CHILDREN'S COURT MENTAL IMPAIRMENT & UNFITNESS TO BE TRIED PROCEEDINGS

SUMMARY FOR COURT OFFICIALS & COURT USERS

A BACKGROUND The ***Crimes (Mental Impairment and Unfitness to be Tried Act) 1997*** (Vic) ('the CMIA') has been in operation since 18/04/1998. The purposes of the CMIA [s.1] are–

(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.

The question of whether a person is unfit to be tried focuses on the person's mental capacity at the time of the trial. The question of whether a person is mentally impaired focuses on the person's mental capacity at the time of the alleged offence. The two questions sometimes overlap and are sometimes mutually exclusive. See [2010] VSC 517 at [29].

The CMIA did not confer jurisdiction on the Children's Court to determine a child's fitness to be tried. In *CL (a minor) v Tim Lee and Ors* [2010] VSC 517 at [77] Lasry J held–

> "[A] Magistrate sitting in the Children's Court or Magistrates' Court has no jurisdiction to deal with issue of fitness to plead once it is raised, assuming the issue is genuinely raised…[N]either the CMIA, the ***Children, Youth and Families Act 2005*** (Vic) ['the CYFA'] or the common law provide any basis to invest jurisdiction on a Children's Court Magistrate to deal with fitness to plead issues."

By contrast, at [25] Lasry J held that the effect of s.5 of the CMIA – which provides that the defence of mental impairment applies in the Magistrates' Court to summary offences and to indictable offences tried summarily – read in conjunction with s.528 of the CYFA was that the statutory defence of mental impairment was available to a Children's Court accused in the same way as to an adult accused in the Magistrates' Court. However, by virtue of s.5(2) of the CMIA, the only consequence of a finding by a Magistrate that an accused was not guilty because of mental impairment was that the court had to discharge the accused unconditionally.

B AMENDMENTS TO THE CMIA In an omnibus Act entitled ***Criminal Organisations Control and Other Acts Amendment Act 2014*** (Vic) [No.55 of 2014]–

- ✪ Part 5A amends the CMIA to create a new statutory regime for proceedings in the Children's Court involving issues of mental impairment and/or unfitness to be tried as well as appeals from those proceedings.
- ✪ Part 5 makes some consequential amendments to the CMIA generally.

These provisions – largely intended to fill jurisdictional gaps partly identified by Lasry J – will commence on 31/10/2014. This paper summarizes this new regime for a hearing in the Children's Court, a regime that comprises Part 5A and ss.39, 40(1) & 47 of the CMIA.

C APPLICATION OF THE CMIA TO THE CHILDREN'S COURT|CMIA-s.5A

Section 5A provides a 3-limbed definition of the application of the CMIA to the Children's Court–

(1) If the Children's Court has jurisdiction under s.516 of the CYFA to hear and determine an indictable offence, the Children's Court may determine in accordance with Part 5A–
  (a) the fitness of an accused to stand trial for the offence; and
  (b) a defence of mental impairment raised to the offence.

(2) The defence of mental impairment as provided for in s.38ZA of the CMIA and the presumption in s.38ZB(1) [see topic **M** below] apply to summary offences and to indictable offences heard and determined summarily in the Children's Court.

(3) If the Children's Court finds a child not guilty because of mental impairment of a summary offence, the Children's Court must discharge the child.

It follows from s.5A(1) that the Children's Court does not have jurisdiction to determine the fitness of a child accused to stand trial for a summary offence. Presumably the court would have to deal with the summary charge (if not withdrawn) as if the child had pleaded not guilty but it is hard to see how a trial could proceed in a way that is procedurally fair to a child who is indeed unfit to stand trial.

D CONSTITUTION OF CHILDREN'S COURT|CMIA-s.38I(1)

If the question of the fitness of a child to stand trial arises or the defence of mental impairment is raised in a proceeding in the Children's Court, the court must be constituted as follows–

(a) if the offence is punishable by level 2 imprisonment (25 years maximum), by the President or, if the President is unavailable, a magistrate nominated by the President [What happens if mental impairment is first raised during an ordinary hearing before a magistrate?]; or
(b) in any other case, by the President or a magistrate.

