular:
- whether the current Presser criteria should be changed
  - whether there should be a distinction made between unfitness to plead and unfitness to stand trial
  - the role of support measures in determining unfitness to stand trial
  - the difficulty in assessing unfitness to stand trial.

## Changing the Presser criteria

- 4.52 The current Presser criteria (set out above at [4.24]) have been criticised for being too general, lacking clarity in terms of what each criterion means and the extent to which each criterion has to be met.<sup>70</sup> As Birgden and Thomson note, the word ‘substantial’ qualifies only one criterion with the remaining criteria not indicating the level of ability that is required.<sup>71</sup>
- 4.53 Further, there may be a need to amend the Presser criteria because they no longer form a suitable basis for the test of unfitness to stand trial. For example, the accused person’s ability to ‘enter a plea to the charge’ and the accused person’s ability to ‘exercise the right to challenge jurors or the jury’ both constitute the second criterion. This means that if an accused person is able to enter a plea but cannot exercise their right to challenge jurors, the accused person may be found unfit to stand trial. The example suggests that the current criteria may not be operating well in practice. Combining the ability to enter a plea to the charge and the ability to challenge jurors in the second criterion may not be appropriate, particularly where the accused person is able to enter a plea to the charge and satisfy the remaining Presser criteria.
- 4.54 Another issue regarding the Presser criteria is whether the test for unfitness to stand trial should more properly reflect the principle of proportionality with regard to the actual proceedings faced by a particular accused person. Including an element of proportionality in a test for unfitness to stand trial is a way of considering the nature of individual proceedings and acknowledging that some proceedings are more difficult than others to follow. This can arise due to the complexities of the elements of the offence, the complexities of the evidence or the length of the trial.
- 4.55 The Law Commission of England and Wales’s preliminary view is that proportionality should not play a part in an assessment of fitness to stand trial, mainly because of the difficulty in predicting the complexity of the trial at the investigation of unfitness to stand trial stage.<sup>72</sup>
- 4.56 In Australia, there is already some recognition of the principle of proportionality in case law. In *R v Gillard*, for example, the court held:
- An accused who is not unfit for the purposes of a trial because there are a limited range of facts and issues, may well be unfit for the purposes of a long, complicated fraud trial. Much will depend upon the individual circumstances.<sup>73</sup>

70 Astrid Birgden and Don Thomson, ‘The Assessment of Fitness to Stand Trial for Defendants with an Intellectual Disability: A Proposed Assessment Procedure Involving Mental Health Professionals and Lawyers’ (1999) 6(2) *Psychiatry, Psychology and Law* 207, 209.

71 *Ibid.*

72 Law Commission, above n 42, 73–7.

73 [2006] SASC 46 (23 February 2006) [50].

- 4.57 However, expressly recognising this principle in legislation may be important. This issue is particularly important in considering the question of whether the unfitness to stand trial process should be extended to the Magistrates' Court where the hearing of a summary offence would be brief, easier to follow and demand a lower level of participation and assistance by the accused.<sup>74</sup> In these circumstances, for example, being able to understand the nature of the charge and to enter a plea without satisfying the remaining Presser criteria may be sufficient for the hearing to be fair.

## Question

- 8 If the unfitness to stand trial test remains the same, are changes required to the Presser criteria?

### Unfitness to plead and unfitness to stand trial

- 4.58 A question may arise as to the appropriateness of including unfitness to enter a plea as a ground for unfitness to stand trial in all cases. Presently, being unable to understand the nature of the charge (section 6(1)(1)(a) of the CMIA) or being unable to enter a plea to the charge (the first part of section 6(1)(b) of the CMIA) is the basis of unfitness to stand trial. There are situations where the accused person is capable of understanding the nature of the charge, is able to enter a plea to the charge and is able to give meaningful instructions to their legal adviser to that effect (as required in section 6(1)(f) of the CMIA), but may not be able to understand the more complex or lengthy elements of the trial process.
- 4.59 Where an accused person in this situation wishes to plead guilty, the CMIA operates to preclude that plea, and requires the person to be subject to the special hearing process, because the CMIA requires capacity to understand the trial process even though in that situation no trial would occur. A question therefore arises as to whether the criteria for determining unfitness should be changed to reflect the difference between capacity to enter a plea to the charge and capacity to understand the full trial process.

## Questions

- 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?
- 10 Do any procedural, ethical or other issues arise in creating this exclusion from the unfitness to stand trial test?

74

Birgden and Thomson, above n 70, 211. In any case, if the current test for fitness to stand trial is maintained, it would likely have to be adapted to apply to the Magistrates' Court (for example, the requirement that an accused person is able to challenge a juror would be inapplicable given that the Magistrates' Court has no jury trials). For a more detailed discussion of the fitness to stand trial process in the Magistrates' Court, see Chapter 6.

## The role of support measures

- 4.60 The current process for determining unfitness to stand trial has been criticised because of the 'possible danger of too readily dismissing the person's capacity to comprehend'.<sup>75</sup> Submissions to the Law Reform Committee indicated that the provision of court support services could provide a mechanism for overcoming barriers that an accused person with an intellectual disability or cognitive impairment may experience when interacting with the courts and may therefore minimise the potential for making findings of unfitness against them.<sup>76</sup>
- 4.61 During its preliminary research, the Commission was made aware that in some cases the level of fitness of accused people, who would otherwise be unfit, may be enhanced if appropriate support was provided to them in court (for example, the support of a social worker or the provision of hearing loops to provide hearing assistance to people with a hearing impairment). The policy of the Department of Human Services is to ensure a person with a disability is accompanied by a person (such as an advocate or social worker) who can support them and explain the court process to them.<sup>77</sup> The Commission's preliminary research indicates that support for accused people in court is generally provided in pre-trial proceedings but not necessarily during the trial.
- 4.62 Another way of providing support measures to increase an accused person's ability to become fit to stand trial could involve providing education to accused people about court processes and then testing their ability to retain that information. This could be particularly beneficial for improving the fitness to stand trial of accused people with intellectual disabilities. The United States, for example, allows accused people with intellectual disabilities to participate in a formal education program that aims to restore their fitness to stand trial.<sup>78</sup>
- 4.63 There are good reasons why the availability of support measures should play a greater role in court processes. For an accused person, this provides them with the opportunity to participate fully in their trial. It also enables a full trial of the accused person where this is fair, which is in the public interest. This was discussed in the Queensland Court of Appeal decision in *R v M*,<sup>79</sup> an appeal from *Re IMM*<sup>80</sup> where the Queensland Mental Health Court found that a person with an intellectual disability was fit to be tried, because the trial court could adapt its procedures sufficiently to accommodate his condition:
- To deny a person like [the accused] a trial would, having regard to both his interest in responding to the charge and possibly having his name cleared (while acknowledging of course that he bears no onus), and the interest of the community in ensuring that criminal charges are properly pursued, be frankly inconsistent with the rule of law, essentially because it would be discriminatory. Contemporary courts are sensitive to the varying needs of those who come before them.<sup>81</sup>
- 4.64 There are a number of ways of increasing the level of support provided to accused people who may be unfit to stand trial. As discussed above at [4.62], in the United States accused people with intellectual disabilities can participate in a formal education program that aims to restore their fitness to stand trial.

75 Victorian Intellectual Disability Review Panel, Submission, 17 December 1992, 8, cited in Freckelton, 'Rationality and Flexibility in Assessments of Fitness to Stand Trial', above n 68, 45.

76 Law Reform Committee, above n 62, 230.

77 Disability Services, *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 Practice Guidelines* (Department of Human Services, 2007) 26.

78 Robert D Miller and Edward J Germain, 'Inpatient Evaluation of Competency to Stand Trial' (1989) 9(3) *Health Law in Canada* 74–8.

79 [2002] QCA 464 (15 November 2002).

80 [2002] QMHC12 (28 June 2002).

81 [2002] QCA 464 (15 November 2002) [15] (de Jersey CJ).

- 4.65 Some jurisdictions have legislative provisions that enable the court to modify its processes to better suit people with an intellectual disability or cognitive impairment. In Queensland, for example, the Mental Health Court may appoint assistants to assist the court in hearings (by providing support to accused people). Assistants may be people who:
- have appropriate communication skills or appropriate cultural or social knowledge or experience
  - have expertise in the aetiology, behaviour and care of people with an intellectual disability.<sup>82</sup>
- 4.66 In England and Wales, the *Youth Justice and Criminal Evidence Act 1999* (UK) provides that on application of the accused person, the court may direct that any examination of the accused person be conducted through an 'intermediary'.<sup>83</sup> The function of an intermediary is to communicate:
- to the accused person, questions put to the accused person
  - to any person asking such questions, the answers given by the accused person in reply to them, and to explain such questions or answers so far as necessary to enable them to be understood by the accused person or the person in question.<sup>84</sup>
- 4.67 Intermediaries also have a role under the Youth Justice and Criminal Evidence Act to assist victims and witnesses with intellectual disabilities or cognitive impairments in giving evidence.<sup>85</sup> The Law Reform Committee recommended recently that the Victorian Government consider establishing a witness intermediary scheme modelled on the scheme in the United Kingdom.
- 4.68 Modifying court processes by providing a support person to assist the accused person may address some of the barriers that an accused person with an intellectual disability or cognitive impairment may experience in court.
- 4.69 Another way of increasing the level of support provided to accused people who may be unfit to stand trial could involve assisting the judiciary in managing proceedings involving accused people with an intellectual disability or cognitive impairment. Research indicates that people with intellectual disabilities are able to engage more with the court process with appropriate supports. For example, they are better able to participate where short sentences are used or a small amount of introductory information is provided when introducing new concepts.<sup>86</sup>
- 4.70 The Law Reform Committee in its *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* recognised the important role the judiciary plays in ensuring that people with an intellectual disability or cognitive impairment participate in the court process.<sup>87</sup> The Law Reform Committee recommended that the Victorian Government support the Judicial College of Victoria to:
- provide more training opportunities for members of the judiciary about best practice management in proceedings involving a person with an intellectual disability or cognitive impairment<sup>88</sup>
  - develop, in consultation with members of the judiciary and the disability sector, guidance material on how the needs of people with an intellectual disability or cognitive impairment can be identified and appropriately met, including with modifications to court proceedings.<sup>89</sup>

82 *Mental Health Act 2000* (Qld) s 410.

83 *Youth Justice and Criminal Evidence Act 1999* (UK) s 33BA(3). This section of the Youth Justice and Criminal Evidence Act is not yet in force.

84 *Ibid* s 33BA(4).

85 *Youth Justice and Criminal Evidence Act 1999* (UK) s 29(2).

86 William R Lindsay 'Adaptations and Developments in Treatment Programs for Offenders with Developmental Disabilities' (2009) 16 *Psychiatry, Psychology and Law* 18, 23.

87 Law Reform Committee, above n 62, 216.

88 *Ibid* 222.

89 *Ibid*.



- 4.71 Finally, the Law Commission of England and Wales is considering submissions on supplementing expert assessments of fitness to stand trial with suggestions from the experts on how the accused person can be assisted during the trial in order to allow it to proceed fairly.<sup>90</sup>

## Questions

- 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?
- 12 What would be the cost implications of any increase in support measures?

- 4.72 The Law Commission of England and Wales expressed the view that ‘special measures’ should play a greater role in the test for unfitness to stand trial.<sup>91</sup> Its view is that in determining whether the accused person has decision-making capacity, consideration should be given to the extent to which special measures could assist the accused person to participate in their trial.<sup>92</sup>

- 4.73 In Australia, there is some opportunity for courts to consider the availability of support measures in an assessment of unfitness to stand trial. In *Ngatayi v The Queen*,<sup>93</sup> for example, the High Court held that whether an accused person is provided with an interpreter or assisted by counsel would be a factor in determining whether someone was able to understand the proceedings. However, it may still be useful to expressly provide for the consideration of support measures in an assessment of unfitness to stand trial to ensure that such measures are considered in every investigation into unfitness and to encourage the use of support measures in individual cases.<sup>94</sup>

## Question

- 13 Should the availability of support measures be taken into consideration when determining unfitness to stand trial?

<sup>90</sup> Law Commission, *Unfitness to Plead*, Analysis of Submissions (2013) 32.

<sup>91</sup> Law Commission, above n 42, 80. The Law Commission of England and Wales uses the term ‘special measures’ to refer to measures that assist vulnerable people to participate in proceedings. This paper uses the term ‘support measures’.

<sup>92</sup> Ibid 86.

<sup>93</sup> (1980) 147 CLR 1, 9.

<sup>94</sup> Law Commission, above n 42, 88.

## Difficulty in assessing unfitness to stand trial

- 4.74 As discussed earlier, another issue concerning the test for determining unfitness to stand trial is the lack of clarity in the Presser criteria. The lack of clarity may be causing problems for expert assessments of unfitness to stand trial. There is evidence that in the United Kingdom clinicians are applying the criteria in an inconsistent manner.<sup>95</sup> Further, an accused person who is assessed for unfitness to stand trial will be somewhere on the fitness continuum.<sup>96</sup> The cut-off point on this continuum, or the point at which it becomes fair that the accused person stands trial, is a 'subjective and difficult empirical judgment' and 'a moral, social and legal question'.<sup>97</sup> Complicating this difficulty is the absence of a clear connection between what experts need to consider when assessing someone who may be unfit to stand trial and the legal test for unfitness to stand trial. The current test requires experts to interpret legal criteria by reference to clinical decision-making models.<sup>98</sup>
- 4.75 If the concerns discussed in this section are indeed problems, it is important that the process for assessing unfitness to stand trial is improved. As Freckelton observes:
- given that determinations have to be made about accused persons' fitness to stand trial and given that those decisions are significantly influenced by expert evidence from psychiatrists and psychologists, it is important to reduce subjectivity and arbitrariness in the assessment process so far as that is possible by the provision of clear guidelines for what constitutes unfitness.<sup>99</sup>
- 4.76 One option would be to reformulate the test so it is easier to apply. The discussion of options earlier in this chapter may assist in the development of a test with criteria that would be easier to apply by experts. However, while the difficulty in assessing unfitness to stand trial may be a reflection of the criteria, it may also be due to other factors, such as the lack of a standardised test.<sup>100</sup>

## Question

- 14 What changes can be made, if any, to enhance the ability of experts to assess an accused person's unfitness to stand trial?

95 N J Blackwood et al, 'Fitness to Plead and Competence to Stand Trial: A Systematic Review of the Constructs and their Application' (2008) 19(4) *Journal of Forensic Psychiatry and Psychology* 576, 586.

96 K C Glass, 'Refining Definitions and Devising Instruments: Two Decades of Assessing Mental Competence' (1997) 20(1) *International Journal of Law and Psychiatry* 5.

97 Birgden and Thomson, above n 70, 211.

98 Lisa Chantler and Karen Heseltine, 'Fitness: What is the Role of Psychometric Assessment?' (2007) 14(2) *Psychiatry, Psychology and Law* 350, 352.

99 Freckelton, 'Rationality and Flexibility in Assessments of Fitness to Stand Trial', above n 68, 54.

100 Law Commission, above n 42, 95–6.

## The process for investigating unfitness to stand trial

- 4.77 If the question of an accused person's unfitness to stand trial arises in a committal proceeding in the Magistrates' Court, the committal proceeding must be completed and if the accused person is committed for trial, the question of unfitness to stand trial must be reserved for the trial judge.<sup>101</sup> If the judge determines that there is a real and substantial question as to the unfitness of the accused person to stand trial, an investigation into the accused person's unfitness is then held before a jury.<sup>102</sup> An investigation also proceeds in this way if the question of the accused person's unfitness to stand trial is raised after the committal or at any time during the trial.<sup>103</sup>
- 4.78 During the investigation into the accused person's unfitness to stand trial, the court will hear any relevant evidence and submissions put to the court by the prosecution or the defence and the judge may also call evidence on their own initiative, including expert evidence.<sup>104</sup> The judge must explain to the jury the reason for the investigation, the findings that may be made (whether the accused person is fit or unfit to stand trial) and that the standard of proof in relation to the fitness of the accused person to stand trial is the balance of probabilities.<sup>105</sup>
- 4.79 As discussed at [4.14], if a jury finds the accused person unfit to stand trial, the matter proceeds to a special hearing before a jury unless the judge determines that the accused person is likely to become fit to stand trial within 12 months and adjourns the matter. A special hearing is also conducted if the accused person remains unfit following the period of adjournment.

## Issues in relation to the process for determining unfitness to stand trial

- 4.80 The terms of reference ask the Commission to consider whether the process of determining unfitness to stand trial can be improved. In its preliminary research, the Commission identified a number of possible issues in relation to the current operation of the process for determining unfitness to stand trial. These issues relate to:
- the requirement to 'plead' in a committal proceeding where the question of unfitness to stand trial is raised
  - the role of lawyers in the process for determining unfitness to stand trial
  - the role of experts in the process for determining unfitness to stand trial
  - jury involvement in all investigations of unfitness to stand trial
  - the availability of a 'consent mental impairment' hearing following a finding of unfitness to stand trial
  - the length of the process.

101 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 8.  
102 *Ibid* ss 8(2), 7(3).  
103 *Ibid* ss 9(1)–(2).  
104 *Ibid* s 11(1).  
105 *Ibid* s 11(3).

## Requirement to ‘plead’ in a committal proceeding

- 4.81 A committal proceeding is a preliminary examination conducted by a magistrate to assess whether there is sufficient evidence to warrant an accused person being tried before a judge and jury for the offence charged.<sup>106</sup> A committal proceeding is conducted when an accused person has been charged with an indictable offence and may be conducted when an accused person is charged with an indictable offence triable summarily.<sup>107</sup>
- 4.82 A committal proceeding has a number of purposes. Its main purpose is to determine whether there is evidence of sufficient weight to support a conviction of the offence charged.<sup>108</sup> This is a means of ‘filtering’ out unwarranted prosecutions and ensuring that there is a good reason for proceeding in the case. A committal proceeding also provides an early opportunity to discharge a person where the prosecution case is inadequate.<sup>109</sup> Another purpose is to encourage the early entry of a guilty plea.<sup>110</sup>
- 4.83 If the question of unfitness to stand trial arises in a committal proceeding, the CMIA provides that the committal proceeding must be completed in accordance with the *Criminal Procedure Act 2009* (Vic).<sup>111</sup> This in turn means that the magistrate must ask the accused person whether they plead guilty or not guilty,<sup>112</sup> in line with one of the purposes of a committal proceeding, to encourage the early entry of a guilty plea.
- 4.84 An accused person who is unfit to stand trial could be, by definition, unable to enter a plea of guilty or not guilty. Despite this, the Criminal Procedure Act does not contain any guidance on how to modify committal proceedings where a question of unfitness to stand trial has been raised.<sup>113</sup>
- 4.85 In its recent *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers*, the Law Reform Committee noted that the lack of a procedure specifically for accused people who may be unfit to stand trial has resulted in magistrates adopting different procedures to commit an accused person to trial where the question of unfitness to stand trial may be in issue.<sup>114</sup> The Law Reform Committee recommended the adoption of a uniform committal procedure when the Magistrates’ Court considers unfitness to stand trial.<sup>115</sup>
- 4.86 Any recommendation made on this issue would depend on any recommendations made in relation to the Magistrates’ Court’s jurisdiction to determine unfitness to stand trial (discussed in more detail in Chapter 6). If the Magistrates’ Court was given the power to determine unfitness to stand trial, the scope of this problem may be more limited.

## Questions

- 15 Is there a need for a uniform procedure in committal proceedings where a question of unfitness to stand trial is raised?
- 16 What procedure should apply where a question of an accused person’s unfitness to stand trial is raised in a committal proceeding?

106 Richard Fox, *Victorian Criminal Procedure: State and Federal Law* (Monash Law Book Co-operative Ltd, 13th ed) (2010) 221–2.  
 107 Ibid.  
 108 *Criminal Procedure Act 2009* (Vic) s 97.  
 109 Fox, above n 106, 222.  
 110 Ibid.  
 111 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 8(1)(a).  
 112 *Criminal Procedure Act 2009* (Vic) s 144(1)(a).  
 113 Law Reform Committee, above n 62, 235.  
 114 Ibid.  
 115 Ibid 236.

## The role of lawyers in the process for determining unfitness to stand trial

- 4.87 The process of determining unfitness to stand trial under the CMIA begins when the question of an accused person's unfitness to stand trial arises. Lawyers, particularly defence lawyers, are often the ones who will raise the question of unfitness to stand trial.
- 4.88 The Commission's preliminary research suggests that lawyers who represent accused people who may be unfit to stand trial often face a number of ethical issues.
- 4.89 One ethical issue that can arise concerns the decision whether to raise the question of unfitness to stand trial on behalf of the client and consequently take the client through the CMIA process. This can be a difficult decision particularly when their client may be unable to provide instructions concerning what path they want to take. Where this is the case, a lawyer may be in a position where they have to make a decision on behalf of the client. In making this decision, a lawyer may feel conflicted between the benefits of the CMIA process for their client (for example, the availability of a special hearing process and the absence of recorded conviction and a sentence of imprisonment) and its potential drawbacks (for example, the indeterminate period of supervision).
- 4.90 The Law Reform Committee observed:
- The primary challenge experienced by lawyers when working with clients with an intellectual disability or cognitive impairment is that clients often lack the ability to provide effective and adequate instructions. Conversely, a lawyer may lack experience working with people with intellectual disabilities or cognitive impairments, and may not communicate effectively with the client.<sup>116</sup>
- 4.91 Another ethical issue that may arise quite frequently involves the difficulty experienced by lawyers in obtaining instructions from clients on how to proceed in a special hearing after they have been found unfit to stand trial. For example, the client may be unable to instruct their lawyer on whether they want to raise any defences to the charge, such as the mental impairment defence, which raises questions about the obligations of lawyers in these circumstances.

### Questions

- 17 What ethical issues do lawyers face in the process for determining unfitness to stand trial?
- 18 What is the best way of addressing these ethical issues from a legislative or policy perspective?

## The role of experts in the process for determining unfitness to stand trial

- 4.92 Expert reports play an important role in the process for determining unfitness to stand trial. The prosecution or the defence may request expert assessments of the accused person's unfitness on their own initiative.
- 4.93 In addition, the CMIA provides that the court may order expert assessments after the question of unfitness to stand trial has been raised but pending the investigation into unfitness to stand trial by the jury,<sup>117</sup> and also when the investigation into unfitness to stand trial is conducted.<sup>118</sup> If the Director of Public Prosecutions wishes to abridge the period of adjournment ordered by the court (where the judge has determined that the accused person is likely to become fit to stand trial following the adjournment), the Director of Public Prosecution's application must also be supported by an expert report.<sup>119</sup>
- 4.94 In matters prosecuted by the Office of Public Prosecutions, they will usually request that the Victorian Institute of Forensic Mental Health (Forensicare) prepare a report. The assessment is conducted and the report is normally prepared by either a forensic psychiatrist or forensic psychologist employed by Forensicare. In some cases, where the accused person has an intellectual disability or cognitive impairment, such as an acquired brain injury, a neuropsychologist may be required to conduct the assessment. Private practitioners commonly provide assessments and reports for the defence. This could include psychiatrists, psychologists or other professionals, in the forensic and non-forensic areas of practice.
- 4.95 In its most recent annual report for 2011–12, Forensicare noted 'the strong demand from Courts for psychiatric and psychological reports' and that requests from the Office of Public Prosecutions on issues of unfitness to stand trial or the mental impairment defence 'continued to take considerable time and effort'.<sup>120</sup> In 2011–12, Forensicare prepared 40 reports for the Office of Public Prosecutions which was 10 fewer than the previous financial year due to the 'difficulty that Forensicare has in allocating clinical resources to this work'.<sup>121</sup> As at 1 July 2012, these reports are now funded by the Department of Justice.<sup>122</sup>
- 4.96 At present, the Commission has little information on the issues that may arise in relation to the provision of expert reports to the court and the role of experts in the process for determining unfitness to stand trial. Potential issues may arise in relation to the qualifications of experts, the quality and utility of expert reports and the number of experts relied on in assessments of unfitness to stand trial. The Commission is interested in gathering information about these potential issues and other issues that may exist in this area.

### Question

- 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?

117 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 10(1)(d).

118 *Ibid* s 11(1).

119 *Ibid* s 13(2).

120 Victorian Institute of Forensic Mental Health, *Report of Operations 2011–2012* (2012) 32.

121 *Ibid*.

122 *Ibid*.

## Jury involvement in all investigations of unfitness to stand trial

- 4.97 Currently under the CMIA, a jury determines the question of unfitness to stand trial in an investigation presided over by a judge.<sup>123</sup>
- 4.98 The Commission's preliminary research suggests that there is a need to examine the role of the jury in the unfitness to stand trial process. A key issue is whether it is necessary to have a jury determine the question of unfitness to stand trial in particular circumstances, such as where the prosecution and defence are in agreement that an accused person is unfit to stand trial, or in all cases. In cases where the prosecution and the defence agree on the unfitness of an accused person (based on expert reports), the question of whether an accused person is unfit to stand trial is not in issue. A jury is nonetheless empanelled and must hear the evidence that establishes that the accused person is unfit to stand trial. The jury is still required to consider and make a formal finding of fitness or unfitness. The process is said to leave jurors feeling confused about their role in the process, take up the time of the jurors and the court and deplete the jury pool without justification.
- 4.99 The Law Reform Committee recommended that the Victorian Government consider amending the CMIA to allow the trial judge to investigate an accused person's fitness to stand trial, without a need for a jury, where the prosecution and defence agree.<sup>124</sup> The Law Reform Committee observed that the requirement to conduct fitness investigations before a jury may place an unnecessary burden on the community and could exacerbate the stress and anxiety that accused people with intellectual disabilities or cognitive impairments ordinarily experience when in court. It outlined the main arguments for removing the requirement that the investigation into an accused person's unfitness to stand trial be conducted before a jury:
- fitness investigations primarily involve technical matters that are more suitable to be heard by a judge alone
  - a fitness hearing is not designed to be adversarial—no decisions are made about the person's criminal responsibility
  - a judge hearing evidence alone may be quicker, less formal and less confusing or stressful for a person with an intellectual disability or cognitive impairment.<sup>125</sup>
- 4.100 The Commission does not currently have data on the findings that juries make in investigations into unfitness to stand trial in cases where the prosecution and defence agree that the accused person is unfit.
- 4.101 In Australia, courts in Tasmania and the Northern Territory have the power to dispense with an investigation into unfitness to stand trial and record that the accused person is unfit for trial if both the prosecution and defence agree.<sup>126</sup>

123 *Crimes (Mental Impairment and Unfitness to be Tried) Act* (Vic) s 8(2).

124 Law Reform Committee, above n 62, 228.

125 *Ibid* 227.

126 *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 19; *Criminal Code Act 1983* (NT) s 43T(1).

4.102 More broadly, some have questioned the need for a jury at all in the investigation of unfitness to stand trial, even where the prosecution and the defence do not agree. In England and Wales, the requirement that a jury decide whether a person is fit to stand trial was based on the *Criminal Lunatics Act 1800*. In recent decades, however, a number of recommendations were made that the trial judge be able to determine the issue. The Butler Committee in its *Report of the Committee on Mentally Abnormal Offenders* said:

It is arguable that the jury are not a suitable body to decide a medico-legal issue and that the judge is better able to form a view on the basis of the medical reports, if necessary in the absence of the defendant. ... The involvement of the jury in the process of determining [unfitness to stand trial] is a historical survival from the days when prisoners were subjected to "peine forte et dure"... Insofar as the question is whether the trial should proceed, juries are not normally involved in a decision of this sort. ... A decision of the issue by the judge would be more expeditious than trial by jury, and this is of some importance where the decision has to be made in the middle of the trial.<sup>127</sup>

4.103 Similarly the Auld Report, in its *Review of the Criminal Courts of England and Wales* observed:

In the majority of cases the jury's role on the issue of unfitness to plead is little more than a formality because there is usually no dispute between the prosecution and the defence that the defendant is unfit to plead. However, the procedure is still cumbersome, especially when the issue is raised, as it mostly is, on the arraignment, because it can then require the empanelling of two juries. More importantly it is difficult to see what a jury can bring to the determination of the issue that a judge cannot. He decides similar questions determinative of whether there should be a trial, for example, whether a defendant is physically or mentally fit to stand or continue trial in applications to stay the prosecution or for discharge of the defendant (citation omitted).<sup>128</sup>

4.104 England and Wales has since dispensed with the requirement for a jury in determinations of fitness to stand trial. In 2004, the *Criminal Procedure (Insanity) Act 1964* (UK) was amended so that section 4(5) now states that the court determines the question of fitness to be tried, without a jury.

4.105 In Australian jurisdictions, other than the Northern Territory and Tasmania, the trial judge or a specialist division of the court determines the question of unfitness to stand trial.<sup>129</sup> In South Australia this process can be dispensed with if the prosecution and the defence agree.<sup>130</sup>

4.106 The Community Development Committee, whose report formed the basis of the CMIA, was of the view that the function of a judge is to determine questions of law and juries determine questions of fact.<sup>131</sup> This is likely the reason the CMIA prescribed an investigation process involving a jury. Further, a finding that an accused person is unfit to stand trial has serious consequences and may lead to a lengthy period of detention if they are ultimately subject to a supervision order.

4.107 In cases where the prosecution and defence do not agree, the retention of the jury may provide an added layer of scrutiny in a process. Such scrutiny could be warranted especially because the CMIA may allow the defence of mental impairment to be resolved by consent between the prosecution and the defence in place of a special hearing (see discussion at [4.110]). This could provide a justification for retaining the jury requirement in cases where there is no agreement between the parties. Further, it is questionable whether there can ever be 'agreement' or 'consent' between the parties when the accused person is unable to instruct the defence.

127 Home Office and Department of Health and Social Security, *Report of the Committee on Mentally Abnormal Offenders*, Cmnd 6244 (1975) [10.22] ('Butler Report').

128 Lord Justice Auld, *Review of the Criminal Courts of England and Wales: A Report* (Stationery Office, 2001) [213].

129 See *Mental Health (Forensic Provisions) Act 1990* (NSW) s 11; *Mental Health Act 2000* (Qld) s 270; *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 12; *Criminal Law Consolidation Act 1935* (SA) ss 269M, 269N.

130 *Criminal Law Consolidation Act 1935* (SA) ss 269M(a)(5), 269N(B)(5).

131 Community Development Committee, Parliament of Victoria, *Inquiry into Persons Detained at the Governor's Pleasure* (1995) 176.



- 4.108 Other jurisdictions have built safeguards into the process that could protect it from the potential of abuse. The *Criminal Procedure (Insanity) Act 1964* (UK), for example, requires the agreement of two registered medical practitioners to establish a finding of unfitness.
- 4.109 Another safeguard could involve a process where the judge may independently assess whether the evidence establishes unfitness to stand trial, if the prosecution and defence agree that the accused person is unfit. Under the CMIA, there is a similar process in establishing the defence of mental impairment by consent.<sup>132</sup>

## Question

- 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?

## A 'consent mental impairment' hearing following a finding of unfitness to stand trial

- 4.110 In relation to the defence of mental impairment, if the prosecution and defence agree that the evidence establishes the defence, the trial judge may hear the evidence and, if satisfied that the evidence establishes the defence, may direct the recording of a verdict of not guilty because of mental impairment.<sup>133</sup> This is often referred to as a 'consent mental impairment' hearing, a procedure introduced several years after the introduction of the CMIA by the Crimes (Homicide) Bill 2005 (Vic) after the Commission's recommendation as part of its *Defences to Homicide* reference.
- 4.111 Although the finding of not guilty because of mental impairment is available at special hearings to people found unfit to stand trial, there is ambiguity on whether a court can hold a consent mental impairment hearing after a finding of unfitness to stand trial.
- 4.112 There are a number of provisions in the CMIA which suggest that a court cannot proceed with a consent mental impairment hearing following a finding of unfitness to stand trial. Section 12(5) of the CMIA, for example, continues to provide that if the jury finds the accused person unfit to stand trial and the judge determines that the accused person is unlikely to become fit within 12 months, the court must proceed to hold a special hearing.<sup>134</sup> Section 21(4) in Part 4 of the CMIA provides that a 'trial judge' conducts the consent mental impairment hearing—the rest of Part 4 of the CMIA that deals with the defence of mental impairment also uses the term 'trial judge' throughout. However, the term is not used at all in Part 3 of the CMIA that deals with special hearings. The second reading speech of the Crimes (Homicide) Bill 2005 that introduced consent mental impairment hearings also makes no mention of special hearings and seems to contemplate that the consent mental impairment hearing applies in place of a trial. Finally, another justification for not allowing for a consent mental impairment hearing in place of a special hearing is to recognise that the accused person has been found unfit to stand trial and may not be capable of instructing their lawyer to consent to the matter being determined by a judge rather than a jury.

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133  
134

*Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 21(4).  
Ibid.  
Ibid s 12(5).

- 4.113 In *DPP v CJC (CJC)*,<sup>135</sup> Justice Osborn rejected a number of the arguments outlined above and found that a consent mental impairment hearing may be held after a finding of unfitness to stand trial instead of a special hearing. His Honour provided a number of reasons for this including:
- A consent mental impairment hearing would achieve the purpose of a special hearing (that is, to determine whether the accused person is not guilty because of mental impairment) and the requirement that a special hearing is conducted as close as possible to a criminal trial.<sup>136</sup>
  - Part 3 of the CMIA on unfitness to stand trial must be read together with Part 4 of the CMIA on the mental impairment defence. For example, the purpose of a special hearing to determine whether the accused person is 'not guilty of the offence because of mental impairment' in Part 3 can only be given content by reference to section 20 of the CMIA in Part 4 that sets out the test for the mental impairment defence. This implies that the consent mental impairment hearing process would apply to people found unfit to stand trial.<sup>137</sup>
- 4.114 More recently, in *DPP v Watson*,<sup>138</sup> Justice Bell found that a consent mental impairment hearing was not available following a finding of unfitness to stand trial. The reasoning for this decision against allowing a consent mental impairment hearing was based on the accused person's inability to give instructions to counsel to agree to the hearing.<sup>139</sup> His Honour said:
- it is a very serious thing to conclude that counsel can exercise decision-making capacity on behalf of an accused without instructions, especially where the consequence would be that the accused would thereby lose the opportunity to test the prosecution case and obtain an acquittal. As I saw it, such an interpretation had to be unmistakably clear by express words or necessary implication. The terms of [section 21(4) on consent mental impairment hearings] did not seem to me to be unmistakably clear.<sup>140</sup>
- 4.115 There may be good reasons to allow a 'consent mental impairment' hearing following a finding of unfitness to stand trial. In *CJC*, for example, the accused person and his mother were visibly distressed during court hearings, which may have made it more humane not to force them to take part in a special hearing before a jury. Justice Osborn said, 'these proceedings should be no more of a public spectacle of suffering than is necessary'.<sup>141</sup> Further, it can save time and resources to dispense with the process when appropriate where there is undisputed evidence that the accused person is not guilty because of mental impairment. However, the counter argument that an accused person who is unfit to stand trial is unable to give instructions and therefore should not be subject to a 'consent' mental impairment procedure is a compelling one, particularly because lawyers owe a duty to their clients to act in accordance with the client's instructions. The availability of such a procedure may also have implications on the right of the accused person to recognition and equality before the law and their right to a fair hearing of criminal proceedings.<sup>142</sup>
- 4.116 In any case, the different decisions by the court in relation to this issue outlined above may warrant an amendment to the CMIA to clarify any ambiguity in this area.

## Question

- 21 Should a 'consent mental impairment' hearing be available following a finding of unfitness to stand trial?

135 [2008] VSC 585 (18 December 2008).

136 Ibid [6], [12].

137 Ibid [19].

138 [2013] VSC 245 (7 May 2013).

139 Ibid [3].

140 Ibid [9].

141 [2008] VSC 585 (18 December 2008) [35].

142 *DPP v Watson* [2013] VSC 245 (7 May 2013) [11]; *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 8, 24–5.

## The length of the process

- 4.117 The unfitness to stand trial process is potentially lengthy for a number of reasons:
- it involves empanelling two juries—one to determine whether the accused person is unfit to stand trial and a second to determine whether the accused person committed the offence if they are found unfit to stand trial, and
  - it can involve a 12 month adjournment, following a finding of unfitness to stand trial by the jury, if the judge determines that the accused person is likely to become fit within 12 months.
- 4.118 If the question of the accused person's unfitness to stand trial arises again on the day of the trial it may extend the process further. The question of the accused person's unfitness to stand trial could also be raised for the first time on the day of the trial. It is not entirely clear whether there is a consistent way in which judges address situations where this happens. However, the CMIA provides that if there is a real and substantial question as to the fitness of the accused person to stand trial at any time during a trial, the judge must adjourn or discontinue the trial and proceed with an investigation into the accused person's fitness to stand trial by a jury.<sup>143</sup>
- 4.119 The length of the process can be difficult for both victims and accused people who may be unfit to stand trial. For victims, it involves waiting for a lengthy period before reaching some resolution. For accused people who may be unfit to stand trial, delays may affect their ability to participate in proceedings. People with a mental illness, cognitive impairment or intellectual disability often have difficulty with memory, especially with storing information in their memory and recalling the details or information.<sup>144</sup> It is therefore preferable that any process is as expeditious as it can be, where appropriate.

### Question

- 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?

- 4.120 If judges and magistrates are given the jurisdiction to determine unfitness to stand trial, the reduction in time spent to empanel two juries could have an effect on the length of the unfitness to stand trial process. It is also worth considering whether there are other ways of expediting the unfitness to stand trial process.

### Question

- 23 Would removing the jury's involvement in investigations of unfitness to stand trial be likely to expedite the process?

- 4.121 The Law Reform Committee recently recommended that the Victorian Government investigate procedures adopted in the United Kingdom for determining unfitness to stand trial, with a view to examining whether these procedures could provide for opportunities to resolve determinations of unfitness to stand trial in Victoria more expeditiously.<sup>145</sup> The Law Reform Committee cited, as an example, a procedure in England and Wales where courts may defer the question of fitness to stand trial and proceed to examine an accused person's criminal responsibility first, up to the opening case for the defence. The examination of fitness to stand trial in this alternative procedure is only necessary if after the examination of criminal responsibility the accused person is not acquitted. The court may adopt this procedure if it is 'of opinion that it is expedient to do so and in the interests of the accused' having regard to the nature of the supposed disability.<sup>146</sup>
- 4.122 The opportunity to dispense with one stage of the process may provide for a less lengthy procedure and the possibility of an early acquittal.<sup>147</sup> However, the New South Wales Law Reform Commission has noted two weaknesses with the process in England and Wales:
- When determining criminal responsibility, the consideration of the mental elements of the offence are excluded and the question for the jury is limited to whether or not the accused person did the act or omission charged.
  - The examination of criminal responsibility can only proceed up to the opening case for the defence, even though there is evidence that may not be called by the prosecution that may be capable of exonerating the accused.<sup>148</sup>
- 4.123 These two issues could be addressed by:
- allowing the mental element to be considered when criminal responsibility is determined
  - providing for an opportunity for the defence case to be taken into account when criminal responsibility is determined.
- 4.124 The New South Wales Law Reform Commission noted that in Canada the court has a discretion to direct that the defence case be taken into account when criminal responsibility is determined. Determination of the issue of fitness to stand trial may be deferred 'until a time not later than the opening of the case for the defence or, on motion of the accused person, any later time that the court may direct'.<sup>149</sup>
- 4.125 Deferring the unfitness to stand trial investigation to follow an examination of the accused person's criminal responsibility may be more efficient and ultimately lead to the same outcome for that person. However, the benefits of this approach may come at the cost of subjecting an accused person to a trial where they may be unfit to stand trial.

## Questions

- 24 How frequent is it for an accused person to be acquitted at a special hearing, following a finding of unfitness?
- 25 What procedures could be implemented to expedite the unfitness to stand trial process?

145 Law Reform Committee, above n 62, 240.  
 146 *Criminal Procedure (Insanity) Act 1964* (UK) s 4(2).  
 147 New South Wales Law Reform Commission, above n 61, 38.  
 148 *Ibid* 38–9.  
 149 *Criminal Code*, RSC 1985 s 672.25(2)(b).

## Special hearings to determine criminal responsibility

- 4.126 A special hearing is a means of determining the criminal responsibility of a person who has been found unfit to stand trial. Its purpose is to determine whether on the evidence available the person who has been found unfit to stand trial is not guilty, not guilty because of mental impairment or committed the offence.<sup>150</sup>
- 4.127 A special hearing is conducted as closely as possible to a criminal trial.<sup>151</sup> The accused person found unfit to stand trial is taken to have pleaded not guilty to the offence.<sup>152</sup> Unlike a criminal trial, the accused person is not expected to participate in the hearing.<sup>153</sup> Instead their interests are represented by their legal representative as far as this is possible.<sup>154</sup>
- 4.128 The Commission has identified a number of possible issues in relation to special hearings that are primarily based on the findings available in special hearings. These include:
- the suitability of findings in special hearings, and
  - the directions to the jury on the findings in special hearings.

### Suitability of findings in special hearings

- 4.129 Following a special hearing, the jury can find that the accused person ‘committed the offence charged or an offence available as an alternative’, that is characterised as a ‘qualified finding of guilt’.<sup>155</sup>
- 4.130 The New South Wales Law Reform Commission observed that the qualified finding of guilt may cause the perception that the accused person has been found guilty of an offence, even though there has not been a usual trial of the evidence, that would enable a full investigation of the facts.<sup>156</sup> Further, that same perception could lead to a misunderstanding that the accused person has been found guilty and yet ‘escapes’ criminal sanctions. A finding that more accurately labels the outcome of a special hearing may be preferable to clarify the outcome of a special hearing.
- 4.131 The qualified finding of guilt in Victoria contrasts with the equivalent finding available in Tasmania. Tasmania provides for a finding that ‘a finding cannot be made that the defendant is not guilty of the offence charged’.<sup>157</sup> It also contrasts with the equivalent finding recommended by the Community Development Committee, whose report formed the basis of the CMIA, that ‘on the limited evidence available, a finding cannot be made that the person is not guilty of the offence or any offence available as an alternative’.<sup>158</sup> Recently, the New South Wales Law Reform Commission suggested a finding that ‘the accused person was unfit to be tried and was not acquitted’ of the offence charged.<sup>159</sup>

## Question

- 26 Should changes be made to the findings available in special hearings?

150 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)* s 15.  
151 *Ibid* s 16(1).  
152 *Ibid* s 16(2)(a).  
153 Law Commission, above n 42, 23.  
154 *Ibid*.  
155 *Crimes (Mental Impairment and Unfitness to be Tried) Act (Vic)* ss 17(1)(c), 18(3).  
156 New South Wales Law Reform Commission, above n 61, 42.  
157 *Criminal Justice (Mental Impairment) Act 1999 (Tas)* s 17.  
158 Community Development Committee, above n 131, 183.  
159 New South Wales Law Reform Commission, above n 61, 42.

## Directions to the jury on findings in special hearings

- 4.132 At the commencement of a special hearing, the judge must explain to the jury:
- that the accused person is unfit to stand trial
  - the meaning of being unfit to stand trial
  - the purpose of a special hearing
  - the findings that are available
  - the standard of proof required for those findings.<sup>160</sup>
- 4.133 As discussed earlier, section 17(1) of the CMIA provides that the following findings are available to the jury at a special hearing: not guilty, not guilty of the offence because of mental impairment and committed the offence charged. Recently, there has been some confusion on the extent of the trial judge's obligation to direct the jury on the findings available in special hearings, particularly whether the judge must explain all three possible findings.
- 4.134 In *R v Langley* (Langley),<sup>161</sup> the trial judge only explained two findings to the jury that were open on the evidence. The trial judge did not tell the jury that they could find the defendant not guilty because of mental impairment. The Court of Appeal held that the trial judge should have explained all three findings to the jury. It said that whether or not the defendant was suffering from a mental impairment was clearly a question of fact for the jury to determine.<sup>162</sup> This was despite the fact that at the special hearing there had been no positive or direct evidence that the defendant had a mental impairment at the time of the offence. It means that even where there is no evidence in relation to the finding, or when the defendant wishes that the finding not be left to the jury, all findings must still be put to the jury.<sup>163</sup>
- 4.135 The approach taken in *Langley* is potentially inconsistent with the approach taken by the High Court when considering a very similar issue. In *Subramaniam v The Queen*,<sup>164</sup> the High Court considered section 21(4) of the *Mental Health (Criminal Procedure) Act 1990* (NSW) that sets out what the trial judge should explain to the jury, including 'the verdicts which are available'. The High Court stated that the trial judge must direct the jury on the verdicts that are 'relevantly available ... in this case not guilty of the offence(s) charged, or, that on the limited evidence available, the accused committed the offences charged'.<sup>165</sup> The High Court did not say that the trial judge should have directed the jury on the remaining two findings, ('not guilty on the ground of mental illness' or 'on the limited evidence available, the accused person committed an offence available as an alternative to the offence charged').
- 4.136 The approach taken in *Langley* may also be inconsistent with the recent change that has taken place in relation to jury directions, driven by the introduction of the *Jury Directions Act 2013* (Vic). Among the aims of the Jury Directions Act is to reduce the complexity of jury directions in criminal trials and to assist the trial judge to give jury directions in a manner that is as clear, brief, simple and comprehensible as possible.<sup>166</sup> The intention of the legislation is that in giving directions in criminal trials, trial judges should give directions on only so much of the law as the jury needs to know to determine the issues in the trial.<sup>167</sup> This could exclude matters not raised in evidence, such as the additional verdict in *Langley*. However, the procedure specified by the Jury Directions Act does not apply to directions given by trial judges under other legislation and would therefore not apply to the provisions of the CMIA.<sup>168</sup> Further amendment to the Jury Directions Act could affect these provisions.

