



Victorian Equal Opportunity
& Human Rights Commission

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

Submission to the Victorian Law Reform Commission
31 December 2013

1. Introduction

1. The Victorian Equal Opportunity and Human Rights Commission ('Commission') welcomes the opportunity to comment on the Victorian Law Reform Commission's supplementary consultation paper regarding the desirability of changes to the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* ('CMIA') to improve its operation.
2. The supplementary terms of reference ask the Victorian Law Reform Commission ('VLRC') to consider whether the application of the CMIA should be further extended to the Children's Court.
3. Specifically the VLRC has been asked to consider:
 - the decision in *CL, A Minor (by his litigation guardian) v DPP (obh Lee)* [2011] VSCA 227;
 - whether the process for determining fitness to stand trial in the CMIA should be adapted for application in the Children's Court;
 - whether a different process for determining fitness to stand trial and the defence of mental impairment should apply in the Children's Court;
 - what orders should be available in the Children's Court following a finding of unfitness to be tried or not guilty because of mental impairment;
 - whether the current jurisdiction of the Children's Court should apply so that it can hear or determine a matter before it if fitness or mental impairment should arise, apart from those currently required to be committed to the Supreme Court.
4. The Victorian Equal Opportunity and Human Rights Commission ('Commission') is an independent statutory body with functions and responsibilities under the *Equal Opportunity Act 2010*, the *Racial and Religious Tolerance Act 2001* and the *Charter of Human Rights and Responsibilities Act 2006* ('Charter'). The vision of the VEOHRC is a community where every person values, understands and respects human rights and equal opportunity.
5. This submission addresses the questions in the supplementary consultation paper on which the Commission has a view from the perspective of its responsibilities for human rights and equal opportunity.
6. The Commission recognises that the views of those bodies and individuals with experience and expertise working with children and young people in this area are crucial to this review. It will also be important to hear from people with disabilities directly, and while recognising the time pressures for the VLRC in this additional reference, we strongly encourage appropriate mechanisms to engage with people who are the subjects of this legislation. Many of these people and bodies will be better placed than the Commission to comment on the detail of appropriate practices and procedure to ensure the best interests of the child are met.
7. While this submission employs the terminology used in the VLRC's Consultation Paper of:
 - mental condition (any condition that results in a person's mental processes becoming disordered or impaired),
 - cognitive impairment (any of a range of disabilities that may limit a person's ability to think, including intellectual disability, acquired brain injury, mental illness, autism spectrum disorder and dementia),
 - intellectual disability (as defined in the *Disability Act 2006* 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), and

- mental illness (as defined in the *Mental Health Act 1985* as ‘a mental condition that is characterised by a significant disturbance of thought, mood, perception or memory’),

the Commission considers that the terminology adopted in any reforms to the CMIA scheme as it applies to both adults and children should take into account the views of people with disability and mental health conditions. The Commission is of the view that the terminology employed in this area should be consistent with modern understanding of conditions that result in a person’s mental processes becoming ‘disordered or impaired’ in such a way that means they are unfit to stand trial or means that they do not understand that their conduct was wrong and therefore should not be criminally responsible.¹

8. Clearly not all children and young people with a mental illness, intellectual disability or cognitive disability are unfit to stand trial. In this regard, the Commission reiterates the importance of appropriate support measures for children and young people in criminal proceedings to ensure that children and young people with disability are not inappropriately determined to be unfit to stand trial.² For example, a young person whose disability prevents them from following the course of the trial or understanding the evidence may be fit to stand trial through the use of practical or procedural adjustments. The preamble to the Convention on Rights of Persons with Disabilities recognises that: *‘Disability is an evolving concept and that ‘disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full participation in society on an equal basis with others’.*³ The use of the term psychosocial disability emphasises the social consequences of the disability and that supports may be required to enable their participation in the community. In the context of the criminal justice process, it is important that children and young people with psychosocial disability are provided with appropriate support measures to participate effectively in the criminal process and, where necessary, appropriate processes to determine their fitness to stand trial that take their age and disability into account.