E WHEN IS A CHILD UNFIT TO BE TRIED?|CMIA-s.38K

Section 38K(1) of the CMIA provides that a child is unfit to stand trial for an indictable offence if, because the child's mental processes are disordered or impaired, the child is or, at some time during the hearing in the Children's Court, will be–

(a) unable to understand the nature of the charge; or
(b) unable to enter a plea to the charge; or
(c) unable to understand the nature of the hearing (namely that it is an enquiry as to whether the child committed the offence); or
(d) unable to follow the course of the hearing; or
(e) unable to understand the substantial effect of any evidence that may be given in support of the prosecution; or
(f) unable to give instructions to his or her legal practitioner.

A child is not unfit to stand trial only because he or she is suffering from memory loss: s.38K(2).

Section 38K is drafted in similar terms to s.6 (applicable to adult accused) and to the former common law principles set out in the decision of Smith J in *R v Presser* [1958] VR 45 at 48.

F PRESUMPTIONS, STANDARD OF PROOF ETC RE FITNESS|CMIA-s.38L

Section 38L of the CMIA provides–

(1) A child is presumed to be fit to stand trial.
(2) The presumption is rebutted only if it is established on an investigation under this Division [as to which see topic **H** below] that the child is unfit to stand trial.
(3) The question of a child's fitness to stand trial is a question of fact to be determined on the balance of probabilities.
(4) If the question of a child's fitness to stand trial is raised by the prosecution or the defence, the party raising it bears the onus of rebutting the presumption of fitness.
(5) If the question is raised by the Children's Court, the prosecution has carriage of the matter, but no party bears any onus of proof in relation to it.
(6) If the defence intends to raise the question of a child's fitness to stand trial, the defence must give reasonable notice to the prosecution.

G QUESTION OF FITNESS TO STAND TRIAL OR MENTAL IMPAIRMENT ARISING IN A COMMITTAL PROCEEDING|CMIA-ss.38M, 38ZC

If the question of a child's fitness to stand trial arises in a committal hearing for an indictable offence-

(a) the committal proceeding must be completed in accordance with Chapter 4 of the ***Criminal Procedure Act 2009***; and
(b) the child must not be discharged only because the question has been raised; and
(c) if the child is committed for trial, the question must be reserved for consideration by the trial judge.

A child must not be discharged only because the defence of mental impairment has been raised.

H INVESTIGATION OF QUESTION OF FITNESS TO STAND TRIAL|CMIA-ss.38N, 38O

If it appears to the Children's Court at any time after a charge-sheet has been filed against a child that there is a real and substantial question as to the fitness of the child to stand trial, s.38N(1) requires the court to reserve that question for investigation. If a hearing has been commenced and it then appears to the court that there is a real and substantial question as to the fitness of the child to stand trial, s.38N(2) requires the court to adjourn or discontinue the hearing and proceed with an investigation into the question. The investigation must be completed as soon as possible after the question is reserved and in any event within 3 months: s.38O.

The question of fitness may be raised more than once in the same proceeding: s.38N(3).

I ORDERS PENDING INVESTIGATION INTO FITNESS TO STAND TRIAL|CMIA-s.38P

BAIL, REMAND ETC Pending an investigation into fitness, s.38P empowers the Children's Court–

(a) to bail the child;
(b) to remand the child in custody if no practical alternative [CMIA/s.38J(1) but note that a s.47 certificate is required per CMIA/s.38J(2) – see topic **P** below]; and/or
(d) to make any other order the court thinks appropriate.

CHILDREN'S COURT CLINIC ETC Section 38P(c) also empowers the court to order–

(i) that the child undergo an examination by a registered medical practitioner or registered psychologist [this will usually be via the Children's Court Clinic]; and
(ii) that the results of the examination be put before the court.

J PROCEDURE ON INVESTIGATION INTO FITNESS TO STAND TRIAL|CMIA-s.38Q

It is clear from s.38P(c) & s.38Q(1)(b) that the investigation procedure is not purely adversarial but gives the court options to make its own enquiry. Section 38Q(1) provides that on an investigation–

(a) the court must hear any relevant evidence and submissions put to the court by the prosecution or the defence; and
(b) if of the opinion that it is in the interests of justice to do so, the court may–
  (i) call evidence on its own initiative; and
  (ii) require the child to undergo an examination by a registered medical practitioner or registered psychologist [usually via the Children's Court Clinic]; and
  (iii) require the results of any such examination to be put before the court.