160 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 16(3).

161 [2008] VSCA 81 (21 May 2008).

162 *Ibid* [38].

163 Ian Freckelton, 'Mandatory Procedures and Fairness in Mental Impairment Hearings' (2009) 16 (2) *Psychiatry, Psychology and Law* 191, 195.

164 [2004] HCA 51 (10 November 2004).

165 *Ibid* [37].

166 *Jury Directions Act 2013* (Vic) s 1.

167 *Ibid* s 5(4).

168 *Ibid* s 9.

## Question

- 27 What is the most appropriate way of directing the jury on the findings in special hearings?

## Appeals against findings of unfitness to stand trial and findings at special hearings

### Current law under the CMIA

- 4.137 If a jury makes a finding of unfitness, the accused person has a right to appeal the finding of unfitness to the Court of Appeal.<sup>169</sup> Following a special hearing, a finding that the accused person committed the offence is subject to appeal in the same manner as if they had been convicted of an offence.<sup>170</sup> A finding that the accused person is not guilty because of mental impairment can also be appealed to the Court of Appeal.<sup>171</sup> For a discussion of appeals in relation to a not guilty because of mental impairment verdict, see Chapter 5.

### Principles underpinning appeals

- 4.138 Appeals provide the opportunity for a higher court to reconsider a decision of the lower court.<sup>172</sup> The opportunity to reconsider a decision of the lower court has a number of functions:
- *To protect against miscarriages of justice*—by avoiding wrongful convictions and providing a forum where any concerns on the fairness of the trial can be addressed.
  - *To maintain consistency between trial courts*—this is achieved by correcting inconsistent applications of the law and providing clarification and guidance on how the law should be applied.
  - *To provide legitimacy to the criminal justice system*—appeals maintain public confidence in the criminal justice system by avoiding miscarriages of justice and holding judges accountable for their decisions.<sup>173</sup>
- 4.139 The opportunity to appeal in this area is particularly important given the vulnerability of accused people who are found unfit to stand trial and the serious consequences of being found unfit to stand trial (and a subsequent finding that the person committed the offence charged). This includes the indefinite duration of supervision orders and the rigorous conditions to which the person is subject.
- 4.140 Despite this, appeals in this area seem to be infrequent. Eagle and Adams, when examining the frequency of appeals in New South Wales, found that there were also very few appeals in Victoria.<sup>174</sup> Eagle and Adams note that there appears to have only been one appeal of an unfitness finding since the introduction of the CMIA.<sup>175</sup> They observe that avenues for appeal appear to be very limited in this area<sup>176</sup> and argue that given the vulnerability of these people, rights to appeal should be more readily available.<sup>177</sup>

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

170 *Ibid* s 18(3).

171 *Ibid* ss 18(2), 24AA.

172 Peter D Marshall, 'A Comparative Analysis of the Right to Appeal' (2011) 22 *Duke Journal of Comparative & International Law* 1.

173 *Ibid* 3–4.

174 Kerri Eagle and Jonathon Adams, 'Appealing a Mental Illness Verdict in New South Wales' (2013) *Psychiatry, Psychology and the Law* 1, 10.

175 *Ibid* 11; *The Queen v NCT* [2009] VSCA 240 (23 October 2009) [6],[7].

176 Eagle and Adams, above n 174, 1.

177 *Ibid* 9.

- 4.141 It is unclear why appeals are so infrequently pursued and whether they should be pursued more often. The infrequency of appeals could suggest that court processes and the safeguards in place are operating to produce appropriate outcomes. It could also reflect that in a high proportion of these cases the parties agree with the conduct and outcome of the case (for example, they agree on the accused person's unfitness to stand trial) and therefore perceive no grounds of appeal. It could, however, also be that people who are unfit to stand trial are less likely to understand their rights or have the capacity to instruct their lawyer to pursue avenues of appeal, or perhaps their lawyers do not pursue the matter on their behalf because of a perception that it will be unsuccessful.

### Question

- 28 Are there any barriers to accused people pursuing appeals in relation to unfitness to stand trial and findings in special hearings?





# Defence of mental impairment

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## 5. Defence of mental impairment

### Introduction

- 5.1 This chapter examines the defence of mental impairment under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)* (CMIA). It briefly explores the history of the defence prior to the CMIA—the ‘insanity’ defence. It sets out the current law and procedure for the defence of mental impairment under the CMIA. It raises the issues regarding the mental impairment defence that have been specified in the terms of reference and seeks to identify whether there are any issues in relation to the way the law operates.
- 5.2 Throughout the chapter, the Commission asks a number of questions about possible changes to the law and if so, what changes to recommend.
- 5.3 The terms of reference ask the Commission to consider a number of particular issues with regard to the mental impairment defence. These are, whether:
- the CMIA should define ‘mental impairment’ and if so, how it should be defined, and
  - legislative clarification is required on how the law should provide for the jury to approach the elements of an offence, and any defences or exceptions when the defence of mental impairment is in issue.
- 5.4 The issue, also specified in the terms of reference, of whether there should be expansion of the orders available in the Magistrates’ Court after a finding of not guilty because of mental impairment is discussed in Chapter 6.
- 5.5 For an accused person to be criminally responsible for committing an offence, it must be demonstrated that the person committed both the physical and mental elements of that offence. Criminal responsibility requires ‘both a criminal act, and a criminal or guilty mind accompanying that act’.<sup>1</sup> For example, for a person to be found guilty of the offence of murder, it must be proven that the person:
- engaged in conduct that caused the death of another person, such as firing a gun (the physical element or *actus reus*), and
  - intended to kill that person or cause serious injury or knew that their conduct was likely to cause the death of that person (the mental element or *mens rea*).

- 5.6 The term *mens rea* encompasses two aspects relating to an accused person's mental state. One aspect is a technical issue regarding 'the fault elements associated with a particular offence, that is, the particular *mental* ingredients which the prosecution must prove to secure a conviction for a particular offence'.<sup>2</sup> The most common fault elements are intention, knowledge and recklessness.
- 5.7 The other aspect is the extent to which the accused person should be held responsible for their mental state, that is whether they had the capacity to understand their thoughts and actions and whether they knew they were morally wrong. If it arises, the question of mental capacity must be dealt with before the question of whether the accused person formed the relevant intent.
- 5.8 The law has long recognised that a person should not be held criminally responsible if at the time of committing an offence, the person lacked the mental capacity to commit the offence because of a mental impairment.
- 5.9 People found guilty of committing offences are sentenced for a number of reasons. These include punishing the offender in proportion to the offence committed, protection of society from harm and as a deterrent to others from committing offences.<sup>3</sup>
- 5.10 Punishment is not an appropriate response to people who are found not criminally responsible for their actions. This is because they cannot be deterred or influenced by the prospect of being punished or are unable to understand the legal ramifications of the actions.<sup>4</sup> This rationale for the defence of mental impairment 'remains as valid today as it did when it first evolved'.<sup>5</sup>
- 5.11 The defence of mental impairment is therefore grounded in two important principles:
- a mental impairment may act as an excuse from criminal responsibility
  - the community must be protected from people who, as a result of a mental impairment, are a risk to themselves or others.<sup>6</sup>

2 Desmond O'Connor and Paul A. Fairall, *Criminal Defences* (Butterworths, 3rd ed, 2006) 12.

3 See *Sentencing Act 1991* (Vic) s 5(1).

4 *R v Porter* (1933) 55 CLR 182, 186.

5 New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: criminal responsibility and consequences*, Consultation Paper No 6 (2010) 50.

6 *Ibid* 47.

## The law prior to the CMIA—the ‘insanity defence’

- 5.12 As discussed in Chapter 2, the principles underlying the insanity defence have been in existence for centuries. However, the insanity defence was not developed as a legal doctrine until the early 1800s. The legal defence was formulated as a result of two English cases: *R v Hadfield*<sup>7</sup> and *Daniel M’Naghten’s Case*.<sup>8</sup>
- 5.13 In the case of *R v Hadfield*, James Hadfield, while suffering from delusions, attempted to shoot King George III. Hadfield was found not guilty by reason of insanity and held in custody. However, at the time there was no authority to detain people found not guilty by reason of insanity. This case prompted the introduction of the *Criminal Lunatics Act 1800*, that allowed for people acquitted on the grounds of insanity to be kept in custody at the King’s pleasure. This legislation was later adopted in Australia and formed the basis for the Governor’s pleasure regime. Under the Governor’s pleasure regime, the detention of a person found not fit to plead or not guilty on the ground of insanity was authorised by sections 420(1) and 393(1) of the *Crimes Act 1958* (Vic).
- 5.14 In *Daniel M’Naghten’s Case*, Daniel M’Naghten was accused of the murder of Edward Drummond, who was the Secretary to the English Prime Minister, Sir Robert Peel. M’Naghten was under the delusion that the Tory party was persecuting him and that his life was in danger and mistakenly shot Drummond, thinking he was the prime minister. M’Naghten was acquitted on the grounds of insanity. However, there was a public outcry at the verdict and the court (the House of Lords) was asked to provide an explanation of the operation of the insanity defence.
- 5.15 In setting out the requirements for establishing the common law defence of insanity, the court in M’Naghten said:
- jurors ought to be told that in all cases every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.<sup>9</sup>
- 5.16 In Victoria, these requirements known as the ‘M’Naghten rules’ provided the basis for the common law defence of insanity that existed under the Governor’s pleasure regime. These rules provide the ‘template for the defence of insanity in the criminal law of numerous jurisdictions’.<sup>10</sup>

## The defence of mental impairment under the CMIA

### Law

5.17 The common law defence of insanity is explicitly abolished by section 25 of the CMIA and replaced with the statutory defence of mental impairment.<sup>11</sup>

5.18 However, the concept of mental impairment and the statutory test for the defence of mental impairment under the CMIA is the same as it was under the common law defence of insanity. In the second reading speech for the Crimes (Mental Impairment and Unfitness to be Tried) Bill, the Attorney-General explained:

The term ‘insanity’ has been replaced by the term ‘mental impairment’ because the former term is antiquated and carries [a] historical stigma. However, it is important to note that the bill does not alter the existing criminal law in relation to determining criminal responsibility ... The bill makes it clear that the new defence of mental impairment has the same meaning as the defence formerly known as the defence of insanity and is to be interpreted accordingly.<sup>12</sup>

5.19 This position was affirmed in the case of *R v Sebalj* where it was held that ‘the term “mental impairment” should not be construed as changing the common law but construed as referring to the concept of “a disease of the mind” used in the common law defence of insanity’.<sup>13</sup> The M’Naghten elements of the defence were added to the statutory defence without any alteration.<sup>14</sup>

5.20 Thus, the changes made by the CMIA to the defence of mental impairment were largely changes in terminology and not expected to affect the scope of the defence in practice.<sup>15</sup>

5.21 The defence of mental impairment is defined in section 20 of the CMIA. The defence is established if at the time of engaging in conduct constituting the offence, the person was suffering from a mental impairment that had the effect that:

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

5.22 The CMIA provides that a person will not know their conduct was wrong where they ‘could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong’.<sup>16</sup>

5.23 In summary, the requirements to establish the defence of mental impairment under the CMIA are that a person has a mental impairment, characterised as a ‘disease of the mind’, and that condition had at least one of two effects:

- the person did not know the nature and quality of the conduct, or
- the person was not capable of reasoning that the conduct was, or could reasonably be perceived as, wrong.

11 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 25.

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

13 *R v Sebalj* [2003] VSC 181 (5 June 2003) [14].

14 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 20(1)(a)–(b).

15 Director of Public Prosecutions, *Director’s Policy – The Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 - Unfitness to Stand Trial and the Defence of Mental Impairment* (2011).

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

## Process

- 5.24 The mental impairment defence under the CMIA operates at all court levels. Different processes are followed depending on the court level.
- 5.25 Figure 2 shows the key stages of the process for determining and establishing the defence of mental impairment in the Supreme Court and County Court.
- 5.26 When an accused person appears in any court, they are presumed not to be suffering from a mental impairment.<sup>17</sup> This is the case for all criminal proceedings, regardless of whether the defence of mental impairment has previously been raised by an accused person in another matter.
- 5.27 The defence of mental impairment may be raised by the prosecution or the defence at any time during the trial.<sup>18</sup> It is up to the party raising the defence to rebut the presumption that the accused person is not suffering from a mental impairment.<sup>19</sup>
- 5.28 The question of whether an accused person was suffering from a mental impairment at the time the offence was committed is a question of fact to be determined by a jury on the balance of probabilities.<sup>20</sup>
- 5.29 Where the prosecution and defence both agree that the proposed evidence establishes the defence of mental impairment, the trial judge may determine whether or not the accused person is not guilty because of mental impairment. If the trial judge is satisfied that the evidence establishes the defence of mental impairment, the judge may direct that a verdict of not guilty because of mental impairment be recorded.<sup>21</sup> If the trial judge is not satisfied that the evidence establishes the defence of mental impairment, the judge must direct that question be determined by a jury.<sup>22</sup> This process known as ‘consent mental impairment’ dispenses with the need to empanel a jury to determine whether the accused person was suffering from a mental impairment.
- 5.30 If the defence of mental impairment is raised in the course of a trial, there are three possible outcomes. The accused person may be found guilty, not guilty, or not guilty because of mental impairment. If the accused person is found not guilty because of mental impairment, they may be placed on a supervision order (custodial or non-custodial) or may be unconditionally discharged.<sup>23</sup>
- 5.31 In the Magistrates’ Court, the magistrate must discharge a person who is found not guilty because of mental impairment.<sup>24</sup> The consent mental impairment process is not available in the Magistrates’ Court.

17 Ibid s 21(1).

18 Ibid s 22(1).

19 Ibid s 21(3).

20 Ibid s 21(2).

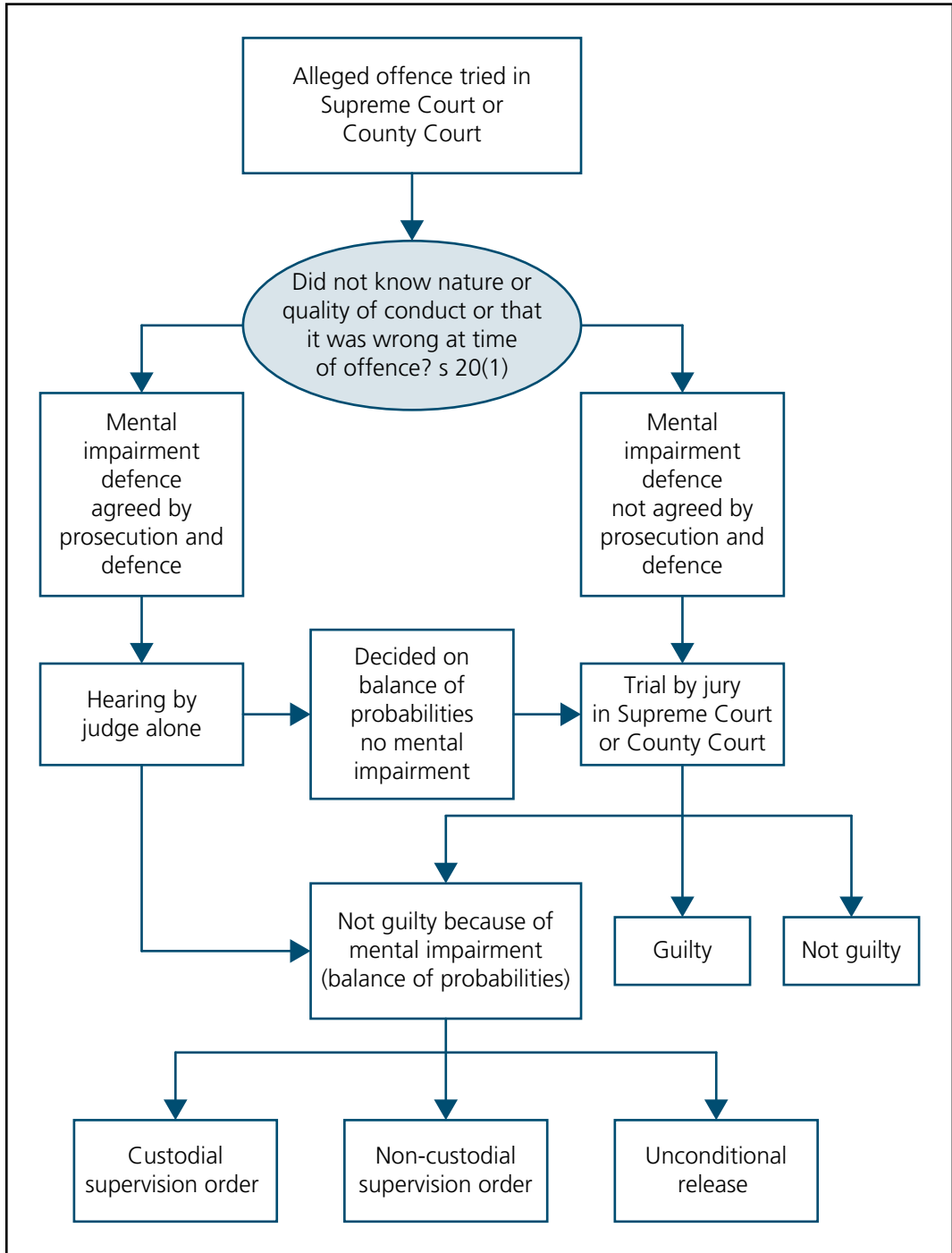
21 Ibid s 21(4)(a).

22 Ibid s 21(4)(b).

23 Ibid s 23.

24 Ibid s 5(2).

**Figure 2: Defence of mental impairment under the CMIA in the Supreme Court and County Court**





## Other mental state defences

- 5.32 The Commission's reference is on the defence of mental impairment under the CMIA. However, an important context to the defence is the other mental state defences available in Victoria.
- 5.33 A person accused of committing an offence may claim a defence to either justify their actions or to excuse them, partially or wholly, from criminal responsibility. The difference between a justification or an excuse can be distinguished as follows:
- defences 'justifying' a crime focus on the accused's act whereas those 'excusing' a person from criminal responsibility are generally viewed as concentrating on the accused's personal characteristics.<sup>25</sup>
- 5.34 A defence may be a complete defence or a partial defence. A complete defence (for example automatism) operates to provide the accused person with an acquittal whereas a partial defence (such as infanticide) operates to reduce murder to manslaughter.<sup>26</sup> Victorian law includes a number of other defences categorised as mental state defences. Included in this category are mental impairment, automatism, intoxication and infanticide. These are outlined in Table 2 below.
- 5.35 The Commission's *Defences to Homicide: Final Report* reviewed mental state defences available in Victoria and recommended that the defences of automatism and infanticide remain unchanged.<sup>27</sup> Changes were recommended to the defence of intoxication that are reflected in the current legislation.<sup>28</sup>
- 5.36 Other jurisdictions in Australia have largely the same mental state defences. A number of jurisdictions (Australian Capital Territory, New South Wales, Northern Territory and Queensland) also have the defence of diminished responsibility. In these jurisdictions, diminished responsibility, like infanticide, is a partial defence to homicide.
- 5.37 There are three common elements across Australian jurisdictions that must be proven on the balance of probabilities to establish the partial defence of diminished responsibility:
- the accused person must have been suffering from an abnormality of mind
  - the abnormality of mind must have arisen from a specified cause, and
  - the abnormality of mind must have substantially impaired the accused person's mental responsibility for the killing.<sup>29</sup>
- 5.38 Diminished responsibility is not a defence in Victorian law. The Commission's *Defences to Homicide: Final Report* recommended that diminished responsibility should not be introduced in Victoria and that a mental disorder should instead continue to have a mitigating effect that is taken into account in sentencing.<sup>30</sup>

25 Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (Oxford University Press, 2004) 53 (citations omitted).

26 Ibid 53.

27 Victorian Law Reform Commission, above n 1, 252, 262.

28 Ibid 126–7.

29 Ibid 233.

30 Ibid 243.

Table 2: Other mental state defences in Victoria

Defence	Type of defence	Requirements	Outcome
Automatism	Full defence	Involuntary conduct resulting from some form of impaired consciousness.  The defence may raise automatism by alleging that the elements of the offence have not been proved because the actions of the accused person were not voluntary.	Acquitted on the grounds of automatism.  In certain circumstances, the accused person may raise the defence of mental impairment and be subject to supervision or unconditionally released.
Intoxication	Factor in deciding whether an element of a crime has been proven.	Intoxication can be used as a defence where the intoxication was not voluntary or intentional.	If intoxication negates an element of an offence, the outcome will be acquittal.
Infanticide	Partial defence  Operates as an offence and defence in New South Wales and Victoria.	Where a woman carries out conduct that causes the death of her child in circumstances that would constitute murder and, at the time of carrying out the conduct, the balance of her mind was disturbed because of her not having fully recovered from the effect of giving birth to that child within the preceding two years, or a disorder consequent on her giving birth to that child within the preceding two years. <sup>a</sup>	If the partial defence is successful, the woman will be found guilty of infanticide, and not of murder, and liable to level six imprisonment (five years maximum). <sup>b</sup>

a *Crimes Act 1958* (Vic) s 6(1).

b *Ibid.*

## Establishing the defence of mental impairment

- 5.39 This section will outline how the defence of mental impairment is established. In doing so, it will consider a number of issues including:
- how ‘disease of the mind’ has been interpreted by the courts in determining criminal responsibility
  - whether ‘mental impairment’ should be defined and if so, how it should be defined
  - the application of the defence of mental impairment and the test for determining whether a person qualifies for the defence.

### The meaning of ‘mental impairment’

- 5.40 The term ‘mental impairment’ is not defined under the CMIA. The terms of reference ask whether the CMIA should define ‘mental impairment’ and if so, how this term should be defined.

### Current meaning under the CMIA—‘disease of the mind’

- 5.41 The common law is relied upon in determining what constitutes a mental impairment, which states that a person must be ‘labouring under such a defect of reason, from *disease of the mind*’<sup>31</sup> in order for the defence of mental impairment to be established.
- 5.42 A ‘disease of the mind’ has been held to be synonymous with a ‘mental impairment’.<sup>32</sup>
- 5.43 The question of what constitutes a ‘mental impairment’ is a legal rather than medical one<sup>33</sup> and this legal construct is ‘often difficult to reconcile within medical and public paradigms of mental illness and justice’.<sup>34</sup>
- 5.44 There has been much debate about which mental conditions constitute a disease of the mind and it is argued ‘[I]legal definitions of what constitutes a mental condition in the insanity defence are generally unclear and variable’.<sup>35</sup>
- 5.45 In order for the defence of mental impairment to be established, the actions of the accused person must be caused by a ‘defect of reason’, that results from ‘an underlying pathological infirmity of the mind, be it of long or short duration and be it permanent or temporary, which can be properly termed mental illness, as distinct from the reaction of a healthy mind to extraordinary external stimuli’.<sup>36</sup>
- 5.46 While mental illness clearly falls within the scope of the defence of mental impairment, it remains unclear whether other conditions such as cognitive impairment, intellectual disability, drug induced psychosis or severe personality disorder constitute a mental impairment.
- 5.47 A ‘disease of the mind’ does not require a physical deterioration in brain cells or changes to the structure of fibres and tissues as found in other medical conditions, but it does require that ‘the functions of the understanding are through some cause, whether understandable or not, thrown into derangement or disorder’.<sup>37</sup>

31 *Daniel M’Naghten’s Case* (1843) 8 ER 718, 722 [210].

32 *R v Falconer* (1990) 171 CLR 30, 53; *R v Radford* (1985) 42 SASR 266.

33 *R v Radford* (1985) 42 SASR 266.

34 Stephen Allnutt, Anthony Samuels and Colman O’Driscoll, ‘The Insanity Defence: From Wild Beasts to M’Naghten’ (2007) 15(4) *Australasian Psychiatry* 292, 297.

35 *Ibid* 295.

36 *R v Radford* (1985) 42 SASR 266, 274.

37 *R v Porter* (1933) 55 CLR 182, 189.

- 5.48 While it is emphasised that a mental impairment may arise from a temporary or long standing disorder, it is not constituted by '[m]ere excitability of a normal man, passion, even stupidity, obtuseness, lack of self-control, and impulsiveness'.<sup>38</sup>
- 5.49 Examples of conditions that have been stated to be diseases of the mind include:<sup>39</sup>
- major mental illnesses such as schizophrenia<sup>40</sup>
  - brain injuries, tumours or disorders<sup>41</sup>
  - physical diseases that affect the soundness of mental faculties, such as cerebral arteriosclerosis.<sup>42</sup>
- 5.50 Examples of conditions that have been stated not to be diseases of the mind include:<sup>43</sup>
- concussion from a blow to the head<sup>44</sup>
  - drug-induced psychosis.<sup>45</sup>
- 5.51 It is unclear if cases of dissociation and epilepsy constitute a mental impairment.<sup>46</sup> Hyperglycaemia has been found to constitute a mental impairment<sup>47</sup> while hypoglycaemia has been held not to constitute a mental impairment.<sup>48</sup>

### Should 'mental impairment' be defined in the CMIA?

- 5.52 The question of whether a statutory definition of mental impairment is required has been previously considered in other reviews.
- 5.53 Victoria remains one of the few Australian jurisdictions that does not provide a definition of mental impairment. Appendix B outlines how mental impairment is defined in Australian jurisdictions along with New Zealand, Scotland, the United Kingdom and Canada. Apart from New South Wales, all other Australian jurisdictions provide some form of a definition of mental impairment.
- 5.54 The New South Wales Law Reform Commission is currently reviewing the need for a definition as part of a broader project on people with cognitive and mental health impairments in the criminal justice system.<sup>49</sup> The New South Wales Law Reform Commission transmitted a report on criminal responsibility and consequences to the New South Wales Attorney-General on 7 May 2013.
- 5.55 The need for legal certainty around what constitutes a mental impairment is a compelling reason for developing a statutory definition. Those supporting the development of a statutory definition of mental impairment argue that it is unclear which mental conditions fall within the scope of the defence, particularly in relation to intellectual disability and cognitive impairment. Inconsistencies in the application of the term have led to calls for certainty in the law:
- given the onerous nature of both criminal sanctions and the dispositional regime attendant upon a finding of insanity, certainty in the law must be established. It is incumbent on the criminal law to ensure that a consistent set of rules determine when people are and are not criminally responsible.<sup>50</sup>

38 Ibid 188.

39 Judicial College of Victoria, *Victorian Criminal Charge Book* (23 April 2013) <<http://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#19057.htm>>.

40 *R v Falconer* (1990) 171 CLR 30; *R v Radford* (1985) 42 SASR 266.

41 *R v Hughes* (1989) 42 A Crim R 270; *Nolan v R* (Unreported, Court of Criminal Appeal, 22 May 1997).

42 *R v Kemp* [1957] 1 QB 399; *R v Radford* (1985) 42 SASR 266.

43 Judicial College of Victoria, above n 39.

44 *R v Scott* [1967] VR 276; *R v Wogandt* (1983) 33 A Crim R 31.

45 *R v Sebalj* [2006] VSCA 106 (2 May 2006); *R v Whelan* [2006] VSC 319 (27 April 2006).

46 Some cases of dissociation and epilepsy have been found to constitute a mental impairment while other cases have not. See *R v Falconer* (1990) 171 CLR 30 (Deane and Dawson JJ).

47 *R v Hennessy* [1989] 1 WLR 287.

48 For hyperglycaemia (high blood sugar) see *R v Quick* [1973] QB 910 and hypoglycaemia (low blood sugar) see *August v Fingleton* [1964] SASR 22.

49 New South Wales Law Reform Commission, above n 5.

50 Steven Yannoulidis, *Mental State Defences in Criminal Law* (Ashgate, 2012) 63–4.

- 5.56 Prior to the introduction of the CMIA, the Victorian Parliamentary Community Development Committee in its review of the Governor’s pleasure regime recommended introducing a statutory definition of mental impairment.<sup>51</sup>
- 5.57 While appreciating the need for flexibility in interpreting the term ‘mental impairment’, the Community Development Committee acknowledged that ‘both the category of people likely to plead the insanity defence, their families and their legal counsel should be provided with some statutory guidance as to what the term means’ and recommended a statutory definition be developed.<sup>52</sup>
- 5.58 The issue was re-examined in the Commission’s defences to homicide report. In that report, the Commission recommended retaining the current defence of mental impairment without including a statutory definition of mental impairment.
- 5.59 The Commission’s report argued that difficulties in adequately defining the term ‘mental impairment’ would mean that any definition would be equally problematic and subject to criticism as having no definition at all.<sup>53</sup>
- 5.60 The complexities in developing a definition of mental impairment were highlighted by McSherry and Naylor:
- One of the initial difficulties with this criterion [for the defence of mental impairment] is that a clear definition of mental impairment, or even mental illness, has eluded members of the medical as well as the legal professions.<sup>54</sup>
- 5.61 Consultations undertaken as part of the Commission’s defences to homicide report indicated that the defence was working well in practice and leaving the term undefined would ensure flexibility in its application.<sup>55</sup> The review instead recommended that a provision be added to the CMIA that specifies what the term ‘mental impairment’ includes but is not limited to the common law notion of ‘disease of the mind’.<sup>56</sup>
- 5.62 In March 2013, the Victorian Parliament Law Reform Committee released a report, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers*, that acknowledged there is ambiguity in the meaning of the term ‘mental impairment’ and recommended that a statutory definition be developed.

## Questions

- 29 How does the defence of mental impairment work in practice with ‘mental impairment’ undefined?
- 30 Should ‘mental impairment’ be defined under the CMIA?
- 31 What are the advantages or disadvantages of including a definition of mental impairment in the CMIA?

51 Community Development Committee, Parliament of Victoria, *Inquiry into Persons Detained at the Governor’s Pleasure* (1995) 172.  
52 Ibid 151.  
53 Ibid 212.  
54 McSherry and Naylor, above n 25, 531.  
55 Community Development Committee, above n 51, 208–9.  
56 Victorian Law Reform Commission, above n 1, 217.

## If mental impairment is defined, how should it be defined?

- 5.63 Previous reviews have identified that developing a definition of what constitutes a mental impairment can be problematic. A number of different options have been proposed for defining mental impairment, including:
- categories of impairments (for example, listing conditions that are included such as mental illness, intellectual disability and cognitive impairments)
  - diagnostic criteria (such as those in the *Diagnostic and Statistical Manual of Mental Disorders*)
  - operational definition (for example by linking the impairment to its effect on the person's ability to understand, know or control their behaviour).
- 5.64 Other Australian jurisdictions with statutory definitions of mental impairment employ a mixture of categorical and operational definitions. Appendix B provides details of the different approaches.
- 5.65 The Commonwealth definition of mental impairment includes senility, intellectual disability, mental illness, brain damage and severe personality disorder.<sup>57</sup> South Australia, Western Australia, the Australian Capital Territory and the Northern Territory have substantially adopted this definition. The Northern Territory includes the category of involuntary intoxication and South Australia excludes intoxication.<sup>58</sup>
- 5.66 Queensland legislation provides that a mental impairment is a 'mental disease' or 'natural mental infirmity' while Tasmanian legislation outlines that a 'mental disease' includes 'natural imbecility'.<sup>59</sup>
- 5.67 The Community Development Committee considered whether Victoria should align itself with the Commonwealth Code by incorporating a volitional element (that is, an element about the person's ability to control their actions). However, the Community Development Committee was unable to resolve competing arguments and stated the area required further consideration.<sup>60</sup> It therefore recommended development of a statutory definition of 'mental impairment' that includes mental illness, intellectual disability, acquired brain injury (including senility) and severe personality disorder.<sup>61</sup>
- 5.68 Most Australian states provide broad definitions of mental impairment that incorporate a volitional element by linking the mental impairment to the person's ability to understand, control their actions or know that they ought not to do the act or make the omission.
- 5.69 In 1990, the Law Reform Commission of Victoria's report *Mental Malfunction and Criminal Responsibility* recommended that 'mental impairment should be defined so as to include mental illness, personality disorder, intellectual disability, senility and brain damage'.<sup>62</sup>
- 5.70 The Law Reform Committee's report recommended that mental impairment 'encompass mental illness, intellectual disability, acquired brain injuries and severe personality disorders'.<sup>63</sup> The report argued that a definition would ensure Victoria is consistent with legislation in other Australian jurisdictions that 'expressly recognise intellectual disability and some other cognitive impairments such as ABIs [acquired brain injuries] and senility as conditions that may qualify a defendant for the defence'.<sup>64</sup>

57 *Criminal Code Act 1995* (Cth) s 7.3(8).

58 *Criminal Law Consolidation Act 1935* (SA) s 269A; *Criminal Code Act 1913* (WA) s 1(1); *Criminal Code 2002* (ACT) s 27(1); *Criminal Code Act* (NT) s 43A.

59 *Criminal Code 1899* (Qld) s 27; *Criminal Code 1924* (Tas) s 16.

60 Community Development Committee, above n 53, 149.

61 *Ibid* 152.

62 Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility*, Report No 34 (1990) 18.

63 Law Reform Committee, Parliament of Victoria, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and Their Families and Carers* (2013) 243.

64 *Ibid*.

- 5.71 The use of diagnostic criteria to provide a definition of mental impairment was considered in the Commission's *Defences to Homicide* report. The Commission identified concerns raised by both medical and legal practitioners that mental impairment does not accurately reflect current thinking on mental illness.<sup>65</sup> The Commission concluded, however, that the use of a diagnostic tool, such as the *Diagnostic and Statistical Manual of Mental Disorders* (DSM IV) would be inappropriate as knowledge about mental illness is constantly changing and these tools are not designed to be used in a legal context.<sup>66</sup>
- 5.72 Others also argue that a statutory definition based on diagnostic criteria would be inappropriate and inflexible, and that:
- By ensuring that the legal expression is not tied down to diagnostic criteria courts and relevant bodies remain free to facilitate the execution of this normative task undertaken as part of the disease of the mind enquiry.<sup>67</sup>

## Questions

- 32 If mental impairment is to be defined in the CMIA, how should it be defined?
- 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?
- 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?

65 Victorian Law Reform Commission, above n 1, 207.

66 Ibid 209. The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM) is the major accepted diagnostic tool for mental illness and other mental disorders. The fifth edition (DSM-5) was released on 22 May 2013.

67 Yannoulidis, above n 50, 65.

## The test for establishing the defence of mental impairment

### Knowledge about the nature and quality of the act

- 5.73 The requirement that the accused person not know the nature and quality of the act refers only to the 'physical character of the act'.<sup>68</sup>
- 5.74 The High Court has described this requirement as a person's 'capacity to comprehend the significance of the act of killing and of the acts by means of which it was done'.<sup>69</sup>
- 5.75 In simple terms, a person will not know the nature and quality of their conduct if because of a mental impairment they do not know '*the physical thing [they were] doing and its consequences*'.<sup>70</sup> This statement implies that the knowledge of the accused person relates to more than just the physical act:
- In *R v Porter*, the common-law requirement of an accused's lack of knowledge of the nature and quality of an act has been interpreted as consisting of both a lack of knowledge of the surface features of the act and its harmful consequences.<sup>71</sup>
- 5.76 For example, a person who hits another person with a stick, but thinks they were actually hitting a tree, would not know the nature and quality of their conduct.
- 5.77 The circumstances in which an accused person does not know the nature and quality of their conduct are rare. The defence of mental impairment is most successful where the second limb of the M'Naghten test is established. This limb relates to the way in which the person processes knowledge about the nature and quality of their conduct and that it was wrong.<sup>72</sup>

### Knowledge that the conduct was wrong

- 5.78 In Australia, the test for determining whether a person 'knew what he or she was doing was wrong' is a moral one rather than a legal one.<sup>73</sup> It is about a person's ability to understand right from wrong.
- 5.79 The standard to be applied to the conduct is that of the ordinary person, 'in the sense that [an] ordinary reasonable ... [person] understand[s] right and wrong and that [as a result of a mental impairment] he was disabled from considering with some degree of composure and reason what he was doing and its wrongness'.<sup>74</sup>
- 5.80 A causal relationship is required between the mental condition and a person being unable to understand that their conduct was wrong.<sup>75</sup> This means that it must be because of the person's mental impairment that they did not know that their conduct was wrong:
- [I]f the disease or mental derangement so governs the faculties that it is impossible for the party accused to reason with some moderate degree of calmness in relation to the moral quality of what he is doing, he is prevented from knowing that what he does is wrong.<sup>76</sup>

68 *R v Codere* (1917) 12 Cr App R 21.

69 *Sodeman v R* (1936) 55 CLR 192.

70 *R v Porter* (1933) 55 CLR 182, 189.

71 Yannoulidis, above n 50, 15 (citation omitted).

72 *Ibid* 16.

73 *Stapleton v R* (1952) 86 CLR 358.

74 *R v Porter* (1933) 55 CLR 182, 190.

75 *Ibid* 189.

76 *Sodeman v R* (1936) 55 CLR 192, 215.



- 5.81 The New South Wales Law Reform Commission has highlighted some of the issues with the Victorian approach, particularly regarding the requirement that the person be unable to consider their actions with ‘some degree of composure and reason’:

A problem with this approach is that it is based on an assumption that, in ordinary circumstances, a person acts (or refrains from acting) only after a reasoned assessment of the rights and wrongs of behaving in a certain way ... In many cases where the defence of mental illness is based on a claim that the person did not know that the act was wrong, it is the extinction or impairment of subconscious regulation, not an inability to reason calmly, which accounts for the act being done (or, more correctly, the person’s failure to refrain from doing it).<sup>77</sup>

- 5.82 While Victoria adopts the common law language of ‘knowledge’, other states such as South Australia, Tasmania, Queensland, Western Australia use a capacity-based knowledge requirement with a volitional element (that the accused person was unable to control their conduct).
- 5.83 Queensland requires that the accused person lack the capacity to understand what they are doing, control their actions or know that they should not do the act.<sup>78</sup> Western Australia employs a similar test, requiring the person be deprived of the capacity to understand, control and know that he ought not to do the act or make the omission.<sup>79</sup> Tasmania requires that ‘when such act or omission was done or made under an impulse which, by reason of mental disease, he was in substance deprived of any power to resist’.<sup>80</sup> South Australia requires that the person ‘is unable to control the conduct’.<sup>81</sup>
- 5.84 There is some contention over whether a ‘knowledge’ or ‘capacity’ approach is more restrictive.<sup>82</sup>

## Questions

- 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?
- 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?
- 37 Are there any issues with interpretation of the requirement that a person be able to reason with a ‘moderate sense of composure’?

77 New South Wales Law Reform Commission, above n 5, 68.

78 *Criminal Code Act 1899* (Qld) s 27.

79 *Criminal Code Act 1913* (WA) s 27.

80 *Criminal Code 1924* (TAS) s 16(1).

81 *Criminal Law Consolidation Act 1935* (SA) s 269C.

82 See Yeo, above n 10; New South Wales Law Reform Commission, above n 5, 69.

## Process for establishing the defence of mental impairment

- 5.85 The process for establishing the defence of mental impairment is set out above from [5.24]. As discussed, the mental impairment defence can be raised in the Supreme Court, the County Court or the Magistrates' Court. In this section, the Commission will look at issues regarding the process for establishing the defence of mental impairment.
- 5.86 As part of this review, the Commission has also been asked to consider whether the Magistrates' Court should be permitted to make supervision and other orders in relation to a person found not guilty because of mental impairment and this will be discussed in Chapter 6.

### Issues in relation to the process for establishing the defence of mental impairment

- 5.87 In its preliminary research, the Commission has identified some possible issues regarding the process for establishing the defence of mental impairment. These primarily relate to the process for establishing the defence of mental impairment in the higher courts (the Supreme Court and County Court). The Commission would like input on the issues identified and any other issues that may exist regarding the operation of the process in any court level, including:
- the role of lawyers in the process for establishing the defence of mental impairment
  - the role of experts in the process for establishing the defence of mental impairment
  - jury involvement in the process and consent mental impairment hearings.

### The role of lawyers in the process for establishing the defence of mental impairment

- 5.88 As discussed above, the defence of mental impairment can be raised at any time throughout the trial by lawyers.
- 5.89 Lawyers representing the accused person may face ethical issues in deciding whether to raise the defence of mental impairment. If the defence of mental impairment is successful, the accused person may be made subject to an onerous supervision regime for an indefinite period of time under the CMIA. Lawyers need to have a thorough understanding of the CMIA regime when providing advice to clients who may be eligible for the defence, to ensure the accused person appreciates the legal consequences.
- 5.90 Ethical issues may arise in cases where unfitness of the accused person is also in question and the accused person is unable to give instructions to their lawyer. Ethical issues arising over whether to raise the issue of unfitness are discussed in Chapter 4.
- 5.91 The outcome in terms of sentence is a key factor in the advice to and decision of an accused person in facing a charge (that is, whether to plead or raise the defence). Some accused persons may base their decision on whether to raise the mental impairment defence on advice about the consequences of the finding. If a lawyer advises an accused person that they are likely to receive a definite sentence within a particular range if they plead guilty, they may choose to do this over facing an indefinite supervision order.

- 5.92 On the other hand, an accused person may choose to raise the defence where there is a legitimate basis for avoiding criminal responsibility and sentence and be subject to a supervision order and receive treatment. As a person is highly reliant on their lawyer in these situations, it is essential that lawyers have a good working knowledge of the CMIA. For example, lawyers should understand that a supervision order is indefinite, what 'nominal term' means, and the restrictions that will be placed on a person's liberty if they become subject to the regime. Lawyers must also understand how the CMIA provisions operate in practice.

## Questions

- 38 What ethical issues do lawyers face in the process for establishing the defence of mental impairment?
- 39 What is the best way of addressing these ethical issues from a legislative or policy perspective?

## The role of experts in the process for establishing the defence of mental impairment

- 5.93 As with the process of determining unfitness to stand trial, expert reports play an essential role in establishing the defence of mental impairment. However, while the court has the power to order a report to assist in determining unfitness to stand trial, they do not have similar powers in relation to the defence of mental impairment.
- 5.94 Similar issues to those outlined in Chapter 4 may arise in relation to the provision of expert reports to the court and the role of experts in establishing the defence of mental impairment. Possible issues include the qualifications of the experts, the quality and utility of expert reports and the number of reports relied on. The Commission is interested in gathering information about these potential issues and other issues in this area.

## Question

- 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?