2. Principles

Question 2: *Are the current CMIA principles appropriate for young people?*

9. The VLRC has identified eight principles as underpinning the CMIA, which are either expressly stated or reflected in the provisions of the CMIA. These are: (1) Fairness to an accused person and the right to a fair trial; (2) Legitimate punishment; (3) Least restrictive alternative; (4) Community protection; (5) Rights of victims and family members; (6) Gradual reintegration; (7) Therapeutic focus; (8) Transparency and accountability.
10. These principles are relevant to all people under the CMIA, including children and young people. However, where the CMIA applies to children and young people all of these principles should be subject to the specific rights that apply to those persons in recognition of their vulnerability due to their age. The Charter recognises that children are entitled to all human rights without discrimination. The Charter also recognises that children have specific rights. Children are entitled without discrimination, to such protection as is in their best interests and is needed by reason of being a child (section 17(2)); and have specific rights when charged with a criminal offence (section 25(3)) and in the criminal process (sections 23).

¹ See VEOHRC Submission (August 2013), pp 8-9 regarding whether the current use of the term ‘mental impairment’ is appropriate and the scope for amendment of the defence of ‘mental impairment’ to reflect terminology used in human rights and discrimination laws nationally and internationally and to reflect modern understanding of conditions that may appropriately engage the defence.

² See ‘The role of support measures’ in VEOHRC Submission (August 2013), pp 6-7.

³ Opened for signature 20 March 2007, A/Res/61/106 (entered into force 3 May 2008), Preamble.

11. To help ensure these rights are protected in the application of the CMIA scheme to children and young people, the CMIA should incorporate the specific human rights principles relating to young people in the criminal justice system. This is particularly important in light of the particular vulnerability of children and young people with mental illness, intellectual disability or cognitive disability to whom the CMIA applies. We have set out these human rights principles in more detail in our response to Question 4.

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

12. Currently, children charged with an indictable offence who have a mental condition that raises a question as to whether they are unfit to plead will have the matter dealt with by committal and trial in the County or Supreme Court. But for the mental condition that results in the question of unfitness to plead being raised, a young person would generally otherwise have their matter dealt with summarily in the Children's Court.⁴
13. Children's rights are *'based on the idea that children, by reason of their physical and mental immaturity, need special safeguards and care, including appropriate legal protection.'*⁵ Consistently with this principle it is widely accepted that children should be subject to a system of criminal justice separate from the adult system that recognises their inexperience and immaturity. As recognised by Vincent J in *DL (a minor by his litigation Guardian) v A Magistrate of the Children's Court & Ors*: "[F]or very good reasons, our society has adopted a very different approach to both the ascertainment of and response to criminality on the part of young persons to that which is regarded as appropriate where adults are involved."⁶ The Commission's primary submission to the VLRC highlights that the specialist jurisdiction of the Children's Court and the procedural guidelines that apply to it under the *Children Youth and Families Act 2005* ('CYFA') help ensure that the human rights of children and young people are protected in the criminal process.⁷
14. The current process under the CMIA where children and young people with the additional vulnerability of a mental condition are removed from this specialist jurisdiction where a question of unfitness is raised conflicts with children's rights. Namely, the right to a criminal procedure that takes into account his or her age and potentially also with the human right of children to such protection as is required in his or her best interests by reason of being a child. This process also potentially conflicts with the right of every person to enjoy their human rights without discrimination and with the fundamental principle that *'persons with a disability have the same rights and responsibilities as other members of the community and should be empowered to exercise those rights and responsibilities.'*⁸

⁴ The exceptions to this are:

- Where the young person accused is charged with one of the seven death-related indictable offences, which are excluded from the Children's Court's jurisdiction;
- Where the accused was under 18 at the time of offending but over 19 at the time of the hearing and exceptional circumstances justify the transfer of the matter to the Magistrates' Court; and
- Where an accused is charged with an indictable offence and the matter is committed to the County or Supreme Court (e.g. where the accused objects to a summary hearing or where the judge decides exceptional circumstances warrant a hearing by judge and jury in the higher courts). Where matters involving children are transferred to higher courts, it is only in 'very special, unusual or exceptional circumstances' where it would be inappropriate to conduct a summary hearing of the charge laid.

⁵ Joseph and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2013, 3rd ed), [21.02].

⁶ (Unreported, Supreme Court of Victoria, Vincent J, 9 August 1994), p 4. Cited in VLRC Supplementary Consultation Paper, [1.45].

⁷ VEOHRC Submission (August 2013), pp 14-15.

⁸ This principle is adopted in the *Disability Act 2006*. See section 5(1). See also section 5(2)(a)-(g).