For a discussion of the similar provision in relation to an adult accused [s.11], see the judgment of Lasry AJA in *R v Langley* (2008) 19 VR 90; [2008] VSCA 81.

Nothing in s.38Q(1) prevents the application of Part 3.10 of the ***Evidence Act 2008*** ["Privileges"] to an investigation, for the purposes of which the investigation is taken to be a criminal proceeding.

If the Children's Court finds that the child is presently unfit to stand trial, that is not the end of the investigation. In that event, the court must–

- determine on the balance of probabilities whether or not the child is likely to become fit to stand trial within the next 6 months [s.38Q(3)(a)]; and
- if so, specify the period by the end of which the child is likely to be fit to stand trial [s.38Q(3)(b)].

For these purposes, the court may call further evidence on its own initiative.

K WHAT HAPPENS AFTER AN INVESTIGATION INTO FITNESS?|CMIA-s.38R, 38S, 38T

IF CHILD FIT TO STAND TRIAL NOW|CMIA-s.38R(1) The summary hearing must be commenced or resumed in accordance with usual criminal procedures as soon as possible and in any event within 3 months.

IF CHILD NOT FIT TO STAND TRIAL NOW BUT LIKELY TO BECOME FIT WITHIN 6 MONTHS

- **ADJOURN|CMIA-s.38R(2)** The court must adjourn the investigation for the period specified under s.38Q(3)(b) and may–
  (a) bail the child; or
  (b) remand the child in custody if no practical alternative [CMIA/s.38J(1) but note that a s.47 certificate is required per CMIA/s.38J(2) – see topic **P** below]; or
  (c) make any other order the court thinks appropriate.
- **ABRIDGE|CMIA-s.38S** At any time during this period of adjournment the child or the prosecutor may apply for an abridgment of the adjournment period or – if of opinion that the child will not become fit to stand trial by the end of 6 months after the first finding of unfitness – for an order that the court proceed to hold a special hearing. The application must be accompanied by a report on the mental condition of the child by a registered medical practitioner or registered psychologist. On hearing the application the court must-
  (a) dismiss the application; or
  (b) if satisfied that the child has become fit to stand trial, order that the hearing commence or resume as soon as possible; or
  (c) if satisfied that the child will not become fit to stand trial by the end of the period of 6 months after the first finding of unfitness, order that the court hold a special hearing [see topic **L** below] as soon as possible and in any event within 3 months.

- **AT END OF ADJOURNMENT|CMIA-s.38T** The child is presumed to be fit to stand trial unless a real and substantial question of fitness is raised again. If it is so raised, the court must hold a special hearing as soon as possible and in any event within 3 months and may bail or remand the child or make any other appropriate order for the safe custody of the child.

IF CHILD NOT FIT TO STAND TRIAL AND NOT LIKELY TO BECOME FIT WITHIN 6 MONTHS |CMIA-s.38R(3) The court must hold a special hearing as soon as possible and in any event within 3 months and may bail/remand or make any other appropriate order for the safe custody of the child.

L SPECIAL HEARING WHEN CHILD FOUND UNFIT TO BE TRIED|CMIA-ss.38V-38Z

PURPOSE|CMIA-s.38V The purpose of a special hearing is to determine whether, on the evidence available, the child–

(a) is not guilty of the offence; or
(b) is not guilty of the offence because of mental impairment [see topic **M** below]; or
(c) committed the offence charged or an offence available as an alternative.

PROCEDURE|CMIA-s.38W A special hearing is to be conducted as nearly as possible as if it were a hearing and determination of a charge for an offence. This means that in contrast with an investigation into fitness to stand trial, a special hearing is essentially an adversarial process. At a special hearing–

(a) the child must be taken to have pleaded not guilty to the offence; and
(b) the child may raise any defence that could be raised if the special hearing were a hearing of the charge, including the defence of mental impairment; and
(c) the rules of evidence apply; and
(d) subject to s.524 of the CYFA the child must be legally represented; and
(e) any alternative finding that would be available if the special hearing were a hearing and determination of the charge is available to the court.