## Jury involvement in the process and consent mental impairment hearings

- 5.95 The role of the jury is to determine whether the accused person was suffering from a mental impairment at the time of committing the offence. For example, if expert evidence indicates that the accused person was suffering from schizophrenia, the jury must determine if at the time of committing the offence, the accused person's symptoms were consistent with schizophrenia.
- 5.96 In its defences to homicide reference, the Commission consulted on issues in relation to 'by consent' mental impairment hearings and considered that empanelling a jury in these cases was 'both unnecessary and inappropriate'.<sup>83</sup> The Commission found that the role of the jury in these cases was not to make a determination on the evidence but to confirm the view of the defence and prosecution. The Commission therefore argued that the process of empanelling a jury where both the prosecution and defence agreed on the evidence that the defence of mental impairment had been established undermined the role of the jury and 'may lead to a loss of faith in the jury system'.<sup>84</sup>
- 5.97 The CMIA was amended to allow for by consent mental impairment hearings.<sup>85</sup> If the prosecution and defence both agree that the evidence has established the defence of mental impairment, the trial judge may decide a jury is not required to make a determination.<sup>86</sup>
- 5.98 Instead, the trial judge alone may hear evidence and:
- direct that a verdict of not guilty because of mental impairment be recorded if the judge is satisfied on the evidence that the defence of mental impairment has been established,<sup>87</sup> or
  - must direct that the person be tried by a jury if the judge is not satisfied on the evidence that the defence of mental impairment has been established.<sup>88</sup>
- 5.99 It is unclear whether a consent mental impairment hearing is available after a finding of unfitness as discussed in Chapter 4 from [4.110].

### Question

- 41 Should there be any changes to the current processes for jury involvement in hearings and consent mental impairment hearings?

83 Victorian Law Reform Commission, above n 1, 229.

84 Ibid 230.

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

86 Ibid.

87 Ibid s 21(4)(a).

88 Ibid s 21(4)(b).

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## Directions to the jury on the defence of mental impairment

- 5.100 In the Supreme Court and County Court, a jury will determine if the defence of mental impairment has been established on the balance of probabilities.<sup>89</sup>
- 5.101 The Magistrates' Court does not have juries and therefore the question of whether the defence of mental impairment has been established will be determined by the magistrate alone.
- 5.102 The Commission has been asked to consider whether legislative clarification is required as to how the law should provide for the jury to approach the elements of an offence, and any defences or exceptions, where the defence of mental impairment is an issue. The Commission considers these issues in this section.

### Issues relating to directions to the jury

- 5.103 The Commission has identified in its preliminary research three main aspects on the issue of jury directions with regard to the mental impairment defence, as follows:
- *The order of considering elements of an offence*—whether a jury should be directed that the prosecution is required to prove all the elements of an offence before a jury can consider the defence of mental impairment, or directed that the prosecution need only prove certain elements of the offence and not the mental element before the jury can consider the defence of mental impairment.
  - *The relevance of mental impairment to the jury's consideration of the mental element of an offence*—whether a jury ought to be able to consider evidence of mental impairment (mental illness, intellectual disability or cognitive impairment) in determining whether the mental element of an offence has been proved beyond reasonable doubt.
  - *Legal consequences of findings*—the extent of the trial judge's obligation to direct the jury on the legal consequences of a finding of not guilty because of mental impairment.
- 5.104 Recent work in this area resulted in the *Jury Directions Act 2013 (Vic)*, that aims to reduce the complexity of jury directions in criminal trials and to assist the trial judge to give jury directions in a manner that is as clear, brief, simple and comprehensible as possible.<sup>90</sup>

## Order of considering the elements of an offence

- 5.105 An accused person is presumed not to be suffering from a mental impairment.<sup>91</sup> The defence of mental impairment may be raised by the prosecution or the defence, and the party raising the defence bears the onus of rebutting this presumption.<sup>92</sup>
- 5.106 A successful defence of mental impairment requires that it be proved on the balance of probabilities (that is more likely than not) that the accused person was suffering from a mental impairment that had the effect of the person not being criminally responsible for their action or omission.<sup>93</sup>
- 5.107 Traditionally, when a person is accused of an offence, all the elements of the offence must be proved beyond reasonable doubt.<sup>94</sup> The CMIA specifies that to establish the defence of mental impairment, it must be proved that the accused person engaged in conduct (an act or omission) that constitutes the offence.<sup>95</sup> The jury must specify whether a finding was based on a mental impairment defence where an accused person is found not guilty.<sup>96</sup>
- 5.108 Some offences have a mental element that must be proven in relation to an offence. Intention, knowledge, or recklessness are examples of mental elements that must be proved. In matters where mental impairment is an issue, it is currently unclear whether the prosecution must also prove the mental element of the offence first, prior to a jury being able to consider whether the person has a defence of mental impairment.
- 5.109 Currently in Victoria, there are two main approaches to directing juries in cases where mental impairment is an issue as cited in the charge book:<sup>97</sup>
- the approach taken in *R v Stiles*<sup>98</sup> (the Stiles approach)
  - the approach taken in *Hawkins v The Queen*<sup>99</sup> (the Hawkins approach).

### The Stiles approach

- 5.110 In the Victorian Court of Criminal Appeal case of *R v Stiles* (Stiles), the accused person, who had schizophrenia, was charged with manslaughter after assaulting a man with a piece of timber.
- 5.111 While this case did not detail the process by which the mental elements are to be considered in establishing the defence of mental impairment, it did comment on the order in which the jury should consider the elements of the offence.
- 5.112 The court in Stiles held that the jury must start with the presumption that the accused person does not have a mental impairment. The jury must then determine if all the elements of the offence have been proven, with the issue of mental impairment only considered if the prosecution succeeds in proving all elements of the offence. If the jury determines that the accused person did not commit the physical elements of the offence, the accused person will be acquitted. If the jury is satisfied beyond reasonable doubt that the accused person did commit the physical elements of the offence, they may then consider evidence relating to mental impairment.<sup>100</sup>

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

92 *Ibid* s 21(3).

93 *Ibid* s 21(2)(b).

94 *R v Porter* (1933) 55 CLR 182; *Stapleton v R* (1952) 86 CLR 358; *Sodeman v R* (1936) 55 CLR 192.

95 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 20(1).

96 *Ibid* s 22(2)(b).

97 Judicial College of Victoria, above n 39.

98 *R v Stiles* (1990) 50 A Crim R 13.

99 *Hawkins v The Queen* (1994) 179 CLR 500.

100 *R v Stiles* (1990) 50 A Crim R 13, 22.

- 5.113 The Stiles approach requires that the jury consider all the elements of the offence prior to making a determination about the existence of a mental impairment. This ensures that the accused person is able to obtain a complete acquittal if the jury is not satisfied that the prosecution has proved all the elements of an offence.<sup>101</sup>
- 5.114 This can be compared with an approach where the jury considers the defence of mental impairment first, prior to deciding whether the accused person even did the physical acts (the physical elements) that constitute the offence. Following this approach, the accused could be found not guilty because of mental impairment of an offence that they in fact did not commit. This could deny the accused person the right of an outright acquittal of the offence.
- 5.115 However, under the Stiles approach the jury may be required to employ artificial reasoning. This is because they must presume that the accused person is not mentally impaired when they consider whether the prosecution has proved both the physical and mental elements of the offence. At the same time, they may be hearing evidence (relevant to the mental elements) that the accused person has a mental impairment.

### The Hawkins approach

- 5.116 The High Court of Australia in the case of *Hawkins v The Queen* (Hawkins) considered the interaction between mental impairment and voluntariness. In this case, the defence was that in a disturbed state of mind, the accused person intended to commit suicide but upon seeing his father, fired a gun and killed him instead without the specific intent to murder, which was the crime charged. The accused's counsel did not raise the defence of insanity (under the *Criminal Code Act 1924* (Tas)) or wish that defence to be put to the jury. The court stated:
- In principle, the question of insanity falls for determination before the issue of intent. The basic questions in a criminal trial must be: what did the accused do and is he criminally responsible for doing it? ... It is only when those basic questions are answered adversely to an accused that the issue of intent is to be addressed.<sup>102</sup>
- 5.117 The approach stated by the High Court in *Hawkins* is that the jury is required to consider the physical elements first before turning to the question of whether an accused person has a mental impairment defence. Under this approach, once the jury has determined that the accused person did the physical acts and does not have a mental impairment defence, it can consider the question of whether they had the requisite level of intention.

## The approach to jury directions in Victoria post *Stiles* and *Hawkins*

- 5.118 The case of *DPP v Soliman*<sup>103</sup> (*Soliman*) also raised the issue of the order in which the jury must consider the elements of the offence. The issue in this case was the approach that the jury was to take in considering the elements of the offence of rape and the defence of mental impairment.
- 5.119 The accused person in this case was charged in the County Court with one count of rape and pleaded not guilty. He had previously been diagnosed with schizophrenia, but expert evidence presented conflicting views as to whether the accused person qualified for a defence of mental impairment. The issue to be determined in this case was whether the accused person's mental impairment resulted in him being unable to be aware if the complainant was not consenting to sexual intercourse.
- 5.120 The court decided that *Stiles* provided the correct approach for considering the order of the elements of the offence in this case. The judge outlined the reasons for this decision as follows:
- *Hawkins* did not consider the case of *Stiles* and therefore did not overrule it
  - *Hawkins*, a High Court decision, considered provisions of the Tasmania Criminal Code rather than the common law and therefore the court was not bound to follow it
  - the *Stiles* approach was followed in the case of *R v Fitchett*<sup>104</sup> (*Fitchett*) without any complaint in the Court of Appeal
  - it was agreed by the parties that the *Stiles* approach was most appropriate because if the *Hawkins* approach was adopted, the jury might never reach consideration of the fourth element of rape and therefore the accused person may be deprived of a chance of being acquitted
  - the *Stiles* approach is consistent with section 20 of the CMIA, that sets out the defence of mental impairment.<sup>105</sup>
- 5.121 The Court held that 'in assessing whether the Crown has proven beyond reasonable doubt that the accused [person] was aware that the complainant was not consenting, might be consenting, or failed to give any thought as to whether or not the complainant was consenting, the jury will not be directed to consider the accused's mental illness'.<sup>106</sup> The approach in this case was outlined as follows:
- if the jury is satisfied beyond reasonable doubt of all the elements of rape, but is not satisfied on the balance of probabilities that the defence of mental impairment has been established, the accused person will be criminally responsible for the offence
  - if the jury is satisfied beyond reasonable doubt of all the elements of the offence of rape (absent evidence of mental impairment) and is also satisfied on the balance of probabilities that the accused person was mentally impaired at the time of the offence, the accused person will be found not guilty because of mental impairment
  - if the jury is not satisfied beyond reasonable doubt of all the elements of the offence of rape, the accused person will be acquitted.<sup>107</sup>

103 *DPP v Soliman* [2012] VCC 658 (1 May 2012).

104 *R v Fitchett* (2009) 23 VR 91.

105 *DPP v Soliman* [2012] VCC 658 (1 May 2012) [24].

106 *Ibid* [61].

107 *DPP v Soliman* [2012] VCC 658 (1 May 2012) [63]–[64].



## The approach in other jurisdictions

- 5.122 In Western Australia, the issue of how the jury should approach the elements of the offence was considered in the case of *Ward v The Queen* (Ward). In this case it was held that it is the directions which are provided to the jury which are important, rather than the order in which the elements are approached:
- Provided that all defences open to an accused are the subject of proper directions, and all elements of the offence are canvassed, it has not as I understand it been suggested that it is necessary, as a matter of law, that directions consider particular matters in any particular order.<sup>108</sup>
- 5.123 The view in Ward was endorsed in the case of *Stanton v The Queen* where it was held that the judge has discretion in directing the jury on how to approach the elements of the offence:
- there is no rule of law or practice that requires a trial Judge to direct a jury that they must consider (as opposed to decide) on various alternative offences that are open on an indictment in any particular order. The trial Judge may do so if he or she thinks that the facts of the case so require and that it will assist the jury to do so. But the power of the jury to approach the task in whatever way they see fit must be respected. If such a direction is given it should be made clear that it is directory or permissive rather than mandatory.<sup>109</sup>
- 5.124 In 2007, the Western Australian Law Reform Commission agreed with the position in Ward and Stiles. It recommended that legislation should not outline the procedure to be followed for a jury considering the elements of a mental impairment defence. In doing so, it said:
- The Commission agrees with the reasons for decision of Wheeler and Pidgeon JJ in *Ward* who stated that, so long as correct directions are given to the jury in respect of the relevant burden of proof and other matters in relation to each issue, there is no reason to require a trial judge to direct a jury to consider the questions of intent and insanity in a particular order.<sup>110</sup>
- 5.125 Consistent with the Western Australian approach, in South Australia, legislation provides that the trial judge has the discretion to decide on the order in which the objective and subjective elements of the offence are to be considered. The legislation outlines options for the procedure to be followed, depending on which elements of the offence are to be considered first.<sup>111</sup>
- 5.126 In New Zealand, the judge or jury only considers the issue of mental impairment once the Crown has proven that the act was committed. As stated in *R v Cottle*:
- This is for the reason that the jury would only go on to consider the special defence, if it were already convinced that the Crown had proved to its complete satisfaction that the act had been committed by the prisoner and—if he was sane—in circumstances which compelled the conclusion that the act was deliberate and intentional.<sup>112</sup>

## Questions

- 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?
- 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?

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*Ward v The Queen* (2000) 23 WAR 254 [130].  
*Stanton v The Queen* [2001] WASCA 189 (22 June 2001) [84].  
Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Final Report (2007) 237.  
*Criminal Law Consolidation Act 1935* (SA) ss 269F, 269G.  
*R v Cottle* [1958] NZLR 999, 1030.

## The relevance of mental impairment to the jury's consideration of the mental element of an offence

- 5.127 A separate but related consideration to the issue of the order of offence elements is whether the accused person's mental impairment is relevant to the jury's consideration of the mental element of an offence.
- 5.128 This issue has been identified as arising in particular under the Stiles approach to directing the jury on offence elements.
- 5.129 Under the Stiles approach to directing a jury, the jury would first have to determine if all the elements of the offence have been proved, including the mental element of the offence. It is only after all the elements of the offence have been proved that the jury would consider evidence relevant to the defence of mental impairment. However, if there is evidence that the accused had a mental impairment at the time of the offence, this could be relevant to the accused person's state of mind at the time of the offence. If there is such evidence, even if it falls short of establishing the mental impairment defence, the prosecution may be unable to prove the mental element of the offence because the accused person was suffering from a mental impairment.
- 5.130 The issue therefore centres on the uncertainty as to whether evidence of an accused person's mental impairment is to be used by the jury to either:
- find that the impairment prevented the accused from forming the requisite mental element for the offence and therefore the element is not proved at all and completely acquit the person, or
  - find that the mental element is proved, but that the impairment prevented the accused from having the capacity to know the nature and quality of their actions or to know whether it was right or wrong, and therefore find the accused person not guilty because of mental impairment.
- 5.131 A number of trial judges have drawn attention to the uncertain state of the law on this issue and the consequent difficulty in properly instructing juries.<sup>113</sup> In the case of *Soliman*, this issue arose in the context of whether evidence of the accused person's mental illness could be used to determine whether the fourth element of the offence of rape (awareness that or not giving any thought to whether the complainant is not consenting or might not be consenting), had been proved by the Crown beyond reasonable doubt. The court held that:
- If an accused is to be presume[d] to be of sound mind for the purposes of a jury's consideration of all the elements, then evidence which goes to the issue of mental impairment, whether it be evidence supporting the defence or rebutting it, should only be considered if, and when all the elements of rape, are proven. If this were otherwise, then potentially all the same evidence which would be relied upon to establish, or even rebut the defence of mental impairment, may well result in an accused's outright acquittal and would interfere with the presumption of sound mind. This would potentially undermine the Stiles approach and undermine the province of the defence of mental impairment itself.<sup>114</sup>
- 5.132 The High Court in *Hawkins* stated that evidence of 'mental disease' (under section 16 of the *Criminal Code Act 1924 (Tas)*) is relevant to specific intent where this is not sufficient to amount to a defence of insanity.<sup>115</sup>

### Question

- 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?

113 See, eg, Transcript of Proceedings, *R v Sutherland* (County Court of Victoria, CR-10-00016, Judge Punshon, 18 October 2012) 118.  
 114 *DPP v Soliman* [2012] VCC 658 (1 May 2012) [41].  
 115 *Hawkins v The Queen* (1994) 179 CLR 500, 517.

## Legal consequences of the findings

- 5.133 Where a jury has been empanelled and there is evidence that raises the defence of mental impairment, the judge must direct the jury to consider this issue.<sup>116</sup> The judge must also explain to the jury the possible findings and the legal consequences of those findings.<sup>117</sup>
- 5.134 It is not the usual practice in a criminal trial to explain the legal consequences of the findings to the jury. This is consistent with the 'well-established view of the jury role' in a criminal proceeding.<sup>118</sup> If a judge is required to explain what may happen to the accused person after the trial, this may affect the outcome of the trial.
- 5.135 The purpose of introducing the requirement to explain the legal consequences of findings to the jury arose out of concerns that juries may be reluctant to make a finding of not guilty because of mental impairment, if they believed 'it could result in the immediate release of a disturbed and dangerous person when, as a practical proposition in most cases, that would most certainly not be the case'.<sup>119</sup>
- 5.136 In the case of *Fitchett*, the Court of Appeal considered whether the trial judge had properly instructed the jury in relation to the consequences of the legal findings. *Fitchett* was accused of the murder of her two sons and raised the defence of mental impairment. The Court of Appeal held that instructions to the jury require something more than a recitation of the possible orders that can be made, as this may 'not be either informative or serve to allay the perceived fears of jury members'.<sup>120</sup> It was held in this case that the jury directions on the legal consequences were deficient as they constituted a description of procedure rather than consequences and while the jury was told there would be consequences, no further explanation was provided.
- 5.137 *Fitchett* also highlighted tensions that judges must manage when directing juries on the legal consequences of findings. Difficulties arise when judges seek to reassure the jury that the accused person will not be released when this is a possible outcome in the legislation. This has created difficulties for judges in determining what is required when directing the jury on the legal consequences of the findings:

Perusal of a number of recently delivered charges in the Trial Division of the court has revealed that there is some confusion concerning what should or should not be said in this regard and the difficulty which has been encountered in resolving the tension. Judges generally appear to have been concerned to reassure jury members that the verdict would not result in the release of the person into the community.<sup>121</sup>

## Question

- 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?

116 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 22(2).  
117 *Ibid* s 22(2)(a).  
118 *R v Fitchett* (2009) 23 VR 91, 100.  
119 *Ibid* 102.  
120 *Ibid* 103.  
121 *Ibid*.

## Appeals against findings of not guilty because of mental impairment

### Current law

- 5.138 A person may appeal a verdict of not guilty because of mental impairment to the Court of Appeal, after obtaining leave (permission) from the Court of Appeal.<sup>122</sup>
- 5.139 The Court of Appeal must allow an appeal if it is satisfied that:
- the verdict is unreasonable or cannot be supported by the evidence
  - as a result of an error or an irregularity in the trial, there has been a substantial miscarriage of justice, or
  - there has been a substantial miscarriage of justice for any other reason.<sup>123</sup>
- 5.140 If the Court of Appeal allows an appeal because it thinks that the verdict of not guilty because of mental impairment should not stand or considers that the proper verdict should have been guilty of an offence, it may substitute the verdict for a verdict of guilty.<sup>124</sup> Otherwise, if the Court of Appeal allows the appeal, it must set aside the not guilty because of mental impairment verdict and enter a verdict of acquittal or order a new trial.<sup>125</sup>

### Principles underpinning appeals

- 5.141 As discussed in Chapter 4 at [4.138], appeals serve an important function. They provide an opportunity for a higher court to review a decision of a lower court and correct any errors that have been made, to protect against miscarriages of justice, maintain consistency between trial courts and provide legitimacy to the criminal justice system.
- 5.142 Information currently available to the Commission indicates that appeals against findings of not guilty because of mental impairment are infrequent in Victoria. As noted at [4.140], the same observation has been made about appeals against findings of unfitness.

### Question

- 46 Are there any barriers to accused persons pursuing appeals in relation to findings of not guilty because of mental impairment?

122 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 24AA(1).  
 123 *Ibid* s 24AA(4).  
 124 *Ibid* s 24AA(7).  
 125 *Ibid* s 24AA(8).



# Application of the CMIA in the Magistrates' Court

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## 6. Application of the CMIA in the Magistrates' Court

### Introduction

- 6.1 The terms of reference ask the Commission to consider whether the application of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (CMIA) should be further extended to the Magistrates' Court, for example:
- whether the process for determining fitness to stand trial should be adapted for use in the Magistrates' Court
  - whether the CMIA should permit the Magistrates' Court to make supervision orders or other orders appropriate to the jurisdiction, rather than being required to discharge the accused person if they are found not guilty because of a mental impairment, and
  - if the Magistrates' Court is permitted to make additional orders, whether this should be limited to indictable offences that are triable summarily or extended to also include certain summary offences.
- 6.2 In this chapter, the Commission asks a number of questions about whether the CMIA should be extended to apply in the Magistrates' Court and the appropriate extent of any expansion. In doing so, the Commission considers the current jurisdiction of the Magistrates' Court under the CMIA, including relevant processes and orders already available in the Magistrates' Court in relation to people with a mental illness, intellectual disability or cognitive impairment and the extent to which these could be utilised. The Commission also considers the equivalent approach taken in other summary jurisdictions.

### The Magistrates' Court of Victoria

- 6.3 The *Magistrates' Court Act 1989* (Vic) establishes the Magistrates' Court of Victoria.<sup>1</sup> The Magistrates' Court sits in 54 different locations around Victoria and is comprised of 114 magistrates, 14 acting magistrates and seven judicial registrars.<sup>2</sup> It is Victoria's principal court of summary jurisdiction<sup>3</sup> with the jurisdiction to hear a broad range of matters, including criminal matters, traffic offences, money claims and civil disputes, family law and family violence matters and infringements. It also has a number of specialist court jurisdictions including the Drug Court and Koori Court. Unlike the higher courts, proceedings are less formal in the Magistrates' Court—for example, magistrates and lawyers do not wear wigs or robes.<sup>4</sup> Juries do not form a part of Magistrates' Court proceedings.

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1 *Magistrates' Court Act 1989* (Vic) s 4.

2 These numbers are correct as at 30 June 2012.

3 Richard Fox, *Victorian Criminal Procedure: State and Federal Law* (Monash Law Book Co-operative Ltd, 13th ed, 2010) 94.

4 *Magistrates' Court Act 1989* (Vic) s 125(2).

- 6.4 In its criminal jurisdiction, the Magistrates' Court has the power to:
- hear and determine all summary offences<sup>5</sup>
  - hear and determine all indictable offences triable summarily<sup>6</sup>
  - conduct committal proceedings into indictable offences.<sup>7</sup>
- 6.5 Summary offences are more minor offences that are heard by a magistrate without a jury. Being drunk in a public place, using obscene or threatening language in public and damaging property are examples of summary offences.
- 6.6 Indictable offences are more serious offences. They attract higher maximum penalties, and are usually triable before a judge and a jury. However, magistrates can hear and determine indictable offences that are triable summarily. Indictable offences that are triable summarily can range from causing serious injury recklessly to assault with intent to rape and aggravated burglary.<sup>8</sup>
- 6.7 Committal proceedings are a preliminary examination to determine whether the case against the accused person is sufficient to warrant the person being directed to stand trial before the Supreme Court or County Court.<sup>9</sup> After a committal proceeding, a magistrate may either direct that the accused person stand trial and order that they be remanded in custody until trial or granted bail, or the magistrate may discharge the accused person.<sup>10</sup>
- 6.8 The maximum term of imprisonment that the Magistrates' Court may impose for a single summary offence or indictable offence triable summarily is two years.<sup>11</sup> Unless expressly provided, the maximum cumulative period of imprisonment that may be imposed by the Magistrates' Court (in respect of several offences committed at the same time) is five years.<sup>12</sup>
- 6.9 The majority of criminal cases in Victoria come before the Magistrates' Court. In 2011–12, the Magistrates' Court finalised 180,731 criminal matters, 24,394 more matters than in 2007–08.<sup>13</sup> The approximately 15.6 per cent increase over a four-year period reflects the expanding jurisdiction of the Magistrates' Court to hear and determine criminal matters.<sup>14</sup>
- 6.10 This contrasts with the 2,350 criminal cases finalised in the County Court and the 102 criminal cases finalised in the Supreme Court in the same year.<sup>15</sup>
- 6.11 These statistics reflect the seriousness and complexity of the criminal matters heard in the higher courts, the longer time it takes to finalise a criminal matter (for example, jury trials) in those jurisdictions and fewer judicial officers.

5 Ibid s 25(1).

6 Ibid. For a list of the main state indictable offences triable summarily, see *Criminal Procedure Act 2009* (Vic) s 28, sch 2.

7 *Magistrates' Court Act 1989* (Vic) s 25(1).

8 Aggravated burglary is burglary with a firearm, weapon or explosive or anything that has the appearance of a firearm or explosive. The Magistrates' Court can hear matters involving aggravated burglary if the offence involves an intent to steal property of not more than \$100,000 in value. See *Crimes Act 1958* (Vic) s 77, *Criminal Procedure Act 2009* (Vic) sch 2 cl 4.

9 Fox, above n 3, 99.

10 *Magistrates' Court Act 1989* (Vic) s 25(1).

11 *Sentencing Act 1991* (Vic) ss 113, 113A.

12 Ibid s 113B.

13 Magistrates' Court of Victoria, *Annual Report 2011–12* (2012) 4.

14 Ibid. See also Magistrates' Court of Victoria, *Annual Report 2008–09* (2009) 5; Magistrates' Court of Victoria, *Annual Report 2010–11* (2011) 51.

15 County Court of Victoria, *Annual Report 2011–12* (2012) 2; Supreme Court of Victoria, *Annual Report 2011–12* (2012) 45.



## The law prior to the CMIA

- 6.12 Under the Governor's pleasure regime, magistrates did not have the authority to deal with issues of unfitness to stand trial and the defence of mental impairment. In *Pioch v Lauder*, Justice Forster observed:

In the case of [a] simple offence [in the Magistrates' Court] ... there appears to be neither authority nor statutory provision to deal with the matter of a defendant who is insane, whether properly so called as being a person suffering from a sufficient defect of reason, or disease of the mind, or a person like the defendant here [who is found to be unfit to plead].<sup>16</sup>

- 6.13 The CMIA granted magistrates limited powers, enabling them to find a person not guilty because of mental impairment. However, the legislation stopped short of giving magistrates the power to make orders following such findings.

## Current law under the CMIA in the Magistrates' Court

- 6.14 The CMIA does not give the Magistrates' Court the power to determine unfitness to stand trial. When the issue of unfitness to stand trial is raised, all matters involving indictable offences (including indictable offences triable summarily) must be committed to a higher court for an investigation of unfitness to stand trial by a jury. If the issue of unfitness to stand trial is raised in relation to a summary offence, the matter must be discontinued.<sup>17</sup> *CL (a minor) v Lee & Ors (CL)*<sup>18</sup> (discussed below at [6.23]) confirms that the Magistrates' Court lacks jurisdiction to determine unfitness to stand trial.
- 6.15 Section 528 of the *Children, Youth and Families Act 2005* (Vic) gives the Children's Court all the 'powers and authorities' that the Magistrates' Court has in relation to all matters over which it has jurisdiction. This means that the CMIA applies to the Children's Court in the same way that it does in the Magistrates' Court. In *CL*, Justice Lasry found that the Children's Court did not have the jurisdiction to determine whether a child is unfit to stand trial partly because the Magistrates' Court had no such jurisdiction. Where a question of a child's unfitness to stand trial is raised, the matter must be referred to the County Court for an investigation into the child's unfitness. Following the investigation, a special hearing or trial must be held.<sup>19</sup>
- 6.16 In relation to the defence of mental impairment, section 5(1) of the CMIA provides that the defence of mental impairment applies to summary offences and to indictable offences heard and determined summarily, which allows the defence to be relied on in the Magistrates' Court. The CMIA provides, however, that if the Magistrates' Court finds a person not guilty because of mental impairment of a summary offence or an indictable offence heard and determined summarily, the Magistrates' Court must discharge the person.<sup>20</sup> The Magistrates' Court therefore has no power to make orders in relation to people found not guilty because of mental impairment. Due to section 528 of the *Children, Youth and Families Act*, the mental impairment defence also applies in the Children's Court. The Commission is not considering whether the CMIA should be extended to the Children's Court as part of this review. The Department of Justice is examining this issue separately.

16 (1976) 13 ALR 266, 271.

17 Law Reform Committee, Parliament of Victoria, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (2013) 231.

18 [2010] 29 VR 570.

19 *Ibid* 588.

20 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 5(2).

## Extending the application of the CMIA in the Magistrates' Court: systemic issues

- 6.17 The question of whether the CMIA should be further extended to the Magistrates' Court raises a number of systemic issues that apply broadly to the matters that the Commission will consider in this section and in other sections in this paper.
- 6.18 Extending the application of the CMIA to the Magistrates' Court to enable it to determine unfitness to stand trial and make orders in relation to people found not guilty because of mental impairment could have potential advantages. The Magistrates' Court could provide a forum to determine these issues in a way that is less costly, more efficient and perhaps less intimidating than having the issue determined in a higher court. A process in the Magistrates' Court could better address the level of offending involved in summary offences and indictable offences triable summarily than a higher court. The Magistrates' Court may also be able to take a more flexible approach to accused people who come under the CMIA because of its less formal processes, the availability of options such as diversion programs and the lower level of offending in its jurisdiction. More flexibility in the regime in the Magistrates' Court could enable a focus on treatment and recovery, balanced with the need to protect the community as encapsulated in the underlying principles of the CMIA.
- 6.19 There could be, however, potential disadvantages and setbacks as well. Investigations into unfitness to stand trial may warrant jury involvement to provide an extra level of scrutiny. The heavy caseload and high throughput in the Magistrates' Court may be inappropriate for the articulated procedures and evidence under the CMIA. It may also be important not to create an overly elaborate process for people who have not committed a serious offence or a rigorous supervision regime for these people, contrary to the principle of least restriction underpinning the CMIA.
- 6.20 In the Commission's *Report on People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care*, the Commission did not recommend that the CMIA be extended to the Magistrates' Court. At the time, the Commission was of the view that this approach could result in supervision orders being made in relation to people who have been charged with minor offences. The Commission was concerned that this could result in the human services system having to manage people simply because they had committed such offences, rather than to people who had a higher level of needs.<sup>21</sup> Since then, the Magistrates' Court has started to deal with progressively more serious offences that may warrant a reconsideration of this recommendation.
- 6.21 It is also important to consider the cost implications of any expansion of the CMIA to the Magistrates' Court. There is a lack of data available on how many people could potentially be drawn into the CMIA cohort if unfitness to stand trial was extended to the Magistrates' Court or if there was an expansion of the orders available. Such changes could have significant resource implications for the Magistrates' Court. The Commission is interested in receiving data that can inform consideration of the possible effects and implications of expanding the jurisdiction of the CMIA to the Magistrates' Court.
- 6.22 An increase in the Magistrates' Court's jurisdiction would involve a higher caseload in the court and demand for services, including for the provision of expert reports and the supervision of orders. Therefore, it would be important to ensure that additional funding is available to enable the court and support services to implement the change. On the other hand, there could be significant resources saved by removing unfitness to stand trial and mental impairment matters that are currently required to be determined in the higher courts due to the restrictions on the application of the CMIA.

## Unfitness to stand trial in the Magistrates' Court

### The lack of jurisdiction

- 6.23 The Victorian Court of Appeal affirmed the decision made by Justice Lasry in CL, that the Magistrates' Court (and the Children's Court) did not have jurisdiction to determine unfitness to stand trial.<sup>22</sup> Justice Lasry stated a number of reasons why the CMIA did not give the Magistrates' Court the power to determine unfitness to plead. These included:
- The CMIA defines 'court' to mean the Supreme Court and County Court and restricts the definition to the Magistrates' Court in relation to requesting certificates of available services for certain orders.<sup>23</sup>
  - The CMIA provides, with no relevant exceptions, that the CMIA applies only in relation to trials of indictable offences in the Supreme Court or County Court.<sup>24</sup>
  - The CMIA does not expressly provide for the Magistrates' Court to determine unfitness to plead.<sup>25</sup>
  - The CMIA requires a jury to determine the issue of unfitness to stand trial, making it clear that it could not possibly apply in the Magistrates' Court.<sup>26</sup>
  - The availability of the defence of mental impairment in the Magistrates' Court does not imply a power to determine the issue of unfitness to plead.<sup>27</sup>
  - The second reading speech indicates that the CMIA is not intended to apply to the Magistrates' Court.<sup>28</sup>
- 6.24 Justice Lasry recommended that the CMIA and the Children, Youth and Families Act be amended to provide the Children's Court with the specific jurisdiction to deal with issues of unfitness to plead.<sup>29</sup> His Honour recommended that parliament consider provisions in other jurisdictions that give magistrates the authority to determine unfitness to stand trial.<sup>30</sup>
- 6.25 The Victorian Parliament Law Reform Committee has made similar recommendations in its *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers*. The Law Reform Committee, whose recommendations the Commission is asked to consider, recommended that the Victorian government consider amending the CMIA to allow investigations into an accused person's unfitness to stand trial in the Magistrates' Court and Children's Court.<sup>31</sup>

22 CL (a minor by his Litigation Guardian) v DPP & Ors [2011] VSCA 227 (5 August 2011).

23 CL (a minor) v Lee & Ors (2010) 29 VR 570, 575; Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) ss 3, 47.

24 CL (a minor) v Lee & Ors (2010) 29 VR 570, 575; Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) s 4(1).

25 CL (a minor) v Lee & Ors (2010) 29 VR 570, 575, 578.

26 CL (a minor) v Lee & Ors (2010) 29 VR 570, 576; Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) s 7(3)(b).

27 CL (a minor) v Lee & Ors (2010) 29 VR 570, 577.

28 Ibid.

29 Ibid 588.

30 Ibid.

31 Law Reform Committee, above n 17, 235.

## Issues with the lack of jurisdiction

- 6.26 Through its preliminary research, the Commission is aware that the Magistrates' Court's lack of jurisdiction to determine unfitness to stand trial may give rise to a number of potential problems. Thus far, the following potential issues have been identified:
- *Inefficiency of the process*—the Law Reform Committee was of the view that the current requirement that investigations into unfitness to stand trial be referred from the court in which the issue was raised to another court caused considerable inefficiencies and lengthened the process. As discussed in Chapter 4, the current process in relation to unfitness to stand trial requires the empanelling of two juries: one to determine whether the accused person is unfit to stand trial, and a second to determine whether the accused person committed the offence if they are found unfit to stand trial. The length of the process could be difficult for both victims and accused people, an issue that is also discussed in Chapter 4. The current process also utilises resources in the higher courts even though the offence is one that comes within the jurisdiction of the Magistrates' Court.
  - *Encourages 'artificial decision making'*—the current system may place pressure on magistrates, prosecutors, defence lawyers and the police to make decisions that they may not otherwise make. For example, in a number of cases, the only reason a magistrate would commit an accused person to trial is because the County Court has the power to empanel a jury to determine the issue of unfitness to stand trial, even though the type of offence would allow it to be heard and determined in the Magistrates' Court.
  - *Risk to community safety*—if a person is unfit to stand trial, proceedings involving that person charged with a summary offence (as opposed to an indictable offence triable summarily) must be discontinued in the Magistrates' Court. This is the case even when the accused person is charged with a large number of summary offences and may pose a risk of re-offending, and could raise issues of community safety.<sup>32</sup> The Magistrates' Court lacks the power to make an order to address the offending or protect the community.<sup>33</sup>
- 6.27 The terms of reference ask the Commission to consider whether changes are needed to ensure that the CMIA operates justly, effectively and consistently with the principles that underlie it. There is a potential inconsistency between the principles that underlie the CMIA and the Magistrates' Court's lack of jurisdiction to determine unfitness to stand trial.
- 6.28 First, the current system could be characterised as not operating 'justly', and may even be discriminatory, towards accused people with a mental illness, intellectual disability or cognitive impairment who may be unfit to stand trial. These accused people, by virtue of their mental illness, intellectual disability or cognitive impairment, do not have the same right as other accused people to have their matter heard in a lower jurisdiction.

32

Office of Public Prosecutions, Submission No 20 to Law Reform Committee, Parliament of Victoria, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers*, 9 September 2011, 4.

33

Ibid.

- 6.29 Second, the unfitness to stand trial doctrine is important for a number of reasons outlined in Chapter 4. These include the importance of avoiding inaccurate verdicts and ensuring the fairness of the criminal trial process. Based on these principles, a trial cannot continue if an accused person is unfit to stand trial.<sup>34</sup> There is, however, a danger that an accused person could be encouraged to plead guilty even when they cannot legitimately plead to avoid having the matter uplifted to a higher court and possibly dealt with by a more onerous supervision regime. Accused people in general may plead guilty for a number of reasons including a 'preference for an informal, speedy resolution over a formal, intimidating, complex and lengthy proceeding ...', to 'reduce costs', 'to get the matter over with, especially if in custody', and 'to get a lesser sentence'.<sup>35</sup> The factors affecting the decision to plead guilty are more pronounced in the situation of vulnerable offenders.<sup>36</sup>
- 6.30 The tendency for accused people to plead guilty even when they are unfit to stand trial existed under the Governor's pleasure regime<sup>37</sup> and exists in other jurisdictions.<sup>38</sup> It is unclear whether this practice occurs and is prevalent under the CMIA in Victoria. In any case, having inappropriate incentives to plead guilty may compromise the fairness of the process and the accuracy of the pleas entered in the Magistrates' Court.
- 6.31 Further, an accused person who pleads guilty even when they are unfit to stand trial could receive a recorded criminal conviction and an unsuitable punishment.<sup>39</sup> If an accused person's unfitness to stand trial continues to go undetected in the system, and the person continues to have multiple encounters with the criminal justice system, their criminal history is more likely to result in a prison sentence.<sup>40</sup> This could also be inconsistent with the principles that underlie the CMIA, particularly the principle that people who have not been tried for their actions because of a mental condition should not be punished.

## Question

- 47 What issues arise in relation to the Magistrates' Court's lack of jurisdiction to determine unfitness to stand trial?

34 *Eastman v R* (2000) 203 CLR 1.

35 Kathy Mack and Sharyn Roach Anleu, *Pleading Guilty: Issues and Practices* (Australian Institute of Judicial Administration, 1995) 109.

36 *Ibid.*

37 *Pioch v Lauder* (1976) 13 ALR 266, 271.

38 See, eg, *R v AAM; Ex parte Attorney-General (Qld)* [2010] QCA 305 (5 November 2010) where a woman with an intellectual disability pleaded guilty to a number of summary offences in the Toowoomba Magistrates' Court. Following a petition, the matter was eventually referred to the Court of Appeal, resulting in all the convictions being set aside. The court held that the pleas were not made by free choice because the woman was unfit to plead when she entered them, and it would be a miscarriage of justice to uphold the conviction.

39 Betheli O'Carroll, 'Intellectual Disabilities and the Determination of Fitness to Plead in the Magistrates' Courts' (2013) 37(1) *Criminal Law Journal* 51, 52.

40 L Edmestone, 'Law Change brings Justice for Mentally Ill Defendants in Courts' *The Courier-Mail* 11 November 2010 as cited in Betheli O'Carroll, 'Intellectual Disabilities and the Determination of Fitness to Plead in the Magistrates' Courts' (2013) 37(1) *Criminal Law Journal* 51, 52.

## The power to determine unfitness to stand trial

### Express power to determine unfitness to stand trial in summary courts

- 6.32 Like Victoria, the Northern Territory and Queensland do not have provisions allowing courts of summary jurisdiction to determine the issue of unfitness to stand trial.<sup>41</sup>
- 6.33 The Australian Capital Territory, South Australia, Tasmania and Western Australia allow magistrates to determine the issue of unfitness to stand trial.<sup>42</sup> In the Australian Capital Territory, the Magistrates' Court has limited jurisdiction to determine unfitness to plead.<sup>43</sup> If the question is raised in the Magistrates' Court (other than at a committal hearing) and the court is satisfied that there is a 'real and substantial question' about the accused person's unfitness to plead, the court must reserve the question for investigation.<sup>44</sup> However, if the issue of unfitness to plead arises during a committal hearing, the committal hearing must be completed. If the accused person is committed, then the question of unfitness to plead is reserved for the Supreme Court.<sup>45</sup> There is a discretionary power not to proceed with the investigation into unfitness and dismiss the charge.<sup>46</sup> The test for determining unfitness to stand trial is not adapted for the Magistrates' Court and is largely based on the Presser criteria.
- 6.34 In South Australia, if there are 'reasonable grounds' to suppose that a person is mentally unfit to stand trial, the magistrate may order an investigation into the unfitness to stand trial.<sup>47</sup> There is no unfitness to stand trial test specifically adapted for the Magistrates' Court. The test appears to be flexible enough to apply to both higher and lower courts. If the question of unfitness arises at a preliminary examination for an indictable offence, the question of whether there should be an investigation must be reserved for the court of trial.<sup>48</sup>
- 6.35 Like the Australian Capital Territory, magistrates in Tasmania have limited jurisdiction to determine unfitness to stand trial.<sup>49</sup> If a 'real and substantial question' is raised relating to the accused person's unfitness to stand trial (other than at a preliminary proceeding for an indictable offence), the court has the power to reserve the question of the accused person's unfitness to stand trial for investigation.<sup>50</sup> However, if the issue of unfitness to stand trial is raised at a preliminary proceeding for an indictable offence, the question is reserved for determination by the Supreme Court.<sup>51</sup> There is no test for determining unfitness to stand trial adapted for the Magistrates' Court.
- 6.36 Finally, in Western Australia, the question of unfitness to stand trial may be raised at any time before or during the hearing of the accused person in the Magistrates' Court.<sup>52</sup> The magistrate then decides the question of the accused person's unfitness to stand trial on the balance of probabilities.<sup>53</sup> The test to determine unfitness to plead is not adapted for the Magistrates' Court and is largely based on the Presser criteria.

41 Part IIA of the *Criminal Code Act 1983* (NT) that provides for a process to determine fitness to stand trial defines 'court' in section 43A to mean the Supreme Court. Section 43L provides that a jury decides if an accused person is fit to stand trial. In Queensland, the Queensland Mental Health Court has jurisdiction to determine fitness to plead in relation to summary offences, but only when the accused person is also charged with an indictable offence. There is no equivalent procedure available for summary offences in the Queensland Magistrates' Court. It is unclear what happens when this issue is raised in the Magistrates' Court, but there does not appear to be a standard practice. See *Mental Health Act 2000* (Qld) s 257(3); *Legal Aid Queensland – Criminal Law Duty Lawyer Handbook* (5th ed, 2012) 208.

42 O'Carroll, above n 39, 60.

43 *Crimes Act 1900* (ACT) s 310.

44 *Ibid* s 314(1).

45 *Ibid* s 314(2).

46 *Ibid* s 315(4).

47 *Criminal Law Consolidation Act 1935* (SA) ss 5, 269A, 269J. The *Criminal Law Consolidation Act 1935* (SA) defines 'court' to generally include a court of summary jurisdiction and 'judge' to include magistrates.

48 *Ibid* s 269I.

49 *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 4. The *Criminal Justice (Mental Impairment) Act 1999* (Tas) enables the provisions on unfitness to stand trial to apply to all courts.

50 *Ibid* s 10.

51 *Ibid* s 10(2).

52 *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 11. Section 4 enables the provisions on fitness to stand trial to apply to all courts exercising criminal jurisdiction, allowing magistrates to determine the issue.

53 *Ibid* s 12(1).

- 6.37 The jurisdictional comparison shows that if the Magistrates' Court is given the power to conduct investigations into unfitness to stand trial, there are a number of other variables that will need to be determined. These include:
- which offences the procedure would apply to (for example, all offences that can be heard and determined in the Magistrates' Court or only indictable offences triable summarily)
  - when the question of unfitness to stand trial must be raised to bring it within the Magistrates' Court's jurisdiction (for example, whether the question can be raised at any time during Magistrates' Court proceedings or alternatively, at any time other than at a committal proceeding)
  - the trigger for an investigation into unfitness to stand trial in the Magistrates' Court (for example, the investigation could be conducted when there is 'a real and substantial question' as to unfitness or when there are 'reasonable grounds' for the investigation)
  - whether the Magistrates' Court should retain a discretion not to proceed with an investigation into unfitness to stand trial (for example, the discretion to adjourn the matter to enable the accused person to become fit or the discretion to refer the investigation into unfitness to stand trial to a higher court)
  - whether a special test to determine unfitness to stand trial should apply in the Magistrates' Court (the requirement that the accused person be able to challenge a juror, for example, would be irrelevant in this jurisdiction).

## Questions

- 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?
- 49 What are the cost implications of giving the Magistrates' Court the power to determine unfitness to stand trial?