15. There are also a number of elements of the current process that raise human rights concerns that would be equally relevant if unfitness or mental impairment were to be dealt with in the Children's Court. These should be considered in any reforms.
16. Under current process, once a young person is transferred to an adult court, two juries are required to be empanelled; one for determining whether the accused is fit to plead and a second to decide whether the person committed the offence. We understand that, in practice, this can cause delays in a person being brought to trial. If transferred to the Children's Court, this process could still run into conflict with the fundamental right contained in section 23(2) of the Charter that an accused child must be brought to trial as quickly as possible.
17. Under the current process, the fear of delay – along with the fear of the costs of CMIA proceedings, the perceived undesirable outcomes of CMIA proceedings, and the perceived benefits of pleading guilty – may result in defendants not raising the question of unfitness even where they have a mental condition which may mean they are unfit to plead.⁹ Where the current process operates to deter people from engaging with it, even where it may be necessary to ensure a fair trial and a correct finding regarding criminality, this is inconsistent with rights to equality and a fair hearing protected in sections 8 and 24 of the Charter. These issues would also need to be considered in the context of Children's Court proceedings.

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

18. In addition to those principles applying to all people under the CMIA, the human rights principles in the Charter relating to the rights of children, without discrimination, to such protection as is in their best interests and the specific rights of children in the criminal process should also govern the application of the CMIA to young people in both the Children's Court and adult courts.
19. In any legislative reform to the CMIA it must first be recalled that children and young people with a mental illness, intellectual disability or cognitive disability who are in conflict with the law are especially vulnerable.

Best interests principles

20. The overarching principle of the primary international instrument on children's rights, the United Nations Convention on the Rights of the Child ('CRC'), is that *'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'*¹⁰ This principle is recognised in section 17(2) of the Charter which specifies that: *'Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.'*
21. The best interests principle is also enshrined in section 10 of the CYFA, which states: *'For the purposes of this Act the best interests of the child must always be paramount.'* Section 10(2) explains that when determining whether a decision or action is in the best interests of the child, the need to protect the child from harm, to protect his or her rights and to promote his or her development must always be considered. It also sets out a number of considerations (section 10(3)(a)-(r)) that must be taken into account where relevant in determining what decision to make or action to take in the best interests of

⁹ See Criminal Bar Association Submission (September 2013), [128]-[129]: *'Members of the CBA regularly encounter cases in which an accused person pleads guilty and is sentenced where in fact they have a complete defence. This problem is not rare. The prevalence of inaccurate or inappropriate guilty pleas is a major issue. The fear of CMIA proceedings, their delay, costs and the perception of onerous outcomes militates against them being pursued. This coupled with the attraction of a lenient sentence... is often overwhelming. This often results in Court outcomes that do not reflect real criminality – and in some cases are effectively discriminatory and unjust.'*

¹⁰ CRC, Article 3(1).

the child. By way of example, these include: the need to strengthen, preserve and promote positive relationships between the child and the child's family members; the child's views and wishes (if they can be reasonably ascertained); the need to respect and maintain the identity of Aboriginal children; the desirability of continuity and stability in the child's care; the child's social, individual and cultural identity and religious faith (if any); the desirability of the child being supported to gain access to appropriate educational services, health services and accommodation; and the possible harmful effect of delay in making the decision or taking the action.

22. While these 'best interests principles' and the CYFA's other general principles¹¹ do not apply to decisions made in the Criminal Division of the Children's Court, the Commission is of the view that they could be usefully applied in decision-making relating to children and young people who raise unfitness to stand trial or the defence of mental impairment. At the least, they should be an essential reference in the creation of any standalone principles governing the application of the CMIA to children and young people.

Equality before the law

23. As recognised in the equality rights in section 8 of the Charter, children are also entitled to equal treatment before the law without discrimination and are entitled to enjoy their human rights without discrimination. Children and young people to whom the CMIA applies are entitled to be free from discrimination on the grounds of both their age and disability.
24. The Commission's primary submission highlighted that the fundamental value of the equality right is the equal dignity of every person and that human dignity is harmed by the unfair treatment of people because of their disability, rather than treatment relating to their needs and capacities of different individuals and taking into account the context underlying their differences.¹² The principle is enshrined in the *Disability Act 2006*, which recognises 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*'¹³ and protected by the equality right in section 8 of the Charter. The Commission highlighted the importance of appropriate support measures for people with disability in criminal proceedings to ensure that a person was not assessed as unfit to stand trial where reasonable adjustments to the trial process could in fact be made, so that that person could comprehend the trial.
25. These principles of equality and non-discrimination must also apply in the application of the CMIA to children and young people. In relation to children in the criminal process, the UN Committee on the Rights of the Child has previously called on all parties to take measures necessary to ensure children in conflict with the law are treated equally, paying particular attention to de facto discrimination and disparities involving vulnerable young people, including children with disabilities.¹⁴ As with adults, children and young people with disability are entitled to equal treatment in the criminal process, which may include such reasonable adjustments as they require because of their age and disability to enable their participation in criminal proceedings on an equal basis with others.
26. We note that the right to equality may have other work to do, depending on the attributes of the individuals involved. For example, a young person from a culturally and linguistically diverse (CALD) background may have particular needs to be considered when assessing and communicating, or a young woman may have particular needs when considering detention orders. The right to equality should be an underpinning

