



[www.libertyvictoria.org.au](http://www.libertyvictoria.org.au)

Victorian Council for Civil Liberties Inc  
Reg No : A0026497L

GPO Box 3161  
Melbourne, VIC 3001  
t 03 9670 6422  
info@libertyvictoria.org.au

PRESIDENT  
Jane Dixon SC

SENIOR VICE-PRESIDENT  
Jessie E Taylor

VICE-PRESIDENTS  
Jamie Gardiner  
Thomas Kane  
Michael Stanton

IMMEDIATE PAST PRESIDENT  
Professor Spencer Zifcak

PATRON  
The Hon. Michael Kirby AC CMG

22 December 2013

To: The Victorian Law Reform Commission

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

**Consultation Paper - Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 and The Children's Court of Victoria.**

Liberty Victoria welcomes the opportunity to make a submission to the Victorian Law Reform Commission in its review of the Crimes (Mental Impairment and Unfitness to be Tried) Act (CMIA) and The Children's Court of Victoria. Thank you for the extension of time granted to make this submission.

Liberty Victoria acknowledges that the Law Reform Commission has been asked to consider whether the application of the CMIA should be further extended to the Children's Court, and consider a number of particular matters.

Firstly, Liberty Victoria seeks to endorse the Criminal Bar Association's submission. Practitioners with experience in the practical application of the law offer expertise in this area.

Liberty wishes to comment and answer a few of the questions discussed in the Supplementary Discussion paper, dated 13 November 2013:

Principles relevant to Children within the criminal justice system

**Question 3 and 4**, the Commission seeks comments on what principles should govern the Children's Court and the CMIA:

- Liberty acknowledges that children's interaction within the criminal justice system needs to be managed carefully given the particular vulnerability of children within society. The complexity of children with mental illnesses and

fitness issues cannot be underestimated. The principles as enshrined in the Children Youth and Families Act 2005 need to be maintained as the starting point. The legislation and Children's Court jurisdiction has a different emphasis – what is in the child's best interest and rehabilitation. This too, must be the starting point for any CMIA matter dealt with in the Children's Court.

- In *R v Mills [1998] VSC 241* it was acknowledged that youthful offenders face different principles of sentencing law than an adult. It was stated that:
  - Youth of an offender, particularly a first offender, should be a primary consideration for a sentencing court where that matter properly arises; and
  - In the case of a youthful offender, rehabilitation is usually far more important than general deterrence. This is because punishment may in fact lead to further offending. Thus, for example, individualised treatment focusing on rehabilitation is to be preferred. (Rehabilitation benefits the community as well as the offender.)
- The complex and multidimensional needs of children suffering from a mental impairment in criminal trials and sentencing requires a specially tailored approach.

#### Give the Children's Court the powers as available under the CMIA

With regard to **Question 9**, Liberty Victoria supports the amendment of the legislation to allow the Children's Court to deal with unfitness when raised before it:

- Determinations should be made upon the basis of expert evidence, similar to *doli incapax* enquiries; this can be done by the existing Clinic attached to the Court.
- Liberty supports the reasoning of Lasry J in the case of *CL (A Minor) v LEE - (2010) 29 VR 570*.
- Liberty supports the current tests under the CMIA (re fitness and whether or not an accused had a mental impairment at the time of offending) as being the appropriate test for the Children's Court.

#### Orders

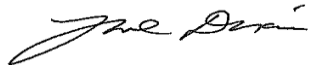
In response to **Question 23**, Liberty does not support the power under the CMIA to be applied to Children. It is appropriate to have both custodial and non-custodial supervisory orders available to sentencers, however the length of the orders that

apply to adults are not appropriate for children. Limiting the duration ensures that rehabilitation and the principles in *Mills*, are followed.

- Liberty refers the Commission to s20BQ of the Commonwealth Crimes Act, which does not in itself provide for a process to determine fitness. Rather it empowers the court to dismiss, adjourn or discharge the defendant to the care of a responsible person, where an accused suffers from a mental illness, intellectual disability.
- Further, with regard to **Question 30**, Liberty Victoria does not see any circumstance where it would be appropriate for a child to be placed on an indefinite order.

Thank you for the opportunity to make this submission. Please contact Jane Dixon SC or Aggy Kapitaniak if we can provide any further information or assistance. Liberty Victoria would particularly like to acknowledge Beatrice Paull and Lea Christopher for their research and assistance in preparing the submission. This is a public submission and is not confidential.

Yours sincerely



Jane Dixon SC  
President, Liberty Victoria