FINDINGS|CMIA-s.38X The following findings are available at a special hearing–

(a) not guilty of the offence charged (i.e. not guilty on the merits);
(b) not guilty of the offence because of mental impairment;
(c) if satisfied beyond reasonable doubt, that the child committed the offence charged or an offence available as an alternative.

EFFECT OF FINDING THAT CHILD COMMITTED THE OFFENCE OR AN ALTERNATIVE|CMIA-ss.38Y, 38Z

✪ [s.38Y(3)] This is a qualified finding of guilt and a bar to further prosecution in respect of the same circumstances but does not constitute a basis in law for any conviction for the offence.

✪ [s.38Y(4)] If the court makes a finding under s.38X(1)(c), the court must–

(a) declare that the child is liable to supervision under Div.5 ➔ this does not end the process because the court cannot immediately make a supervision order [see topic **N** below]; or
(b) order the child to be released unconditionally ➔ this ends the process.

- **BAR ON DECLARING A CHILD LIABLE TO SUPERVISION|CMIA-s.38Y(5)** The court must not declare a child liable to supervision unless it considers the declaration is necessary in all the circumstances including–
  (a) whether adequate supervision is available in the community; and
  (b) whether and to what extent the child has complied with community supervision; and
  (c) whether a declaration is required for the protection of the community.

- **BAR ON ORDERING A CHILD TO BE RELEASED UNCONDITIONALLY|CMIA-s.38Y(6)** The court must not order a child to be released unconditionally unless satisfied that, if necessary, the child is receiving appropriate treatment or support for his/her mental health or disability.

✪ [s.38Z] Following the making of a declaration that a child is liable to supervision and pending the making of a supervision order, the court may bail or remand the child or make any other appropriate order [see also topic **P** below].

M DEFENCE OF MENTAL IMPAIRMENT|CMIA-ss.5A, 38ZA-38ZD

ELEMENTS OF THE DEFENCE|CMIA-s.38ZA(1) The defence is established for a child charged with an offence [not limited to an indictable offence] if, at the time of engaging in conduct constituting the offence, the child was suffering from a mental impairment that had the effect that–

(a) he or she did not know the nature and quality of the conduct; or
(b) he or she did not know that the conduct was wrong (that is, he or she could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong).

This definition is in identical terms to s.20 which defines mental impairment for an adult even though developmentally a child is not just a small adult.

In *R v Fitchett* [2009] VSCA 150 at [14] the Court of Appeal noted that ss.20 & 21 of the CMIA reflected the longstanding common law position with respect to the defence of insanity under the McNaughton Rules as they have been understood in Australia following the interpretation adopted by Dixon J in *R v Porter* (1933) 55 CLR 182. See also *R v Falconer* (1990) 171 CLR 30*; R v Sebalj* [2003] VSC 181 at [14]; *R v R* [2003] VSC 187; *R v Gemmill* [2004] VSCA 72; *R v Martin (No.1)* [2005] VSC 518; *DPP v Taleski* [2007] VSC 183.

PRESUMPTIONS, STANDARD OF PROOF ETC|CMIA-s.38ZB, 38ZC(1)

- A child is presumed not to have been suffering from a mental impairment until the contrary is proved.
- The question of mental impairment may be raised at any time during a hearing by the defence or, with the leave of the court, by the prosecution. The CMIA does not envisage the issue being raised by the court on its own motion [cf. fitness to stand trial – see topic **F** above].
- The party raising the defence bears the onus of rebutting the presumption.
- If the defence intends to raise the question of mental impairment, the defence must give reasonable notice to the prosecution.
- The question of whether a child was suffering from a requisite mental impairment is a question of fact to be determined on the balance of probabilities.

EFFECT OF ESTABLISHING THE DEFENCE OF MENTAL IMPAIRMENT|CMIA-s.38ZA(2), 38ZD

✪ **FINDING|CMIA-s.38ZA(2)** If the defence of mental impairment is established, the child must be found not guilty by reason of mental impairment. ➔ However, this does not immediately end the process in every instance.

✪ **CONSEQUENCE OF FINDING IF SUMMARY OFFENCE|CMIA-s.5A(3)** The court must discharge the child.