¹¹ The decision-making principles (Division 3 of Part 1.2) and additional decision-making principles for Aboriginal children (Division 4 of Part 1.2).

¹² See VEOHRC Submission (August 2013), p 5.

¹³ *Disability Act 2006*, s 5(1).

¹⁴ UN Committee on the Rights of the Child, *General Comment 10*, UN Doc CRC/C/GC/10 (2007), [10.6].

principle and the particular circumstances will then inform how it needs to be considered.

Cultural rights

27. In light of the overrepresentation of Aboriginal and Torres Strait Islander children and young people in the criminal justice system,¹⁵ the Commission emphasises the importance of recognising the special interests and needs of Aboriginal and Torres Strait Islander children and young people and highlights the importance of recognising cultural rights in the application of the CMIA to children and young people.¹⁶ Cultural competence and the promotion of cultural safety is crucial in the treatment of and responses to Aboriginal people.
28. These cultural rights are recognised in the general best interests principles and the additional decision-making principles applying to Aboriginal children in the CYFA. The general best interests principles '*place particular stress on protecting and promoting the need to protecting and promoting the "Aboriginal cultural and spiritual identity and spiritual identity and development" of Aboriginal children*'.¹⁷ They provide that wherever possible this must be done by '*maintaining and building their connections to their Aboriginal family and community*'. In recognition of the importance of maintaining a child's Aboriginal identity and the principle of Aboriginal self-management and self-determination, the additional-decision making principles for Aboriginal children in section 12 include a principle of consultation with the Aboriginal community to which the child belongs. This will be important to address in the CMIA context as well.

Rights of children in the criminal process

29. The specific rights of children in the criminal process set out in section 23 of the Charter must be taken into account in the application of the CMIA to children and young people. Section 23 states:
 - (1) *An accused child who is detained without charge must be segregated from all detained adults.*
 - (2) *An accused child must be brought to trial as quickly as possible.*
 - (3) *A child who has been convicted of an offence must be treated in a way that is appropriate for his or her age.*
30. The right is modelled on Article 10(2)(b) of the International Covenant on Civil and Political Rights ('ICCPR'). The UN Human Rights Committee, the ICCPR treaty monitoring body, has explained that:¹⁸

As individuals, children benefit from all of the civil rights enunciated in the Covenant. In enunciating a right, some provisions of the Covenant expressly indicate to States measures to be adopted with a view to affording minors greater protection than adults. ... [I]f lawfully deprived of their liberty, accused juvenile persons shall be separated from adults and are entitled to be brought as speedily as possible for adjudication; in turn, convicted juvenile offenders

¹⁵ See Children's Court Research Materials, *Criminal Division – General* (July 2012), [7.11]. See also VEOHRC, *Koori Women in Prison Report* (2013), 13.

¹⁶ Section 19(1) of the Charter states that all persons with a particular cultural, religious, racial or linguistic background must not be denied to the right to enjoy their culture. Section 19(2) recognises the distinct cultural rights of Aboriginal persons to enjoy their identity and culture, maintain and use their language, and maintain their kinship ties among other things. The CYFA recognises these cultural rights in its provision of specific decision-making principles that apply to Aboriginal children, which recognises the importance of kinship ties and respects 'the principle of Aboriginal self-management and self-determination.'

¹⁷ *Secretary to the Department of Human Services v Sanding* [2011] VSC 42, [22]. See an outline of these principles at [22]-[23].

¹⁸ UN Human Rights Committee, General Comment 17: Rights of the Child (Art 24), [2]. See also UN Human Rights Committee, General Comment No 9: Humane treatment of persons deprived of liberty (Art 10), [4].

shall be subject to a penitentiary system that involves segregation from adults and is appropriate to their age and legal status, the aim being to foster reformation and social rehabilitation.

31. The rights in section 23 of the Charter should be considered together with section 25(3) of the Charter, which is modelled on Article 14(4) of the ICCPR. It states:

A child charged with a criminal offence has the right to a procedure that takes account of his or her age and the desirability of promoting the child's rehabilitation.