## Discretionary power to make orders

- 6.38 Rather than the Magistrates' Court gaining the power to determine unfitness to stand trial, it could instead have a broad discretionary power to make orders in relation to people with a mental illness, intellectual disability or cognitive impairment.
- 6.39 While New South Wales and the Commonwealth do not have express provisions enabling summary courts to determine unfitness to stand trial,<sup>54</sup> both jurisdictions give magistrates limited discretionary powers to make orders in relation to people with a mental illness or an intellectual or developmental disability.<sup>55</sup> Both jurisdictions permit summary courts to adjourn proceedings, grant bail, dismiss proceedings or make any other appropriate order in relation to accused people who have a mental illness or intellectual or developmental disability.<sup>56</sup> The court may dismiss the charge and discharge the accused person into the care of a responsible person, on the condition that the accused person be assessed or receive treatment, or without conditions.<sup>57</sup>
- 6.40 The New South Wales and Commonwealth approach removes the need for a decision on whether an accused person is unfit to stand trial and a process to determine whether the accused person committed the offence charged. By being less procedure driven, it is potentially more efficient and less resource intensive. However, this approach has raised some concerns. For example, a person could potentially be made subject to an order without being found unfit to stand trial or to have committed the offence. O'Carroll argues:
- One concern with s 20BQ of the [*Crimes Act 1914* (Cth)] and s 32 of the [*Mental Health (Forensic Provisions) Act 1990* (NSW)] is that they do not give defendants a chance to defend the charge. This could result in unfair outcomes where a person with an intellectual disability has a valid defence but the magistrate dismisses the charge under one of these sections and orders that the person be placed in somebody's care or attend for treatment or assessment.<sup>58</sup>
- 6.41 Further, the power is discretionary and magistrates are not required to apply it. Finally, leaving the terms 'mental illness' and 'intellectual disability' or 'developmentally disabled' undefined may lead to confusion and result in the inconsistent application of the provision.<sup>59</sup> An accused person may be unfit but not clearly fall into those categories.<sup>60</sup>

## Questions

- 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?
- 51 If considered, should such a power be framed or limited in any way (for example, limited to indictable offences triable summarily)?
- 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?

54 Section 4 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) provides that Part 2 of the Act, that provides a process for determining fitness to stand trial, only applies to criminal proceedings in the Supreme Court (including criminal proceedings within the summary jurisdiction of the Supreme Court) and the District Court. Section 20B of the *Crimes Act 1914* (Cth) provides that if the issue of fitness to stand trial is raised in a committal, the magistrate must refer the proceedings to the court to which the proceedings would have been referred had the person been committed for trial.

55 O'Carroll, above n 39, 60.

56 *Mental Health (Forensic Provisions) Act 1990* (NSW) s 32; *Crimes Act 1914* (Cth) s 20BQ(1).

57 Ibid.

58 O'Carroll, above n 39, 62–3.

59 Ibid 66.

60 Ibid.



## Determining whether the accused person committed the offence

- 6.42 If the Magistrates' Court is given the power to determine unfitness to stand trial, it will be necessary to decide what process should be followed following a finding of unfitness to stand trial in the Magistrates' Court to determine whether the accused person committed the offence.
- 6.43 Some jurisdictions have approached this issue by providing for a 'special hearing' procedure in the Magistrates' Court. The Australian Capital Territory, for example, requires the court to conduct a hearing in which the magistrate decides whether the accused person engaged in the conduct required for the offence charged.<sup>61</sup> The conduct of the hearing is similar to a usual criminal proceeding.<sup>62</sup>
- 6.44 In Tasmania, if the accused person has been found unfit to stand trial (and is unlikely to become fit after 12 months or does not become fit within a 12-month adjournment), the court must hold a special hearing to determine, on the limited evidence available, whether the accused person is not guilty of the offence.<sup>63</sup> The court must conduct the hearing as close as possible to a usual criminal proceeding.
- 6.45 In Western Australia, where there is a finding that an accused person is unfit to stand trial for a summary offence or indictable offence triable summarily, the court must make an order dismissing the charge without deciding the guilt of the accused person and either release that person or make a custody order.<sup>64</sup> The court has power to adjourn the proceedings for up to six months to see whether the accused person will become mentally fit to stand trial.<sup>65</sup> Where the offence is an indictable offence, the matter proceeds to committal and the accused person is presumed to plead not guilty.<sup>66</sup>

## Questions

- 53 If the Magistrates' Court is given the power to determine whether the accused person committed the offence charged, what process should apply to determine whether the accused person committed the offence charged?
- 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?

61 *Crimes Act 1900* (ACT) s 315C. This section applies to indictable offences that can be heard and determined summarily.

62 *Ibid.*

63 *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 15.

64 *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 16(6). A custody order must not be made in respect of an accused person unless the statutory penalty for the offence includes imprisonment and the court is satisfied that a custody order is appropriate having regard to a number of factors including the strength of the evidence against the accused person.

65 *Ibid* ss 2(b), 3.

66 *Ibid* s 17.

## Defence of mental impairment in the Magistrates' Court

### The requirement to discharge

- 6.46 Section 5 of the CMIA, while providing that the defence of mental impairment applies to summary offences and indictable offences heard and determined summarily, also provides that:
- If the Magistrates' Court finds a person not guilty because of mental impairment of a summary offence or an indictable offence heard and determined summarily, the Magistrates' Court must discharge the person.
- 6.47 The Community Development Committee, which developed most of the policy underlying the CMIA, decided not to give magistrates the power to make orders in relation to people found not guilty because of mental impairment. This decision was based on the reasoning that offences heard in the Magistrates' Court were less serious and did not warrant the kind of treatment and supervision that would be required by someone who committed a more serious offence. The Committee expressed doubt that the supervision regime proposed (that was subsequently adopted by the CMIA) would be suitable for people charged with summary offences. The Committee also envisaged that such people would receive assistance through psychiatric or intellectual disability services or pre-trial diversion, recognising that there would need to be legislative change before a true pre-trial diversionary process could operate in Victoria.<sup>67</sup>
- 6.48 These reasons, while justified at the time the CMIA came into effect, may no longer be pertinent.
- 6.49 First, the 'safety net' that the Committee envisaged (that is, that people who were found not guilty because of mental impairment in the Magistrates' Court would receive psychiatric or intellectual disability services or be diverted at a pre-trial stage) did not eventuate. While such options are available in the Magistrates' Court, these options are not available as a means of dealing with people who are found not guilty because of mental impairment.
- 6.50 Second, the summary offences the Committee referred to have since increased in number and seriousness. This expansion of the Magistrates' Court's criminal jurisdiction began as early as the 19th and 20th century,<sup>68</sup> but has continued in recent years, motivated by the costs involved in jury trials in the higher courts.<sup>69</sup> This was achieved primarily by increasing the number of indictable offences that can be heard summarily.<sup>70</sup> While the number of summary offences was lower at the time of the Community Development Committee's report, the jurisdiction of the Magistrates' Court now includes a number of serious offences previously heard in the higher courts.<sup>71</sup> Making a threat to kill, stalking, assault with intent to rape and aggravated burglary are some examples of relatively serious indictable offences triable summarily.

67 Community Development Committee, Parliament of Victoria, *Inquiry into Persons Detained at the Governor's Pleasure* (1995) 159, 161.  
 68 Simon Bronitt and Russell Hogg, 'The 21st century Jury: The Rhetoric and the Reality' (2003) 15(3) *Legaldate* 1, 2.  
 69 *Ibid.*  
 70 John Willis, 'The Magistracy: The Undervalued Work-horse of the Court System' (2001) 18(1) *Law in Context* 129, 137.  
 71 *Ibid.*

## Issues with the requirement to discharge

6.51 Through its preliminary research, the Commission is aware that the lack of orders available to magistrates in relation to people found not guilty because of mental impairment raises a number of potential problems. Thus far, the following potential issues have been identified in preliminary research:

- *Lack of ‘outcome’ encourages artificial decision making and fails to address the offending behaviour or mental illness, intellectual disability or cognitive impairment*—as with the Magistrates’ Court’s lack of jurisdiction to determine unfitness to stand trial, the current system may put pressure on magistrates, prosecutors, defence lawyers and the police to make decisions that they may not otherwise make. For example, a magistrate may consider committing a person for trial in the County Court, even though the type of offence would allow it to be heard and determined summarily, to avoid a discharge in the Magistrates’ Court. Lawyers may decide not to rely on the defence of mental impairment in the Magistrates’ Court, in the hope of having the mental impairment considered in sentencing. In the absence of any measures in place to provide these accused people with services or options for diversion, a discharge usually follows a verdict of not guilty because of mental impairment in the Magistrates’ Court. The Magistrates’ Court has no power to make an order to address the offending behaviour or mental illness, intellectual disability or cognitive impairment.
- *Risk to community safety*—the discharge of a person found not guilty because of mental impairment may also compromise community safety. As the Commission observed in its *Review of People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care*, it may be inappropriate for a Magistrates’ Court to discharge an accused ‘... if the person is in need of care and is acting violently or dangerously, and may do so again in the future if he or she does not receive appropriate care ...’.<sup>72</sup> Without treatment or supervision, the offending behaviour of some accused people may escalate and ultimately lead to more serious consequences for the accused person and the community.<sup>73</sup>

### Question

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?

## The power to make orders following a finding of not guilty because of mental impairment

6.52 The Australian Capital Territory, South Australia, Tasmania and Western Australia provide magistrates with the power to make orders in relation to people found not guilty because of mental impairment. In New South Wales, the Magistrates’ Court deals with accused people with a mental impairment using its diversionary powers under sections 32 and 33 of the *Mental Health (Forensic Provisions) Act 1990* (NSW). Courts of summary jurisdiction in the Northern Territory, Queensland and the Commonwealth do not have jurisdiction to decide whether the defence of mental impairment is established.<sup>74</sup>

72 Victorian Law Reform Commission, above n 21, 123.

73 Ibid 232–3.

74 Section 20BQ(1) of the *Crimes Act 1914* (Cth) provides that if a person with a mental illness or intellectual disability appears in a summary court in respect of a federal offence and the court is of the opinion that it is appropriate, the court has the power to dismiss the charge, adjourn the proceedings, grant bail or make any other appropriate order. In the Northern Territory, the *Criminal Code Act* (NT) defines court to mean Supreme Court for the defence of mental impairment in section 43A. Section 43G provides for a process for a jury to determine whether the defence has been established. In Queensland, the Mental Health Court does not have jurisdiction to determine the defence of mental impairment in relation to summary offences, unless the person is also charged with an indictable offence. There is no equivalent procedure available for summary offences. It is unclear what happens when these issues are raised in the Magistrates’ Court, but there does not appear to be a standard practice.

- 6.53 In the Australian Capital Territory, the Magistrates' Court can:
- order that the person is detained in custody until the Civil and Administrative Tribunal otherwise orders
  - direct that the person submit to the jurisdiction of the Civil and Administrative Tribunal which will make a mental health order or recommendations on the orders the magistrate should make, or
  - make any other order.<sup>75</sup>
- 6.54 The options available to the magistrate depend on whether the offence is a 'serious offence' or not.<sup>76</sup>
- 6.55 In South Australia, the Magistrates' Court may make orders in relation to people who are found mentally incompetent to commit the offence.<sup>77</sup> The Magistrates' Court may order the release of the person unconditionally, make a supervision order involving detention or make a supervision order releasing the person on licence.<sup>78</sup> Supervision orders are subject to 'limiting terms' equivalent to the period of imprisonment or supervision that would have been appropriate if the person had been convicted of the offence.<sup>79</sup> The order lapses at the end of the limiting term.<sup>80</sup>
- 6.56 In Tasmania, the Magistrates' Court may make a range of orders in relation to these people including:
- making a continuing care order
  - releasing the person and making a community treatment order
  - releasing the person on such conditions as the court considers appropriate
  - releasing the person unconditionally.<sup>81</sup>
- 6.57 In Western Australia, if the Magistrates' Court finds an accused person not guilty of an offence because of unsoundness of mind the court may make an order in respect of that person.<sup>82</sup> The orders available depend on whether the offence is serious or not, but generally the court can release the person unconditionally, make a conditional release order, a community-based order or an intensive supervision order under the *Sentencing Act 1995* (WA), or make a custody order.<sup>83</sup>
- 6.58 In New South Wales, the defence of mental illness does not apply to proceedings for summary offences in the Local Court.<sup>84</sup> Whether the defence applies in indictable offences triable summarily is less clear.<sup>85</sup> The Local Court generally deals with accused people with a mental impairment using its diversionary powers under the *Mental Health (Forensic Provisions) Act*.<sup>86</sup>
- 6.59 If magistrates have the power to make orders in relation to people found not guilty because of mental impairment it will be necessary to decide which offences this power should apply to. It may not make sense, for example, to find a person not guilty because of mental impairment in relation to a summary offence that lacks a mental element (such as the offence of 'disorderly conduct' in a public place) and subject that person to an order.

75 *Crimes Act 1900* (ACT) ss 328 (1), 329(1).

76 A 'serious offence' is an offence involving actual or threatened violence punishable by imprisonment for longer than 12 months, or committing an act endangering life under section 27 of the *Crimes Act 1900* (ACT). See *Crimes Act 1900* (ACT) s 300.

77 *Criminal Law Consolidation Act 1935* (SA). 'Judge' is defined to include magistrates in section 269A (which regulates the competence to commit an offence) and 'court' generally refers to a court of summary jurisdiction in section 5.

78 *Ibid* s 269O(1).

79 *Ibid* s 269O(2).

80 *Ibid* s 269O(3).

81 *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 21. Only the Supreme Court may make a restriction order or supervision order in relation to people found not guilty of an offence on the ground of insanity. Section 4 enables Part 3 of the *Criminal Justice (Mental Impairment) Act 1999* (Tas), that deals with orders in relation to accused people found not guilty by reason of insanity, to apply to all courts including the Magistrates' Court.

82 *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 20.

83 *Ibid* s 22.

84 New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Consultation Paper No 6 (2010) 89.

85 *Ibid*.

86 *Mental Health (Forensic Provisions) Act 1990* (NSW) ss 32–3.

- 6.60 Further, different considerations apply to the question of whether orders should be available following a finding of not guilty because of mental impairment according to the seriousness of the offence. The current discharge requirement under the CMIA following a finding of not guilty because of mental impairment may be appropriate if an accused person has been found not guilty of a summary offence as the offence is less serious. Therefore, the need to consider other orders may be more pertinent in cases where an accused person is charged with an indictable offence triable summarily.

## Questions

- 56 Should the Magistrates' Court have the power to make orders in relation to people found not guilty because of mental impairment?
- 57 If yes, should the power to make orders be limited to indictable offences triable summarily or include certain summary offences?

## Options for expanding the orders available in the Magistrates' Court

- 6.61 If the CMIA is expanded to the Magistrates' Court to enable it to determine unfitness to stand trial and the criminal responsibility of the accused person following a finding of unfitness, it will be necessary to decide whether and what orders should be made available to magistrates following that process. A similar assessment would need to be made if the CMIA was expanded to enable magistrates to make orders in relation to people found not guilty because of mental impairment.
- 6.62 The following section outlines a number of options that could be introduced in the Magistrates' Court if the court's jurisdiction is so extended. The options outlined could also be relevant if the Magistrates' Court is given a broad discretionary power to make orders in relation to accused people with a mental illness, intellectual disability or cognitive impairment.

## Orders under the CMIA supervision regime

- 6.63 When a person is declared liable to supervision under the CMIA, they may be placed under an indefinite custodial or non-custodial supervision order. Given the seriousness of offences under the jurisdiction of the Magistrates' Court, it would be important to avoid drawing a rigorous supervision regime for minor offences. A supervision regime such as the one that currently exists under the CMIA, which is indefinite for example, may be inappropriate for offences in the Magistrates' Court.
- 6.64 To avoid drawing an overly rigorous supervision regime, the orders available under the CMIA could be subject to a time limit. Alternatively, only non-custodial supervision orders and unconditional discharges could be made available to the Magistrates' Court. With indictable offences triable summarily, the Magistrates' Court could retain a discretion to commit the accused person to trial, which could act as a safety net for matters that might warrant a more restrictive order.

## Orders under the Sentencing Act 1991 (Vic) in the Magistrates' Court

- 6.65 There are currently a number of orders available under the *Sentencing Act 1991* (Vic) in the criminal justice system, other than under the CMIA, for people with a mental illness, intellectual disability or cognitive impairment. If suitable, these orders could be utilised or adapted if the Magistrates' Court's jurisdiction is extended. The Commission's preliminary research indicates that these orders are infrequently imposed.
- 6.66 Part 5 of the Sentencing Act provides the following orders for a person with a mental illness, instead of imposing a criminal sentence:
- *Assessment order*—This is an order detaining the person as an involuntary patient at a mental health service for up to 72 hours for an assessment to be made of their suitability for a restricted involuntary treatment order or a hospital security order.<sup>87</sup>
  - *Diagnosis, assessment and treatment order*—This is an order detaining the person as an involuntary patient in an approved mental health service for diagnosis, assessment and treatment for up to three months.<sup>88</sup>
  - *Restricted involuntary treatment order*—This is an order for people found guilty of an offence other than a serious offence detaining the person in an approved mental health service as an involuntary patient for up to two years.<sup>89</sup> This order applies to people who meet the criteria for transfer from the criminal justice system to the mental health system.<sup>90</sup> The person is then dealt with as a patient under the *Mental Health Act 1986* (Vic) instead of as a prisoner.<sup>91</sup>
  - *Hospital security order*—This is an order detaining the person at an approved mental health service for a period not exceeding the period of imprisonment to which the person would have been sentenced.<sup>92</sup>
- 6.67 Generally, to qualify for these orders:
- The person must be found guilty at a criminal trial.<sup>93</sup>
  - The person must appear to have a mental illness that may require treatment that is obtainable in detention in an approved mental health service.<sup>94</sup>
  - Involuntary treatment must be necessary for their safety or the protection of the public.<sup>95</sup>
  - The authorised psychiatrist of the approved mental health service must certify that there are facilities and services available for the assessment or treatment of that person.<sup>96</sup>

87 *Sentencing Act 1991* (Vic) s 90.

88 *Ibid* s 91.

89 *Ibid* s 93.

90 Fox, above n 3, 435.

91 *Ibid*.

92 *Sentencing Act 1991* (Vic) s 93A.

93 *Ibid* ss 90(1)(a), 91(1)(a), 93(1), 93A(1).

94 *Ibid* ss 90(1)(b), 91(1)(b), 93(1)(a), 93A(1)(a).

95 *Ibid*.

96 *Ibid* ss 90(1)(c), 91(1)(c), 93(1)(b), 93A(1)(b).

- 6.68 For people with a intellectual disability or cognitive impairment, the following orders are available:
- *Justice plan condition*—This is a special condition that attaches to a community correction order or an order for release. The special condition requires the person to participate in certain services in the ‘justice plan’ that are designed to reduce the likelihood of the person committing further offences. The person must have an intellectual disability within the meaning of the *Disability Act 2006* (Vic) to qualify for a justice plan condition.
  - *Residential treatment order*—This is an order detaining the person for up to five years in a residential treatment facility. This order can only be made in relation to people who have been found guilty of a serious offence or indecent assault under section 39 of the *Crimes Act 1958* (Vic),<sup>97</sup> the person must be suitable for admission to a residential treatment facility and there must be services available at the residential treatment facility.<sup>98</sup>
- 6.69 There are also community correction orders made under the Sentencing Act that can be adapted to the needs of people with a mental illness, intellectual disability or cognitive impairment. These orders have been described as a ‘non-custodial sanction with multiple elements capable of being tailored to the needs of different types of offender ...’.<sup>99</sup> The order must not operate for more than two years and the offender must consent to the order.<sup>100</sup> The court must attach one or more conditions to the order that could include a treatment and rehabilitation condition.<sup>101</sup>

### Orders potentially available under the civil mental health and disability system

- 6.70 Instead of making an order under the criminal justice system, the Magistrates’ Court could refer the person to the Office of Senior Practitioner (Department of Human Services) or the Office of the Chief Psychiatrist (Department of Health). Those bodies can then decide whether the person is eligible for services under their respective Acts (the Mental Health Act and the Disability Act) and if appropriate, recommend that the person receive such services.
- 6.71 This option is similar to recommendation 93 made by the Commission in its report on *People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care*. The Commission recommended that ‘where a magistrate finds a person with an intellectual disability or mental impairment is not guilty because of a mental impairment ..., the magistrate may refer the person to the Office of Senior Clinician’.<sup>102</sup>

97 *Sentencing Act 1991* (Vic) s 82AA(1).

98 *Ibid* s 82AA(3).

99 Fox, above n 3, 385.

100 *Sentencing Act 1991* (Vic) ss 38(1), 37.

101 *Ibid* ss 47, 48D.

102 Victorian Law Reform Commission, above n 21, 124.

- 6.72 There are a number of orders under the Mental Health Act and the Disability Act that could be used to address the needs of accused people with a mental illness, intellectual disability or cognitive impairment in the Magistrates' Court. The Mental Health Act contains the following orders for people with a mental illness:
- *Involuntary treatment order*—This is an order that allows for the involuntary detention of a person for treatment at an approved mental health service.<sup>103</sup>
  - *Community treatment order*—This is an order for people subject to an involuntary treatment order for treatment in an approved mental health service without detention.<sup>104</sup>
- 6.73 Under the Mental Health Act, a person must satisfy the following criteria for involuntary treatment:
- the person appears to be mentally ill
  - the person's mental illness requires immediate treatment and that treatment can be obtained by the person being subject to an involuntary treatment order
  - because of the person's mental illness, involuntary treatment of the person is necessary for their health or safety (whether to prevent a deterioration in the person's physical or mental condition or otherwise) or for the protection of members of the public
  - the person has refused or is unable to consent to the necessary treatment for the mental illness
  - the person cannot receive adequate treatment for the mental illness in a manner less restrictive of their freedom of decision and action.<sup>105</sup>
- 6.74 The Disability Act contains provisions for a supervised treatment order, that is an order to detain people with an intellectual disability who pose 'a significant risk of serious harm to others'.<sup>106</sup>

### Processes potentially available in the Magistrates' Court

- 6.75 In recent years, the Magistrates' Court has developed a number of support and diversion initiatives to address the issues underlying offending behaviour. These include the Court Integrated Services Program (CISP) and the Assessment and Referral Court (ARC) List. CISP provides short-term services and support before sentencing to accused people with health and social needs. The ARC List is a specialist court list to meet the needs of accused people who have a mental illness and/or a cognitive impairment. A Mental Health Court Liaison Service (MHCLS), provided by Forensicare, also operates out of the Melbourne Magistrates' Court and a number of regional and rural courts.

### Assessment and Referral Court (ARC) List

- 6.76 The ARC List, established in 2010, is a 'specialist problem-solving court' piloted by the Magistrates' Court in collaboration with the Department of Justice. The list, that operates in Melbourne, was established to assist people who have a mental illness and/or a cognitive impairment by addressing the issues that underlie their offending behaviour. It aims to reduce the likelihood of re-offending. Like other specialist courts in the Magistrates' Court, the ARC List is generally less formal than a traditional court. It is an interactive process designed to make participants more comfortable, which encourages greater compliance and responsiveness to any orders imposed, and provides a more individualised and practical approach to address the needs of this group of accused people.<sup>107</sup>

103 *Mental Health Act 1986* (Vic) ss 12, 12AA.

104 *Ibid* s 14.

105 *Ibid* s 8(1).

106 *Disability Act 2006* (Vic) s 191(2)(c).

107 Magistrates' Court of Victoria, above n 13, 15.



6.77 Participants in the ARC List are required to attend regular hearings during the course of their participation (that may be up to 12 months) where their issues and progress in addressing them are discussed. The list relies on ‘therapeutic jurisprudence principles’ that take into account the participant’s mental illness or cognitive impairment.<sup>108</sup> A magistrate supervises the list, supported by a program manager and clinical or case advisors who provide support to the participants throughout their involvement with the list. An evaluation of the ARC List has been conducted by KPMG but is not publicly available. The ARC List is widely regarded as a valuable initiative.

#### **Courts Integrated Services Program (CISP)**

6.78 CISP commenced operation in early 2007. It is a multi-disciplinary rehabilitation program established by the Magistrates’ Court in collaboration with the Department of Justice to ensure that accused people receive appropriate treatment and support services with the aim of promoting safer communities by reducing re-offending. It provides referrals or links for the participant to drug and alcohol treatment, crisis accommodation, disability services and mental health services. The program currently operates in Melbourne, Sunshine and Latrobe Valley Magistrates’ Courts.

6.79 CISP provides case management by:

- providing participants with short-term assistance to address their health and social needs
- working on the causes of their offending through individualised case management support
- helping them gain access to treatment and community support services.

6.80 CISP participants can be involved in the program for up to four months. A recent evaluation of CISP found that ‘compared with offenders at other court venues, offenders who completed CISP showed a significantly lower rate of re-offending in the months after they exited the program’.<sup>109</sup>

#### **Mental Health Court Liaison Service (MHCLS)**

6.81 The Mental Health Court Liaison Service (MHCLS), provided by Forensicare, is a court-based assessment and advice service. The main role of the MHCLS is to provide mental state assessments and advice regarding the management and needs of accused people, and if necessary, referring people to area mental health services for treatment and case management. The MHCLS sometimes undertakes assessments for the purpose of determining whether an accused person is unfit to stand trial. Forensicare provides the assessment service to seven metropolitan Magistrates’ Courts and there are four regional roles that are provided by local area mental health services.

#### **Diversion if the CMIA is further extended to the Magistrates’ Court**

6.82 At present, the ARC List and CISP are not designed to include accused people who are unfit to stand trial (or people who are found criminally responsible following a finding of unfitness) or those who would qualify for a defence of mental impairment. This can be contrasted with the South Australian diversion program that aims to provide a diversion option in the Magistrates’ Court for people who may otherwise put forward a defence of mental impairment. Any expansion of the ARC List or CISP to people found unfit to stand trial or not guilty because of mental impairment would require a change in the respective criteria for eligibility.

- 6.83 It would also be important to consider whether the initiatives, as they currently stand, are appropriate for people who come under the CMIA. The four-month CISP case management, for example, may be too brief for people with an intellectual disability or cognitive impairment. Any diversion program would need to be appropriate for both accused people with a mental illness and an intellectual disability or cognitive impairment.
- 6.84 Another factor to consider is the time and costs involved in diversion: diversion requires more time to move accused people through the system, additional services and intensive judicial monitoring that could lead to higher costs.<sup>110</sup> However, it may be that these costs are still less than the alternative, where a person ends up having repeated encounters with the criminal justice system and ultimately requires a much stricter level of supervision or detention.

### New orders and processes that could be developed in the Magistrates' Court

- 6.85 In Tasmania, as discussed earlier, the Magistrates' Court can make a flexible range of orders including:
- a continuing care order (detention in a mental health facility for up to six months on a renewable basis)
  - a community treatment order (a conditional release with the requirement that the person accept treatment or attend a mental health facility or fulfil some other condition, for up to one year on a renewable basis)
  - a conditional or unconditional release.<sup>111</sup>
- 6.86 In some jurisdictions, the decision to make an order is deferred to another body. In the Australian Capital Territory, for example, courts can refer the making of an order to the Civil and Administrative Tribunal. The Civil and Administrative Tribunal can then make a mental health order.<sup>112</sup>

## Questions

- 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?
- 59 What are the cost implications of the options for expanding orders available in the Magistrates' Court?

110 Thomas L Hafemeister, Sharon G Garner and Veronica E Bath, 'Forging Links and Renewing Ties: Applying the Principles of Restorative and Procedural Justice to Better Respond to Criminal Offenders with a Mental Disorder' (2012) 60 *Buffalo Law Review* 147, 186–7.

111 *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 21(1).

112 *Crimes Act 1900* (ACT) ss 328, 329, 335.



# Consequences of findings under the CMIA

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## 7. Consequences of findings under the CMIA

### Introduction

- 7.1 In a usual criminal trial, if a jury finds a person not guilty of an offence, the court must release them. If a jury finds a person guilty of an offence or the person pleads guilty, the court must decide whether to record a conviction against the person and impose an appropriate sentence in response to the offending. The *Sentencing Act 1991* (Vic) governs sentencing in Victoria.
- 7.2 In addition to a conviction and/or a sentencing order, other orders can follow a finding of guilt. These are ‘ancillary’ orders because a court makes them in addition to the primary order. In some cases, the court makes these orders, for example, an order for compensation to a victim. In other cases, the orders occur automatically due to a requirement in legislation, for example licence suspension or disqualification.
- 7.3 The consequences that follow findings in the unfitness to stand trial and mental impairment processes differ from the consequences that follow a trial of an accused person in the usual criminal process.
- 7.4 The existence of different orders under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (CMIA) reflects the different principles that underlie the CMIA. A person who is unfit to stand trial is not able to exercise their full right to a criminal trial. A jury must determine their responsibility for an offence at an alternative special hearing. If a jury at the special hearing finds that the person committed the offence, it would be unfair for a court to sentence them as if they had been guilty in a usual criminal trial. The principle of legitimate punishment also prevents a court from sentencing a person who is not guilty of an offence because of mental impairment.
- 7.5 The terms of reference ask the Commission to consider whether changes should be made to the provisions governing supervision and review, including the frequency, form and conduct of reviews and the arrangements for consideration and representation of the various interests involved, including the interests of the community. In its preliminary research, the Commission identified a number of potential issues regarding the making of orders and other consequences that can follow findings made under the CMIA. This chapter examines these issues, discusses the consequences of findings under the CMIA and the processes that operate regarding these consequences. Chapter 8 discusses the legislative framework governing the process that follows the making of supervision orders, including processes for review, leave and management of people subject to supervision orders. Finally, Chapter 9 discusses a number of broad, systemic issues that affect the CMIA supervision regime as a whole.

- 7.6 First, this chapter discusses the orders that a court can make in respect of a person after a finding under the CMIA. The Commission raises a number of issues regarding the operation of the processes for making such orders and the nature of the orders available.
- 7.7 Secondly, the chapter discusses ancillary orders that follow a finding of guilt, conviction or sentence in the usual criminal process. It identifies and describes some of the ancillary orders under different legislation in Victoria. This chapter asks for input on whether such consequences should apply to matters under the CMIA.

## The law prior to the CMIA

- 7.8 Under the Governor's pleasure regime, people found either unfit to plead or not guilty on the ground of insanity were detained in custody indefinitely until the Governor decided they could be released.
- 7.9 A court was required to order that the person be kept in strict custody until the 'Governor's pleasure' was known in 'such a place and in such a manner as to the court seems fit'. The Governor could order that the person be kept in 'safe custody' in the place specified by the court or direct that some other place could be designated.<sup>1</sup>
- 7.10 The Governor could, at any time, order that the person subject to a Governor's pleasure order be released. The Governor could impose any conditions on the release, including that a community corrections officer supervise the person.<sup>2</sup> In practice, before the Governor released a person the Adult Parole Board had to review the person and make a recommendation to the Attorney-General. The Attorney-General, Cabinet and the Premier had to each agree to the recommendation prior to the Governor authorising the release of the person.<sup>3</sup>
- 7.11 Under the Governor's pleasure regime, an alternative to indefinite detention was also available. Section 420(2) of the *Crimes Act 1958* (Vic) allowed the court to 'make any orders it sees fit to enable that the person receive services under the *Mental Health Act 1986* (Vic) or the *Intellectually Disabled Persons' Services Act 1986* (Vic)'. The Victorian Sentencing Committee in its review of sentencing in Victoria in 1998, interpreted this provision as allowing:
- the court hearing the trial of a person who is found insane to make some form of order to enable that person to receive treatment where he or she is mentally ill, or services available through Community Services Victoria [now Health and Community Services] where he or she is intellectually disabled.<sup>4</sup>
- 7.12 However, when the Victorian Parliamentary Community Development Committee reviewed the Governor's pleasure regime in 1995, it expressed uncertainty about how these orders worked in practice.<sup>5</sup> Thus, it is not clear whether such orders were ever used as alternatives to detention at the Governor's pleasure.

1 *Crimes Act 1958* (Vic) ss 393, 420. These sections have since been repealed.

2 Community Development Committee, Parliament of Victoria, *Inquiry into Persons Detained at the Governor's Pleasure* (1995) 31.

3 This process is discussed in more detail in Chapter 8.

4 Victorian Sentencing Committee, *Sentencing – Report of the Victorian Sentencing Committee*, Volume 2 (1988) 435.

5 Community Development Committee, above n 2, 30.

## Consequences of findings under the CMIA

7.13 The CMIA made significant changes to the consequences faced by a person found unfit to stand trial or not guilty because of mental impairment. The impetus for this came from the Community Development Committee’s recognition that the ‘Victorian judiciary are severely limited in the dispositions it can make regarding Governor’s pleasure detainees’.<sup>6</sup> Based on the strong support for the court to have a range of options, it recommended that there be three options available. These were the unconditional release of a person, an order for supervision of the person in detention and an order for supervision of the person in the community on conditions.<sup>7</sup>

7.14 Table 3 shows the orders that can be made by the Supreme Court and County Court under the CMIA following particular findings in the unfitness and mental impairment process. The court must either:

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

**Table 3: Orders under the CMIA in the Supreme Court and County Court**

Finding on unfitness	Finding on offence	Order
Unfit to stand trial	Not guilty	Acquitted and released
	Not guilty because of mental impairment	Unconditional release <b>or</b> Declare liable to supervision (custodial supervision order or non-custodial supervision order)
	Committed the offence: - qualified finding of guilt - no conviction recorded	Unconditional release <b>or</b> Declare liable to supervision (custodial supervision order or non-custodial supervision order)
Fit to stand trial or unfitness not raised	Not guilty	Acquitted and released
	Not guilty because of mental impairment	Unconditional release <b>or</b> Declare liable to supervision (custodial supervision order or non-custodial supervision order)
	Guilty	Conviction and/or sentence under the Sentencing Act

- 7.15 When the court declares a person liable to supervision, the court must then make a supervision order. A supervision order is for an indefinite term. A supervision order can either be a custodial supervision order or a non-custodial supervision order. Before the court imposes a supervision order, it can also make orders in relation to bail, remand in custody and for a medical or psychological examination of the person.
- 7.16 If a person found unfit to stand trial is then found by a jury in a special hearing not to have committed the offence, this is taken to be a finding of not guilty at a criminal trial.<sup>8</sup> This is an acquittal and the court is required to release the person.
- 7.17 In the Magistrates' Court, the only option available to a magistrate if they find a person not guilty because of mental impairment is to discharge the person. In Chapter 6, the Commission considers the issues regarding whether there should be other orders available to magistrates under the CMIA.

## Process for making orders after a finding under the CMIA

- 7.18 Once a person has been declared liable to supervision, the court must make a supervision order. The CMIA sets out the process that it is to follow after a person has been declared liable to supervision and for making a supervision order.
- 7.19 In this section, the Commission examines the current process and seeks to identify whether there are issues with the way it operates. In particular, it examines:
- the process for making an order for unconditional release
  - orders pending the making of a supervision order
  - section 47 certificates on availability of facilities and services
  - reports on mental conditions of people declared liable to supervision.

## Process for making an order for unconditional release

- 7.20 A court must consider a number of matters prior to making an order for the unconditional release of a person under the CMIA.
- 7.21 Section 40(2) of the CMIA requires that the court can only order that person be released unconditionally if the court:
- has obtained and considered the report of at least one registered medical practitioner or registered psychologist who has examined the person's mental condition and the possible effect of unconditionally releasing the person on their behaviour
  - is satisfied that the person's family members and victims of the charged offence have been given reasonable notice of the hearing at which the court is proposing to order release
  - has considered any report of the family members or victims, and
  - has obtained any other reports necessary.<sup>9</sup>
- 7.22 Thus, reports and information must be prepared and provided to the court after the making of findings and prior to a court deciding whether to release the person or declaring them liable to supervision. If this information is not already available, the court may be required to adjourn the matter. This will allow the appropriate expert to examine the person and prepare a report, the Office of Public Prosecutions to inform family members and victims and for family members and victims to prepare a report. The court may not be in a position to decide whether to unconditionally release the person or declare them liable to supervision at the time a finding is made under the CMIA.



## Orders pending the making of a supervision order

- 7.23 Once the court declares a person liable to supervision, it may make a number of other orders before it makes a supervision order. The orders primarily relate to the facilities and services for supervision and treatment of a person before and during a supervision order.
- 7.24 During the court processes for determining the questions of unfitness and mental impairment, a person may be on bail or they may be in custody. In some cases, the person may be in a prison, or the person may be in custody in an approved mental health service (for example, Thomas Embling Hospital) or a residential institution or facility (for example, one operated by the Disability Forensic Assessment and Treatment Service).
- 7.25 Once the court has declared a person liable to supervision, it can make an order granting the person bail<sup>10</sup> or remanding them in custody.
- 7.26 Section 24(1) allows a court to make an order, if in the interests of justice, requiring a person to undergo an examination by a registered medical practitioner or registered psychologist and for the results put before the court.<sup>11</sup>

## Section 47 certificates on availability of facilities and services

- 7.27 In deciding whether to remand a person declared liable to supervision, the court can remand the person in custody in an ‘appropriate place’. This means an approved mental health service, a residential treatment facility or a residential institution. However, before making this order, the court must first receive a certificate under section 47 of the CMIA confirming the availability or otherwise of the facilities or services necessary for the custody of that person (section 47 certificate).<sup>12</sup>
- 7.28 Alternatively, the court can remand the person in custody in a prison. However, the court cannot remand a person in prison unless there is ‘no practicable alternative in the circumstances’.<sup>13</sup>
- 7.29 The section 47 certificate requirement also applies when a court makes a supervision order. The certificate is required before a court can order a custodial supervision order committing a person to custody in an appropriate place or a non-custodial supervision order providing for a person to receive services in the community.<sup>14</sup> As with remand, the court must not commit a person to prison under custodial supervision order unless it is satisfied that there is no practicable alternative.<sup>15</sup>
- 7.30 The section 47 certificate requirement means that the court’s decisions on bail, remand and choice of supervision order depend heavily on the availability of facilities and services to cater for the needs and risks of the person.
- 7.31 A recent example of how a lack of facilities or services can affect a grant of bail is a case that was reported in *The Age* newspaper. In this case, a person who was intellectually disabled and had early stages of dementia had been held in remand for 371 days prior to being found unfit to stand trial and not guilty because of a mental impairment. There had been no application for bail over this period because of a lack of supervised accommodation. Judge Taft, who presided over the unfitness hearing, made the following comments regarding the situation:

That a man with a significant intellectual disability and dementia should be imprisoned for such a time is an embarrassment to the administration of the criminal justice system.<sup>16</sup>

10 Ibid ss 24(1)(a), 19(1)(a).

11 Ibid s 24(1)(d).

12 Ibid ss 24(1)(b), (2).

13 Ibid ss 24(1)(c), (3).

14 Ibid s 26(3).

15 Ibid s 26(4).

16 Jane Lee, ‘Imprisonment of Intellectually Disabled Man “Embarrassing”’, *The Age* (Melbourne), 23 February 2013, 5.

- 7.32 In some cases, the unavailability of facilities and services may be due to the resources not meeting the demand for services and facilities.
- 7.33 Thomas Embling Hospital, the secure mental health service for people subject to the CMIA, has 116 beds. These beds are for people detained under the CMIA, as well as for people who transferred from the prison system due to a mental illness and patients from the public mental health system who require specialised management.
- 7.34 Beds at Thomas Embling are spread across a number of distinct units, according to two programs set out in Table 4.
- 7.35 The Acute Care Program comprises 60 beds in four distinct units. It is primarily for 'patients from the criminal justice system who are in need of psychiatric assessment and/or acute care and treatment'.<sup>17</sup> Most patients are people detained under the CMIA because of a mental condition and remanded and sentenced prisoners with serious mental illness in need of inpatient treatment.<sup>18</sup>
- 7.36 The Continuing Care Program comprises 56 beds in three distinct units. It is for patients who require 'long-term care due to chronic [symptoms] and/or behaviours that represent a risk to the community, together with patients whose mental state has been stabilised and who are assessed as ready to commence working towards reintegration into the community'.<sup>19</sup> Patients are generally forensic patients, sentenced prisoners or patients/prisoners detained by the courts.<sup>20</sup>

**Table 4: Beds and units at Thomas Embling Hospital, Forensicare<sup>21</sup>**

<b>Acute Care Program</b>		
<i>Name of unit</i>	<i>Number of beds</i>	<i>Description</i>
Argyle	15 beds	Male acutely ill patients in a high secure setting.
Atherton	15 beds	Male acutely ill patients in a high secure setting.
Barossa	10 beds	Females requiring acute care in a high secure setting.
Bass	20 beds	Male, sub-acute unit in a high secure environment.
<b>Continuing Care Program</b>		
<i>Name of unit</i>	<i>Number of beds</i>	<i>Description</i>
Canning	20 beds	Extended and sub-acute care, supported living male unit in a high-medium secure environment.
Daintree	20 beds	Rehabilitation and independent living, mixed gender unit in a low-medium secure environment.
Jardine	16 beds	Intensive rehabilitation and independent living, mixed gender unit in a low secure environment.

17 Victorian Institute of Forensic Medicine (Forensicare), *Thomas Embling Hospital* (2010) < <http://www.forensicare.vic.gov.au/page.aspx?o=teh>>.

18 All admissions are approved by the authorised psychiatrist or their delegate. The transfer of patients from the prison system also requires the Commissioner of Correctional Services' approval (Corrections Victoria, Department of Justice).

19 Victorian Institute of Forensic Medicine (Forensicare), above n 17.

20 Admission to the units is through referral to the Unit Manager and consultant psychiatrist, and is usually generated from within Thomas Embling Hospital.

21 Victorian Institute of Forensic Medicine (Forensicare), above n 17.

7.37 In February 2013, Forensicare announced that it would be required to close 16 hospital beds in the Jardine unit due to ‘the Commonwealth’s \$107 million cuts to Victoria’s health system’.<sup>22</sup> The chief executive officer of Forensicare said:

Forensicare is the sole provider of these services in Victoria and these are not decisions that our Council has taken lightly. At the forefront of Forensicare’s function is that of community safety. It is critical that Forensicare continues to provide specialist forensic mental health services to ensure that people with a mental illness in the criminal justice system receive appropriate levels of care and treatment.<sup>23</sup>

7.38 There are 19 places in residential treatment institutions and treatment facilities. These places are available for persons who meet the criteria for admission under the Disability Act. This may include persons who are subject to a custodial supervision order.<sup>24</sup> There are five beds at the Long Term Rehabilitation Program (LTRP) at Plenty Residential Services in Bundoora managed within the North Division, North Eastern Melbourne Area of the Department of Human Services and 14 beds at the Intensive Residential Treatment Program (IRTP) of the Disability Forensic Assessment and Treatment Service. People subject to custodial supervision orders must also meet criteria under the Disability Act in order to be admitted to a residential institution or residential treatment facility.<sup>25</sup>

7.39 In other cases, the particular mental condition or the type of offending behaviour presents difficulties in finding appropriate facilities or services. For example, personality disorders can be challenging to treat effectively and people with an intellectual disability with a history of sexual offending can also present challenges in supervision.

7.40 It is inappropriate for a person who has been found unfit or not guilty because of mental impairment to be in a prison. As discussed at [3.8]–[3.42], people with a mental illness, intellectual disability or cognitive impairment are particularly vulnerable in the criminal justice system. Prisons lack the specialised services required for managing and treating people subject to the CMIA and expose already vulnerable people to conditions that can be detrimental to their mental state and cause further harm.

7.41 The Community Development Committee’s review of the Governor’s pleasure regime found that many people subject to the regime were detained in prisons rather than mental health or disability services. Submissions to the Community Development Committee raised a range of issues regarding this. The Community Development Committee also referred to the problematic experiences described in a group submission by 13 Governor’s pleasure detainees. For example, one detainee said:

To be honest, Pentridge is rather frightening. I had never been in prison or in trouble before ... I was mixing with people I had never mixed with before and it was really frightening to say the least.<sup>26</sup>

7.42 The Community Development Committee also heard evidence that a number of people ultimately subject to the Governor’s pleasure regime were also initially remanded in prison.<sup>27</sup> The Community Development Committee’s recommendation was that ‘no person who is found not guilty of a crime on the ground of metal impairment or unfit to plead on the ground of mental impairment should be detained in a prison’.<sup>28</sup>

22 Henrietta Cook, ‘No Help for the Mentally Ill Facing Court Charges’, *The Age* (online), 8 February 2013 <<http://www.theage.com.au/victoria/no-help-for-the-mentally-ill-facing-court-charges-20130207-2e1cy.html#ixzz2VxZ9QQn6>>. Forensicare also announced it would be required to suspend assessments as part of the Mental Health Court Liaison Service in the Magistrates’ Court. These announcements have since been reversed due to funding being secured.