✪ **CONSEQUENCE OF FINDING IF INDICTABLE OFFENCE|CMIA-s.38ZD(1)** If a child is found not guilty because of mental impairment of an indictable offence heard and determined summarily in the Children's Court, the court must–

(a) declare that the child is liable to supervision under Div.5 ➔ this does not end the process because the court cannot immediately make a supervision order [see topic **N** below]; or
(b) order the child to be released unconditionally ➔ this ends the process.

- **BAR ON DECLARING A CHILD LIABLE TO SUPERVISION|CMIA-s.38ZD(2)** [Same wording as CMIA-s.38Y(5)] The court must not declare a child liable to supervision unless it considers the declaration is necessary in all the circumstances including–
  (a) whether adequate supervision is available in the community; and
  (b) whether and to what extent the child has complied with community supervision; and
  (c) whether a declaration is required for the protection of the community.

- **BAR ON ORDERING A CHILD TO BE RELEASED UNCONDITIONALLY|CMIA-s.38ZD(3)** [Same wording as CMIA-s.38Y(6)] The court must not order a child to be released unconditionally unless satisfied that, if necessary, the child is receiving appropriate treatment or support for his/her mental health or disability.

N DISPOSITION OF CHILD DECLARED TO BE LIABLE TO SUPERVISION|CMIA-Div.5

SUPERVISION ORDER|CMIA-s.38ZH If the court declares that a child is liable to supervision under Div.5, the court must make a supervision order in respect of the child. The purpose of the supervision order is to ensure that the child receives treatment, support, guidance and assistance for his/her mental impairment or other condition or disability. There are two types of supervision orders–

✪ **NON-CUSTODIAL SUPERVISION ORDER|CMIA-ss.38ZH(5)(b)** This order releases the child on conditions decided by the court and specified in the order.

✪ **CUSTODIAL SUPERVISION ORDER|CMIA-ss.38ZH(3), (5)(a) + (7)** This order – which commits the child to custody – has an additional purpose of protecting the child or the community while the child receives the requisite treatment, support, guidance and assistance. It cannot be made unless the court finds there is no practicable alternative and the order is required for the protection of the child or the community. The court has no power to include conditions on a custodial supervision order, these being determined administratively within the custodial setting.

REPORT & CERTIFICATE A PRE-CONDITION TO MAKING A SUPERVISION ORDER|CMIA-s.38ZH(6)

The court must not make a supervision order of either type unless it has received–

(a) a report under Div.6 as to supervision [see topic **O** below]; and

(b) a certificate under s.47 stating that the facilities or services necessary for the supervision order are available [see topic **P** below].

It is expected that the report and certificate will be provided to the court as a single package.

DURATION OF SUPERVISION ORDER|CMIA-s.38ZH(4), 38ZI

- A supervision order is initially for a term not exceeding 6 months. ➔ However this does not end the process.
- The court must direct that the matter be brought back to court for review at the end of the period specified by the court [see topic **Q** below]. It appears that this direction for review must be given by the court even if the supervision order is due to expire on the review date. [This may be a consequence of parliamentary counsel adapting similar provisions relating to adults for whom supervision orders can only be made for an indefinite term.]
- The term of the supervision order may be extended more than once by a maximum of 6 months per extension. However, the total period of the order (including custodial and non-custodial supervision orders) may not exceed 12 months if child was aged 10-14 at the time the supervision order was made or 24 months if child or person was aged 15-21 at the time the supervision order was made.
- Within the bounds of the above regime, a child may be subject to a custodial supervision order only for as long as is required for the protection of the child or the community [s.38ZH(4)].