32. In addition to the ICCPR, the CRC as the primary international instrument on children's rights is also relevant to the interpretation of these Charter rights. Article 40 of the CRC relevantly specifies the rights of children in the criminal process:

- Article 40(1) sets out the right of children alleged as, accused of, or recognised as infringing the law *'to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.'*
- Article 40(2)(b) of the CRC specifies certain minimum procedural safeguards including the rights of the child to be presumed innocent, to have appropriate legal assistance, to have the matter determined without delay, to have the free assistance of an interpreter if necessary, and to have his or her privacy fully respected at all stages of the proceedings.
- Article 40(3) provides that, where appropriate and desirable, States should promote *'measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected'*.
- Article 40(3) also states that a range of dispositions *'such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care'* should be available for children to ensure they are treated in *'a manner appropriate to their well-being and proportionate both to their circumstances and the offence'*.

33. The UN Standard Minimum Rules for the Administration of Juvenile Justice ('Beijing Rules') are also relevant to the interpretation of sections 23 and 25(3) of the Charter because they recognise the same fundamental rights and provide guidance as to what will amount to "appropriate" treatment of children in the criminal process.¹⁹

34. As the first international instrument to set out standards for the administration of youth justice with a child rights approach, the Beijing Rules recognise that, owing to their early stage of human development, young people *'require particular care and assistance with regard to physical, mental and social development, and require legal protection in conditions of peace, freedom, dignity and security.'*²⁰ The principles in the Beijing Rules are reflected in the CRC, which refers to the Rules in its preamble.

35. The Beijing Rules emphasise the importance of specific laws applying to young offenders and specific institutions and bodies that are designed to meet the varying needs of young offenders, while protecting their human rights. They provide that two of the most important objectives of youth justice are the promotion of the wellbeing of the child and proportionality,²¹ and specify what amounts to the appropriate treatment of young people in the criminal process. The Rules recognise:

¹⁹ The Beijing Rules are outlined in the VLRC Supplementary Consultation Paper, [2.35]-[2.39].

²⁰ Beijing Rules, Preamble.

²¹ See Beijing Rules, Rule 5 and Commentary. <<http://www.un.org/documents/ga/res/40/a40r033.htm>> at 15 December 2013.

- the guarantee of minimum procedural safeguards recognised under international human rights instruments that are essential for a fair and just trial
 - the importance of the protection of a young person's right to privacy
 - the importance of diversion for young offenders wherever appropriate
 - that proceedings be conducive to the best interests of the young person and be conducted in an atmosphere of understanding, allowing the young person to participate and express themselves freely
 - the need to avoid unnecessary delay
 - the need for a broad range of dispositions in sentencing young people and flexibility so as to avoid institutionalisation to the greatest extent possible
 - placing a young person in an institution shall be a disposition of last resort and for the minimum necessary period.
36. The children's criminal process rights in the Charter, which are informed and can be understood with reference to the rights and principles in the CRC and the Beijing Rules, already underpin the jurisdiction of the Children's Court and inform many of its processes. It is essential that these same rights are respected and principles are upheld in the application of the CMIA to children and young people.

3. Delays in CMIA matters involving young people

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

37. Section 23(2) of the Charter provides for the important right that '*An accused child must be brought to trial as quickly as possible.*'
38. The Explanatory Memorandum to the Charter explains that this '*is a more onerous obligation than the requirement of trial "without unreasonable delay" provided in clauses 21(5(b) and 25(2)(c).*'
39. The anxiety and stress felt by an adult facing trial is often even greater for a young person in the same position. Delays can have a significant detrimental effect on a vulnerable accused by prolonging anxiety and stress.
40. This was recognised in a decision of an ACT Magistrate in a decision that a delay in the prosecution of a young person amounted to a breach of the right of the child to be brought to trial as quickly as possible in section 20(3) of the *Human Rights Act 2004* (ACT).²² In finding that the unjustifiable delay in the prosecution had led to injustice to both the child accused and the child complainant that meant it was appropriate to permanently stay the proceeding, the Magistrate highlighted the distinction between the fair trial rights that apply to adults and the special rules intended to apply to children in the criminal process. The Magistrate highlighted the detrimental effect of delay in matters for both a young accused person and a young victim in his reference to the comments of Lord Bingham in *Dwyer v Watson* that:

*...prejudice to the fairness of the trial altogether apart, delay has the highly undesirable result of prolonging the stress to which a vulnerable accused is inevitably subject and retarding the date at which his problems (if he has such) can be addressed and full counselling given to young victims without the risk of tainting their evidence.*²³

²² *Perovic v CW No CH 05/1046* (Unreported, Magistrates Court, 1 June 2006). See ANU Human Rights Portal, *Case summary: Perovic v CW No CH 05/1046, Unreported decision of Magistrate Somes*. <http://acthra.anu.edu.au/cases/case_summary.php?id=49> at 15 December 2013.