23 Tom Dalton, Chief Executive Officer, ‘Victorian Institute of Forensic Mental Health: Forensicare’ (Media Release, 5 February 2013) 1.

24 Data provided to the Commission by the Department of Human Services.

25 Persons must meet the criteria under section 87 for admission to a residential institution and section 152 of the *Disability Act 2006* (Vic) for admission to a residential treatment facility.

26 Community Development Committee, above n 2, 47.

27 *Ibid* 48.

28 *Ibid* xv.

## Question

- 60 Are there appropriate and sufficient facilities and services for people subject to the CMIA?

### Reports on the mental condition of people declared liable to supervision

- 7.43 When a person is declared liable to supervision, in addition to the section 47 certificate, the court receives a report on the mental condition of the person. The ‘appropriate person’, that is the service responsible for supervising the person, is responsible for providing this report. This is either the authorised psychiatrist for Forensicare (for people with a mental illness)<sup>29</sup> or the Secretary to the Department of Human Services (for people with an intellectual disability).<sup>30</sup>
- 7.44 The report on the mental condition of the person must be provided within 30 days of the person being declared liable to supervision. It contains the following:
- a diagnosis and prognosis of the condition or an outline of the person’s behavioural problems
  - the person’s response to treatment, therapy and counselling
  - a suggested treatment or other plan for managing the condition.<sup>31</sup>
- 7.45 A clinician at Forensicare assesses people with a mental illness. The authorised psychiatrist of Forensicare or the authorised psychiatrist of the service that will provide the treatment (an approved mental health service or a private practitioner) will generally develop a treatment plan.<sup>32</sup> A private psychologist is usually contracted by regional Disability Client Services to assess people with an intellectual disability and prepare a treatment plan on behalf of the Secretary of the Department of Human Services.<sup>33</sup>
- 7.46 The aim of the 30-day period for preparing the mental condition report is to give ‘sufficient time to negotiate service delivery ... to develop clinical and management strategies to meet the needs of the person and to discuss the proposal with the person and where appropriate any primary carer or family members’.<sup>34</sup> However, in practice the report is usually required well before the 30 days limit, and the mental condition report and the section 47 certificate are often prepared at the same time.<sup>35</sup> The court requires both reports before it can make a supervision order. If the court remanded the person in custody after declaring them liable to supervision, it may have already received a section 47 certificate.

## Question

- 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?

29 Department of Human Services, *Non-custodial supervision orders: Policy and procedure manual* (2009) 20.  
 30 Department of Human Services, *Disability Services Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 Practice Guidelines 2007* (2007) 37.  
 31 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 41.  
 32 Department of Human Services, *Disability Services Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 Practice Guidelines 2007*, above n 30, 20.  
 33 Department of Human Services, *Disability Services Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 Practice Guidelines 2007*, above n 30, 40.  
 34 Department of Human Services, *Non-custodial supervision orders: Policy and procedure manual*, above n 29, 21.  
 35 Ibid.

## Nature of supervision orders

- 7.47 If a court declares a person liable to supervision, it must make a supervision order.<sup>36</sup> The court can make one of the following orders:
- an order committing the person to custody
  - an order releasing the person on conditions decided by the court and specified in the order.<sup>37</sup>
- 7.48 Chapter 9 discusses the principles and matters that the court is required to take into account in making a supervision order.
- 7.49 In its preliminary research, the Commission identified a number of possible issues regarding the nature of supervision orders under the CMIA. In this section, the Commission describes how supervision orders are currently structured and raises a number of issues about how this structure operates in practice. These include:
- the method for setting a nominal term
  - possible effects of the indefinite nature of supervision orders.

### Indefinite nature of the order with a ‘nominal term’

- 7.50 A supervision order under the CMIA is an indefinite order.<sup>38</sup> This means that the person can be subject to the order for an indefinite period, possibly for the rest of their life.
- 7.51 When a court imposes a supervision order, it must then set a ‘nominal term’ in accordance with the CMIA. A nominal term is the period that specifies when the court is to conduct a major review of the order and decide whether to decrease the level of supervision.
- 7.52 The court may also direct that the matter be brought back to the court for review at the end of a specified period.<sup>39</sup>
- 7.53 These requirements are part of the CMIA’s system for the review of the order (discussed in Chapter 8 at [8.21]–[8.44]). The purpose of the nominal term is to ensure that the court reviews the order over this indefinite period. If appropriate, having regard to a range of principles and factors, the court may reduce the level of supervision with a view to possible release. This reflects the principle of gradual reintegration and aims to ensure that the period of detention is referable to the person’s mental condition and risk posed to community safety.
- 7.54 The Community Development Committee expressed concerns about detention without any fixed period for review or date for possible release under the Governor’s pleasure regime. It had particular concerns when periods of detention were longer than what the person would have served had they been convicted of the offence charged.<sup>40</sup>
- 7.55 To address these concerns, the Community Development Committee recommended that a ‘limiting term’ be set when a supervision order is imposed that would denote when the order would lapse.<sup>41</sup> This aimed to provide a safeguard against arbitrary and indefinite detention of people when they no longer posed a risk to the community. The Community Development Committee said:

a more structured and rigorous release process will significantly reduce the likelihood of persons being detained for longer than their condition warrants. However, the only way to ensure that persons with a mental impairment are not detained for periods which are significantly disproportionate to those for which sentenced offenders are detained, is to state a time when that person’s forensic status must end.<sup>42</sup>

36 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)* s 26(1).  
37 *Ibid* s 26(2).  
38 *Ibid* s 27(1).  
39 *Ibid* s 27(2).  
40 Community Development Committee, above n 2, 1.  
41 *Ibid* 66.  
42 *Ibid* 134.

- 7.56 In adopting this approach, the Community Development Committee weighed both the arguments for and against the inclusion of a term that provides for the review of a supervision order. It had regard to the ‘tension between the competing concepts of a limiting term and release decisions being based on response to treatment and assessments of dangerousness’.<sup>43</sup> It noted in particular, the comments made by Dr David Neal about the risks in each system:
- One danger is the tariff and the other danger is open-ended detention becoming, ‘Let’s play it safe and hold people well beyond when they ought to have been held if their mental illness were really the consideration.’ The underlying question is: Are these people continuing to be ill and continuing to be dangerous? I think to some extent there is a tension with a limiting term, but the danger of not having a limiting term outweighs that for me.<sup>44</sup>
- 7.57 There is no uniform approach to the nature of supervision orders across Australian jurisdictions.
- 7.58 Queensland, Tasmania and Western Australia do not have limiting terms on supervision orders. In Queensland, a ‘forensic order’ remains in force until revoked by the Mental Health Tribunal.<sup>45</sup> There is no period of detention specified for persons on ‘restriction orders’ in Tasmania. In Western Australia, a mentally impaired accused is detained until released by an order of the Governor.<sup>46</sup> The Governor may order the release of the person from custody if the Minister advises the Governor to do so on a recommendation by the Mentally Impaired Accused Board.<sup>47</sup>
- 7.59 New South Wales and South Australia specify limiting terms in their legislation. In New South Wales a limiting term must be nominated. A limiting term is defined as ‘in respect of that offence, being the best estimate of the sentence the Court would have considered appropriate if the special hearing had been a normal trial of criminal proceedings against a person who was fit to be tried for that offence and the person had been found guilty of that offence’.<sup>48</sup> A limiting term in South Australia is also required and is ‘equivalent to the period of imprisonment or supervision (or the aggregate period of imprisonment and supervision) that would, in the court’s opinion, have been appropriate if the defendant had been convicted of the offence of which the objective elements have been established’.<sup>49</sup>
- 7.60 The nominal term in the CMIA seeks to strike a balance between two competing considerations.<sup>50</sup> On the one hand, it aims to prevent the detention of people on an indefinite order with no opportunity to review or release when they no longer pose a risk to the community. On the other hand, it aims to prevent the release of people subject to supervision orders while they still pose a risk to the community.

## Question

- 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?

43 Ibid 133.

44 Ibid. A number of other people supported the introduction of limiting terms.

45 *Mental Health Act 2000* (Qld) s 207.

46 *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 24(1).

47 Ibid ss 33, 35.

48 *Mental Health (Forensic Provisions) Act 1990* (NSW) s 23(1)(b).

49 *Criminal Law Consolidation Act 1935* (SA) s 269O(2).

50 Victoria, *Parliamentary Debates*, Legislative Assembly, 18 September 1997, 185 (Jan Wade, Attorney-General).

## The method for setting a nominal term

- 7.61 A court is required to impose a nominal term in accordance with section 28 of the CMIA. The nominal term is imposed with reference to the maximum penalty of the offence that the person has been found not guilty of or found at a special hearing to have committed.
- 7.62 The section comprises a table setting out the nominal terms as follows:
- murder or treason—25 years (the penalty for murder and treason under the Crimes Act is life imprisonment or such term of years as is fixed by the court).
  - a ‘serious offence’ within the meaning of the Sentencing Act<sup>51</sup>—the maximum term of imprisonment for the offence
  - any other offence that has a term of imprisonment as its statutory maximum penalty—half the maximum term of imprisonment for the offence
  - any other offence punishable by imprisonment where there is no statutory maximum penalty—a period specified by the court.
- 7.63 In some cases, a person may be found not guilty because of mental impairment of more than one offence or found at a special hearing to have committed more than one offence. If this is the case, the nominal term is calculated by reference to the offence that carries the longest maximum term of imprisonment.<sup>52</sup>
- 7.64 This method of calculating the nominal term is different to that recommended by the Community Development Committee in its recommendation to introduce a limiting term as part of supervision orders. The Community Development Committee recommended that the limiting term to be set was to be
- equivalent to the period of imprisonment or supervision (or the aggregate period of imprisonment or supervision) that would, in the judge’s opinion, have been appropriate if the defendant had been convicted of the offence concerned.<sup>53</sup>
- 7.65 The current method for setting the nominal term is referable to the highest possible penalty for the offence, not the sentence that the judge would have imposed on the person if convicted.
- 7.66 The Community Development Committee considered the current method in the CMIA as part of its inquiry and rejected this approach for a number of reasons including:
- it would be unfair and misleading to use a maximum penalty where it would be highly unusual to have the maximum sentence imposed if convicted
  - it exposes the person subject to the order to dramatic increases in the maximum penalty by parliament
  - it is contrary to the principle of proportionality in sentencing.<sup>54</sup>
- 7.67 On the other hand, the possible advantages of the approach are that it provides consistency in setting nominal terms and may also be a more appropriate reflection of community expectations of the consequences that flow from a finding under the CMIA.

51 This includes a range of offences such as manslaughter, child homicide, defensive homicide, intentionally causing serious injury, threats to kill, rape, assault with intent to rape, some forms of incest, sexual penetration of child under 16, persistent sexual abuse of a child under the age of 16, abduction or detention, abduction of a child under the age of 16, kidnapping and armed robbery. See *Sentencing Act 1991* (Vic) s 5.

52 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 24(2).

53 Community Development Committee, above n 2, xix–xx.

54 *Ibid* 132.

- 7.68 The Community Development Committee also considered arguments against its recommended method of using the period of imprisonment or supervision had the person been convicted. These were:
- the process is artificial as sentencing is primarily based on factors that are not appropriate when a person is not criminally responsible for the offence (for example the person's remorse or the need to deter the person)
  - the method would require a hypothetical sentencing hearing which would take time and resources.<sup>55</sup>

## Question

- 63 Should the method for setting the nominal term be changed? If so, how should it be changed?

### Possible effects of the indefinite nature of supervision orders

- 7.69 In its preliminary research, the Commission has identified a number of possible issues with the current nature of supervision orders under the CMIA. These issues relate to how the indefinite nature of supervision orders affects different people under CMIA, in particular people who are subject to supervision orders, their family members and victims in CMIA matters.
- 7.70 One issue is whether there are sufficient levels of knowledge and understanding among people involved in CMIA proceedings of the nature of supervision orders and the concept and operation of nominal terms. People involved in CMIA proceedings could include lawyers, accused people and their family members and victims in CMIA matters.
- 7.71 Another series of issues relates to the impact that the indefinite nature of the regime can have on people who are affected by the CMIA. These include the following matters:
- whether the indefinite nature of the regime provides a disincentive for a person to proceed down the CMIA pathway
  - whether an indefinite supervision order impedes a person's recovery and progress under a supervision order
  - what effect indefinite supervision orders have on victims and their family members in matters under the CMIA.
- 7.72 Previous reviews of the Governor's pleasure regime have flagged issues on these matters. However, there is little information about how the nature of supervision orders in the current system under the CMIA affects people who are subject to the regime.

### Knowledge and understanding of the nature of supervision orders and operation of nominal terms

- 7.73 The Commission's preliminary research indicates that there may be confusion around the indefinite length of supervision orders and the meaning of nominal terms. For example, a nominal term does not denote the length of the order or the release date for the person subject to the order.
- 7.74 It is important that lawyers understand the meaning and implications of supervision orders under the CMIA so that they may provide accurate legal advice on the decision to proceed down the CMIA pathway. This is particularly so when the person faces a potentially onerous and indefinite supervision regime.



- 7.75 It is also important that victims have an accurate understanding of the nature of supervision orders and nominal terms and the implications that these will have on the length of time a person may be subject to supervision under the CMIA. The guide *Prosecuting Mental Impairment Matters*<sup>56</sup> released by the Office of Public Prosecutions discussed at [2.75]–[2.76] is a useful tool to assist victims and other people who are involved in the process, such as family members of the person subject to the CMIA, to understand the processes and become aware of their rights.
- 7.76 It is also important that the community has an accurate understanding of the nature of the regime that follows the making of a supervision order under the CMIA, including the indefinite nature of the orders and the meaning of a nominal term. The media play a key role in the level of community knowledge and perceptions of the consequences under supervision orders.

## Question

- 64 What steps should be undertaken for people involved in CMIA proceedings to better understand the expression ‘nominal term’?

### The indefinite supervision order as a disincentive

- 7.77 In its report on *Mental Malfunction and Criminal Responsibility*, the Law Reform Commission of Victoria recognised that indefinite supervision orders with no limiting term operated as a disincentive for people to raise the insanity defence.<sup>57</sup>
- 7.78 The Commission’s preliminary research suggests that the indefinite nature of the regime can influence the decisions that accused persons make.
- 7.79 A person charged with an offence has a number of choices. They can choose to plead guilty or not guilty to the charge. If at the time of the charged offence the person had a mental impairment, they could choose to plead guilty and raise the defence of mental impairment. They may receive advice from their lawyer on the likely consequences of each choice.
- 7.80 The lawyer should provide advice on the likely sentence and non-parole period the person might expect to receive if they plead guilty or a jury finds them guilty. If the person is facing a sentence of imprisonment, they will have advice on the likely period of time that they may be in prison and know that there will be a fixed date for their release at the end of the sentence.<sup>58</sup>
- 7.81 The lawyer should also advise them of the likely consequences of a finding of not guilty because of mental impairment. This advice will explain that the accused person could be subject to an indefinite supervision order with a nominal term set for a major review of the order. Depending on the offence, the nominal term could be half or all of the period of the maximum penalty for that offence.
- 7.82 For example, if the offence was intentionally causing serious injury, the nominal term under the CMIA is set at 25 years. Under the usual criminal process, the highest imprisonment length imposed in the higher courts for that offence for the four-year period from 2006–07 to 2010–11 was 15 years. The majority of people sentenced in that period received lengths of imprisonment from two years to less than six years (72.6 per cent).<sup>59</sup>

56 Office of Public Prosecutions, *Prosecuting Mental Impairment Matters* (2012).

57 Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility*, Report No 34 (1990).

58 Unless they are eligible to be detained for a further period at the completion of their sentence under legislation, see, eg, the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic).

59 Dennis Byles, ‘Sentencing Trends in the Higher Courts of Victoria 2006–07 to 2010–11 (Causing Serious Injury Intentionally)’ (Sentencing Snapshot No 125, Sentencing Advisory Council, June 2012) 4.

- 7.83 Presented with these two options, the person may choose to plead guilty and receive a sentence that is almost certainly shorter in length than the period of the nominal term. The person may choose to do this even though they had a legitimate mental impairment defence to the charge.
- 7.84 If this occurs, the outcomes may be inconsistent with the CMIA's underlying principles. There could be the abrogation of the right to a fair trial for people who are unfit to stand trial. Alternatively, the result may be the illegitimate punishment of a person who has been found to be criminally responsible for an offence. This can also result in the further over representation of people with mental conditions in the prison population.

## Question

- 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?

### The effect of indefinite supervision orders on people affected by the CMIA

- 7.85 In its review of the Governor's pleasure regime, the Community Development Committee heard evidence about the detrimental effect that imposing an order without a release date can have on the wellbeing of the person subject to the order. For example, one detainee said:
- By the law, I am not guilty on the grounds of insanity but in reality I am detained for an indefinite period of time.<sup>60</sup>
- 7.86 If there are detrimental effects to the recovery of people subject to the CMIA, this may be contrary to one of its underlying principles—the therapeutic aim of the process.
- 7.87 However, this must be balanced with other principles, such as the protection of the community from the likely danger posed by the person. Victims' rights and interests are also paramount. The choice of supervision order and its length will have a direct impact on victims in CMIA matters. Victims of crime or family members of victims who are injured or killed in CMIA matters are likely to experience high levels of trauma and fear. Decisions regarding the type of supervision order, the nature of the order, the nominal term and the length of supervision will therefore also affect their wellbeing and recovery.
- 7.88 Therefore, a relevant factor in understanding the effect of indefinite supervision orders is the effect that they have on victims and their family members. Other people, such as the family members of the person subject to the order may also be affected. In some cases, where the offence involves a member of the person's family, other family members will also be both victims and family members of the person subject to the order. Family members may also be affected by virtue of the support role that they may play to the person subject to the order.

## Question

- 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?

## Appeals against orders for unconditional release and supervision

7.89 The CMIA provides appeal rights to various parties to appeal against orders made by the court following findings under the CMIA.

### Current law

7.90 The Director of Public Prosecutions may appeal to the Court of Appeal against an order for unconditional release. To lodge such an appeal, the Director of Public Prosecutions must consider that the order should not have been made and that the appeal should be brought in the public interest.<sup>61</sup> This right exists in both the unfitness and mental impairment processes.

7.91 The Court of Appeal may either confirm the order or set aside the order and declare the person liable to supervision. If the Court of Appeal declares the person liable to supervision, it can either remit the matter back to the original court with or without directions or it can make a supervision order.<sup>62</sup>

7.92 The CMIA does not provide a right for a person to appeal against a declaration that they are liable to supervision. However, a person has the right to appeal against a supervision order (either a custodial supervision order or non-custodial supervision order) once it has been made by the court.<sup>63</sup>

7.93 The Director of Public Prosecutions, Attorney-General, the Secretary to the Department of Human Services and the Secretary to the Department of Health can also appeal against a supervision order. To lodge such an appeal, the party must consider that a different supervision order should have been made and that an appeal should be brought in the public interest.<sup>64</sup>

7.94 In an appeal against a supervision order, the Court of Appeal may do one of the following:

- confirm the supervision order
- set aside the supervision order and substitute it with another supervision order
- set aside the supervision order and remit the matter back to the original court with or without directions, or
- set aside the supervision order and order that the person be unconditionally released.<sup>65</sup>

### Principles underpinning appeals

7.95 These rights exist to prevent unjust outcomes, to maintain consistency and provide legitimacy to the criminal justice system.

7.96 The opportunity to appeal against a supervision order is important given that the order results in the supervision of a vulnerable person for an indefinite period. This reflects the principle of least restriction and that community safety ought to be balanced with the right of the person to liberty.

61 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 19A (after a finding of unfitness and a finding that the accused committed the offence), s 24A (after a finding of not guilty because of mental impairment on its own or after a finding of unfitness).  
62 *Ibid* ss 19A(2)–(3), 24A(2)–(3).  
63 *Ibid* s 28A(1).  
64 *Ibid* s 28(2).  
65 *Ibid* s 28A(3). The Court of Appeal may make the same orders available to the trial court after findings under the CMIA, including orders granting the person bail, remanding the person in custody in an appropriate place or in a prison or that the person undergo an examination by a registered medical practitioner or registered psychologist. The requirements discussed at [7.27]–[7.29] apply to any orders remanding a person in custody in an appropriate place and in prison.

- 7.97 It is also important that other parties have the right to appeal against these orders under the CMIA to ensure it operates in a way that is consistent with its underlying principles, such as community protection, the principle of least restriction, victims' rights and interests and gradual reintegration. However, the Commission's preliminary research suggests that clarity is required around the purposes of these appeal rights and identifying the interests that are represented. The Commission considers this issue in Chapter 9 as part of a holistic examination of the arrangements for representing and considering various interests under the provisions governing supervision and review.
- 7.98 Research suggests that appeals against findings by people subject to the CMIA are rare (see, for example Chapter 4 at [4.140]). However, appeals against supervision orders may be more frequent. The Commission is seeking to gather data on the number of appeals against orders for unconditional release and supervision orders.

## Question

- 67 Are there any barriers to people subject to supervision orders and other parties pursuing appeals against supervision orders?

## Ancillary orders and other consequences of findings under the CMIA

- 7.99 As discussed in the introduction to this chapter, in the usual criminal process, ancillary orders can be made in addition to a sentence when a person is found guilty of an offence. The ancillary orders that follow can vary depending on the particular type of offence. In some cases, the orders can be made at the court's discretion and others are mandatory requirements by virtue of legislation.
- 7.100 A finding under the CMIA does not result in a conviction for an offence.
- 7.101 A person who is found not guilty because of mental impairment is not deemed criminally responsible for the offence.
- 7.102 A person found unfit to stand trial but found to have committed the offence is not convicted of the offence. The finding in a special hearing that the accused person committed the offence is a 'qualified finding of guilt'. It is similar to a finding of guilty in the usual trial process in that the person cannot be prosecuted for the same circumstances<sup>66</sup> and the person has the same appeal rights as if they had been convicted of the offence in a criminal trial. However, unlike a guilty finding in a criminal trial, the finding that the person committed the offence does not provide a legal basis for a conviction to be recorded against the person.<sup>67</sup>
- 7.103 In the usual criminal process, when a person is found guilty of an offence, the court is usually required to record a conviction against the person. When the offence is less serious, the court usually has a discretion to record no conviction. Some ancillary orders can only be made following a conviction, while others can flow after a finding of guilt without a conviction of a person.
- 7.104 An issue arises as to whether the ancillary orders that can flow in addition to sentencing can also be consequent on a finding under the CMIA. In this section, the Commission briefly examines a number of these orders, by way of example, and seeks input on the operation of ancillary orders under the CMIA.

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This is called the principle of 'double jeopardy'.  
*Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) s 18(3).*

## Orders in addition to sentence

7.105 There are a number of different orders that can be made in addition to a sentence, either by a court or automatically.

## Restitution, compensation and recovery

7.106 Part 4 of the Sentencing Act provides for a number of orders to be made following a finding of guilt for an offence. These are:

- *Restitution order*—where a person is found guilty *or* convicted of an offence connected with theft, an order requiring the return of stolen goods or property or money to replace the stolen goods.<sup>68</sup>
- *Compensation order*—where a person is found guilty *and* convicted of an offence, an order for compensation for:
  - pain and suffering to any person who has sustained an injury as a direct result of the offence,<sup>69</sup> or
  - property loss sustained to any person who has suffered loss or destruction of, or damage, to property.<sup>70</sup>
- *Order for recovery of assistance paid under the Victims of Crime Assistance Act 1996*—where a person is found guilty of *or* convicted of particular offences<sup>71</sup> and an award of assistance is made in respect of an injury or death resulting from an offence, an order requiring the offender to pay to the state an amount of money.<sup>72</sup>
- *Cost recovery order*—where a person is found guilty *or* convicted of an offence relating to contamination of goods and bomb hoaxes, an order requiring the offender to pay to the state an amount to fit the costs incurred by an emergency services agency, such as Victoria Police or the Ambulance Service Victoria.<sup>73</sup>

## Licence cancellation and disqualification

7.107 Other examples of consequences that can follow conviction and/or sentence for an offence are cancellation of and disqualification from obtaining a driver licence or suspension of a driver licence.

7.108 Section 89 of the Sentencing Act requires a court to cancel a driver licence and disqualify a person from obtaining one for at least 18 months if they are found guilty of various offences arising out of the driving of a motor vehicle by the offender, including:

- manslaughter
- negligently causing serious injury
- culpable driving causing death
- dangerous driving causing death or serious injury.

7.109 The *Road Safety Act 1986* (Vic) also provides for various categories of automatic and court-ordered licence suspension and disqualification, depending on the type of offence.

68 *Sentencing Act 1991* (Vic) ss 84–5.

69 *Ibid* ss 85A–85M.

70 *Ibid* s 86.

71 Within the meaning of the *Victims of Crime Assistance Act 1996* (Vic).

72 *Sentencing Act 1991* (Vic) s 87A.

73 *Ibid* ss 87C–87N.

7.110 An example of an automatic order of this type is for an offence of drink driving. If police issue an infringement notice for an offence of drink driving above a certain blood alcohol concentration level, the person's licence is automatically cancelled and the person is disqualified from obtaining a new licence for a specified period of between six months and four years.<sup>74</sup> An example of court ordered suspension and disqualification is the power of a court to suspend a person's licence for any offence under the Road Safety Act.<sup>75</sup>

### Confiscation and forfeiture

7.111 Another consequence that can follow findings of guilt in the criminal process is orders for confiscation or forfeiture of property used in the commission of offences or owned by the offender.

7.112 Confiscation and forfeiture laws have their roots in long-established concepts in relation to removing the right to hold, inherit or dispose of property (referred to as 'attainder') and the confiscation of instruments of crime or damage (referred to as 'deodand').<sup>76</sup> The difference between confiscation and forfeiture has been described as follows:

'forfeiture' describes the procedure used to take away specific property belonging to an offender or someone else that is 'tainted' because it was either used in connection with, or was derived from, the commission of an offence. The term 'confiscation' is slightly broader and describes the procedure for taking away any financial benefits gained through criminal activity, through the making of a 'pecuniary penalty order'.<sup>77</sup>

7.113 In Victoria, the *Confiscation Act 1997* (Vic) governs the laws for forfeiture and confiscation of property following charges or convictions for Victorian offences. The scheme is primarily conviction based, but depending on the type of offence, the mechanism for confiscation or forfeiture varies.

7.114 The Confiscation Act provides for confiscation through discretionary court ordered forfeiture, automatic forfeiture, discretionary civil forfeiture and discretionary pecuniary penalty orders. By way of summary, the Confiscation Act provides for the following orders:

- *court-ordered forfeiture*—a discretionary court order for forfeiture of tainted property upon conviction of any indictable offence or a specified summary offence<sup>78</sup>
- *automatic forfeiture*—an automatic order for forfeiture of property that has been 'restrained'<sup>79</sup> upon conviction of an 'automatic forfeiture offence' (primarily serious drug offences involving commercial quantities and serious fraud offences)<sup>80</sup>
- *civil forfeiture*—a discretionary court order for forfeiture of tainted property that has been restrained under the automatic forfeiture provisions upon the court finding that the accused committed a certain offence on the balance of probabilities (*no finding of guilt or conviction required*)<sup>81</sup>
- *pecuniary penalty orders*—a discretionary court order for a person to pay a sum of money to the Crown equivalent to the proceeds of crime upon conviction or a finding on the balance of probabilities that the person committed an automatic forfeiture offence (*no finding of guilt or conviction required*).<sup>82</sup>

74 *Road Safety Act 1986* (Vic) s 89C.

75 *Ibid* s 28.

76 Arie Freiberg and Richard Fox, 'Fighting Crime with Forfeiture: Lessons From History' (2000) 6 *Australian Journal of Legal History* 1.

77 Nina Hudson, 'Sentencing, Parole Cancellation and Confiscation Orders' (Report, Sentencing Advisory Council, November 2009) 35 (citations omitted).

78 *Confiscation Act 1997* (Vic) pt 3 div 1. Specified offences are listed in Schedule 1 and include a Schedule 2 offence.

79 This means that a restraining order has been made on the property which prohibits an accused person from disposing of or dealing with the property or any interest in property.

80 *Confiscation Act 1997* (Vic) pt 3 div 2.

81 *Ibid* pt 4.

82 *Ibid* pt 8.

- 7.115 Forfeiture and confiscation orders have the potential to affect people subject to the CMIA. Many of the orders require a conviction of an offence; therefore they may not follow a CMIA finding. However, in some cases a court can make forfeiture orders if it is satisfied that the person committed a particular offence on the balance of probabilities.
- 7.116 There are potential difficulties with some types of orders for forfeiture and confiscation when applied in the CMIA setting. This is due to the proportionality principle. In general, the court is not to have regard to the confiscation of profits that relate solely to the proceeds of crime when imposing sentence. However, if a person's lawfully acquired property is forfeited because they used it in the commission of an offence, the court must consider this in sentencing.<sup>83</sup> This is because of the punitive impact that such orders can have on offenders, in addition to the sentence.<sup>84</sup>
- 7.117 The principle of legitimate punishment applies to the CMIA. Therefore, it would not be appropriate for a punitive forfeiture order to be imposed following a finding under the CMIA that a person is not criminally responsible for an offence.

### Administrative consequences in addition to sentence

- 7.118 Another type of consequence that can follow in addition to a sentence for a criminal offence is an administrative consequence.

### Sex offender registration

- 7.119 One such example is registration on a register of sexual offenders, the Sex Offenders Register. The *Sex Offenders Registration Act 2004* (Vic) sets out a scheme for the registration of people who have been found guilty of or sentenced for particular offences. Upon registration, sex offenders are required to comply with various reporting requirements.
- 7.120 The purpose of the sex offenders registration scheme is 'to require sex offenders to provide information to the police on a regular basis in order to reduce the likelihood that they will re-offend and to facilitate the investigation and prosecution of future offences'.<sup>85</sup>
- 7.121 A person becomes a 'registrable offender' if a court has, at any time, sentenced the person for a 'registrable offence'.<sup>86</sup> Registrable offenders are required to comply with the reporting obligations in the Sex Offenders Registration Act.<sup>87</sup>
- 7.122 Whether an offender will be included in the Sex Offenders Register, and subject to the reporting obligations, depends on:
- whether they are an adult or a child at the time of committing the offence, and
  - the type of offence committed.
- 7.123 All adults who are sentenced for Class 1 or 2 offences—broadly speaking, sexual offences against or involving children<sup>88</sup>—automatically become registered sex offenders.<sup>89</sup> For these offenders, registration is a mandatory, administrative consequence of sentence. There are no exceptions and the court has no discretion regarding registration.

83 *Sentencing Act 1991* (Vic) s 5(2A)–(2B).

84 Hudson, above n 77, 40.

85 Victorian Law Reform Commission, *Sex Offenders Registration*, Final Report (2012) x.

86 *Sex Offenders Registration Act 2004* (Vic) s 6(1). Note that 'registrable offender' and 'registered offender' are used interchangeably in the Sex Offenders Registration Act.

87 *Ibid* pt 3.

88 The age of the child victims to which the offences apply differs from one offence to another. See Victorian Law Reform Commission, *Sex Offenders Registration*, Information Paper (2011) Appendix A.

89 The *Sex Offenders Registration Act 2004* (Vic) requires the retrospective registration of offenders who were subject to a specified sentencing order in respect of a Class 1 or 2 registrable offence immediately before 1 October 2004: see section 3 (definition of 'existing controlled registrable offender'), and section 6(4). The specified sentencing orders include imprisonment, suspended terms of imprisonment, parole, home detention, drug treatment orders and others.

- 7.124 In addition to the mandatory registration of those offenders, the courts have discretionary powers to register other offenders by making a sex offender registration order. The court may make a sex offender registration order, to include a person in the Sex Offenders Register and make them subject to reporting obligations, when:
- it finds a person guilty of any offence, other than a sexual offence against or involving a child<sup>90</sup>, or
  - it sentences a person for a sexual offence against or involving a child, committed as a child<sup>91</sup>, or
  - it finds a person guilty of any offence, sexual offence against or involving a child, committed as a child, and
  - it is satisfied, beyond reasonable doubt that 'the person poses a risk to the sexual safety of one or more persons or of the community'.<sup>92</sup>
- 7.125 The Sex Offenders Registration Act contemplates the inclusion of people who are subject to the CMIA on the Sex Offenders Register. Depending on the type of offender and type of offence, registration consequences may flow from either a 'finding of guilt' or a 'sentence' within the meaning of the Sex Offenders Registration Act.<sup>93</sup>
- 7.126 Section 4(1)(d) of the Sex Offenders Registration Act defines a finding of guilt in relation to an offence to include a:
- a finding in a special hearing that a person is not guilty because of mental impairment<sup>94</sup>
  - a finding in a special hearing that a person committed the offence<sup>95</sup>
  - a finding in a special hearing that a person committed an offence available as an alternative<sup>96</sup>, or
  - a finding of not guilty because of mental impairment.<sup>97</sup>
- 7.127 For the purposes of the Sex Offenders Registration Act, a sentence is defined to include:
- a declaration under sections 18(4)(a) or 23(a) of the CMIA that the accused is liable to supervision under Part 5 of the CMIA, and
  - an order that the accused be released unconditionally, made under sections 18(4)(b) or 23(b) of the CMIA.<sup>98</sup>
- 7.128 The Sex Offenders Registration Act also provides for alternative reporting arrangements for a person with a 'disability' defined as a person who is a forensic patient or a forensic resident under the CMIA.<sup>99</sup> When a forensic patient or forensic resident is subject to reporting requirements under the sex offenders register, their parent, guardian, carer or another person nominated by them can make reports.<sup>100</sup>
- 7.129 Disability is also a factor that can be taken into account by a court when considering an offence of failing to comply with reporting obligations.<sup>101</sup>

90 *Sex Offenders Registration Act 2004* (Vic) s 11(1). Broadly speaking, Class 1 and 2 offences are sexual offences against or involving a child: *Sex Offenders Registration Act 2004* (Vic) schs 1–2.

91 Broadly speaking, Class 1 and 2 offences are sexual offences against or involving a child: *Sex Offenders Registration Act 2004* (Vic) schs 1–2. When a person is sentenced for a Class 1 or 2 offence committed as a child, they are not automatically registered as they would be if they had been an adult when they committed the offence: *Sex Offenders Registration Act 2004* (Vic) s 6(3)(a), schs 1–2.

92 *Sex Offenders Registration Act 2004* (Vic) s 11(3).

93 Automatic registration follows a sentence for a Class 1 or 2 offence: *Sex Offenders Registration Act 2004* (Vic) s 6(1). The making of a sex offender registration order can follow a sentence or a finding of guilt: *Sex Offenders Registration Act 2004* (Vic) ss 11(1)–(2A).

94 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 17(1)(b).

95 *Ibid* s 17(1)(c).

96 *Ibid*.

97 *Ibid* s 20(2).

98 *Sex Offenders Registration Act 2004* (Vic) s 3. Another relevant order that is included is a restricted involuntary treatment order under section 93 of the *Sentencing Act 1991* (Vic).

99 *Sex Offenders Registration Act 2004* (Vic) s 3.

100 *Ibid* s 23(4).

101 *Ibid* s 46(2).



- 7.130 The Commission examined issues regarding the registration of offenders in its reference on *Sex Offenders Registration*. In its final report, released in April 2012, the Commission made a number of recommendations regarding mandatory and discretionary registration, and the categorisation of offences for the purposes of mandatory sex offender registration.<sup>102</sup>
- 7.131 One of the Commission's recommendations related to the circumstances in which a court should be permitted to decline to make a registration order in respect of any person found guilty of any offence at any time. One of the circumstances was that if the court was satisfied on the balance of probabilities that:
- the person would be unable to comply with the reporting obligations due to physical or cognitive impairment.<sup>103</sup>

### Licensing and accreditation

- 7.132 Another example of an administrative consequence that can follow from a finding of guilt is the prevention of a person from obtaining licences or accreditation required for particular positions of employment.

### Accreditation for public transport

- 7.133 The *Bus Safety Act 2009* (Vic) sets out a number of requirements in order for a person to be accredited to operate a commercial or local bus service. An application for accreditation must be refused if the person has been found guilty of particular types of offences. The findings under the CMIA listed above are included in the definition of a guilty finding.<sup>104</sup>
- 7.134 Consequences of this nature were also highlighted in a series of decisions following from the case of *XFJ v Director of Public Transport (Occupational Business Regulation)*.<sup>105</sup>
- 7.135 In 1992, the court found XFJ not guilty of murder because of mental impairment. The court detained XFJ on a Governor's pleasure order. Subsequently, the court released him after six years of detention and treatment and revoked his supervision order in 2003.
- 7.136 In 2001, XFJ applied to the Victorian Taxi Directorate to be accredited as a taxi driver under the *Transport (Compliance and Miscellaneous) Act 1983* (Vic). After several years of refusals, he took the case to the Victorian Civil and Administrative Tribunal (VCAT).<sup>106</sup>
- 7.137 The main issue in the case became 'whether a person who has committed an act of extreme violence, while experiencing severe mental illness, can rehabilitate and be fully integrated into the community'.<sup>107</sup>
- 7.138 VCAT heard psychiatric evidence regarding XFJ's past and current mental condition and his risk of further violence. The Director of Public Transport argued that accreditation should be denied on the 'public care objective' in the *Transport (Compliance and Miscellaneous) Act* as:
- there was an objective risk that XFJ would engage in further violence, and there was a subjective possibility that members of the community would be apprehensive about having XFJ as their taxi driver.<sup>108</sup>

102 At the time of writing this paper, the Commission's recommendations have not been adopted. The Commission's recommendations were considered in the Victorian Parliamentary Law Reform Committee's *Inquiry into Sexting* which was released in May 2013.

103 Victorian Law Reform Commission, above n 85, xxiv.

104 *Bus Safety Act 2009* (Vic) ss 3, 27.

105 [2008] VCAT 2303 (31 October 2008) [3].

106 The *Transport (Compliance and Miscellaneous) Act 1983* (Vic) included a finding of not guilty because of mental impairment as a finding of guilty upon which an application for accreditation could be refused. The provisions did not apply directly to XFJ as his was a finding under the previous common law defence of insanity.

107 Vanessa Taylor and Janette Nankivell, 'The Many Cases of XFJ: Suitable to Drive a Taxi or "Killer Cabbie?"' (2012) 20 *Journal of Law and Medicine* 204, 205.

108 *Ibid* 209.

7.139 VCAT rejected the Director’s arguments and set aside the denial of XFJ’s accreditation. After a series of appeals, the Director appealed to the Court of Appeal. The Court of Appeal unanimously dismissed the application. It emphasised that all the circumstances at the time of the killing were relevant to an assessment of the public’s perceptions and expectations of XFJ as a ‘suitable person’ to be accredited to drive taxis. The court said:

Our community does not attribute responsibility for criminal acts to those who, at the time of the commission of those acts, are unable to appreciate that what they are doing is wrong ... it would be [unfair] to judge a person by reference merely to a physical act, without considering all of the surrounding circumstances.<sup>109</sup>

7.140 The issue at the core of such a case has been said to be whether a ‘mentally ill person can ever be allowed to rehabilitate’.<sup>110</sup>

### Working with children check

7.141 Another example is the consequences that a finding of guilt can have on an application for a ‘working with children check’. The purpose of a working with children check is to ‘assist in protecting children from sexual or physical harm by ensuring that people who work with, or care for, them have their suitability to do so checked by a government body’.<sup>111</sup> The provisions are set out in the *Working with Children Act 2005* (Vic).

7.142 A finding of guilt for particular offences, particular sentences or sex offender registration can affect whether the Secretary to the Department of Justice will grant or even assess an application for a working with children check. Applications are categorised according to a number of factors, including whether a person:

- has been found guilty of certain offences
- is subject to sex offender registration, or
- is under particular sentencing or supervision orders.

7.143 For example, if a person has been found guilty of a sexual offence against a child, their application for a working with children check will not be assessed by the Secretary to the Department of Justice.<sup>112</sup> The findings under the CMIA listed above are included in the definition of a guilty finding.<sup>113</sup>

## Questions

- 68 Should the ancillary orders and administrative consequences that follow in usual criminal proceedings apply to findings made under the CMIA?
- 69 Which ancillary orders and administrative consequences are appropriate and why?

109 *Director of Public Transport v XFJ* [2011] VSCA 302 (11 October 2011) [59].

110 Taylor and Nankivell, above n 107, 215.

111 *Working with Children Act 2005* (Vic) s 1(1).

112 *Ibid* ss 12–14.

113 *Ibid* s 4.



# Supervision: review, leave and management of people subject to supervision

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## 8. Supervision: review, leave and management of people subject to supervision

### Introduction

- 8.1 The terms of reference ask the Commission to consider whether changes should be made to the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)* (CMIA) provisions governing supervision and review, including the frequency, form and conduct of reviews and the arrangements for consideration and representation of the various interests involved, including the interests of the community.<sup>1</sup>
- 8.2 Chapter 7 discusses the orders available to the Supreme Court and County Court following a qualified finding of guilt or a verdict of not guilty because of mental impairment.
- 8.3 This chapter outlines the legislative framework governing the process that follows the making of those orders. In particular, this chapter examines the CMIA provisions on the types of review, frequency of reviews, variation and revocation of supervision orders, leave and the management of people subject to supervision orders. The Commission raises and discusses a number of legal and practical issues relating to these provisions.
- 8.4 Chapter 9 discusses a number of broad, systemic issues that affect the CMIA supervision regime as a whole.

### The law prior to the CMIA—detention at the Governor’s pleasure

#### Reviewing Governor’s pleasure orders

- 8.5 Under the Governor’s pleasure system, people found unfit to plead or not guilty because of insanity were held in strict custody until the Governor’s pleasure was known. People subject to Governor’s pleasure orders with a mental illness were generally referred to a psychiatric inpatient service as a ‘security patient’. People subject to Governor’s pleasure orders with an intellectual disability were referred to a residential institution as a ‘security resident’.

- 8.6 The Adult Parole Board reviewed all security patients and residents under Governor's pleasure orders on an annual basis to determine whether the person was suitable for release. The Adult Parole Board would make a recommendation on whether to release the person subject to the Governor's pleasure order or continue to detain that person until the next review. Recommendations were based on reports from the professional staff responsible for the treatment and management of the person. People subject to Governor's pleasure orders had no right to appear before the Adult Parole Board, nor did they have a right to appeal a decision of the Adult Parole Board.<sup>2</sup>
- 8.7 If the Adult Parole Board made an initial recommendation for release, it forwarded this recommendation to the Attorney-General, who then had to decide whether to agree with the recommendation. If the Attorney-General agreed with the recommendation, the Attorney-General referred the matter to Cabinet for discussion. If Cabinet approved the recommendation at that stage, the Premier was to recommend the revocation of the order to the Governor, who then signed a document revoking the order. The Adult Parole Board continued to supervise the person for five years, with or without conditions. Following this five-year period, the process was repeated and if successful, resulted in the unconditional revocation of the Governor's pleasure order.

### Leave under the Governor's pleasure system

- 8.8 Security patients and security residents could be granted a leave of absence under the *Mental Health Act 1986* (Vic) or the *Intellectually Disabled Persons' Services Act 1986* (Vic). Grants of leave allowed the person subject to the Governor's pleasure order to be absent from the psychiatric inpatient service or residential institution for a duration of time, subject to any conditions. The legislation generally did not specify the nature and duration of leave.
- 8.9 The Chief Psychiatrist, in consultation with the Chief Psychiatrist's advisory committee (that included representatives from Victoria Police, Victims of Crimes Assistance League, Forensic Health Service, the Adult Parole Board, the Correctional Services Division and the Office of Public Advocate) generally made leave decisions for security patients. Security patients had no right to appear before the Chief Psychiatrist's advisory committee and the chief psychiatrist generally did not attend.<sup>3</sup>
- 8.10 The Mental Health Act required the Chief Psychiatrist to be satisfied on the evidence available that the safety of members of the public would not be seriously endangered as a result of the security patient's leave of absence. The Mental Health Act also required that the Chief Psychiatrist consult the Director-General of Corrections. Patients whose leave applications were unsuccessful could seek review of the decision by the Mental Health Review Board. However, it was unusual for the Mental Health Review Board to overturn the Chief Psychiatrist's decision.<sup>4</sup>
- 8.11 The Minister for Health and Community Services's delegate made leave decisions for security residents under the *Intellectually Disabled Person's Services Act* on the recommendation of the Director-General of Corrections or the Intellectual Disability Review Panel. The Minister's decision was not reviewable.<sup>5</sup> Leave decisions for security residents were also based on whether the safety of members of the public would be seriously endangered as a result of the security resident's leave of absence.