O REPORTS AS TO SUPERVISION & VICTIM IMPACT STATEMENTS|CMIA-Div.6

- [s.38ZR(1)] If a court declares that a child is liable to supervision it must, before making a supervision order, order that a report as to supervision be submitted in respect of the child. The court must adjourn the hearing to enable the report to be prepared and may bail or remand the child or make any other appropriate order for the safe custody of the child in the meantime.
- [s.38ZS] Depending on the needs of the child and the services that the child may need under a supervision order, a report is to be prepared by DOHS or Department of Health or jointly by both. The respective Departments have advised that if the child has a mental health issue the report request should be made to the Department of Health, if the child has an intellectual disability the request should be made to DOHS and if the child has both problems, the request should be made to both Departments. There is no power to request such a report from the Children's Court Clinic.
- [s.38ZT] The report must set out-
  (a) whether the child has a mental impairment or other condition or disability and, if so, specify the services available and appropriate for the child.
  (b) the services currently being made available to the child, whether or not by a government department, and the child's compliance with those services.
  (c) if the court so requests, the services that would be made available to the child if a custodial supervision order were to be made.
- [s.38ZU & 38ZV] Provisions as to filing of report with court and access to reports.
- Although ss.38ZR-38ZV of the CMIA are expressed to apply to reports ordered for supervision order hearings, the writer can see no reason why the same regime ought not apply to reports ordered for variation, revocation or review proceedings.
- [s.38ZW] Before a court makes a supervision order or varies or revokes a supervision order, a victim of the offence may make a victim impact statement to the court for the purpose of assisting the court in determining any conditions it may impose on the supervision order.

P CERTIFICATE OF AVAILABLE SERVICES|CMIA-s.47

- [s.47(1)(ab)] The court must request DOHS to provide a certificate of available services if it is considering–
  (i) imposing a supervision order on a child committing the child to custody in a YJC/YRC;or
  (ii) imposing a supervision order on a child providing for the child to receive services in a YJC/YRC or from a disability services provider or from DOHS; or
  (iii) that a child be placed in custody in a YJC/YRC [this means on remand].
- [s.47(1A)(ab)] The court must request the Department of Health to provide a certificate of available services if it is considering imposing a supervision order on a child providing for the child to receive services from a mental health service provider.

- [ss.47(2) + 47(3)] The certificate must state whether there are facilities or services available for the custody, care or treatment of the person and if there are outline them. If there are not, the certificate may contain any other options that the certificate provider considers appropriate for the court to consider in making the proposed order.
- [ss.47(4) + 47(5)] The certificate must be provided to the court within 7 days after receiving the request or within such longer period as the court allows. The court may require *viva voce* evidence from the provider or a further certificate to clarify or expand on the original certificate. [When the Court is intending to remand the child (see topics **J** & **K** above), the Court will need to have some a s.47 certificate provided immediately. We have been advised this will simply state that there is a remand bed available. What happens if there is not has not been explained.]

Q VARIATION, REVOCATION, REVIEW OF SUPERVISION ORDER|CMIA-ss.38ZN-38ZQ

✪ **APPLICATION TO VARY OR REVOKE SUPERVISION ORDER|CMIA-s.38ZN** An application to–

- vary a custodial supervision order [note there is no application to revoke]; or
- vary or revoke a non-custodial supervision order–

may be made by–

(a) the child [the court may order that a subsequent application by the child cannot be made until the next review];
(b) a person having the custody, care, control or supervision of the child [this clearly means pursuant to the CMIA which would exclude a parent];
(c) the Chief Commissioner of Police.

✪ **COURT'S POWERS ON APPLICATION OR REVIEW|CMIA-ss.38ZO, 38ZP** The court has the same powers on an application to vary as it has on a review at the end of a period of a supervision order [as to which see topic **N** above]. However, the powers are different depending on whether the supervision order is custodial or non-custodial.

- **POWERS ON APPLICATION TO VARY OR REVIEW A CUSTODIAL SUPERVISION ORDER |CMIA s.38ZO**

  [ss.38ZO(1) + 38ZO(2)] The court must–
  (a) confirm the order; or
  (b) vary the place of custody; or
  (c) vary the order to a non-custodial supervision order but only if satisfied that the safety of the child or members of the public will not be seriously endangered as a result of the release of the child on a non-custodial supervision order.

  Despite ss.38ZO(1) & 38ZO(2) which seems to cover the field, s.38ZO(3) provides: "Unless the Children's Court **revokes** the order, the court may direct that the matter be brought back to the court for further review at the end of the period not exceeding 6 months specified by the court." Hence it may be that there is an implied power to revoke in s.38ZO – that is certainly suggested by s.38ZW – or perhaps "revoke" should be read as "fails to extend". We have been advised that this is "an anomaly that will have to be fixed".

  There is no power in s.38ZO to vary the conditions of a custodial supervision order [cf. s.38ZP(1)(b) for a non-custodial supervision order]. This is because the court has no power to include conditions on a custodial supervision order, these being determined administratively within the custodial setting.