²³ [2002] 3 WLR 1488. <<http://www.bailii.org/uk/cases/UKPC/2002/D1.html>> at 15 December 2013.

41. Delays may result in a young person spending time in custody on remand. Such pre-trial detention of a vulnerable young person may be contrary to their best interests and amount to an unjustifiable restriction of their liberty contrary to section 21 of the Charter.
42. In the specific context of CMIA matters, young people in the CMIA process may need access to care, which makes it especially crucial for the trial to occur as quickly as possible so that any necessary intervention can be decided upon and taken. Timely access to necessary assessment and care is crucial. The Commission agrees with the VLRC's important observation that because young people are continually developing changes can occur in a short space of time and an assessment of what care or treatment is necessary may not retain its currency over an extended period.²⁴
43. Also relevant, as highlighted in the commentary to the Beijing Rules, delay in proceedings may affect the potential benefits of the trial and the disposition because the passing of time may increase the difficulty of the young person to relate the procedure and disposition to the offence '*both intellectually and psychologically*'.²⁵

4. Determination of unfitness in the Children's Court

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

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

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

44. The Commission has recommended that the Children's Court should have jurisdiction to determine unfitness to stand trial.²⁶
45. The Commission submitted that this jurisdiction should be clearly provided for, however we are not best placed to make a submission regarding the form in which this power should be legislated.
46. Certainly, the evidence on which any unfitness determination is made must be from practitioners experienced in the mental conditions affecting children and young people and based on assessments that are as current as possible in the circumstances, in light of the constant development of children and young people and potential fluctuations in the severity and nature of certain disabilities.
47. As highlighted in the introduction above, it is important that any process ensures that the assistance that a child or young person may need to participate effectively in the criminal process by reason of their age or a disability is not confused with the fitness of child or young person to stand trial.

5. Definition of mental impairment

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

48. Yes. The Commission reiterates our recommendation from our primary submission that the common law language 'disease of the mind' is no longer appropriate and, consistently with the right to equal protection of the law without discrimination, the defence of mental impairment should be defined in the CMIA consistently with modern understanding of the cognitive disabilities and mental illnesses that may impact on a

²⁴ VLRC Supplementary Consultation Paper, [2.68].

²⁵ See Beijing Rules, Rule 5, Commentary. <<http://www.un.org/documents/ga/res/40/a40r033.htm>> at 15 December 2013.

²⁶ See VEOHRC Submission (August 2013), Recommendation 8.

person's criminal responsibility and the language and terminology of the defence should be consistent with modern understanding of disability.²⁷

49. The formulation of any definition as it relates to children and young people must take into account that cognitive and mental health impairments in children and young people may differ from those of adults because young people's cognitive abilities are still developing or it may be that a mental illness is emerging.

6. Special hearings

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

50. Yes. If special hearings are to apply in the Children's Court, the conduct of hearings should be modified to make them appropriate for children and young people.
51. Where a person has been found unfit to stand trial, a special hearing is held to determine their criminal responsibility. The purpose is to determine on the evidence whether the person (a) is not guilty, (b) is not guilty because of mental impairment, or (c) committed the offence.
52. Section 25(3) of the Charter states the right of children to 'a procedure that takes account of his or her age.' Consistently with this right, if special hearings do apply in the Children's Court the procedural requirements in section 522 of the CYFA, or procedural requirements equivalent to those, should apply to make such hearings appropriate for young people. As outlined in the Consultation Paper, section 522 of the CYFA requires the court to take steps to ensure, among other things, that the young person understands the nature and implications of the proceeding and is allowed to participate fully in the proceeding.