2 Community Development Committee, Parliament of Victoria, *Inquiry into Persons Detained at the Governor's Pleasure* (1995) 96.  
 3 Ibid 70.  
 4 Ibid 69.  
 5 Ibid 72.

## Supervision under the CMIA

- 8.12 As discussed in Chapter 7, under the CMIA, following a finding under the CMIA, the court can unconditionally discharge the person or declare the person liable to supervision and make an order for a custodial supervision order or non-custodial supervision order.

### Responsibility for supervision and treatment

- 8.13 A person with a mental illness subject to a supervision order is supervised by an 'approved mental health service' under the Department of Health. In all but exceptional circumstances, the Victorian Institute of Forensic Mental Health (Forensicare) is the 'approved mental health service' that supervises people with a mental illness. For a person with a mental illness, different arrangements apply depending on whether the person is on a custodial supervision order or a non-custodial supervision order:
- A person subject to a custodial supervision order ('forensic patient') is detained and supervised at the Thomas Embling Hospital, Forensicare's secure hospital. Forensicare will nominate an authorised psychiatrist at Forensicare to manage the forensic patient and their treatment.
  - People subject to non-custodial supervision orders or forensic patients who are on extended leave are supervised in the community by Forensicare through its Community Forensic Mental Health Service. Forensicare will nominate an authorised psychiatrist from Forensicare or a local approved mental health service to manage and treat the person, sometimes in collaboration with a private psychiatrist.
- 8.14 A person with an intellectual disability or cognitive impairment subject to a supervision order is both supervised by and receives treatment from agencies in the Department of Human Services. The main agency that provides forensic disability services to people on supervision orders is the Disability Services Division in the Department of Human Services. Different arrangements apply depending on whether the person is subject to a custodial supervision order or a non-custodial supervision order.
- Within Disability Services, the Disability Forensic Assessment and Treatment Services manage and provide treatment to a person subject to a custodial supervision order ('forensic resident'). Forensic residents can be detained in either a residential treatment facility or a residential institution.
  - A person subject to a non-custodial supervision order is managed and receives treatment in the community by Disability Client Services in the Department of Human Services.

### Review and leave

- 8.15 The CMIA introduced a new system for the review, leave arrangements and management of people subject to supervision orders.
- 8.16 The CMIA removed the involvement of the Adult Parole Board and the executive in the review process by shifting responsibility for these decisions to the judiciary (the Supreme Court or County Court). Chapter 2 discusses the involvement of the executive and the Adult Parole Board.

- 8.17 In terms of the review of supervision orders, the CMIA also provided for:
- a new process for the variation and revocation of supervision orders, including processes for the review of supervision orders, and clarified the criteria on which the review should be based
  - a ‘comprehensive system of reports’ in relation to people subject to supervision orders, to ensure that they have regular reviews and are not lost in the system<sup>6</sup>
  - a major review by a court into each person subject to a supervision order to consider whether to release the person or reduce the degree of supervision to which the person is subject following the expiry of the nominal term.<sup>7</sup>
- 8.18 The CMIA established new procedures for granting leave to people subject to custodial supervision orders.<sup>8</sup> The CMIA established an independent body—the Forensic Leave Panel—to be the main leave decision-making body. The Forensic Leave Panel was established to increase the transparency and accessibility of the leave process that the Governor’s pleasure system lacked.<sup>9</sup> The CMIA introduced four different types of leave with more specificity on their nature and durations. The Forensic Leave Panel makes the decisions on the majority of leave applications.
- 8.19 In both the review and leave process, the CMIA introduced the right of people subject to supervision orders to appear at hearings and more substantial appeal rights. It also provided for the greater involvement of family members of people subject to supervision orders and victims, including provisions for notification to and consultation with family members and victims where the court is considering releasing the person or substantially reducing the degree of supervision to which the person is subject.

### Pathway for gradual reintegration

- 8.20 The CMIA system of supervision has been characterised as ‘gradualist’<sup>10</sup> or ‘staggered’,<sup>11</sup> in recognition ‘that the treatment and reintegration of people with a mental disorder is most appropriately considered on a gradual basis’.<sup>12</sup> The CMIA therefore envisages a pathway for release for a person subject to a supervision order, where a person on a custodial supervision order receives increasing leave entitlements (from on-ground leave, both supervised then unsupervised, to off-ground leave, both supervised then unsupervised, and then extended leave), eventually ‘graduates’ to a non-custodial supervision order and is finally released following revocation of the non-custodial supervision order.<sup>13</sup> A key question for the Commission’s review of the CMIA is whether this staggered pathway for release is operating well in practice for all people subject to supervision orders (for both people with a mental illness and people with an intellectual disability or cognitive impairment (see Chapter 3)).

6 Victoria, *Parliamentary Debates*, Legislative Assembly, 18 September 1997, 188 (Jan Wade, Attorney-General).

7 Ibid 185.

8 Ibid 186.

9 Ibid 185.

10 Ian Freckelton, ‘Applications for Release by Australians in Victoria Found Not Guilty of Offences of Violence by Reason of Mental Impairment’ (2005) 28 *International Journal of Law and Psychiatry* 375.

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

12 Victoria, *Parliamentary Debates*, Legislative Assembly, 18 September 1997, 186 (Jan Wade, Attorney-General).

13 For example, section 32(3) of the CMIA provides that the court cannot vary a custodial supervision order to a non-custodial supervision order unless the forensic patient or forensic resident has completed a 12-month period of extended leave.



## Review, variation and revocation of orders

- 8.21 Once a court makes a supervision order, the court can vary or revoke it. The process of varying and reviewing orders facilitates the transition of people subject to supervision orders through the CMIA's staggered system of release.
- 8.22 A court can vary or revoke a supervision order using three procedures under the CMIA :
- through an application to vary or revoke the supervision order
  - in the course of a review or further review
  - at a major review.
- 8.23 A number of parties have the right to make an application to the court that made the original supervision order to vary a custodial supervision order or to vary or revoke a non-custodial supervision order. The person subject to the supervision order, the person having the 'custody, care, control or supervision' of that person, the Director of Public Prosecutions or the Attorney-General may make an application.<sup>14</sup> If the court refuses an application to vary a custodial supervision order, a fresh application is barred for another three years or a lesser period if the court directs.<sup>15</sup>
- 8.24 When a person is declared liable to supervision and the court makes a supervision order in relation to that person, the court may also direct a 'review' of the matter at the end of a certain period.<sup>16</sup> Unless the court revokes the order, the court may also direct a further review of the matter following an application to vary or revoke an order or a review of an order.<sup>17</sup> The court may order a further review any number of times.

### Issues in relation to review, variation and revocation of orders

- 8.25 In the following section, the Commission discusses each of these procedures and asks questions about how these procedures operate. In doing so, the Commission considers the following issues:
- custodial supervision orders: applications to vary and reviews
  - non-custodial supervision orders: applications to vary or revoke and reviews
  - major reviews
  - frequency of reviews.
- 8.26 This chapter will not discuss the matters the court considers in varying and revoking orders and the representation of various interests in the process. Chapter 9 covers these topics.

### Custodial supervision orders: applications to vary and reviews

- 8.27 When a person subject to a custodial supervision order applies to vary the order, or has a review or further review of their order, the court can decide that the order will stay in place either by confirming the order or by varying the place of custody. Alternatively, the court can decide to change the custodial supervision order by varying the order to a non-custodial supervision order.<sup>18</sup>

14 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 31(1).  
15 *Ibid* s 31(2).  
16 *Ibid* s 27(2).  
17 *Ibid* ss 32(5), 33(2).  
18 *Ibid* s 32(1).

- 8.28 The court must not vary a custodial supervision order to a non-custodial supervision order during the nominal term unless satisfied on the evidence available that the safety of the person subject to the order or members of the public will not be seriously endangered as a result of the variation.<sup>19</sup> The court must also have regard to a number of matters under section 40 of the CMIA, such as the nature of the person's mental impairment. These matters will be discussed in more detail in Chapter 9.
- 8.29 Where the person subject to the supervision order is a forensic patient or forensic resident, courts must not vary a custodial supervision order to a non-custodial supervision order unless the person has completed a period of at least 12 months extended leave.<sup>20</sup> The court must consider whether the forensic patient or forensic resident has complied with any conditions of their extended leave.<sup>21</sup>
- 8.30 The person subject to the supervision order may appeal any decision to confirm or vary a custodial supervision order to the Court of Appeal.<sup>22</sup>

### Non-custodial supervision orders: applications to vary or revoke and reviews

- 8.31 When a person subject to a non-custodial supervision order applies to vary or revoke that order, or has a review or further review of the non-custodial supervision order, the court can decide not to change the order either by confirming the order or by varying the conditions of the order. Alternatively, the court may change the order. The court can vary the order to a custodial supervision order, resulting in the detention of the person, or it can revoke the non-custodial supervision order and release the person.<sup>23</sup> The person may appeal a decision confirming or varying a non-custodial supervision order to the Court of Appeal.<sup>24</sup>
- 8.32 In deciding whether to vary or revoke a supervision order, the court must have regard to a number of matters, such as the nature of the person's mental impairment and the resources available for the treatment and support of the person in the community. These matters will be discussed in more detail in Chapter 9.

### Major reviews

- 8.33 The third way a court can vary or revoke a supervision order is through a major review. The court that originally made the supervision order must conduct a 'major review' of the order at least three months before the end of the nominal term of the order, and at intervals not exceeding five years after that for the duration of the order.<sup>25</sup> Chapter 7 discusses nominal terms in more detail.
- 8.34 The purpose of a major review is to determine whether to release the person subject to the supervision order.<sup>26</sup>
- 8.35 In a major review of a custodial supervision order, there is a presumption in favour of varying the order to a non-custodial supervision order. The court must vary the order to a non-custodial supervision order, unless satisfied that the safety of the person subject to the order or members of the public will be seriously endangered because of the variation of the order.<sup>27</sup> Where the court is satisfied that the safety of the person subject to the order or members of the public will be seriously endangered because of the downgrading of the order, the court must confirm the order or vary the place of custody.<sup>28</sup>

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19 Ibid s 32(2).  
 20 Ibid s 32(3)(a).  
 21 Ibid s 32(3)(b).  
 22 Ibid s 34(1).  
 23 Ibid s 33(1).  
 24 Ibid s 34(1).  
 25 Ibid s 35(1).  
 26 Ibid s 35(2).  
 27 Ibid s 35(3)(a).  
 28 Ibid.

- 8.36 In a major review of a non-custodial supervision order, the court may confirm the order, vary the conditions of the order or revoke the order.<sup>29</sup> Unlike the major review of a custodial supervision order, in a major review of a non-custodial supervision order, the person subject to the supervision order does not have the advantage of a presumption that the court will downgrade their order and release them. In that sense, the major review of a non-custodial supervision order is not very different to a usual review of a supervision order.
- 8.37 A person subject to a supervision order can appeal a decision to confirm or vary a supervision order at a major review to the Court of Appeal.<sup>30</sup>

## Question

- 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?

### Frequency of reviews

- 8.38 The CMIA provides judges with the flexibility to decide how often to review, or further review, a person's supervision order.<sup>31</sup> The CMIA only specifies the timing of the major review (being at least three months before the end of the nominal term of the order and at intervals not exceeding five years after that for the duration of the order).<sup>32</sup> The Commission's preliminary research indicates that judges take a range of approaches in fixing the frequency of reviews. Some judges may conduct annual reviews, while others set shorter or longer periods.
- 8.39 The lack of specificity on the frequency of reviews in the CMIA raises the question of whether the CMIA should be more prescriptive in this area. Some jurisdictions have more specific provisions on the frequency of reviews. In New South Wales, for example, once a person is subject to a supervision order, the Mental Health Review Tribunal (the body that reviews supervision orders in New South Wales) must conduct an initial review of the order as soon as practicable after the making of the order.<sup>33</sup> The Mental Health Review Tribunal must generally conduct subsequent reviews every six months.<sup>34</sup> In Queensland, a review of each forensic patient's mental condition must occur at least every six months.<sup>35</sup>
- 8.40 Having flexible provisions on the frequency of reviews does, however, allow judges to set the timing of reviews to best suit the individual case. More frequent reviews are not necessarily preferable. Review hearings can be traumatic for the person subject to the supervision order, their family members and victims. Reviews can also be counter-therapeutic, requiring the person subject to the supervision order to relive their offending and have their behaviour scrutinised.<sup>36</sup>
- 8.41 Further, reviews require substantial resources, including:
- court time
  - legal representation for each party involved
  - time to provide information to the court on the progress of the person subject to the supervision order, including the time it takes to prepare reports and give evidence in court.

29 Ibid s 35(3)(b).

30 Ibid s 34(1).

31 Ibid ss 27(2), 32(5), 33(2).

32 Ibid s 35(1).

33 *Mental Health (Forensic Provisions) Act 1990* (NSW) ss 44, 45.

34 Ibid s 46.

35 *Mental Health Act 2000* (Qld) s 200.

36 Ian Freckelton, 'The Preventive Detention of Insanity Acquittes: A Case Study from Victoria' in Bernadette McSherry and Patrick Keyzer (eds) *Dangerous People: Policy, Prediction and Practice* (Routledge, 2011) 94.

- 8.42 In 2011–12, five forensic patients on a custodial supervision order returned to court for a review or major review. In four of the five cases, the court confirmed the custodial supervision order. In the other case, the court granted the person extended leave. In the same year, the court varied custodial supervision orders for four people on extended leave to a non-custodial supervision order.<sup>37</sup>
- 8.43 In 2011–12, there were 30 reviews or major reviews of non-custodial supervision orders. The court revoked the non-custodial supervision orders of 10 people. This is five more than the previous year.
- 8.44 One option would be to preserve the flexibility that the CMIA gives to judges, while also ensuring that people subject to supervision orders are not ‘lost in the system’. In the Commission’s reference on guardianship, for example, the Commission recommended a legislatively required regular, automatic review of each custodial supervision order under the CMIA at an interval of no longer than every two years. To the Commission’s knowledge, this recommendation has not yet been adopted.

## Questions

- 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?
- 72 What effect does the current frequency of reviews have on court resources and the resources of other parties involved?
- 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?

## Leave of absence under supervision orders

- 8.45 Forensic patients and forensic residents are able to apply for a leave of absence from their supervision order. Leave arrangements enable forensic patients and forensic residents to be absent from their place of custody for a number of reasons, including:
- for access to necessary services that cannot be provided while in custody (such as medical services)
  - for court attendance
  - for humanitarian grounds (for example, attending a family member’s funeral)
  - in anticipation of discharge (for example, to find accommodation or seek employment)
  - as part of a rehabilitation plan to encourage people subject to supervision orders to develop the social skills necessary for rehabilitation and social reintegration.<sup>38</sup>
- 8.46 The purpose of leave is to allow a person on a custodial supervision order to gradually reintegrate into the community. A graduated approach to granting leave aims to balance the person’s rehabilitative needs with the safety of the community. A person’s progress through the various types of leave will therefore vary from individual to individual and will

depend on the nature of the person's illness or condition, their response to treatment or rehabilitation and the person's risk profile.<sup>39</sup> It is a:

stepwise process, contingent on the successful negotiation of a graduated leave process. ... If a patient demonstrates a sustained ability to cope with a return to life outside of an institution, then the level of uncertainty in assessing their risk is correspondingly lowered.<sup>40</sup>

8.47 The Forensic Leave Panel's annual report describes this graduated approach to leave as follows:

Initially a patient or resident is granted a small amount of leave, which is escorted by two or three staff members. This could include leave to attend medical appointments, or may allow a patient or resident to attend a nearby facility (such as a park or café) for one hour a week. This slow approach to leave allows for gradual reintegration into the community, and also provides staff with a valuable opportunity to monitor how the person copes and adapts in a community setting. If a patient or resident can successfully participate in leave over a sustained period, the [Forensic Leave Panel] may decrease the number of escorts and increase the number of approved locations and purposes, as well as the duration, of further leaves. This process allows a patient or resident to increase their participation in a wide variety of activities that form part of everyday living in order to prepare them for release back into the community.<sup>41</sup>

8.48 The following section explains the types of leave available to forensic patients and forensic residents, the process of applying for leave, the documentation in support of a leave application, the criteria for granting leave and the leave conditions that the court may impose. The section will also outline the process for suspending and revoking leave and appealing leave decisions. It will explain the functions and processes of the Forensic Leave Panel and the administrative arrangements for the panel such as the appointment of members. In doing so, it focuses on the process issues regarding leave.

8.49 Chapter 9 discusses the criteria for granting leave and the representation of various interests in the leave process in more detail.

## Types of leave

8.50 The CMIA is unique among Australian jurisdictions because it specifies the type of leave that is available based on the location and duration of the leave, and designates different decision-making bodies for the different types of leave.

8.51 Other Australian jurisdictions tend to categorise leave based on the purpose of the leave. For example in Queensland, a person may request a temporary leave of absence on medical grounds, to appear before a court or tribunal or for any other reasons on compassionate grounds.<sup>42</sup> In New South Wales leave is available for emergency or special circumstances.<sup>43</sup> In Tasmania a person can apply for leave for personal reasons, for rehabilitation or reintegration into the community or for 'any other purpose'.<sup>44</sup>

8.52 The types of leave available under the CMIA are:

- special leave of absence
- on-ground leave
- limited off-ground leave
- extended leave.<sup>45</sup>

8.53 Table 5 shows the types of leave available under the CMIA.

39 Department of Human Services, *Non-custodial supervision orders: Policy and procedure manual* (2011) 8.  
40 Andrew Carroll, Mark Lyall and Andrew Forrester, 'Clinical Hopes and Public Fears in Forensic Mental Health' (2004) 15(3) *Journal of Forensic Psychiatry and Psychology* 407, 416–7.  
41 Forensic Leave Panel, *Annual Report 2011* (2012) 4.  
42 *Mental Health Act 2000* (Qld) s 186.  
43 *Mental Health (Forensic Provisions) Act 1990* (NSW) ss 49, 50.  
44 *Mental Health Act 1996* (Tas) s 72Q(5).  
45 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 49.

**Table 5: Types of leave available under the CMIA<sup>46</sup>**

Type of leave	Conditions	Who can apply	Who can grant	Who can suspend
Special leave	Not more than seven days in the case of absence for medical treatment or not more than 24 hours in any other case	Forensic patient Forensic resident Person on behalf of the forensic patient or resident	Authorised psychiatrist (for forensic patients) or the Secretary to the Department of Human Services (for forensic residents)	Chief Psychiatrist (for forensic patients) or Secretary to the Department of Human Services (for forensic residents)
On-ground leave	Absence from the place of custody but within the surrounds of the mental health service or residential treatment facility or institution	Forensic patient Forensic resident Authorised psychiatrist (for forensic patients) or the Secretary to the Department of Human Services (for forensic residents)	Forensic Leave Panel	Chief Psychiatrist (for forensic patients) or Secretary to the Department of Human Services (for forensic residents)
Limited off-ground leave	Between 6am and 9pm and outside those hours on a maximum of three days in any seven day period	Forensic patient Forensic resident Authorised psychiatrist (for forensic patients) or the Secretary to the Department of Human Services (for forensic residents)	Forensic Leave Panel	Chief Psychiatrist (for forensic patients) or Secretary to the Department of Human Services (for forensic residents)
Extended leave	Not more than 12 months but extensions may be granted	Forensic patient Forensic resident Authorised psychiatrist (for forensic patients) or the Secretary to the Department of Human Services (for forensic residents)	Court which originally made the supervision order	Chief Psychiatrist (for forensic patients) or Secretary to the Department of Human Services (for forensic residents)

## Special leave

- 8.54 Special leave allows a forensic patient or forensic resident on a custodial supervision order to leave their place of detention and receive services for:
- seven days for the purpose of receiving medical treatment, or
  - 24 hours for non-medical treatment purposes.<sup>47</sup>
- 8.55 The authorised psychiatrist (for forensic patients) or the Secretary to the Department of Human Services (for forensic residents) make decisions on special leave.<sup>48</sup>

## Applying for special leave

- 8.56 A forensic patient or forensic resident, or a person on their behalf, may apply for special leave by specifying the special circumstances for which the person requires leave.<sup>49</sup>
- 8.57 The authorised psychiatrist or the Secretary to the Department of Human Services must grant the application for special leave if they are satisfied on the evidence that:
- there are special circumstances, and
  - the safety of members of the public will not be seriously endangered.<sup>50</sup>
- 8.58 The authorised psychiatrist or Secretary to the Department of Human Services may approve special leave subject to specified conditions.<sup>51</sup>

## Appealing special leave decisions

- 8.59 A forensic patient or forensic resident may appeal to the Forensic Leave Panel against a decision not to grant special leave.<sup>52</sup> The Forensic Leave Panel may either confirm the decision of the authorised psychiatrist or the Secretary to the Department of Human Services to refuse to grant special leave or allow the person to take special leave.<sup>53</sup> There were no appeals of special leave decisions in Victoria in 2011.<sup>54</sup>

## Suspension of special leave

- 8.60 The Chief Psychiatrist<sup>55</sup> (for forensic patients) or the Secretary to the Department of Human Services (for forensic residents) may suspend leave if they are satisfied on the evidence available that the safety of the person on leave or members of the public will be seriously endangered if they do not suspend leave, or part of the leave.<sup>56</sup> The Chief Psychiatrist or Secretary to the Department of Human Services must lift the leave suspension where there is no longer any reason for suspending the person's leave.<sup>57</sup>

47 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 50(6)(a).

48 *Ibid* s 50(2).

49 *Ibid* s 50(1).

50 *Ibid* s 50(3).

51 *Ibid* s 50(6)(b).

52 *Ibid* s 50(4).

53 *Ibid* s 50(5).

54 Forensic Leave Panel, *Annual Report 2011*, above n 41, Appendix C.

55 The Chief Psychiatrist is appointed by the Secretary to the Department of Health under the *Mental Health Act 1986* (Vic).

56 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 55(1).

57 *Ibid* s 55(3).

## On-ground leave and limited off-ground leave

- 8.61 The Forensic Leave Panel makes decisions about on-ground and limited off-ground leave. On-ground leave allows a forensic patient or forensic resident to leave their place of detention and receive services, but requires them to remain 'within the surrounds' of the place of detention, which the Governor in Council declares.<sup>58</sup>
- 8.62 Forensic patients at Thomas Embling Hospital do not require on-ground leave because the hospital has sufficient grounds within the secure perimeter. Consequently, the Forensic Leave Panel does not hear any applications from forensic patients for on-ground leave.<sup>59</sup> Forensic residents, however, have made use of on-ground leave provisions under the CMIA.<sup>60</sup>
- 8.63 Limited off-ground leave allows a forensic patient or forensic resident, for a maximum of six months, to leave their place of detention:
- between the hours of 6am and 9pm, and
  - outside those hours on a maximum of three days in any seven day period.<sup>61</sup>
- 8.64 The times specified for limited off-ground leave 'allow more flexibility in allowing clinically appropriate rehabilitative activities'.<sup>62</sup>

## Applying for or varying on-ground or limited off-ground leave

- 8.65 The forensic patient or forensic resident or the authorised psychiatrist (for forensic patients) or the Secretary to the Department of Human Services (for forensic residents) can make an application for on-ground or limited off-ground leave, or an application to vary these types of leave.<sup>63</sup>
- 8.66 In making leave decisions, the Forensic Leave Panel must primarily have regard to the forensic patient or forensic resident's current mental condition or pattern of behaviour and to their clinical history and social circumstances.<sup>64</sup> The Forensic Leave Panel must also have regard to the applicant profile and the leave plan or statement submitted with the leave application.<sup>65</sup>

## Applicant profile

- 8.67 An applicant profile must be provided with the leave application.
- 8.68 The applicant profile contains a range of information to assist the Forensic Leave Panel to make a decision about granting or varying leave, including the relationship between the forensic patient or forensic resident's impairment, condition or disability and the offending conduct, their current mental state or pattern of behaviour and the offence that led to the making of the supervision order.<sup>66</sup>
- 8.69 The Clinical Director of Forensicare or the authorised psychiatrist for the approved mental health service provides the applicant profile for forensic patients. For forensic residents, the Secretary to the Department of Human Services provides the applicant profile.<sup>67</sup>

58 Ibid ss 51, 52.

59 Forensic Leave Panel, *Annual Report 2011*, above n 41.

60 Ibid 3.

61 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 53.

62 Victoria, *Parliamentary Debates*, Legislative Assembly, 29 November 2001, 2189 (John Thwaites).

63 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 54(1).

64 Ibid s 54(4)(a).

65 Ibid s 54(4)(c).

66 Ibid s 54A(2). An application profile must include information concerning the forensic patient or forensic resident's impairment, condition or disability, the relationship between the impairment, condition or disability and the offending conduct, their clinical history and social circumstances, their current mental state or pattern of behaviour, the offence that led to the supervision order being made and details of the order and nominal term.

67 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 54A(1).



## Leave plan or statement

- 8.70 The Clinical Director of Forensicare or the authorised psychiatrist for the approved mental health service (for forensic patients) or the Secretary to the Department of Human Services (for forensic residents) must also provide a leave plan or statement.<sup>68</sup> A leave plan or statement does not have to be provided by them if they consider that the application should be refused.
- 8.71 The CMIA started to require a leave plan with all applications to the Forensic Leave Panel following the Vincent Review 'to ensure that the forensic leave panel is properly informed before granting leave'.<sup>69</sup>
- 8.72 The leave plan or statement should also include information on the purpose of the leave and how it will contribute to the forensic patient or forensic resident's rehabilitation, any proposed conditions of the leave and any other information the Clinical Director or Secretary to the Department of Human Services consider relevant or that the Forensic Leave Panel has requested.<sup>70</sup> This provision 'allows the person's treating team to recommend any leave conditions and/or recommend against leave being granted'.<sup>71</sup>
- 8.73 The Forensic Leave Panel's Annual Report lists the most common types of leave granted, including leave to:
- attend medical, legal, dental or allied health appointments
  - undertake activities of daily living (for example, personal shopping and banking)
  - build or maintain relationships with family or friends in the community
  - participate in therapeutic or rehabilitation groups, activities and programs
  - attend educational and vocational activities, groups and courses
  - participate in or seek voluntary or paid employment.<sup>72</sup>
- 8.74 The Clinical Director or Secretary to the Department of Human Services only provides a leave plan if they consider that the application should be granted.<sup>73</sup> If they consider that an application should be refused, the Clinical Director or Secretary to the Department of Human Services must provide a written statement to the Forensic Leave Panel outlining the reasons the application should not be granted, and any other information they consider relevant or that the Forensic Leave Panel has requested.<sup>74</sup>

## Criteria for granting or varying on-ground or limited off-ground leave

- 8.75 The Forensic Leave Panel may grant an application for on-ground or limited off-ground leave if it is satisfied on the evidence that:
- the proposed leave will contribute to the person's rehabilitation, and
  - the safety of the person or members of the public will not be seriously endangered as a result of the person's leave.<sup>75</sup>
- 8.76 The Forensic Leave Panel can place any conditions on leave that it considers appropriate, including any escorts that may be required, where the forensic patient or forensic resident may go while on leave, who they may meet with, their travel arrangements or any requirement to undertake drug or alcohol testing following return from leave.<sup>76</sup>

68 Ibid s 54B(1).

69 Victoria, *Parliamentary Debates*, Legislative Assembly, 29 November 2001, 2189 (John Thwaites).

70 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 54B(2).

71 Forensic Leave Panel, *Annual Report 2011*, above n 41, 6.

72 Ibid 4.

73 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 54B(1).

74 Ibid s 54B(3).

75 Ibid s 54(2).

76 Forensic Leave Panel, *Annual Report 2011*, above n 41, 3.

- 8.77 The same criteria outlined at [8.75] apply to an application to vary a forensic patient or forensic resident's on-ground or limited off-ground leave. However, the Forensic Leave Panel must also be satisfied that there has been a significant alteration in the person's circumstances since it last granted or varied leave.<sup>77</sup>

### Suspension of on-ground leave or limited off-ground leave

- 8.78 The Chief Psychiatrist (for forensic patients) or the Secretary to the Department of Human Services (for forensic residents) may suspend on-ground or limited off-ground leave if they are satisfied on the evidence available that the safety of the forensic patient or forensic resident on leave or members of the public will be seriously endangered if they do not suspend leave, or part of the leave.<sup>78</sup> The Chief Psychiatrist or Secretary to the Department of Human Services must lift the leave suspension where there is no longer a reason for suspending a forensic patient or forensic resident's leave.<sup>79</sup>
- 8.79 In 2011, nine forensic patients had their leave partially or wholly suspended. No forensic residents had their leave suspended during the same period.<sup>80</sup>

### Extended leave

- 8.80 Extended leave allows a forensic patient or a forensic resident to leave the place where they are being detained for a period of time not exceeding 12 months.<sup>81</sup>
- 8.81 In 2011–12, six patients moved from Thomas Embling Hospital to live full time in the community on extended leave.<sup>82</sup>

### Applying for extended leave

- 8.82 A forensic patient or forensic resident may apply for extended leave to the court that made their original custodial supervision order.<sup>83</sup> The forensic patient or forensic resident can apply for extended leave themselves or the authorised psychiatrist (for forensic patients) or the Secretary to the Department of Human Services (for forensic residents) can apply on their behalf.<sup>84</sup>

### Extended leave plan

- 8.83 The authorised psychiatrist (for a forensic patient) or the Secretary to the Department of Human Services (for a forensic resident) must prepare a leave plan and submit it to the court in support of an application for extended leave.<sup>85</sup> The court may grant extended leave if satisfied that the safety of the person applying for leave or the safety of members of the public will not be seriously endangered as a result of the person's extended leave.<sup>86</sup> The court must also consider a number of matters under section 40 of the CMIA, such as the nature of the person's mental impairment and whether there are adequate resources available for the treatment and support of the person in the community. These matters will be considered in more detail in Chapter 9.

77 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 54(3)(c).

78 *Ibid* s 55(1).

79 *Ibid* s 55(3).

80 Forensic Leave Panel, *Annual Report 2011*, above n 41, Appendix C.

81 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 56(1)(a).

82 Victorian Institute of Forensic Mental Health, above n 37, 31.

83 *Ibid* s 57(1).

84 *Ibid* s 57(1).

85 *Ibid* s 57A.

86 *Ibid* s 57(2).

## Suspending and revoking extended leave

- 8.84 The Chief Psychiatrist (for forensic patients) or the Secretary to the Department of Human Services (for forensic residents) can suspend the extended leave of a person on a custodial supervision order.<sup>87</sup>
- 8.85 Suspension of leave can only occur in situations where the safety of the forensic patient or forensic resident on leave, or members of the general public will be seriously endangered if the Chief Psychiatrist or the Secretary to the Department of Human Services do not suspend leave.<sup>88</sup>
- 8.86 Once a forensic patient or forensic resident's leave has been suspended, the Chief Psychiatrist or the Secretary to the Department of Human Services must either make an application to the court that granted their leave to revoke the leave or lift the suspension.<sup>89</sup> The Chief Psychiatrist or the Secretary to the Department of Human Services must also lift the suspension where they are satisfied that the reason for suspending the leave no longer exists.<sup>90</sup>
- 8.87 In 2011–12, one forensic patient had their extended leave revoked and returned to the Thomas Embling Hospital.<sup>91</sup>

## Appealing a grant of extended leave or decision to revoke or suspend extended leave

- 8.88 A forensic patient or forensic resident may appeal to the Court of Appeal against a court's refusal to grant extended leave.<sup>92</sup> A person may appeal to the Court of Appeal against a decision to revoke their extended leave.<sup>93</sup>

## Administering leave

- 8.89 Certain types of leave for forensic patients and forensic residents require staff supervision. The Commission's preliminary research suggested that there may be circumstances where forensic patients have sought to make use of the leave they had been granted, but may have been unable to do so for operational reasons. Operational issues may arise because of resource constraints and the availability of staff.

## Questions

- 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?
- 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?

87 Ibid s 58(1).

88 Ibid.

89 Ibid s 58(2)(b). This must occur within 48 hours after the leave has been suspended.

90 Ibid s 58(5).

91 Victorian Institute of Forensic Mental Health, above n 37, 31.

92 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 57B(1).

93 Ibid s 58A(1).

## Leave decision-making bodies

- 8.90 The CMIA uses a range of decision-making bodies to make determinations about leave including the courts, the Forensic Leave Panel, authorised psychiatrists and the Secretary to the Department of Human Services. In addition, Forensicare has an Internal Leave Review Committee that considers the leave applications and endorses leave plans. In this section, the Commission discusses the operation of the Forensic Leave Panel and the Internal Leave Review Committee. Chapter 9 discusses the role of the court in granting extended leave.
- 8.91 Like Victoria, many jurisdictions utilise an independent tribunal or board as a leave decision-making body, for example the Forensic Tribunal in Tasmania, the Mental Health Tribunal in New South Wales, the Mentally Impaired Accused Review Board in Western Australia and the Mental Health Board in Queensland.

## Supreme Court and County Court

- 8.92 The Supreme Court and County Court make decisions regarding extended leave. The court that made the original supervision order will hear and determine applications for extended leave under a supervision order.

## Operation of the Forensic Leave Panel

- 8.93 The CMIA established the Forensic Leave Panel to hear and determine applications for on-ground and limited off-ground leave and appeals of special leave decisions.<sup>94</sup> The Forensic Leave Panel's role is 'integral to the rehabilitation of patients and residents and facilitates their reintegration into the community'.<sup>95</sup>
- 8.94 The Forensic Leave Panel's membership consists of one or more judges of the Supreme Court, one or more judges of the County Court, the Chief Psychiatrist and any members necessary from time to time for the proper functioning of the Forensic Leave Panel.<sup>96</sup> For the purpose of a hearing, the panel consists of a judicial member, a member appointed to the panel to represent the view and opinions of members of the community, and the person who is primarily responsible for the treatment and care of the applicant who is:
- for forensic patients, the Chief Psychiatrist and a medical practitioner with experience in forensic psychiatry
  - for forensic residents, a registered psychologist with forensic experience.<sup>97</sup>
- 8.95 The judicial member of the Forensic Leave Panel is the chairperson for the hearing. The chairperson's role includes deciding questions of law, arranging the business and procedure of the Forensic Leave Panel in consultation with other members and determining the sittings of the Forensic Leave Panel.<sup>98</sup>
- 8.96 The Minister for Mental Health nominates the members of the Forensic Leave Panel who are then appointed by the Governor in Council. Judicial members serve a term of five years and other members serve a period of up to four years.<sup>99</sup> Members of the Forensic Leave Panel are eligible for reappointment.<sup>100</sup>
- 8.97 In hearing any matter, the Forensic Leave Panel must act according to 'equity and good conscience' without regard to technicalities and legal forms, is bound by the rules of natural justice and is not required to conduct any proceedings in a formal manner.<sup>101</sup>

94 Ibid s 60.

95 Forensic Leave Panel, *Annual Report 2011*, above n 41, 1.

96 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 59(2).

97 Ibid sch 2 cl 1.

98 Ibid sch 2 cl 3, 4, 5.

99 Ibid sch 1 cl1(1)(b), 2(1)(a), 2(1)(b).

100 Ibid sch 1 cl1(1)(c), 2(1)(c).

101 Ibid s 64(1).

- 8.98 The following comment made by the Forensic Leave Panel in its 2010 annual report provides an indication of the difficult task of the Forensic Leave Panel and its approach in conducting leave hearings:
- The panel recognises that attending a hearing can be difficult and stressful for some forensic patients and residents. The panel seeks to create an environment where patients and residents feel able to express their views and wishes freely. The panel is also sensitive to the needs of treating staff, who must balance the requirement to provide candid evidence to the panel with the need to maintain a healthy therapeutic relationship with the patient or resident.<sup>102</sup>
- 8.99 The Forensic Leave Panel must provide reasons for all its decisions.<sup>103</sup> The panel may give reasons orally, however a person applying for leave can request the reasons in writing.<sup>104</sup> When the Forensic Leave Panel does not approve a leave application, it must tell the person who applied for the leave that they have the right to request written reasons for the decision.<sup>105</sup> Only one patient requested a written statement of reasons from the Forensic Leave Panel in 2011.<sup>106</sup>
- 8.100 As part of this review, the Commission is examining the provisions in the CMIA on the operation of the Forensic Leave Panel and how they function in practice. Currently, hearings require the presence of three or four panel members to make decisions on leave, which in some cases may be relatively straightforward. The judicial members of the panel must be current judges (as opposed to retired judges). Currently, there are eight judges on the Forensic Leave Panel.<sup>107</sup> Further, the maximum period for which the Forensic Leave Panel can grant on-ground or limited off-ground leave is six months.<sup>108</sup> If the Forensic Leave Panel does not sit or cancels a hearing, there is no continuing authority for a forensic patient or forensic resident's leave to continue, which can affect their rehabilitation prospects.

## Questions

- 76 Should the CMIA provide the Forensic Leave Panel with more flexibility in its operation?
- 77 Is the composition of the Forensic Leave Panel appropriate?

102 Forensic Leave Panel, *Annual Report 2010* (2011) 13.  
103 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 66(1).  
104 *Ibid* s 66(2).  
105 *Ibid* s 66(4).  
106 Forensic Leave Panel, *Annual Report 2011*, above n 41, Appendix C.  
107 *Ibid* 2.  
108 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 54(6).

## Operation of the Internal Leave Review Committee

- 8.101 The Vincent Review was commissioned in 2001 to consider leave arrangements for patients at the Thomas Embling Hospital in response to community safety concerns following a patient absconding from the hospital. The Vincent Review recommended establishing a committee to comment on leave applications, convened by Forensicare's Clinical Director and comprising the Chief Psychiatrist, senior clinical staff and heads of treating teams. The purpose of such a committee was to:
- consider leave applications (other than applications for special leave)
  - consider the associated treatment plans
  - ensure relevant clinical issues are considered
  - formally endorse the plans.
- 8.102 Under the proposal, the Clinical Director was then to pass on the advice of the committee to the formal leave decision-making body.<sup>109</sup>
- 8.103 Forensicare implemented the Vincent Review's recommendation by establishing the Internal Leave Review Committee. Unlike the Forensic Leave Panel, the Internal Leave Review Committee does not have a legislative basis. As an internal body, the Internal Leave Review Committee's policy, procedures and decision making are not governed by legislation, even though its recommendations would be influential in the Forensic Leave Panel or court's decision making.
- 8.104 There are obvious benefits of an Internal Leave Review Committee. It can provide useful assistance to the Forensic Leave Panel or the court in considering applications for leave and thus an extra degree of oversight for leave applications. In its 2010 annual report, the Forensic Leave Panel made the following observation:
- Occasionally, the leave review committee (for forensic patients) does not support an application that the treating team supports. In that case, the hearing offers an additional opportunity for the treating team to clarify any issues surrounding the application.<sup>110</sup>
- 8.105 Further, the Internal Leave Review Committee can ensure consistency in the approach taken by Forensicare to preparing information (such as applicant profiles and leave plans or statements). The role of the Internal Leave Review Committee is well documented,<sup>111</sup> but there is less publicly available information about how it functions in practice. This raises questions about how people who may be subject to the leave process perceive it to operate in terms of transparency and fairness.

### Question

- 78 Are changes required to the operation of the Internal Leave Committee? If so, what changes are required?

109 Review Panel Appointed to Consider Leave Arrangements for Patients at the Victorian Institute of Forensic Health, above n 38, 31.  
 110 Forensic Leave Panel, *Annual Report 2010*, above n 102, 13.  
 111 See, for example Forensic Leave Panel, *Annual Report 2010*, above n 102.

## Monitoring people subject to supervision orders

- 8.106 The arrangements for the supervision, treatment and management of people subject to supervision orders are complex. While the CMIA has set out some of the arrangements, to a large degree they are contained in various policies and procedures of agencies in the Department of Health and the Department of Human Services that are responsible for managing and providing treatment to people subject to supervision orders.
- 8.107 In this section, the Commission describes the processes for monitoring people subject to supervision orders and seeks to identify how they operate in practice. In doing so, the Commission considers the potential issues in the following areas:
- responsibility for people subject to supervision orders
  - breaches of supervision orders
  - people who abscond to Victoria from another state
  - interstate transfer orders.

## Responsibility for people subject to supervision orders

- 8.108 As discussed at [8.13]–[8.14] a number of organisations have responsibility for supervising people subject to orders under the CMIA. The Department of Health has primary responsibility for forensic patients, whereas the Department of Human Services has primary responsibility for forensic residents.<sup>112</sup>
- 8.109 Forensicare or the Department of Human Services manage people subject to non-custodial supervision orders in the community, depending on the nature of the mental impairment.

## Responsibility for people on non-custodial supervision orders

- 8.110 When a court makes a non-custodial supervision order, it will generally specify:
- who manages the non-custodial supervision order (for example, the authorised psychiatrist of Forensicare)
  - the area mental health service that will treat the person.<sup>113</sup>
- 8.111 The person supervising the order monitors the treatment and management of the person but most of the time has no direct clinical responsibility for providing the treatment.<sup>114</sup>
- 8.112 In terms of departmental responsibility for people on non-custodial supervision orders, the Secretary to the Department of Human Services and the Secretary to the Department of Health must file a report with the court on the person subject to the non-custodial supervision order at intervals of not more than 12 months.<sup>115</sup> The Secretary to the Department of Human Services and the Secretary to the Department of Health also have powers under the CMIA to address non-compliance with non-custodial supervision orders.<sup>116</sup> The CMIA does not otherwise provide that these departments are responsible for people on non-custodial supervision orders.
- 8.113 In its preliminary research, the Commission identified that there can be complex arrangements for the supervision, management and treatment of people subject to supervision orders. As a result, there can be a lack of clarity around who is responsible for monitoring, reporting and returning people to court for hearings or for responding to breaches of an order. This situation could arise, for example, in the case of a person

112 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 26(8), 26(9).  
113 Department of Human Services, above n 39, 14.  
114 *Ibid* 15.  
115 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 41.  
116 *Ibid* ss 29, 30A.

subject to a non-custodial supervision order in the community who is supervised by Forensicare’s Community Forensic Mental Health Service, managed by an approved mental health service and receiving treatment from a private psychiatrist or other medical practitioner.

- 8.114 While it is implicit that someone should be monitoring the person subject to the non-custodial supervision order at any given time, it is not always clear who is responsible for some of the requirements imposed by the legislation. Clarity around this is integral to ensure that a person subject to a supervision order does not become ‘lost in the system’.
- 8.115 The Victorian Parliament Law Reform Committee in its *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* recommended that the CMIA clarify departmental responsibility for supervision and monitoring custodial supervision orders and non-custodial supervision orders.<sup>117</sup>

## Questions

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

## Breaches of supervision orders

- 8.116 A person subject to a supervision order can breach it by:
- failing to comply with a non-custodial supervision order, or
  - being absent without leave while on a custodial supervision order.
- 8.117 The following section will discuss the CMIA provisions on each of these breaches.

## Emergency powers of apprehension

- 8.118 Where a person subject to a non-custodial supervision order becomes a serious risk to themselves or others, the CMIA provides that the person can be apprehended using an emergency power of apprehension.<sup>118</sup> The person must:
- have failed to comply with the non-custodial supervision order, and
  - be a serious danger to their own safety or public safety.<sup>119</sup>
- 8.119 People responsible for the supervision of the person subject to the supervision order (supervisors) use the emergency power when they need to apprehend the person subject to a supervision order as a matter of urgency and it would be inappropriate to wait for a court decision.<sup>120</sup> Members of the police force, ambulance officers and other mental health service providers may also use the emergency power of apprehension.<sup>121</sup>

117 Law Reform Committee, Parliament of Victoria, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (2013) 309.

118 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 30.