- **POWERS ON APPLICATION TO VARY, REVOKE OR REVIEW A NON-CUSTODIAL SUPERVISION ORDER|CMIA-s.38ZP**

  The court must–
  (a) confirm the order; or
  (b) vary the conditions of the order; or
  (c) vary the order to a custodial supervision order; or
  (d) revoke the order.

  Unless the court revokes the order, it may direct that the matter be brought back to the court for further review at the end of the period not exceeding 6 months specified by the court.

- **TRANSFER OF SUPERVISION ORDER FOR REVIEW BY COUNTY COURT|CMIA-s.38ZQ**

  The Children's Court may [not must] order that a supervision order made by the court be transferred to the County Court for review if the subject of the order is or will be of above the age of 19 years at the date specified by the Children's Court for review of the order. On review, the County Court may exercise all the powers of the Children's Court.

R NON-COMPLIANCE WITH NON-CUSTODIAL SUPERVISION ORDER, ARREST OF CHILD|CMIA-ss.38ZK-38ZM

- [s.38ZK] The supervisor of the child under a non-custodial supervision order, DOHS or Department of Health may apply to the court for a variation if it appears the child has failed to comply with the order. The court may order a warrant to arrest be issued if the child does not attend the hearing of the application. If satisfied of non-compliance by evidence on oath, whether orally or by affidavit, the court must–
  (a) confirm the order; or
  (b) vary the conditions of the order; or
  (c) vary the order to a custodial supervision order.
- [s.38ZL] A child subject to a non-custodial supervision order may be apprehended without warrant by the supervisor, a police officer, an ambulance officer or a prescribed person if the apprehender reasonably believes that–
  (a) the child has failed to comply with the order; and
  (b) the safety of the child or members of the public will be seriously endangered if the child is not apprehended.
- [s.38ZM] The supervisor of the child under a non-custodial supervision order, DOHS or Department of Health may apply to the Children's Court for a warrant to arrest the child if it appears that the child–
  (a) has failed to comply with the order; and
  (b) is no longer in Victoria.
  If the court is satisfied by evidence on oath, whether orally or by affidavit, of the matters in ss.38ZM(1)(a) & (b), the court may issue a warrant to arrest the child.
- A child apprehended under ss.38ZL or s.38M must be released from detention within 48 hours unless an application is make under s.38K(1) for variation of the child's supervision order. The court must hear any such application as soon as possible.
- There are no powers under the CMIA to deal with non-compliance with a custodial supervision order. As the CMIA does not allow the court to attach conditions to a custodial supervision order, the only way a child can fail to comply is to abscond. The offences contained in Part 6.2 of the *CYFA* are applicable in the same way as they apply to any person lawful detained in a YJC/YRC.

S AGE JURISDICTION|CMIA-s.38ZG

Except when a review is transferred to the County Court under s.38ZQ, provisions relating to the making, variation, revocation, breach, review or extension of supervision orders are heard in the Children's Court even if the subject of the order is no longer a child, provided he or she was a child when the proceeding for the offence was commenced in the Children's Court.

T PRINCIPLES ON WHICH COURT IS TO ACT|CMIA-s.39

In deciding whether to make, vary or revoke a supervision order or to remand a child in custody, 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.

U MATTERS TO WHICH COURT IS TO HAVE REGARD|CMIA-s.40(1)

In deciding whether or not to make, vary or revoke a supervision order, the court must have regard to–

(a) the nature of the child's mental impairment or other condition or disability; and
(b) the relationship between the impairment, condition or disability and the offending conduct; and
(c) whether the child is, or would if released be, likely to endanger himself/herself, another person or other people generally because of his/her mental impairment; and
(d) the need to protect people from such danger; and
(e) whether there are adequate resources available for the treatment and support of the person in the community; and
(f) any other matters the court thinks relevant.

V APPEALS|CMIA-Part 5A

The following provisions provide a right of appeal to the County Court or the Supreme Court if the Children's Court was constituted by the President:

- [s.38U] Appeal by child against a finding of unfitness to stand trial
- [s.38ZE] Appeal by child against finding of not guilty because of mental impairment
- [s.38ZF] Appeal by DPP against an order for unconditional release under s.38ZD(1)(b)
- [s.38ZJ] Appeal by child, DPP, A-G, DOHS or DH against supervision order