7. Diversion

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

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

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

53. Yes. A program should be introduced in the Children's Court to divert young people who raise unfitness to stand trial or the defence of mental impairment.
54. The human rights principles outlined above emphasise the importance of diversion for young offenders wherever appropriate and that measures for dealing with young people without resorting to judicial proceedings should be considered wherever appropriate while ensuring that human rights and legal safeguards are fully protected.
55. There is currently no formal diversion program for young people appearing in the Children's Court of Victoria. The Commission strongly supports the introduction of diversion options for young people in Victoria generally including for young people with cognitive and mental health impairments.
56. The recent New South Wales Law Reform Commission Report referred to by the VLRC highlights that effective diversion of people with a mental condition requires a relationship between the criminal justice system and the service sector, since effectiveness depends on connecting people with the right services to address their needs.²⁸

²⁷ VEOHRC Submission (August 2013), Recommendations 4 and 5.

²⁸ VLRC Supplementary Consultation Paper, [2.109].

57. Tailored diversion options for young people with cognitive and mental health impairments organised, for example, with a protective or disability services worker, have the potential to reduce the detrimental impact that can result from a young person's involvement with the criminal justice system. It can better support the human rights of children and young people by providing them with relevant treatment, care and rehabilitation while also preventing and reducing reoffending.
58. Diversion where appropriate can also help to reduce delay in the provision of any required assessment of a young person's therapeutic needs with the result that those needs can be met promptly and appropriately.

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

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

- (a) *limited supervision orders under the CMIA*
 - (b) *orders available in the criminal jurisdiction of the Children's Court*
 - (c) *orders available in the civil mental health and disability systems for young people*
 - (d) *other orders?*
59. In making decisions about supervision orders under the CMIA, courts are required to assess future risk and balance that risk with the human rights and rehabilitative needs of the person subject to the supervision order. Where children and young people are concerned, the best interests of the child should be a primary consideration in reaching a decision as to what order should apply and the specific human rights of children must be considered in any decision and given appropriate weight.
 60. Taking into account the differences between sentencing a young offender and deciding on the disposition of a young offender under the CMIA, it may be appropriate that the Court is directed to be guided by certain decision-making principles, such as the decision-making principles in Part 1.2 of the CYFA,²⁹ or to take certain matters into account, such as those matters the Children's Court currently takes into account 'in determining which sentence to impose on a child' in section 362 of the CYFA.
 61. The Commission strongly agrees with the VLRC that indefinite supervision orders are inappropriate for children and young people and should not be an available option for children and young people in either the Children's Court or the higher courts.
 62. The Commission supports the VLRC option that only non-custodial supervision orders and unconditional discharges should be available under the CMIA in the Children's Court. This is consistent with the nature of the matters in respect of which the Children's Court will have jurisdiction and the discretion retained by the Children's Court to commit a person to trial in the higher courts in respect of matters that would potentially warrant a more restrictive order in light of the risk and rehabilitative needs of the young person.
 63. Orders currently available in the Criminal Division of the Children's Court would not be sufficient or appropriate for children and young people who fall within the CMIA, in light of the fact that people who are found unfit to plead or not guilty due to mental impairment should be subject to supervision and treatment rather than punishment.³⁰

²⁹ These include the best interests principles, decision-making principles, and additional decision-making principles for Aboriginal children.

³⁰ See VLRC Supplementary Consultation Paper at [2.117]-[2.119]. Orders currently available without a conviction include dismissing charges, undertakings, good behaviour bonds, fines, probation or youth supervision orders. Orders currently available with a conviction include good behaviour bonds, fines, youth supervision orders, custodial orders for a maximum of three years (youth residential orders for 10-14 year olds and youth justice centre orders for 15-20 year olds), and youth attendance orders.

While sentencing in the Children's Court is focused on the rehabilitation of the young offender and graduated and proportional responses, the range of orders available in the criminal jurisdiction may still be insufficient to provide for the support needs of some young people with a mental illness, intellectual disability or cognitive disability.

64. With this in mind, the Commission considers that orders currently available in the Family Division of the Children's Court, such as protection orders under section 349 of the CYFA and therapeutic treatment orders under section 244 of the CYFA, could potentially be more appropriate following a finding of unfitness or not guilty because of mental impairment due to therapeutic focus and their ability to meet the specific needs of the young person such as educational, health or social services required.
65. In identifying orders that might be made available in the Children's Court in relation to unfitness and the defence of mental impairment, the VLRC identifies orders under the *Mental Health Act 1986* and the *Disability Act 2006*. The Commission has concerns about making these civil mental health and disability orders available in the Criminal Division of the Children's Court in relation to unfitness and the defence of mental impairment. We are of the view that the involuntary treatment and detention orders identified are inappropriate for application in this jurisdiction.³¹