119 *Ibid* s 30(1).

120 Department of Human Services, above n 39, 28.

121 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 30(6).



## Arresting people subject to a supervision order who breach a supervision order by leaving Victoria

- 8.120 People on non-custodial supervision orders may travel out of Victoria if they have the permission of their supervisor.<sup>122</sup> However, where a person on a non-custodial supervision order leaves Victoria without permission, they fail to comply with the supervision order and can be arrested.<sup>123</sup> The supervisor, the Secretary to the Department of Health or the Secretary to the Department of Human Services may apply for a warrant to arrest the person subject to the non-custodial supervision order.<sup>124</sup>
- 8.121 The supervisor, the Secretary to the Department of Health or the Secretary to the Department of Human Services may also apply for a warrant of arrest if a person is absent without leave while on a custodial supervision order.<sup>125</sup>

## Application to vary an order following non-compliance with a non-custodial supervision order

- 8.122 If it appears that a person subject to a non-custodial supervision order has failed to comply with it, the supervisor, the Secretary to the Department of Health or the Secretary to the Department of Human Services may apply to the court for a variation of the non-custodial supervision order. These parties may make an application to the court:
- following an emergency apprehension<sup>126</sup>
  - after a person is arrested under a warrant<sup>127</sup>, or
  - if it otherwise appears that the person has not complied with the order.<sup>128</sup>
- 8.123 If an application is not made within 48 hours of the emergency apprehension or the person's arrest, the person must be released.<sup>129</sup>
- 8.124 The court may order a warrant for the arrest of a person subject to a non-custodial supervision order if they fail to attend the hearing (in situations where the person is not already in detention).<sup>130</sup>
- 8.125 At the hearing, if the court is satisfied that the person on the non-custodial supervision order has failed to comply with conditions of the order, the court may confirm the order, vary the conditions of the order or vary the order to a custodial supervision order.<sup>131</sup>

## Lack of clarity in dealing with non-compliance of non-custodial supervision orders

- 8.126 A person can fail to comply with a non-custodial supervision order for various reasons, for example, by missing appointments with the treating team, refusing to participate in programs or using illicit drugs (where this is in breach of a condition of the non-custodial supervision order).<sup>132</sup>
- 8.127 When Forensicare is supervising a person subject to a non-custodial supervision order and there is a concern that the person is breaching the conditions of their non-custodial supervision order, the area mental health service providing treatment to the person must contact the authorised psychiatrist of Forensicare immediately.<sup>133</sup> Forensicare and the area mental health service will then both decide how to deal with the issue.<sup>134</sup>

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122 Department of Human Services, above n 39, 35.  
123 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 30A.  
124 *Ibid* s 30A(1).  
125 *Ibid* s 30B.  
126 *Ibid* s 30(4).  
127 *Ibid* s 30A(4).  
128 *Ibid* s 29(1).  
129 *Ibid* ss 30(4), 30A(4).  
130 *Ibid* s 29(3).  
131 *Ibid* s 29(4).  
132 Department of Human Services, above n 39, 28.  
133 *Ibid*.  
134 *Ibid*.

- 8.128 In its preliminary research, the Commission identified a potential issue regarding whether there is sufficient guidance in dealing with the failure to comply with a non-custodial supervision order. In particular, the current provisions of the CMIA are not adequately clear on the extent of the non-compliance before action must be taken under the CMIA to apprehend the person subject to the supervision order. For example, in many cases the person subject to the non-custodial supervision order may maintain a stable mental state but may fail to comply with the non-custodial supervision order because of other behavioural issues, a substance use or a personality disorder. It is unclear in some of these cases whether the person's behaviour warrants an apprehension under the CMIA. There is no requirement that the person or the community be in danger due to the person's behaviour—the person subject to the supervision order need only breach a condition of the order by their behaviour.<sup>135</sup>

## Questions

- 81 Is there is a need for guidance on failures to comply with or breaches of supervision orders?
- 82 If so, what is the best mechanism for providing more guidance on failures to comply with or breaches of supervision orders?

## People who abscond to Victoria from another state

- 8.129 The Secretary to the Department of Human Services or the Secretary to the Department of Health may apply for a warrant to arrest a person where they are:
- in Victoria and are absent without leave from a mental health service in another state, or
  - in breach of a non-custodial type order in another state that would allow them to be apprehended in that state.<sup>136</sup>
- 8.130 When the person is brought before the Magistrates' Court, the court may make an 'interim disposition order' to:
- grant the person bail
  - detain the person as if they were subject to a supervision order, or
  - remand the person in custody in a prison.<sup>137</sup>
- 8.131 An application must be made to the Supreme Court within seven days of making the interim disposition order so that the court can review it to determine the appropriate future management of the person.<sup>138</sup>
- 8.132 If the person cannot return to the state that made the original supervision order, the court may make the person subject to a supervision order or unconditionally release the person.<sup>139</sup>

135  
136  
137  
138  
139

Ibid.  
*Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) s 73J.*  
Ibid s 73K(2).  
Ibid s 73L(1).  
Ibid s 73L(4).

## Interstate transfer orders

### Overview

- 8.133 Interstate transfer orders provisions in the C Mia govern the approved transfer of people on supervision orders in and out of Victoria. A separate set of C Mia provisions, discussed at [8.129]–[8.132], govern the entry of people on supervision orders from another state who arrive in Victoria without approval.
- 8.134 The C Mia contains provisions that allow people subject to supervision orders in Victoria to transfer to other states and supervised people subject to corresponding laws to transfer to Victoria.
- 8.135 A person subject to a supervision order must give informed consent to transfer to another state. The person must give consent in writing after the person receives an explanation of the process of the transfer, the reasons for the transfer and has had the opportunity to ask and have answered any questions they may have.<sup>140</sup>
- 8.136 Transfer provisions aim ‘to promote rehabilitation and the reunion of families separated under difficult circumstances’.<sup>141</sup>

### Transfer of people from Victoria to another state

- 8.137 There are two main requirements for a person subject to a supervision order to transfer from Victoria to another state. These are:
- the laws of the state the person would like to transfer to must allow the transfer, and
  - the Minister administering the transfer must allow the transfer by making an order.<sup>142</sup>
- 8.138 The Minister may only allow the transfer if they are satisfied that:
- the Chief Psychiatrist has provided a written statement that the transfer is of benefit to the person subject to a supervision order, and
  - the Minister is satisfied that the transfer is allowed by laws of the state the person would like to transfer to and the person subject to the supervision order has given informed consent to the transfer or if unable to give informed consent, their guardian has given informed consent to the transfer.<sup>143</sup>

### Transfer of people from another state to Victoria

- 8.139 A person subject to a supervision order in another state must meet the requirements outlined above at [8.137] and [8.138] to transfer to Victoria, with some additional requirements.
- 8.140 The additional requirements for people transferring to Victoria are:
- the Minister is satisfied that ‘the transfer is necessary for the maintenance or re-establishment of family relationships or relationships with people who can assist in supporting the person’<sup>144</sup>, and
  - the Chief Psychiatrist has provided a written statement that there are facilities or services available for the custody, care and treatment of the person.<sup>145</sup>

140 Ibid s 73C.

141 Victoria, *Parliamentary Debates*, Legislative Assembly, 29 November 2001, 2190 (John Thwaites).

142 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 73D(1).

143 Ibid s 73D(2).

144 Ibid s 73E(2)(b).

145 Ibid s 73E(2)(a).

- 8.141 Upon arrival in Victoria, the person is placed on an 'interim order' and within six months, an application must be made to the Supreme Court for a review.<sup>146</sup> At the review, the court may place the person on a supervision order or order the person's unconditional release.<sup>147</sup> If the person is placed on a supervision order, the court must set a nominal term.<sup>148</sup> The Supreme Court cannot make an order that is 'more restrictive on the person's freedom and personal autonomy' than the order the person was on interstate, unless the safety of the person or members of the public would be seriously endangered if a more restrictive order is not made.<sup>149</sup>

### Difficulty in effecting interstate transfers

- 8.142 Throughout Australia, the laws governing the supervision of people who are unfit to stand trial or found not guilty because of mental impairment are different. This can create complexity when a person subject to a supervision order in one state, moves to another state. There is no uniform legislation governing the interstate transfer of people subject to supervision orders in Australia and therefore interstate agreements govern the process.<sup>150</sup> Limited progress has been made in finalising these agreements, 'notwithstanding the existence of legislation enabling their development'.<sup>151</sup>
- 8.143 When compared with the powers to apprehend a person who has left Victoria, Carroll et al argue that the situation regarding interstate transfer orders is less 'clear cut' and is largely a legal problem:
- It was accepted that there was a 'conflict of laws', of the kind that frequently arises in the Australian system of federalism. While there are often compelling arguments for interstate transfers consistent with good clinical practice, such as optimising relationships with families and other support networks, the issue unfortunately remains low on the political agenda and attendant with a high degree of political sensitivity.<sup>152</sup>
- 8.144 Interstate transfers can be beneficial for the person subject to the supervision order and their family members. However, there may be a range of reasons the transfers are difficult to effect, including the lack of complementary provisions across jurisdictions, a lack of motivation on the part of the people who are able to initiate these transfers and possibly a lack of straightforward mechanisms in the legislation to enable the transfers to occur.

## Questions

- 83 What are the barriers to effecting interstate transfers under the CMIA?
- 84 If there are barriers, what changes should be made to make the process more efficient?

146 Ibid s 73F(1).

147 Ibid s 73F(4).

148 Ibid s 73F(6).

149 Ibid s 73F(5).

150 Andrew Carroll et al, 'Forensic Mental Health Orders: Orders Without Borders' (2009) 17(1) *Australasian Psychiatry* 34, 36.

151 Ibid.

152 Ibid.



# Decision making and interests under the CMIA

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## 9. Decision making and interests under the CMIA

### Introduction

- 9.1 The terms of reference ask the Commission to consider whether changes should be made to the provisions governing supervision and review in the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (CMIA). The Commission has been asked to consider the frequency, form and conduct of reviews and the arrangements for consideration and representation of the various interests involved, including the interests of the community.
- 9.2 Chapter 7 and Chapter 8 discuss process issues regarding the CMIA system of supervision. Chapter 7 focuses on the making of orders and other consequences following findings under the CMIA. Chapter 8 considers a range of issues in the processes for review, leave and the management of people subject to supervision orders.
- 9.3 However, the CMIA supervision regime as a whole also faces a number of broad, systemic issues. This chapter addresses these issues. The purpose of this chapter is to take a holistic view of the CMIA supervision regime and to encourage comments on what improvements, if any, could be made to it at a systemic level. This chapter addresses the following issues:
- flexibility in the system
  - decision making by the court, Forensic Leave Panel, experts and people responsible for supervision
  - consideration and representation of various interests involved, including the interests of people subject to supervision orders, victims, family members and the community
  - suitability of the system for people with intellectual disabilities or cognitive impairments
  - suppression orders.

## The flexibility in the system

- 9.4 When making supervision orders under the CMIA, courts have limited orders to impose in relation to people declared liable to supervision. The court can either impose a custodial supervision order or a non-custodial supervision order. If the court does not declare a person to be liable to supervision, the court only has the option of ordering that the person be released unconditionally. When varying an order during a review, further review or major review, the court can generally choose between custodial supervision orders, non-custodial supervision orders (with varying conditions) or a revocation of a non-custodial supervision order to release the person. When a person subject to a non-custodial supervision order has not complied with the order, the possible outcomes are similar: the court may confirm the order, vary the conditions of the non-custodial supervision order or move the person back to a custodial supervision order.
- 9.5 The Commission's preliminary research indicates that while courts are able to address breaches, the orders available to the court at various stages of the supervision regime may be unduly limited. This issue arises mainly in:
- making and reviewing supervision orders
  - addressing the non-compliance of supervision orders.
- 9.6 The system's potential lack of flexibility could result in a mismatch between the supervision the person should ideally receive and the supervision order that is actually made. A person subject to a custodial supervision order, for example, could be managed in lower security facilities rather than in the high security setting at the Thomas Embling Hospital in cases where the level of offending was not serious or their mental illness is not acute (but the person still requires a higher level of supervision than that available on a non-custodial supervision order). A person with an intellectual disability may be better managed under the *Disability Act 2006* (Vic) that would give them the benefit of a treatment plan, currently not required or reviewable under the CMIA.
- 9.7 The current system's potential lack of flexibility could also be problematic in terms of the limitations that it imposes when responding to the non-compliance of a supervision order. A person who breaches a non-custodial supervision order, for example, may do so because of drug or alcohol use, and not because of re-offending or because they are experiencing symptoms of their mental illness. In these circumstances, making an order that would target the drug or alcohol issue could be a better approach than moving the person back to a custodial supervision order and would also be more consistent with the principle of least restriction underlying the CMIA.
- 9.8 A lack of flexibility in the CMIA could also suggest issues with the way the CMIA operates in conjunction with other legislation that works alongside it to facilitate the treatment and management of people subject to the CMIA. The Commission's preliminary research indicates that there may be a need to examine how the CMIA interacts with other relevant legislation, including the *Mental Health Act 1986* (Vic) and the *Disability Act*, and whether there are areas that prevent the CMIA from operating consistently with its underlying principles.



- 9.9 The potential issues regarding the lack of flexibility in the CMIA system of supervision prompt an examination of whether courts should be able to select from a wider range of options, such as civil mental health orders. In Tasmania's system, for example, the court can make the following orders when making and reviewing supervision orders:
- a restriction order
  - an order to release the defendant and make a supervision order
  - a continuing care order
  - an order to release the defendant and make a community treatment order
  - an order to release the defendant on such conditions as the court considers appropriate, or
  - an order to release the defendant unconditionally.<sup>1</sup>
- 9.10 The New South Wales Law Reform Commission has suggested that courts should be able to make 'treatment orders', such as the ones available in England and Wales.<sup>2</sup> In England and Wales, courts can make the following orders after a qualified finding of guilt or a finding of not guilty because of insanity:
- a hospital order under the *Mental Health Act 1983* (UK) with or without a restriction order<sup>3</sup>
  - a supervision order, or
  - an order for their absolute discharge.<sup>4</sup>

## Questions

- 85 Is there a need for more flexibility in making and reviewing supervision orders and addressing non-compliance under the CMIA?
- 86 What changes should be made to give the system more flexibility where needed?

1 *Criminal Justice (Mental Impairment) Act 1999* (Tas) ss 18(2), 37.

2 New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Consultation Paper No 6 (2010) 156.

3 *Criminal Procedure (Insanity) Act 1964* (UK) ss 4(2), 5; *Mental Health Act* (UK) ss 37, 41.

4 *Criminal Procedure (Insanity) Act 1964* (UK) s 5. Hospital orders are six months in duration but the hospital managers or responsible clinician can renew the order. A restriction order is an order that the person will be subject special restrictions, such as restrictions on leave and discharge.

## Decision making in the CMIA supervision system

9.11 In this section, the Commission considers the approach to decision making in the CMIA system of supervision. This includes decisions made by the courts, the Forensic Leave Panel, experts and people responsible for the supervision and treatment of people subject to the CMIA.

### Principles and matters the court considers

9.12 The CMIA requires that in making, varying or revoking a supervision order or granting or revoking extended leave, the court must apply the principle that ‘restrictions on a person’s freedom and personal autonomy should be kept to the minimum consistent with the safety of the community’.<sup>5</sup>

9.13 The court must also have regard to:

- the nature of the person’s mental impairment or other condition or disability
- the relationship between the impairment, condition or disability and the offending conduct
- whether the person is, or would if released be, likely to endanger themselves, another person, or other people generally because of their mental impairment
- the need to protect people from such danger
- whether there are adequate resources available for the treatment and support of the person in the community, and
- any other matters the court thinks relevant.<sup>6</sup>

9.14 Reports play an important role in the court’s decision making. The court must obtain and consider reports from a range of people involved in the supervision of the person including medical practitioners, psychologists, other people involved in supervising the person, and from victims and family members who may have submitted a report.<sup>7</sup>

9.15 Additionally, in extended leave applications, the court may grant extended leave if it is satisfied that the safety of the forensic patient or forensic resident, or members of the public will not be seriously endangered as a result of the forensic patient or forensic resident’s extended leave.<sup>8</sup> Courts must consider the leave plan filed in support of applications for extended leave.<sup>9</sup>

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

9.16 The next section will consider how the court applies sections 39 and 40 of the CMIA and whether the current criteria and its application is striking the right balance between the freedom of people subject to supervision orders and the safety of the community.

### Presumptions

9.17 In major reviews, there is a presumption that the court must vary a custodial supervision order to a non-custodial supervision order unless the court is satisfied on the evidence available that the safety of the person subject to the supervision order or members of the public will be seriously endangered as a result of reducing the supervision status of the person.<sup>10</sup> This presumption is advantageous to the person subject to a supervision order. However, it stands in contrast with the presumption that applies to varying orders when

5 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)* s 39.  
 6 *Ibid* s 40.  
 7 *Ibid* s 40(2).  
 8 *Ibid* s 57(2).  
 9 *Ibid* s 40(2)(da).  
 10 *Ibid* s 35(3).

However, it stands in contrast with the presumption that applies to varying orders when an application is made. In this case, the presumption is in favour of keeping the person on the custodial supervision order. Section 32(2) of the CMIA provides that the court must *not* vary a custodial supervision order to a non-custodial supervision order unless satisfied that the safety of the person subject to the supervision order or members of the public will not be seriously endangered.

- 9.18 In extended leave matters, there is no presumption either way. The court *may* grant an application of extended leave if satisfied that the safety of the forensic patient or forensic resident will not be seriously endangered because of the extended leave.<sup>11</sup>
- 9.19 The existence of different presumptions that apply at various stages of the decision-making process prompts examination of why these differences exist and how they operate in practice at different stages of review.

## Question

- 87 Are the current presumptions in varying and revoking supervision orders appropriate?

### The role of dangerousness

- 9.20 A significant part of the decision to make, vary or revoke a supervision order or to grant extended leave hinges on the court's assessment of the dangerousness of the person subject to the supervision order. The system currently in place, that permits the detention of a person based on the likelihood of endangerment, is a system of preventive detention, justified because of community protection. McSherry says:

There is a presumption that a person who has committed a crime once because of his or her mental impairment will be driven to do so again. In this sense, those found not criminally responsible have generally been detained on the basis of 'dangerousness'. That is, they are perceived as dangerous individuals who may do harm again.<sup>12</sup>

- 9.21 Justice Cummins set out the process in *Re PL*:

Predicting dangerousness is notoriously difficult. No guarantees ever can be given. Bearing in mind that many applicants have killed, the court moves very cautiously. The court carefully takes into account the circumstances of the original events. On the question of community safety, the court has regard to the length of time between the events and the application because the applicant has been found to have committed the relevant serious actions. The court examines the treatment, insight and progress of the applicant and considers expert evidence from very experienced medical and other professionals. It calls upon its own experience of human behaviour and of recidivism and reformation. Thus the court proceeds with as much responsible data as reasonably can be obtained, to seek to ensure community safety as contemplated by the [CMIA]. However, it must be remembered that applicants found not guilty by reason of mental impairment (or previously insanity) have not been convicted of a crime. Characteristically, they have suffered from a mental illness. The court's jurisdiction in that respect is protective. It should be remembered that ultimately the best protection for the community is that persons found not guilty by reason of mental impairment are able to return to the community as useful citizens.<sup>13</sup>

- 9.22 Relying on the risk of endangerment could potentially raise a number of issues.

- 9.23 First, it is difficult to demonstrate that a person subject to a supervision order will not pose a serious or likely danger following a change in the level of supervision. As Freckelton observes, having to satisfy a ‘negative’ or that something will not happen, is difficult to prove.<sup>14</sup>
- 9.24 Secondly, assessing dangerousness could be subject to much subjective interpretation—assessing future risk requires the court to embrace notions of uncertainty and to consider the ‘likelihood of such [future] risk becoming a reality’.<sup>15</sup> The interpretation of the term ‘serious endangerment’ has been ‘somewhat elastic’.<sup>16</sup> The CMIA does not define what the term means, for example, whether it requires the endangerment to be physical or psychological, or whether it requires the risk that an actual violent offence will be committed (as opposed to a non-violent offence). The use of ‘likely to endanger’ in some parts of the CMIA and ‘seriously endanger’ in others also implies that different thresholds for court intervention apply at different stages of the process, that could add to the subjectivity.
- 9.25 Thirdly, using dangerousness as the basis of a decision raises the question of whether this could lead to overly cautious decision making (discussed later in the chapter at [9.51]–[9.58]) and if this is the case, whether the criteria the court considers should be based on something other than dangerousness. Carroll, Lyall and Forrester distinguish between two types of legislation: ‘disorder’ based legislation and ‘risk’ based legislation.
- 9.26 The ‘disorder’ based approach, taken in England and Wales and some jurisdictions in the United States, relies on the same criteria for the detention of forensic patients as for civil patients. This approach requires an ongoing mental disorder.<sup>17</sup> In England and Wales, the Mental Health Review Tribunal must discharge a person subject to an unrestricted hospital order on a number of criteria. The person must be discharged if the Tribunal is not satisfied:
- that they are suffering from a mental disorder that makes it appropriate for them to be detained in a hospital
  - that it is necessary for the health or safety of the patient or of other people
  - that appropriate medical treatment is available for them.<sup>18</sup>
- 9.27 Further, in that jurisdiction the court may revoke a supervision order if it would be in the interests of the health or welfare of the person.<sup>19</sup>
- 9.28 Victoria adopts the ‘risk based’ approach. Under this approach the criteria for detention and supervision relate not to the persistence of the person’s mental disorder, but to the risk of harm to others (and, to self, in some cases).<sup>20</sup>
- 9.29 Some other Australian jurisdictions use the ‘risk’ based approach. However not all of them use ‘danger’ as the basis for their tests. In Western Australia, for example, the Mentally Impaired Accused Review Board considers ‘the degree of risk that the release of the accused appears to present to the personal safety of people in the community or of any individual in the community’ when deciding whether to grant leave.<sup>21</sup> In Queensland, the Mental Health Court must not revoke a forensic order ‘unless it is satisfied the patient does not represent an unacceptable risk to the safety of the patient or others’.<sup>22</sup>

14 Ian Freckelton, ‘Applications for Release by Australians in Victoria Found Not Guilty of Offences of Violence by Reason of Mental Impairment’ (2005) 28 *International Journal of Law and Psychiatry* 375, 383.

15 *Re LN* [1999] VSC 144R (6 May 1999) [6].

16 Ian Freckelton, ‘The Preventive Detention of Insanity Acquittes: A Case Study from Victoria’ in Bernadette McSherry and Patrick Keyzer (eds) *Dangerous People: Policy, Prediction and Practice* (Routledge, 2011) 89.

17 Andrew Carroll, Mark Lyall and Andrew Forrester, ‘Clinical Hopes and Public Fears in Forensic Mental Health’ (2004) 15(3) *Journal of Forensic Psychiatry and Psychology* 407, 417.

18 *Mental Health Act* (UK) s 72(1).

19 *Criminal Procedure (Insanity) Act 1964* (UK) sch 1A cl 9(1).

20 Carroll, Lyall and Forrester, above n 17, 418. New South Wales has a similar approach to Victoria. Section 39(2) of the *Mental Health (Forensic Provisions) Act 1990* (NSW) requires the court to be satisfied that ‘the safety of the person or any member of the public will not be seriously endangered by the person’s release’.

21 *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 28(3).

22 *Mental Health Act 2000* (Qld) s 204.

## Question

- 88 Should the court continue to consider the 'dangerousness' of the person subject to the supervision order?

### Danger to themselves

- 9.30 The current criteria for making, varying or revoking a supervision order, or granting a person extended leave, require the court to consider not just the likelihood of the person endangering other people but also the likelihood of the person endangering him or herself. The New South Wales Law Reform Commission has questioned whether where the person only poses a threat to him or herself, this is a sufficient and appropriate basis for a criminal court to order the person's detention.<sup>23</sup> It says:

an argument can be made that it is inappropriate to use the coercive apparatus of the criminal justice system (and the associated forensic mental health system) solely for the purpose of preventing an offender, who has not been convicted of a crime, from harming him or herself. This is particularly so in light of the detailed civil legislative and administrative arrangements that exist to care, support and supervise people in the general community ...<sup>24</sup>

- 9.31 The New South Wales Law Reform Commission has suggested that such people could be managed in the civil mental health system or other care arrangements that take into account a person's risk of harming themselves.<sup>25</sup>

## Question

- 89 Should the court continue to consider the likelihood of the person endangering themselves?

### The role of the offence in assessing dangerousness

- 9.32 A 2010 study of people found not guilty because of mental impairment in Victoria found that the seriousness of the offence tends to be a recurring consideration when courts make and review supervision orders under the CMIA. The study suggested that offence seriousness 'remains at the forefront of the risk assessment process', especially when courts are making the initial order.<sup>26</sup> The seriousness of an offence is not included in the matters specified in section 40 of the CMIA that the court is required to take into account. However, the court is required to consider the relationship between the impairment, condition or disability and the offending conduct. The influence of offence seriousness in decision making under the CMIA may therefore be contrary to its underlying principles. A key principle is that a person should not be punished for an offence for which they are not criminally responsible.

23 New South Wales Law Reform Commission, above n 2, 158.

24 Ibid 159.

25 Ibid.

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

- 9.33 People who have been unfit to stand trial and then found to have committed the offence at a special hearing are not punished for the offence as they have not had a proper trial of the charge. People who have been found not guilty because of mental impairment are also not criminally responsible for their offence because the court has held that the person is not responsible for their actions.<sup>27</sup>
- 9.34 The logical extension of the principle that people subject to the CMIA should not be treated in the same way as people who are found to be criminally responsible for an offence in a trial is that any period of detention that person is subject to should bear 'no nexus to the offence charged'.<sup>28</sup>
- 9.35 Tying the matters that are traditionally sentencing principles (for example, the principle of proportionality reflected in the consideration of 'seriousness of the offence') may inadvertently import a punitive element to the decision making and constrain the ability of the court to make a true assessment of future risk.<sup>29</sup> People subject to the CMIA might end up subject to more restrictive orders or in custody for longer than they should be. This is inconsistent with the principle of least restriction. On the other hand, it has been argued that:
- Given that past behaviour is the single best predictor of future behaviour, it is actually understandable and appropriate that the index offence exerts an influence on risk management decisions. The challenge for clinicians is to ensure that this does not occur in a facile manner, whereby, for example, certain sorts of offence necessarily result in certain lengths of detention [citation omitted].<sup>30</sup>
- 9.36 Further, if a person is subject to a supervision order for a minor offence, a failure to consider the seriousness of the offence could result in a more restrictive order or detention of the person for periods in excess of the time they would have served in the usual criminal justice system.<sup>31</sup>
- 9.37 A Victorian study has concluded that courts in this jurisdiction are not using an informal tariff based on the seriousness of the offence to determine the length of detention of people found not guilty because of mental impairment *following* the making of the initial order.<sup>32</sup> However, when courts are *making* the initial order, the seriousness of the offence is an important consideration in deciding which order to make.<sup>33</sup>

## Question

- 90 What role should the seriousness of the offence play in the making, varying and revocation of orders and applications of leave?

27 New South Wales Law Reform Commission, above n 2, 151.

28 Arie Freiberg, 'The Disposition of Mentally Disordered Offenders in Australia: "Out of Mind, Out of Sight" Revisited' (1994) 1(2) *Psychiatry, Psychology and Law* 97, 105.

29 New South Wales Law Reform Commission, above n 2, 147.

30 Carroll, Lyall and Forrester, above n 17, 412.

31 Isabel Grant, 'Canada's New Mental Disorder Disposition Provisions: A Case Study of the British Columbia Criminal Code Review Board' (1997) 20(4) *International Journal of Law and Psychiatry* 419, 441.

32 Ruffles, above n 26, iii.

33 Ibid.

## Other factors that affect decision making

9.38 The criteria in section 40 of the CMIA attempt to strike a balance between the person subject to the supervision order's freedom and the safety of the community. As McSherry observes:

The problem really lies in drawing up appropriate criteria which will lead to the detention of those who really may do harm in the future, whilst allowing for the absolute discharge of those who do not pose a risk to the public.<sup>34</sup>

9.39 Aside from the likelihood of danger and the matters in section 40 of the CMIA, decisions in CMIA matters provide further insight into the other factors that play a role in the court's decision making. These include:

- *The nature of the person's mental impairment*—while this is one of the matters section 40 includes, courts also consider related issues such as the person's responsiveness to treatment,<sup>35</sup> control of any ongoing symptoms<sup>36</sup> and the person's compliance with medical treatment.<sup>37</sup>
- *The person's insight*—the CMIA does not require the court to consider insight, however, courts often look into the level of insight the person has into their mental illness and into the circumstances of the offence.<sup>38</sup>
- *The ability to monitor any re-emergence of symptoms*<sup>39</sup>—courts have considered, for example, the ability of the treating team to apprehend the person or suspend leave if necessary.<sup>40</sup>
- *The views of psychiatrists*—the opinions of the supervising clinicians which they present through their reports and by giving evidence in court are influential in the court's decision making.<sup>41</sup>
- *The person's previous downgrading of supervision*—courts consider, for example, development of rapport with treating team,<sup>42</sup> tendency to use drugs and alcohol,<sup>43</sup> and the willingness of the person to self-report to their area mental health service if they relapse.<sup>44</sup>
- *The likelihood of care in the civil mental health system*<sup>45</sup>—courts have also considered whether the person could be detained under the Mental Health Act when deciding whether to vary an order.<sup>46</sup>

## Question

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?

34 McSherry, above n 12, 221.

35 See, eg, *Re PEL* [1999] VSC 532R (13 December 1999) [19] (Ashley J).

36 *Re NR* [2004] VSC 2R (16 January 2004).

37 *Re EKW* (No 2) [2001] VSC 122R (23 April 2001).

38 Freckelton, 'Applications for Release by Australians in Victoria Found Not Guilty of Offences of Violence by Reason of Mental Impairment', above n 14, 392. See also *Re PSG* [2005] VSC 325R (19 August 2005) [13] (Kaye J).

39 Freckelton, 'The Preventive Detention of Insanity Acquitees: A Case Study from Victoria', above n 16, 94.

40 *Re TEK* [2003] VSC 132R (6 May 2003) [47].

41 *Re GM* [2000] VSC 338R (29 August 2000) [67].

42 *Re TLB* (No 2) [2003] VSC 204R (11 June 2003).

43 *Ibid.*

44 *Re TDD* [2003] VSC 504R (12 November 2003).

45 Freckelton, 'Applications for Release by Australians in Victoria Found Not Guilty of Offences of Violence by Reason of Mental Impairment', above n 14, 395.

46 See, eg, *Re EKW* [1998] VSC 176R (8 December 1998); *Re TDD* [2004] VSC 504R (12 November 2003).

## Principles and matters the Forensic Leave Panel considers

9.40 In leave applications, the authorised psychiatrist or Secretary to the Department of Human Services must grant an application for special leave if satisfied that the safety of members of the public will not be seriously endangered.<sup>47</sup> The Forensic Leave Panel may grant an application for on-ground leave or limited off-ground leave if satisfied the safety of the forensic patient or forensic resident or members of the public will not be seriously endangered as a result of the leave.<sup>48</sup> Dangerousness as a factor in decision making was discussed in this chapter at [9.20]–[9.37].

## Guidance for making decisions about leave

- 9.41 One issue that arises for consideration is whether the CMIA provides sufficient guidance to the Forensic Leave Panel for making decisions on leave. The Review Panel Appointed to Consider Leave Arrangements for Patients at the Victorian Institute of Forensic Health (Vincent Review) recommended that the government consider whether to amend the CMIA to ensure that the Forensic Leave Panel considers specific criteria before granting leave.<sup>49</sup> Previously, the main criteria for deciding whether or not to grant leave were based on the dangerousness of the person. The Vincent Review noted that while the Supreme Court had provided some guidance on the statutory interpretation of that provision, there was still some uncertainty in its interpretation that would benefit from clarification.<sup>50</sup>
- 9.42 The legislature amended the CMIA to implement the recommendation by the Vincent Review. Now the CMIA also requires the Forensic Leave Panel to have regard to the person's current mental condition or pattern of behaviour, clinical history, social circumstances and the applicant profile and leave plan.<sup>51</sup>
- 9.43 There is more guidance for the Forensic Leave Panel following the amendments to the CMIA. However, this guidance is not as extensive as the guidance provided to courts in section 40 for a decision to make, vary or revoke a supervision order or to grant or revoke extended leave.<sup>52</sup>

## Question

- 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?

47 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 50(3).

48 *Ibid* s 54.

49 Review Panel Appointed to Consider Leave Arrangements for Patients at the Victorian Institute of Forensic Health, *Report* (2001) 22.

50 *Ibid* 21–2. The provision has changed since the Review Panel's report. The CMIA used to provide that the Forensic Leave Panel *must not* grant leave unless satisfied that the safety of the forensic patient or forensic resident and members of the public will not be seriously endangered as a result of their leave. Now the CMIA provides that the court *may* grant an application if satisfied on the evidence available that the safety of the forensic patient or resident or members of the public will not be seriously endangered as a result of their leave.

51 *Crimes (Mental Impairment and Unfitness to be Tried) Act* (Vic) s 54(4).

52 *Ibid* s 40.



## Role of experts and people responsible for supervision

- 9.44 The CMIA introduced a comprehensive system for the provision of expert reports. Reports play a number of roles:
- to communicate information
  - to prepare the ground for giving evidence in court
  - to facilitate treatment
  - to demonstrate the proper conduct of the expert assessment
  - to aid the measurement of clinical and forensic practice.<sup>53</sup>
- 9.45 An expert prepares a report if a person is declared to be liable to supervision that contains information on:
- a diagnosis and prognosis of the condition or an outline of the person's behavioural problems
  - the person's response to treatment, therapy or counselling (if any), and
  - a suggested treatment or other plan for managing the condition.<sup>54</sup>
- 9.46 The report must be filed within 30 days after the declaration or within a longer period if the court allows it,<sup>55</sup> but generally these reports are filed very early in the process.
- 9.47 Routine reports must then be prepared and filed with the court (at intervals not exceeding 12 months for the duration of the order) containing:
- a statement of any treatment, therapy or counselling that the person has undergone, or any services that the person has received, since the making of the order or last report
  - any changes to the prognosis of the person's condition or the person's behavioural problems and the plan for managing the condition or problems.<sup>56</sup>
- 9.48 Under the CMIA, the court cannot order a person's unconditional release, or significantly reduce the level of supervision the person is subject to, unless it:
- has obtained and considered a report from an expert who has personally examined the person's mental condition and the possible effect of the proposed order on the person's behaviour
  - has obtained and considered the report of a person having the supervision of the person subject to the order where relevant
  - has considered the section 41(1) or (3) report submitted to the court (that is, the report prepared when the person was declared liable to supervision, and the annual reports prepared following that initial report)
  - has considered the leave plan filed in the case of an application for extended leave
  - has obtained and considered any other reports it thinks necessary.<sup>57</sup>

53 Kenneth J Weiss et al, 'History and Function of the Psychiatric Report' in Alec Buchanan and Michael A Norko (eds), *The Psychiatric Report: Principles and Practice of Forensic Writing* (Cambridge University Press, 2011) 11, 17.

54 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 41(1).

55 *Ibid* s 41(2).

56 *Ibid* s 41(3).

57 *Ibid* s 40(2).

- 9.49 Evidently, the emphasis the CMIA places on reports from experts and the people responsible for supervision means that the views of these groups are influential in the decision making of the court. It is therefore important that reports are provided at the right stage of the process, supported by a second report when needed, and are of a high standard.
- 9.50 Further, it is quite common for someone to be both the person responsible for supervision (for example, the treating clinician) and the expert responsible for preparing reports on the person subject to the supervision order. These people may find themselves in a difficult position where they feel a duty to maintain a confidential and supportive relationship with the person subject to the supervision order, but at the same time are relied on as the main source of information to the court on that person.

## Question

- 93 Are changes required to improve the way in which expert reports are provided to the courts? If so, what changes are required?

## Influence of decision making on lengths of detention

- 9.51 Given the concerns over indefinite detention under the Governor's pleasure regime, there was an expectation that the CMIA would result in shorter periods of detention.<sup>58</sup> Since the CMIA came into operation, however, a number of commentators have observed that an overly cautious approach is being taken in the making and review of supervision orders.<sup>59</sup>
- 9.52 A Victorian PhD study of 146 people found not guilty because of mental impairment between the CMIA's introduction in 1997 to late 2006 was published in 2010. It found that the time served by many people found not guilty because of mental impairment has actually increased under the CMIA.<sup>60</sup> The study found that the average length to revocation for both violent and non-violent offences was 10.09 years, compared to the average 8.5 years spent under Governor's pleasure orders between 1946 and 1995.<sup>61</sup> Ruffles says:
- the establishment of a 'staggered' system for release was intended to provide a practical means by which the principle of least restriction could be operationalised, ensuring that community reintegration remains a central aim in the management of forensic patients ... However, the finding that periods of detention served by forensic patients have not lessened under the CMIA indicates that legislative measures designed to offset the conservative bias of the risk-based approach have not functioned as intended.<sup>62</sup>
- 9.53 The study noted, however, that a number of people who were transitioned from the Governor's pleasure regime to the CMIA system were included in the collection of data and that this may have led to an inflation of the CMIA period of detention.<sup>63</sup> The people under the Governor's pleasure regime could have also skewed the results because they were less likely to be released in any case (for example, because they were not responsive to treatment).

58 Freckelton, 'The Preventive Detention of Insanity Acquittes: A Case Study from Victoria', above n 16, 87.  
 59 See, eg, McSherry, above n 12, 221.  
 60 Ruffles, above n 26.  
 61 Ibid 166.  
 62 Ibid 176.  
 63 Ibid 168.

- 9.54 Further, it may be that while people subject to supervision orders are still subject to orders for long periods, they may be in detention for a shorter period of time than under the Governor's pleasure system. Freckelton has observed that the Supreme Court has been more liberal in revoking orders from a custodial supervision order to non-custodial supervision order than in revoking supervisory status completely.<sup>64</sup> Another possibility is that decision makers took a more cautious approach when the CMIA was first introduced, but the inertia caused by the Governor's pleasure system is gradually wearing off. Between 2010–11 and 2011–12, for example, the number of non-custodial supervision orders revoked for forensic patients doubled from five to 10.
- 9.55 If it exists, it is unclear where the over-cautiousness comes from, but there are a number of possible sources. The process of applying for the variation or revocation of supervision orders, leave and ultimately a release is mainly driven by the opinion of the treating team. Clinicians understandably tread cautiously because of the serious consequences involved if they recommend the premature release of a person. Any missteps could be detrimental not just to the person subject to the supervision order and the general public, but could lead to 'political disapproval, interference and ultimately undermine service provision'.<sup>65</sup> Further, individual attitudes of clinicians towards the person subject to a supervision order could be a significant factor in whether they apply for a variation or revocation of the order, leave or release.<sup>66</sup>
- 9.56 Another source of possible over-cautiousness may be the approach taken by judges towards the release of a person subject to a supervision order. Discharging a person subject to a supervision order requires taking a 'step into the unknown'.<sup>67</sup> If there is a judicial tendency towards over-cautiousness, it is understandable given the inability of the evidence before the court to provide it with any certainty of the outcome.<sup>68</sup>
- 9.57 However, cautiousness does not necessarily warrant legislative intervention. Freckelton says:
- There remains cautiousness in decision-making but that is justified in most instances given the violence engaged in by acquirtees and their illness course. ... the Victorian experiment in a little over its first decade has suggested that Supreme Court judges for the most part have undertaken the risk-assessment process in a clinically informed and considered way. The outcome has been reintegration of acquirtees into the community in a staged process attended by the exercise of caution, but caution that generally has been clinically warranted.<sup>69</sup>
- 9.58 Recidivism rates among people found not guilty because of mental impairment who have been released are low.<sup>70</sup> This could mean that the system is working and courts are detaining people consistently with the principle that restrictions should be kept at a minimum consistent with the safety of the community. However, it could also mean that courts are being overly cautious.

## Question

- 94 Is the current approach to decision making in relation to people subject to supervision orders overly cautious?

64 Freckelton, 'The Preventive Detention of Insanity Acquirtees: A Case Study from Victoria', above n 16, 94.

65 Carroll, Lyall and Forrester, above n 17, 409.

66 Wendy Northey, 'Mind Your Attitude: The Fundamental Issue for Clinicians in Offender Rehabilitation' (2001) 8 (2) *Psychiatry, Psychology and Law* 197, 199.

67 Freckelton, 'The Preventive Detention of Insanity Acquirtees: A Case Study from Victoria', above n 16, 95.

68 Ruffles, above n 26, 177.

69 Freckelton, 'The Preventive Detention of Insanity Acquirtees: A Case Study from Victoria', above n 16, 96.

70 Ibid 214: '... of the 41 forensic patients who were granted extended leave while on a custodial supervision order, only two (4.48%) had that leave suspended or revoked on the grounds of the commission of a criminal act, while only two (8.33%) of the 24 forensic patients originally detained under a custodial order but subsequently granted non-custodial status were returned to custodial supervision by reason of the commission of a criminal act. None of these acts involved serious violence'.

## Other models of decision making

- 9.59 If the approach currently taken by decision makers is unduly cautious, the next issue to consider is whether anything can be done to remedy the over-cautiousness. Part of the solution may involve giving courts more flexibility in making orders, discussed earlier, that may make it more likely that the person subject to the supervision order will be shifted out of the forensic mental health system and into the civil mental health system. In New South Wales, for example, the Mental Health Review Tribunal can reclassify the forensic patient as an involuntary patient under the civil mental health system.<sup>71</sup> Another option, also discussed earlier, could involve changing the matters courts have regard to in making, varying and revoking supervision orders, for example, by moving from a 'risk based' approach to a 'disorder based' approach. Changing the way in which courts make decisions may have a trickle down effect to the way experts and clinicians make decisions as well.
- 9.60 In the Commission's preliminary research, there was some suggestion that a specialised independent court or tribunal should be considered as a way of addressing the possible over cautiousness. This was based on the notion that this may allow for judges to develop a higher level of expertise in forensic mental health and the greater involvement of clinicians in these courts or tribunals.
- 9.61 There are a number of different models of decision making involving independent courts or tribunals. For example:
- Queensland has a model where a mental health court makes the initial disposition and a separate tribunal deals with the review and release of people subject to supervision orders.
  - In New South Wales, the court makes the initial order for supervision, but a separate tribunal reviews the orders following that initial order.
  - In the Australian Capital Territory, the hearing proceeds in court but an administrative tribunal makes and reviews the order.
- 9.62 The Queensland Mental Health Court has the jurisdiction to determine unfitness to stand trial and whether a person is not guilty because of mental impairment. It also has the jurisdiction to make a 'forensic order' to detain a person for involuntary treatment and care.<sup>72</sup> The court comprises a judicial officer and two psychiatrists. The Mental Health Review Tribunal then reviews the person under the forensic order at least every six months.<sup>73</sup>
- 9.63 In New South Wales, following a decision by the court, forensic patients are subject to the jurisdiction of the Forensic Division of the Mental Health Review Tribunal, that has a specialist forensic division. The Mental Health Review Tribunal has the power to make orders in relation to the person's care, detention or treatment and the forensic patient's release (either unconditionally or subject to conditions) following an initial review.<sup>74</sup> The Mental Health Review Tribunal also reviews breaches of conditions of release or leave.<sup>75</sup> Reviews generally occur every six months but on the application of the patient or the primary carer of the patient, the Tribunal can extend this period to a maximum of 12 months.<sup>76</sup>
- 9.64 This is in contrast to the approach in the Australian Capital Territory where the court refers the making of a mental health order to the Civil and Administrative Tribunal.<sup>77</sup> The Civil and Administrative Tribunal also reviews the mental health orders.<sup>78</sup>
- 9.65 Canada has a similar system to the Australian Capital Territory where each province has a review board that makes and reviews dispositions of people who have been found not

71 *Mental Health (Forensic Provisions Act) 1990 (NSW) s 53.*

72 *Mental Health Act 2000 (Qld) s 288.*

73 *Ibid s 187.*

74 *Mental Health (Forensic Provisions Act) 1990 (NSW) s 44(2).*

75 *Ibid s 68(1).*

76 *Ibid ss 46(1), 46(4).*

77 *Crimes Act 1900 (ACT) ss 318, 319, 328, 329, 335.*

78 *Mental Health (Treatment and Care) Act 1994 (ACT) s 36L.*

- criminally responsible by reason of mental disorder or unfit to stand trial.<sup>79</sup> The court has the discretion to make the original disposition if it chooses to.<sup>80</sup> A study published in 1997 found the absence of a relationship in British Columbia between the seriousness of the offence and the type of order the review board initially makes.<sup>81</sup>
- 9.66 Aside from potentially ameliorating over-cautiousness in decision making, mental health courts or tribunals have other benefits. Freckelton observes:
- Inquisitorial review bodies constituted by lawyers experienced in mental health, psychiatrists and community members with lengthy experience in mental health generally enjoy a significant advantage over the courts in exploring the dangerousness of persons with mental illness and assimilating the presentation of such patients. Adversarial courts are ill-suited to such a process and risk being insensitive to psychiatric illness realities and also to being counter-therapeutic in their outcome.<sup>82</sup>
- 9.67 The informality and inquisitorial (as opposed to adversarial) nature of the proceedings could make it more accessible for people subject to the supervision order, victims and family members.<sup>83</sup> Further, from a resource perspective, a mental health court or tribunal would have greater capacity to schedule matters, and perhaps more capacity to monitor a person's progress, and would free up resources in other courts.<sup>84</sup>
- 9.68 There are, however, a number of benefits in maintaining the judicial model of decision making under the CMIA. Courts have an established procedural framework and safeguards, including mechanisms for appeal.<sup>85</sup> Since the introduction of the CMIA, Victorian courts have produced what has been described as 'Australia's richest and most complex jurisprudence in relation to mental health law'.<sup>86</sup> The value of the jurisprudence and the expertise that has developed within the current judicial model should not be underestimated.
- 9.69 Courts also provide continuity in approach—in many cases, the judge who made the supervision order is also responsible for the review and revocation of that order.<sup>87</sup> Further, courts provide a forum that is more open to public scrutiny, which may be desirable in CMIA matters. In his Honour's submission to the Community Development Committee, Justice Vincent said:
- The individual concerned has been detained following the conduct of a public court hearing and is subject to a public order. The problem should go back to that kind of body and be dealt with in the same way.<sup>88</sup>
- 9.70 Finally, courts confer a certain 'degree of authority',<sup>89</sup> which may be more effective at reassuring victims that their interests are important and being meaningfully represented.<sup>90</sup> The Community Development Committee ultimately recommended that given the sensitive nature of proceedings in this area, the community would have the most confidence in the decisions of a court.<sup>91</sup>

## Question

95 Should there be a change in the judicial model of decision making under the CMIA?

79 *Criminal Code*, RSC 1985 s 672.38(1).

80 *Criminal Code*, RSC 1985 s 672.45.

81 Grant, above n 31, 441.

82 Freckelton, 'Applications for Release by Australians in Victoria Found Not Guilty of Offences of Violence by Reason of Mental Impairment', above n 14, 399.

83 New Zealand Law Commission, *Mental Impairment Decision-Making and the Insanity Defence*, Report No 120 (2010) 84.

84 *Ibid.*

85 *Ibid.*

86 Freckelton, 'Applications for Release by Australians in Victoria Found Not Guilty of Offences of Violence by Reason of Mental Impairment', above n 14, 399.

87 Community Development Committee, Parliament of Victoria, *Inquiry into Persons Detained at the Governor's Pleasure* (1995) 141.

88 *Ibid.*

89 *Ibid.*

90 New Zealand Law Commission, above n 83, 81.

91 Community Development Committee, above n 87, 142–3.

## Representation of interests

### Representation of people subject to supervision orders

#### Legal representation

- 9.71 A person subject to a supervision order has the right to appear before the court in person in any hearing in that the court is considering:
- making, varying or revoking a supervision order in respect of the person
  - granting extended leave to the person, or
  - revoking a grant of extended leave.<sup>92</sup>
- 9.72 Section 36(3) of the CMIA allows the person subject to a supervision order to be legally represented at any of these hearings. A person applying for leave before the court or Forensic Leave Panel may also be represented by a legal practitioner.<sup>93</sup>
- 9.73 The Commission's preliminary research suggests that most people subject to a supervision order have legal representation when the court is making, varying or revoking the order. However, legal representation at Forensic Leave Panel hearings may be less common. In 2011, for example, the Forensic Leave Panel conducted 22 hearings but only six of the applicants were legally represented.<sup>94</sup>

#### Question

- 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?

### Advocacy and support for people subject to supervision orders

- 9.74 In its guardianship reference, the Commission proposed that people detained under the CMIA be provided with an advocate at particular times, such as:
- at regular intervals during a period that a person is detained on a custodial supervision order
  - during hearings such as major reviews or applications to vary a custodial supervision order
  - when leave decisions are made by the Forensic Leave Panel
  - when decisions about accommodation placements after discharge are being made.<sup>95</sup>
- 9.75 Advocates could assist people subject to a supervision order to determine if they should apply for a review to vary the order, or to assist a person during a review hearing.<sup>96</sup> The Commission recommended that legislation provide for the role of advocates for people subject to supervision orders.

92 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 36(1).

93 *Ibid* ss 36(3), 70(1).

94 Forensic Leave Panel, *Annual Report 2011 (2012)* Appendix C.

95 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) 565.

96 *Ibid* 559.

- 9.76 People subject to supervision orders could also receive more support in hearings. As discussed in Chapter 4, some jurisdictions have legislative provisions that enable the court to modify its court processes to better suit people with an intellectual disability or cognitive impairment. In Queensland, for example, the Mental Health Court may appoint assistants in hearings.<sup>97</sup> As discussed in Chapter 4, the judiciary also has a role to play in managing proceedings involving accused people with an intellectual disability or cognitive impairment.

## Question

- 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?

## The role and interests of victims and family members

- 9.77 A qualified finding of guilt or verdict of not guilty because of mental impairment can be a traumatic outcome for victims and family members of victims and people subject to supervision orders. While the court process acknowledges that the accused person did the act constituting the offence, for example, that the accused person killed the victim, for those close to the victim, the verdict may mean that no one is responsible for their death.<sup>98</sup> As Chappell observes:
- Many victims remain confused and perplexed by the proceedings, while others express anger and resentment about such a verdict, perceiving it to be unjust and a barrier to any healing process, including restorative justice.<sup>99</sup>
- 9.78 Issues concerning the involvement of victims and family members can be more pronounced in CMIA matters because often it is the close family members of the accused person who experience the victimisation.<sup>100</sup>
- 9.79 The CMIA contains provisions that acknowledge the role of victims and family members in the process and encourage their involvement.
- 9.80 The victims of the offence and family members of the person subject to a supervision order can make reports to the court for the purpose of:
- assisting, counselling and treatment processes for all people affected by an offence, and
  - assisting the court in determining any conditions it may impose on an order or in determining whether or not to grant a person extended leave.<sup>101</sup>

97 *Mental Health Act 2000* (Qld) s 410.

98 Duncan Chappell, 'Victimisation and the Insanity Defence: Coping with Confusion, Conflict and Conciliation' (2010) 17(1) *Psychiatry, Psychology and Law* 39, 39.

99 *Ibid.*

100 *Ibid.* 47.

101 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 42(1).

- 9.81 Reports by victims and family members contain their views on the conduct of the person and the impact of that conduct on them.<sup>102</sup> Victims and family members can make reports at various stages. This includes:
- any point where the court makes an order following a qualified finding of guilt or not guilty because of mental impairment
  - whenever there is an application for the variation or revocation of an order
  - during a major review or whenever there is an application for extended leave (that, if granted, would significantly reduce the degree of supervision to which the person is subject).<sup>103</sup>
- 9.82 The CMIA also requires each victim and each family member to be notified of hearings.<sup>104</sup> The Director of Public Prosecutions is required to give 14 days notice, by registered post, of the following court hearings in relation to a person subject to a supervision order:
- major reviews, reviews and further reviews
  - applications for the variation or revocation of a supervision order
  - applications for extended leave, if granting the application would significantly reduce the degree of the person's supervision.<sup>105</sup>
- 9.83 The Director of Public Prosecutions should not give notice to a victim or family members who have informed the Director of Public Prosecutions that they do not wish to be notified of any hearing in relation to the person subject to the supervision order.<sup>106</sup>
- 9.84 The Commission's preliminary research indicated that the participation of victims and family members, while well meaning, might be in some circumstances over-inclusive. Not all victims and family members want to be notified of each hearing that concerns the person subject to a supervision order:
- the extent to which individual victims find solace and satisfaction from ... involvement varies widely, as does the impact and influence upon the decision-making process regarding forensic patients.<sup>107</sup>
- 9.85 Some victims and family members prefer to be more involved than others. The diversity in people's reactions may mean that a 'one size fits all' approach is not the appropriate way of representing these interests. At present victims and family members can choose to opt out of receiving notice but many may not avail themselves of this option. It is unclear how many victims and family members have chosen not to receive notice.
- 9.86 Another difficulty that may arise in relation to the involvement of victims and family members is the onerous notification requirements on the Director of Public Prosecutions.

## Question

- 98 Do the CMIA provisions allow for effective participation by victims and family members?

102 Ibid s 42(2).  
 103 Ibid s 43(1).  
 104 Ibid s 38C(1).  
 105 Ibid s 38C(2).  
 106 Ibid s 38C(5).  
 107 Chappell, above n 98, 41.



## Representation of community interests

9.87 A number of government bodies and the prosecution are involved in various stages of making and reviewing supervision and leave orders. The main purpose of their involvement is to represent the public interest and assist the court.

## Orders for unconditional release and supervision orders

9.88 The Director of Public Prosecutions may appeal against an order for unconditional release of a person.<sup>108</sup> A number of parties have appeal rights against a supervision order. These include the person subject to the order, the Director of Public Prosecutions, Attorney-General, the Secretary to the Department of Human Services and the Secretary to the Department of Health.<sup>109</sup>

## Making, varying or revoking a supervision order and granting extended leave (or revoking extended leave)

9.89 The Attorney-General and the Director of Public Prosecutions may appear as parties to hearings, as well as any other person having a substantial interest in the matter.<sup>110</sup> The person having the custody, care, control or supervision of the person subject to the order may also appear as a party to these hearings (with the exception of the hearing to make the supervision order).<sup>111</sup>

## Appeals against confirmation, variation and revocation of supervision orders

9.90 The Secretary to the Department of Human Services or the Secretary to the Department of Health may appeal, in the public interest, against an order confirming or varying a supervision order, or an order against revoking a non-custodial supervision order, if they consider that the court should not have made the order.<sup>112</sup>

9.91 The Director of Public Prosecutions or the Attorney-General may appeal against these orders if:

- they were a party to the proceeding in which the court confirmed or varied the supervision order, or made the order for revocation
- they consider that the court should not have confirmed or varied the supervision order, or revoked the non-custodial supervision order
- they consider that they should bring an appeal in the public interest.<sup>113</sup>

108 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 19A, 24A.

109 *Ibid* s 28A.

110 *Ibid* ss 37(1), 37(2).

111 *Ibid* s 37(1A).

112 *Ibid* ss 34(2), 34A(1).

113 *Ibid* ss 34(3), 34A(2).

## Leave and extended leave appeals

- 9.92 The CMIA does not provide for a right for government bodies or the prosecution to appear in applications for leave, however, the Forensic Leave Panel may allow a 'person who wishes to be heard' to appear before it.<sup>114</sup>
- 9.93 The Secretary to the Department of Human Services and the Secretary to the Department of Health may appeal against a grant of extended leave if they consider that the court should not have granted extended leave and they should bring an appeal in the public interest.<sup>115</sup>
- 9.94 The Director of Public Prosecutions or the Attorney-General may appeal against a grant of extended leave if they were party to the proceeding in which the court granted extended leave, consider that the court should not have granted extended leave and consider that they should bring an appeal in the public interest.<sup>116</sup>
- 9.95 The following parties can appeal to the Court of Appeal against a refusal to revoke extended leave:
- the Secretary to the Department of Health (for forensic patients)<sup>117</sup>
  - the Secretary to the Department of Human Services (for forensic residents)<sup>118</sup>
  - the Attorney-General (for forensic patients or residents)<sup>119</sup>
  - the Director of Public Prosecutions (for forensic patients or residents).<sup>120</sup>
- 9.96 The Secretary to the Department of Health and the Secretary to the Department of Human Services can appeal against a refusal to revoke a person's extended leave if they consider that:
- the court should have revoked the extended leave, and
  - they should bring an appeal in the public interest.<sup>121</sup>
- 9.97 The same criteria also apply to the Attorney-General and the Director of Public Prosecutions if they wish to appeal against a refusal to revoke a person's extended leave. However, there is an extra requirement that they must have been a party to the initial proceeding to revoke the person's extended leave.<sup>122</sup>

## Appeal against the unconditional release of a person transferred to Victoria

- 9.98 The Attorney-General may appeal to the Court of Appeal against a decision to unconditionally release a person who has transferred to Victoria from another State.<sup>123</sup> To appeal, the Attorney-General must consider that:
- the order to unconditionally release the person should not have been made
  - the Attorney-General should bring an appeal in the public interest.<sup>124</sup>
- 9.99 The Attorney-General may also appeal to the Court of Appeal against an order to unconditionally release a person on a supervision order from another State who has absconded to Victoria.<sup>125</sup>

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114 Ibid s 70(3).  
 115 Ibid ss 57B(2), 57B(2A).  
 116 Ibid s 57B(3).  
 117 Ibid s 58A(2A).  
 118 Ibid s 58A(2).  
 119 Ibid s 58A(3).  
 120 Ibid.  
 121 Ibid ss 58A(2), 58A(2A).  
 122 Ibid s 58A(3).  
 123 Ibid s 73H(1).  
 124 Ibid.  
 125 Ibid s 73N.

## Issues relating to the representation of community interests

9.100 Aside from the person subject to the supervision order, the Attorney-General, Director of Public Prosecutions, Secretary to the Department of Human Services and Secretary to the Department of Health may also be involved in hearings or appeals concerning supervision orders. The Commission’s preliminary research indicates that the involvement of these parties may be problematic for a number of reasons:

- *The interests of the executive or prosecution may be overrepresented*—the current arrangement results in potentially the prosecution and three government bodies acting in opposition to the person subject to the supervision order (although the prosecution and government bodies do not always take an opposing stance). This raises the question of whether these provisions create an imbalance in representation, where the public interest is being represented in multiple guises, and whether the involvement of all four parties is necessary to effectively represent the community’s interest. Further, one of the purposes of the CMIA was to reduce executive involvement.
- *Involvement of multiple parties can have resource implications and increase the length of the process*—the involvement of multiple parties could result in delays to hearings because of the number of people that need to be coordinated. If each party must put a view forward, this also results in longer hearings.
- *Lack of clarity in the CMIA on the reason for involvement*—the parties involved may see their role as tokenistic or merely a formality. The CMIA does not make clear why these parties are involved at different stages, other than to represent the public interest.

9.101 Much of the Director of Public Prosecution’s role seems to be based on its knowledge of the case and perhaps because of its involvement in appeals in usual criminal matters. This is the case even though the role of the Director of Public Prosecution usually ends once an accused person is not convicted of an offence, which is the case where a person is found not guilty because of mental impairment. In practice, the Director of Public Prosecutions seeks to be excused and takes no active part in hearings after informing the court that the obligation to notify victims and family members has been fulfilled.<sup>126</sup>

9.102 In *NOM v DPP & Ors* (NOM),<sup>127</sup> the Court of Appeal considered the responsibilities of the government bodies involved in CMIA proceedings. The Court of Appeal held that in addition to the function the Attorney-General and Secretary to the Department of Health usually perform in adducing evidence and cross-examining witnesses to explore the evidence, the Attorney-General and the Secretary to the Department of Health should also take a position, or make a submission, on whether the court should vary the existing regime of supervision.<sup>128</sup> The Court of Appeal observed that a failure to take up any position could be motivated by a desire to avoid any public criticism if the person were to re-offend.<sup>129</sup>

126 [2012] VSCA 198 (24 August 2012) [14].  
127 Ibid.  
128 Ibid [38].  
129 Ibid [37].

- 9.103 Before NOM, the Department of Health's role was largely administrative and focused on facilitating the production of evidence before the court.<sup>130</sup> The role of the Attorney-General was discretionary, in that it usually involved the testing of evidence adduced by other parties, and might or might not involve submissions as to outcome. The Court of Appeal at [34]–[37] set out the reasons for its conclusion at [38] that, 'The Secretary and the Attorney-General should adopt a clear and unequivocal position [as to outcome] where the evidence permits'. While doubtless such submissions would assist a court, it is unclear why they should be mandated. It is the court's responsibility to decide the application, not that of any party. The Court of Appeal does not suggest any ethical duty reposes on the Secretary to the Department of Health or the Attorney-General to make submissions as to outcome, nor could it.
- 9.104 The Department of Human Services was not a party to the proceeding in NOM. However, due to the Department of Human Services' similar responsibilities and rights to appear in CMIA matters where the Department of Human Services (rather than the Department of Health) supervise the person subject to the order, the decision may have implications on its obligations as well.

## Questions

- 99 Should community interests be represented in the CMIA system of supervision?
- 100 Does the involvement of a number of agencies representing the community's interests increase costs unnecessarily?
- 101 What is the most appropriate way of representing the community's interests in the CMIA?

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

- 9.105 The CMIA is modelled on a gradual or staggered system of release, based on the expectation that the person subject to the supervision order will recover and be reintegrated into the community. Both people with a mental illness and people with intellectual disabilities or cognitive impairments come under the CMIA system, unlike the New Zealand system, for example, which has created a separate disposition process for people with an intellectual disability.<sup>131</sup>
- 9.106 Some commentators have suggested that this gradual or staggered system of release was constructed for people with mental illnesses but is less suitable for people with intellectual disabilities or cognitive impairments:
- there remains something about the machinery of the CMIA and/or its application that discriminates against the potential for intellectually disabled acquittees to move through its staggered system of release ... It is submitted that the answer lies in the fact the very structure of the CMIA is uniquely skewed towards the disposition and management of forensic patients who have been acquitted on the grounds of mental illness. That is, the Act, as reflected in the staggered system of release and discharge, is built on concepts such as treatment, relapse and remission, all of which are central to the management of mentally ill persons but are largely inapplicable to intellectually disabled forensic residents, who by definition, have no prospect of complete recovery and have different management needs.<sup>132</sup>
- 9.107 Of the 10 forensic residents included in the study referred to in [9.52] above, no one had their supervision order revoked.<sup>133</sup> The Forensic Leave Panel's annual reports show that only two or three forensic residents have applied for leave each year since 2002.
- 9.108 The current system of supervision could be unsuitable for people with intellectual disabilities and cognitive impairments, for a number of reasons aside from the staggered nature of the system. First, the criteria for decision making may have been tailored for people with a mental illness. Section 40, for example, requires the court to consider the nature of the person's mental impairment. In considering the nature of the person's mental impairment, courts have generally looked at the resolution of any symptoms. People subject to supervision orders with intellectual disabilities or cognitive impairments may not pursue leave or a variation or revocation of their order because of the difficulty in demonstrating that there has been an improvement in their mental impairment.

- 9.109 Further, people with intellectual disabilities and cognitive impairments could have fewer resources available to them, in terms of facilities and support in the community. This may make it less likely that they will apply for leave or transition to a non-custodial supervision order or to be released. While there are a number of community-based accommodation options for people with intellectual disabilities and cognitive impairments,<sup>134</sup> it is unclear whether there are enough. Further, the majority of these places would not have the coercive powers available under the CMIA, making it more difficult for the court to transition people out of the system.
- 9.110 There have been a number of significant developments in the treatment of offenders with intellectual disabilities since the introduction of the CMIA.<sup>135</sup> Studies have shown the effectiveness of treatment programs, including anger management treatment,<sup>136</sup> intervention for fire-setting behaviour,<sup>137</sup> and intervention for sexual offending,<sup>138</sup> for people with intellectual disabilities. However, Ruffles notes the unsuitability of the system could relate to the more permanent nature of an intellectual disability or cognitive impairment. Unlike people with a mental illness, these people do not have as clear a pathway to recovery. For these people, the CMIA system that envisages that a person is able to recover from their mental condition, may be a poor match.

## Questions

- 102 Is the current CMIA model of supervision appropriate for 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?
- 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?

134 Australian Community Support Organisation (ACSO), for example, provides community-based accommodation for people with disabilities that encourages developmental opportunities and enables maximum integration within the community. Department of Human Services funded short term residential services (Charlton House and Furlong House) house a maximum of five people. These are not exclusively used for people subject to non-custodial supervision orders but also for other people who have come into contact with the justice system, such as people on bail and parole.

135 William R Lindsay 'Adaptations and Developments in Treatment Programs for Offenders with Developmental Disabilities' (2009) 16 *Psychiatry, Psychology and Law* 18, 31.

136 Ibid 26.

137 Ibid 27.

138 Ibid 29.

## Suppression orders and the principle of open justice

- 9.111 Another potential issue that arises across the CMIA as a whole is the suppression of information under the CMIA.
- 9.112 The principle of open justice requires that all court proceedings take place in public except in limited circumstances. In *Re Percy*, Justice Kellam considered the principle of open justice in the context of the CMIA:
- The principle of open justice is deeply entrenched in our law. It rests upon a legitimate concern that, if the operations of the courts are not on public view as far as possible, the administration of justice may be corrupted. A court is open when at least members of the public have a right of admission. ... From this it may be thought ordinarily to follow that the media in their various forms are also entitled to communicate to the whole public what that public has a right to hear and see should they attend in court.<sup>139</sup>
- 9.113 The principle of open justice is reflected in section 24 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Charter') that provides for a 'fair and public hearing' for accused people.
- 9.114 However, the principle of open justice can be limited, in some circumstances. Section 24(2) of the Charter, for example, provides that a court may exclude the media or the general public from hearings if permitted to do so by other laws.
- 9.115 One of the main aims of non-publication or suppression orders is to protect the privacy of the people involved in proceedings by preventing their identification.<sup>140</sup>
- 9.116 The term 'suppression order' is used in the heading to section 75 of the CMIA. It is not used in the *Supreme Court Act 1986* (Vic) or the *County Court Act 1958* (Vic). For orders under these Acts, often the term 'non-publication order' is used. This accurately reflects the fact that the court is open but proceedings cannot be published. In this paper the term 'suppression order' is used as that is the term in the CMIA.
- 9.117 Generally, a court may make a non-publication order only if it is necessary to do so for the proper administration of justice.<sup>141</sup> However, under the CMIA a court may make a suppression order if it is in the public interest to do so.
- 9.118 The CMIA provides that in any CMIA proceeding if the court is satisfied that it is in the public interest to do so, it may order that the following information not be published (except in the manner and to the extent the court specifies in the order):
- any evidence given in the proceeding
  - the content of any report or other document put before the court in the proceeding, and
  - any information that might enable an accused person or any person who has appeared or given evidence in the proceeding to be identified.<sup>142</sup>
- 9.119 A party to the proceeding may apply for a suppression order or the court may do it on its own initiative.<sup>143</sup>
- 9.120 In *Re Percy*, Justice Kellam accepted that the 'public interest' test under the CMIA was wider than the test for granting suppression orders in other proceedings.<sup>144</sup> This is perhaps because people subject to supervision orders have not been found guilty of a crime.<sup>145</sup>

139 *Re Percy* [2004] VSC 67 (2 March 2004) [37].

140 Director of Public Prosecutions Victoria, *Director's Policy: Suppression and Prohibition Orders* (2008) 3.

141 See, eg, *Supreme Court Act 1986* (Vic) ss 18, 19; *County Court Act 1958* (Vic) s 80AA.

142 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 75(1).

143 *Ibid* s 75(2).

144 *Re Percy* [2004] VSC 67 (2 March 2004) [34], [35].

145 *Ibid* [15].

9.121 In *Re PL*, Justice Cummins said that it is in the public interest that the progressive rehabilitation of the person subject to the supervision order is not defeated.<sup>146</sup> However, his Honour continued by saying:

It follows that suppression orders should not be granted, or come to be granted, routinely. The powerful and fundamental value of the community's knowledge of the judicial process in its midst should not be whittled down by a developing habit of suppression. ... The degree of likely negative impact [on the person subject to the supervision order] needs to be examined in each case. The existence of negative impact will not of itself justify a suppression order. Sufficient negative impact needs to be established to justify departure from the fundamental that courts are open.<sup>147</sup>

9.122 There are a number of reasons a suppression order could be important in a CMIA proceeding, including:

- to prevent any setbacks in the treatment and recovery of the person subject to the supervision order due to publicity<sup>148</sup>
- to avoid the stigma that people with mental illness face, particularly when connected with a qualified finding of guilty or a finding of not guilty because of mental impairment<sup>149</sup>
- to respect the privacy of the victims involved and not deter victims from participating in proceedings<sup>150</sup>
- the successful reintegration of the person into society.<sup>151</sup>

9.123 On the other hand, there are powerful reasons for courts to be open for public scrutiny, including media scrutiny. The public is entitled to know what decisions are being made by courts and the reasons for those decisions. Further, matters determined under the CMIA usually involve very significant harm to victims, in which the public has a legitimate interest.

9.124 The Commission's preliminary research indicates that the practice of granting suppression orders differs between judges. At present, the Commission has little information on the issues that may arise in relation to granting suppression orders, as well as any issues in relation to compliance with and enforcement of these orders. The Commission is interested in gathering information about any issues that may exist in this area.

9.125 The Commission is aware that the Department of Justice is developing some proposals for reform to the law on suppression orders. However, suppression orders under the CMIA do not fall within the ambit of these proposals.

## Questions

- 105 What matters should the court consider when making suppression orders?
- 106 What issues arise concerning suppression orders under the CMIA?
- 107 What is the appropriate balance between therapeutic considerations (pointing to suppression) and open proceedings (pointing to publication)?

146 Ibid [27].

147 *Re PL* [1998] VSC 209 (15 December 1998) [27].

148 *XfJ v Director of Public Transport (Occupational and Business Regulation)* [2009] VCAT 96 (9 February 2009) [55].

149 See, eg, the expert evidence in *Re Percy* [2004] VSC 67 (2 March 2004) [14].

150 See, eg, *Re Percy* [2004] VSC 67 (2 March 2004) [20], [30], [58].

151 *Re Percy* [2004] VSC 67 (2 March 2004) [40].



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## Conclusion

This consultation paper has covered a broad range of issues to assist the Commission to understand the operation of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (CMIA).

The Commission welcomes submissions from all areas of the community. It particularly invites submissions from victims and their family members, accused people, people subject to supervision orders and family members of people subject to the CMIA. The Commission also seeks input and views based on the specialist knowledge of professionals in the criminal law, mental health and disability sectors who work in the area governed by the CMIA.

You can provide input into the Commission's review of the CMIA by responding to the questions throughout the paper. The Commission's questions are also included at the back of this paper. Information about how to provide the Commission with a submission is on page x. To allow the Commission time to consider your views before deciding on final recommendations, **submissions are due by 23 August 2013.**

Your responses to these questions will assist the Commission to determine whether changes are needed to improve the operation of this specialised but important area of law.

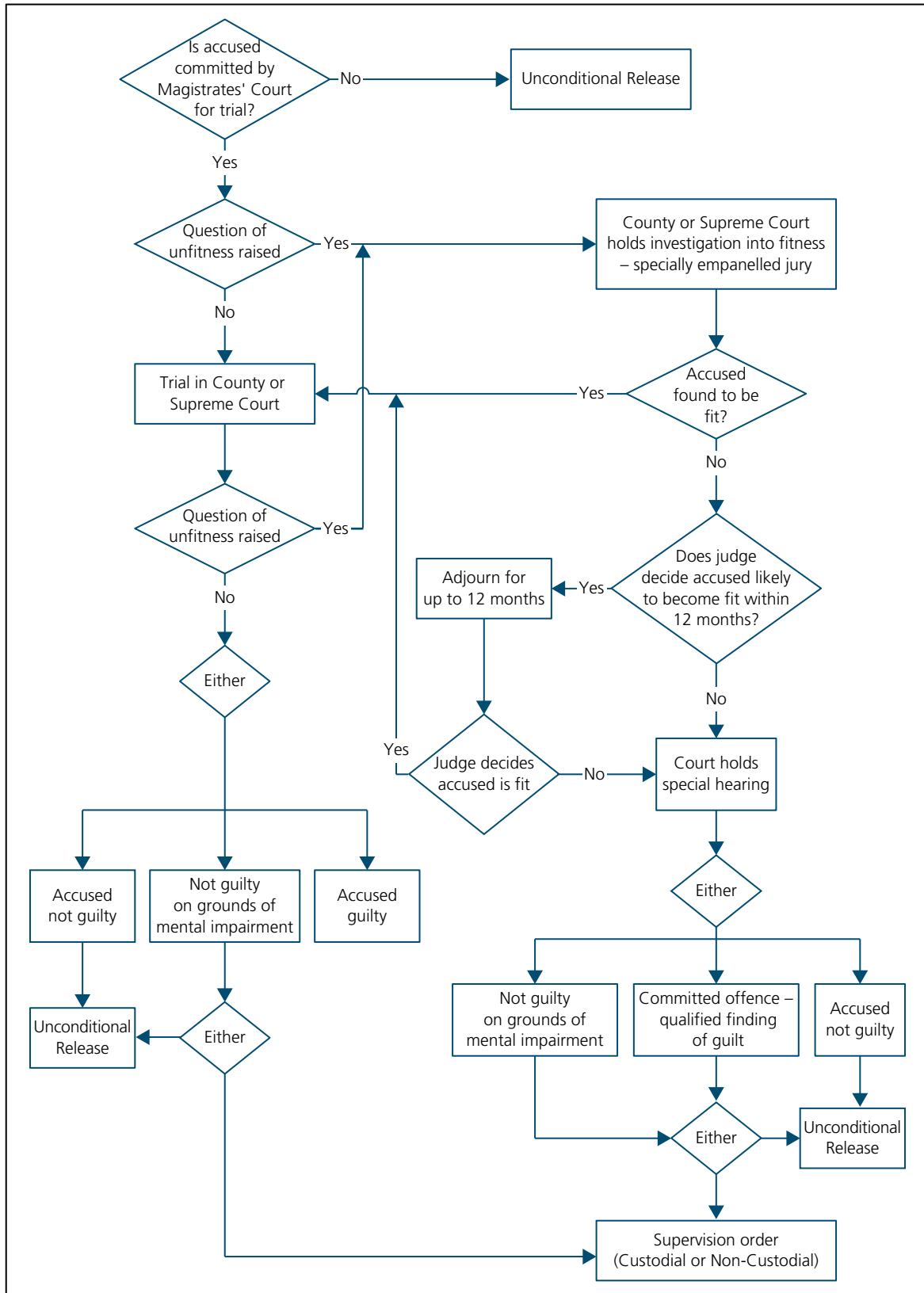
# Appendices

214 **Appendix A: Flowchart of the CMIA process**

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# Appendices

## Appendix A: Flowchart of the CMIA process



## Appendix B: Jurisdictional comparison of mental impairment definitions

Jurisdiction	Legislation	Definition
Commonwealth	<i>Criminal Code ACT</i> 1995 (Cth)	<p>s 7.3(1) – A person is not criminally responsible for an offence if, at the time of carrying out the conduct constituting the offence, the person was suffering from a mental impairment that had the effect that:</p> <ul style="list-style-type: none"> <li>a) the person did not know the nature and quality of the conduct; or</li> <li>b) the person did not know that the conduct was wrong (that is, the person could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong); or</li> <li>c) the person was unable to control the conduct.</li> </ul> <p>s 7.3(8) – mental impairment includes senility, intellectual disability, mental illness, brain damage and severe personality disorder.</p> <p>s 7.3(9) – mental illness is a reference to an underlying pathological infirmity of the mind, whether of long or short duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary external stimuli. However, such a condition may be evidence of a mental illness if it involves some abnormality and is prone to recur.</p>
New South Wales	<i>Mental Health (Forensic Provisions) Act 1990</i> (NSW)	<p>‘mentally ill’</p> <p>s 38(1) – If, in an indictment or information, an act or omission is charged against a person as an offence and it is given in evidence on the trial of the person for the offence that the person was mentally ill, so as not to be responsible, according to law, for his or her action at the time when the act was done or omission made, then, if it appears to the jury before which the person is tried that the person did the act or made the omission charged, but was mentally ill at the time when the person did or made the same, the jury must return a special verdict that the accused person is not guilty because of mental illness.</p>

Jurisdiction	Legislation	Definition
Queensland	<i>Criminal Code 1988</i> (Qld)	<p>'mental disease' or 'natural mental infirmity'</p> <p>s 27(1) – A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission the person is in such a state of mental disease or natural mental infirmity as to deprive the person of capacity to understand what the person is doing, or of capacity to control the person's actions, or of capacity to know that the person ought not to do the act or make the omission.</p> <p>s 27(2) – A person whose mind, at the time of the person's doing or omitting to do an act, is affected by delusions on some specific matter or matters, but who is not otherwise entitled to the benefit of subsection (1), is criminally responsible for the act or omission to the same extent as if the real state of things had been such as the person was induced by the delusions to believe to exist.</p>
Tasmania	<i>Criminal Code 1924</i> (Tas)	<p>'mental disease' includes 'natural imbecility'</p> <p>s 16(1) – A person is not criminally responsible for an act done or an omission made by him when afflicted with mental disease to such an extent as to render him incapable of understanding the physical character of such act or omission, or knowing that such act or omission was one which he ought not to do or make, or when such act or omission was done or made under an impulse which, by reason of mental disease, he was in substance deprived of any power to resist.</p> <p>s 16(2) – The fact that a person was, at the time at which he is alleged to have done an act or made an omission, incapable of controlling his conduct generally, is relevant to the question whether he did such act or made such omission under an impulse which by reason of mental disease he was in substance deprived of any power to resist.</p> <p>s 16(3) – A person whose mind at the time of his doing an act or making an omission is affected by a delusion on some specific matter, but who is not otherwise exempted from criminal responsibility under the foregoing provisions of this section, is criminally responsible for the act or omission to the same extent as if the fact which he was induced by such delusion to believe to exist really existed.</p>

South Australia	<i>Criminal Law Consolidation Act 1935 (SA)</i>	<p>'mental impairment'</p> <p>s 269A – mental illness means a pathological infirmity of the mind (including a temporary one of short duration) and includes a mental illness, an intellectual disability or a disability or impairment of the mind resulting from senility but does not include intoxication.</p> <p>s 269C – A person is mentally incompetent to commit an offence if, at the time of the conduct alleged to give rise to the offence, the person is suffering from a mental impairment and, in consequence of the mental impairment—</p> <p>(a) does not know the nature and quality of the conduct; or</p> <p>(b) does not know that the conduct is wrong; or</p> <p>(c) is unable to control the conduct.</p>
Western Australia	<i>Criminal Code Act Compilation Act 1913 (WA)</i>	<p>'mental impairment'</p> <p>s 1(1) – The term mental impairment means intellectual disability, mental illness, brain damage or senility</p> <p>s 27(1) – A person is not criminally responsible for an act or omission on account of unsoundness of mind if at the time of doing the act or making the omission he is in such a state of mental impairment as to deprive him of capacity to understand what he is doing, or of capacity to control his actions, or of capacity to know that he ought not to do the act or make the omission.</p> <p>s 27(2) – A person whose mind, at the time of his doing or omitting to do an act, is affected by delusions on some specific matter or matters, but who is not otherwise entitled to the benefit of subsection (1), is criminally responsible for the act or omission to the same extent as if the real state of things had been such as he was induced by the delusions to believe to exist.</p>

Jurisdiction	Legislation	Definition
Australian Capital Territory	<i>Criminal Code 2002</i> (ACT)	<p>s 27(1) – mental impairment includes senility, intellectual disability, mental illness, brain damage and severe personality disorder.</p> <p>s 27(2) – mental illness is an underlying pathological infirmity of the mind, whether of long or short duration and whether permanent or temporary, but does not include a condition (a reactive condition) resulting from the reaction of a healthy mind to extraordinary external stimuli.</p> <p>s 28(1) – A person is not criminally responsible for an offence if, when carrying out the conduct required for the offence, the person was suffering from a mental impairment that had the effect that—</p> <p>(a) the person did not know the nature and quality of the conduct; or</p> <p>(b) the person did not know that the conduct was wrong; or</p> <p>(c) the person could not control the conduct.</p> <p>s 28(2) – a person does not know that conduct is wrong if the person cannot reason with a moderate degree of sense and composure about whether the conduct, as seen by a reasonable person, is wrong.</p>
Northern Territory	<i>Criminal Code 1983</i> (NT)	<p>s 43A – ‘mental illness’ means an underlying pathological infirmity of the mind, whether of long or short duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary stimuli (although such a condition may be evidence of a mental illness if it involves some abnormality and is prone to recur).</p> <p>‘mental impairment’ includes senility, intellectual disability, mental illness, brain damage and involuntary intoxication.</p> <p>s 43C(1) – The defence of mental impairment is established if the court finds that a person charged with an offence was, at the time of carrying out the conduct constituting the offence, suffering from a mental impairment and as a consequence of that impairment:</p> <p>(a) he or she did not know the nature and quality of the conduct;</p> <p>(b) he or she did not know that the conduct was wrong (that is he or she could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong); or</p> <p>(c) he or she was not able to control his or her actions.</p>

New Zealand	<i>Crimes Act 1961</i> (NZ)	<p>'Natural imbecility' or 'disease of the mind'</p> <p>s 23(2) – No person shall be convicted of an offence by reason of an act done or omitted by him when labouring under natural imbecility or disease of the mind to such an extent as to render him incapable—</p> <p>(a) of understanding the nature and quality of the act or omission; or</p> <p>(b) of knowing that the act or omission was morally wrong, having regard to the commonly accepted standards of right and wrong.</p>
Scotland	<i>Criminal Procedure (Scotland) Act 1995</i>	<p>'mental disorder'</p> <p>s 51A(1) – A person is not criminally responsible for conduct constituting an offence, and is to be acquitted of the offence, if the person was at the time of the conduct unable by reason of mental disorder to appreciate the nature or wrongfulness of the conduct.</p> <p>s 51A(2) – a person does not lack criminal responsibility for such conduct if the mental disorder in question consists only of a personality disorder which is characterised solely or principally by abnormally aggressive or seriously irresponsible conduct.</p>
United Kingdom	<i>Mental Health Act 2007</i> (UK)	<p>'mental disorder' means any disorder or disability of the mind</p> <p>Section 1(2) of the <i>Mental Health Act 2007</i> (UK) amended section 1(2) of the <i>Mental Health Act 1983</i> (UK) and defines mental disorder as 'any disorder or disability of the mind.'</p> <p>Examples of clinically recognised mental disorders include personality disorders, eating disorders, autistic spectrum disorders, mental illnesses such as depression, bi polar disorder and schizophrenia, and learning disabilities.</p>
Canada	<i>Criminal Code, RSC 1985</i> (Canada) pt 1	<p>s (1) – 'mental disorder' means a disease of the mind</p> <p>s 16(1) – No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.</p>





# Questions

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# Questions

## Chapter 4—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?

### Decision-making capacity or effective participation

- 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?
- 3 Should the test for unfitness to stand trial include a consideration of the accused person's decision-making capacity?
- 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?
- 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?
- 6 If not decision-making capacity, should the test for unfitness to stand trial include a consideration of the accused person's effective participation?

### 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?

### Issues specific to the Presser criteria

- 8 If the unfitness to stand trial test remains the same, are changes required to the Presser criteria?
- 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?
- 10 Do any procedural, ethical or other issues arise in creating this exclusion from the unfitness to stand trial test?
- 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?
- 12 What would be the cost implications of any increase in support measures?
- 13 Should the availability of support measures be taken into consideration when determining unfitness to stand trial?
- 14 What changes can be made, if any, to enhance the ability of experts to assess an accused person's unfitness to stand trial?

### 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?
- 16 What procedure should apply where a question of an accused person's unfitness to stand trial is raised in a committal proceeding?

### 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?
- 18 What is the best way of addressing these ethical issues from a legislative or policy perspective?

### 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?

### 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?

## **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?

### **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?
- 23 Would removing the jury’s involvement in investigations of unfitness to stand trial be likely to expedite the process?
- 24 How frequent is it for an accused person to be acquitted at a special hearing, following a finding of unfitness?
- 25 What procedures could be implemented to expedite the unfitness to stand trial process?

### **Suitability of findings in special hearings**

- 26 Should changes be made to the findings available in special hearings?

### **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?

### **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?

## **Chapter 5—Defence of mental impairment**

### **The meaning of ‘mental impairment’**

- 29 How does the defence of mental impairment work in practice with ‘mental impairment’ undefined?
- 30 Should ‘mental impairment’ be defined under the CMIA?
- 31 What are the advantages or disadvantages of including a definition of mental impairment in the CMIA?
- 32 If mental impairment is to be defined in the CMIA, how should it be defined?
- 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?
- 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?

### **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?
- 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?
- 37 Are there any issues with interpretation of the requirement that a person be able to reason with a 'moderate sense of composure'?

### **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?
- 39 What is the best way of addressing these ethical issues from a legislative or policy perspective?

### **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?

### **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?

### **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?
- 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?

### **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?

### **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?

### **Principles underpinning appeals**

- 46 Are there any barriers to accused persons pursuing appeals in relation to findings of not guilty because of mental impairment?

## Chapter 6—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?

### 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?
- 49 What are the cost implications of giving the Magistrates’ Court the power to determine unfitness to stand trial?
- 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?
- 51 If considered, should such a power be framed or limited in any way (for example, limited to indictable offences triable summarily)?
- 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?
- 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?
- 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?

### 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?

### 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?

- 57 If yes, should the power to make orders be limited to indictable offences triable summarily or include certain summary offences?

### **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?
- 59 What are the cost implications of the options for expanding orders available in the Magistrates' Court?

## **Chapter 7—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?

### **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?

### **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?

### **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?

### **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'?
- 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?
- 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?

### **Principles underpinning appeals**

- 67 Are there any barriers to people subject to supervision orders and other parties pursuing appeals against supervision orders?



## **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?
- 69 Which ancillary orders and administrative consequences are appropriate and why?

## **Chapter 8—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?
- 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?
- 72 What effect does the current frequency of reviews have on court resources and the resources of other parties involved?
- 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?

### **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?
- 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?

### **Leave decision-making bodies**

- 76 Should the CMIA provide the Forensic Leave Panel with more flexibility in its operation?
- 77 Is the composition of the Forensic Leave Panel appropriate?
- 78 Are changes required to the operation of the Internal Leave Committee? If so, what changes are required?

### **Responsibility for people subject to supervision orders**

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

### **Breaches of supervision orders**

- 81 Is there is a need for guidance on failures to comply with or breaches of supervision orders?
- 82 If so, what is the best mechanism for providing more guidance on failures to comply with or breaches of supervision orders?

### **Interstate transfer orders**

- 83 What are the barriers to effecting interstate transfers under the CMIA?
- 84 If there are barriers, what changes should be made to make the process more efficient?

## **Chapter 9—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?
- 86 What changes should be made to give the system more flexibility where needed?

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

- 87 Are the current presumptions in varying and revoking supervision orders appropriate?
- 88 Should the court continue to consider the ‘dangerousness’ of the person subject to the supervision order?
- 89 Should the court continue to consider the likelihood of the person endangering themselves?
- 90 What role should the seriousness of the offence play in the making, varying and revocation of orders and applications of leave?
- 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?

### **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?

### **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?

### **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?

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## **Other models of decision making**

- 95 Should there be a change in the judicial model of decision making under the CMIA?

## **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?
- 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?

## **The role and interests of victims and family members**

- 98 Do the CMIA provisions allow for effective participation by victims and family members?

## **Representation of community interests**

- 99 Should community interests be represented in the CMIA system of supervision?
- 100 Does the involvement of a number of agencies representing the community's interests increase costs unnecessarily?
- 101 What is the most appropriate way of representing the community's interests in the CMIA?

## **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?
- 103 Are changes needed to the CMIA model of supervision to better meet the needs of 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?

## **Suppression orders and the principle of open justice**

- 105 What matters should the court consider when making suppression orders?
- 106 What issues arise concerning suppression orders under the CMIA?
- 107 What is the appropriate balance between therapeutic considerations (pointing to suppression) and open proceedings (pointing to publication)?