9. Suitability of the criminal jurisdiction of the Children's court

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

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

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

66. Yes, all indictable and summary offences (excluding death offences and exceptional circumstances), should be dealt within the Children's Court so that, wherever possible, children are dealt with in a court system designed to address their particular needs as children.
67. Regarding what factors should be considered in deciding whether a matter should be uplifted to the higher courts, the VLRC highlights that the nature and severity of actual offending behaviour should be able to be factored into any determination of whether children ought more appropriately be dealt with in the Children's Court than in the higher courts under the CMIA.
68. The Commission considers that the human rights of the young person should also be considered in deciding whether a matter should be uplifted to the higher courts, namely the right of the child accused to such protection as is in his or her best interests in the particular circumstances, the rights of the child to a procedure that takes account of his or her age and to be tried as quickly as possible, and whether the child will be accorded their right to receive a fair hearing in the circumstances.
69. For example, where the Children's Court is of the view that the young person's health or wellbeing will be detrimentally affected by a trial in an adult court contrary to the right of the child to protection in their best interests in section 17(2) of the Charter, this may be a factor in a determination of whether the matter under the CMIA would be more appropriately dealt with in the Children's Court. Or where uplifting a matter to a higher court would result in a delay in the proceedings contrary to the right of the child to be brought to trial 'as quickly as possible' in section 23(2) of the Charter.

³¹ Note also that the Commission has serious concerns about the use of involuntary treatment orders under the *Mental Health Act 1986* (and under its proposed reforms) where children can be subject to treatment without consent or the consent of a parent or guardian and be subject to forms of treatment that the Commission strongly opposes in relation to children, such as electro-convulsive therapy and psychosurgery. See VEOHRC, *Comment's on the Department of Health's Mental Health Bill 2010 Exposure Draft* (March 2011).

10. Adult courts

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

70. The Commission strongly supports the endorsement by the trial judge in the case of CL (at trial) of the Practice Direction of the Lord Chief Justice of England and Wales of 16 February 2000, which lists support measures that adult courts should have in place for trials involving young people.³²
71. As the VLRC notes, this endorsement is not binding. Consistent with the right in section 25(3) of the Charter of children charged with a criminal offence to a procedure that takes account of their age, the Commission is of the view that the implementation of binding guidelines specifying support measures for young people in adult courts should be developed and implemented.

11. Indefinite orders and young people

Question 30: *Should young people be subject to indefinite orders?*

72. No. The Commission is concerned about the detrimental impact on a young person's wellbeing that may result from subjecting young people to an indefinite supervision order. The Commission is of the view that any order made in relation to children and young people under the CMIA should be time limited.

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

73. When a court considers what order to make in relation to a young person who is found unfit to be tried or not guilty because of mental impairment, the best interests of the child should be a primary consideration along with the principles of least restriction and fostering the reformation and social rehabilitation of the young person. As identified by the VLRC, the indefinite nature of an order is contrary to the therapeutic aim of the process. The Commission considers that an indefinite order could limit a number of human rights protected in the Charter including: the right of the child to such protection as is in their best interests (section 17(2)); the right not to be subjected to cruel, inhuman and degrading treatment (s 10(b)); the right not to have privacy arbitrarily interfered with (section 13(a)); the right of a child convicted of an offence to be treated in a way that is appropriate for his or her age (section 23); the right to a procedure that takes into account the desirability of promoting the child's rehabilitation (section 25(3)). The Commission does not consider the limitations on these rights resulting from imposing an indefinite order on a child or young person could be justified as necessary or reasonable in accordance with section 7(2) of the Charter.

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

74. Yes. Consistently with the right to equal treatment before the law, if the range of orders available in the Children's Court is expanded to provide better treatment, diversion and rehabilitation pathways for young people with a mental condition, such orders should be available to all young people under the CMIA scheme regardless of the jurisdiction in which they are tried.

³² These are set out in the VLRC Supplementary Consultation Paper at [2.136].

12. Child protection

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

(a) Are there appropriate custodial facilities available?

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

75. The Commission's primary submission includes recent case studies that demonstrate a lack of available appropriate custodial facilities.³³ The Commission supports the use of community based orders where appropriate however acknowledges that custodial orders may be necessary for young people in certain circumstances where necessary for their treatment and rehabilitation and, in some instances, the protection of the community. In such circumstances, there is a need for appropriate health-focused facilities for young offenders who have a mental illness, intellectual disability or cognitive disability and, consistent with the CMIA scheme, is directed at supervision and/or treatment of young people as distinct from punishment.

³³ VEOHRC Submission (August 2013), pp 9-11.