# Victoria Legal Aid appeal clarifies law and frees intellectually impaired man from indefinite prison order

## Case summary – Richards (a Pseudonym) v The Queen (No 2) [2017] VSCA 174

In June 2017 a collaboration of lawyers from Victoria Legal Aid (VLA) won a significant victory in an appeal under the *Crimes (Mental Impairment and Unfitness to be Tried) 1997* (CMIA). The appeal was not only life changing for the individual client, who had an indefinite custodial order reversed, but it also significantly advanced the law in relation to how the courts deal with persons found unfit to be tried.

## The facts of the case

The case of [Richards (a Pseudonym) v The Queen (No 2) [2017] VSCA 174](http://www.austlii.edu.au/au/cases/vic/VSCA/2017/174.html) was a successful appeal against an indefinite custodial supervision order under the CMIA. Mr ‘Richards’ was an elderly man with multiple physical and mental ailments, including an intellectual impairment, who had been found unfit to be tried for historical offences. Although Mr Richards had been found unfit to be tried, for a variety of reasons neither the Department of Health and Human Services (DHHS) nor Forensicare could identify any services or treatment options that would assist his condition.

Despite Mr Richards being a low risk to the community, the judge at first-instance concluded (erroneously) that because DHHS and Forensicare were not able to identify treatment options, there was no ‘supervisor’ available for Mr Richards in the community. The judge therefore concluded that the only option available was a custodial supervision order in prison.

The custodial supervision order under the CMIA is an indefinite order, with a nominal review period of 20 years, which effectively meant that Mr Richards was likely to spend the remainder of his life in prison, with little prospect of review. Such orders are intended to be supervisory, not punitive, despite the custodial setting. The act requires restrictions on a person’s liberty to be kept to the minimum consistent with the safety of the community. In Mr Richard’s case, through a misinterpretation of the CMIA, the first-instance judge had misconstrued his powers, failing to take into account the wide discretion he had to release Mr Richards on an appropriately structured non-custodial order. This resulted in Mr Richard’s unlawful detention in prison for a period of almost two years.

VLA lawyers, who had not acted at first-instance, came across Mr Richards in prison while researching for a different case. They were alarmed at the error which had been made in his case, resulting in his indefinite detention.

On appeal, the Crown conceded there had been an error in the interpretation of the CMIA, and the Court of Appeal allowed the appeal and ordered that Mr Richards be placed on a non-custodial order in the community. This allowed Mr Richards to return to his specialist residential aged-care facility.

## Legal significance of this decision

Three main points of legal significance resulted from this litigation:

* The Court of Appeal held that a non-custodial supervision order could still be made in circumstances were no treatment was available from DHHS or Forensicare ([32]–[37]). The court accepted the parties’ submissions that the proper construction of s. 26 of the CMIA was broad, and empowered the court to release the person on any conditions which were consistent with the statutory purpose of such an order ([25]–[31]).
* The Court of Appeal further held that the meaning of ‘supervision’ under the CMIA was not necessarily limited to supervision by only DHHS or Forensicare ([38], [57]–[59]). The court accepted the secretary’s submission that the CMIA does not require the court to specifically identify a person as the ‘supervisor’ of a non-custodial supervision order, although it could do so if appropriate ([57]–[58]). In this case, the court decided that the Director of Public Prosecutions was the most appropriate person to ‘supervise’ Mr Richards on his non-custodial order.
* A further point of law developed by the litigation was in relation to the power of the Court of Appeal to grant bail during CMIA appeals. The case of [Richards (a Pseudonym) v The Queen [2017] VSCA 57 (No 1)](http://www.austlii.edu.au/au/cases/vic/VSCA/2017/57.html) clarified that the Court of Appeal had inherent power to grant bail to a person who was appealing a CMIA custodial supervision order.

This decision has expanded the range of options for people made liable to supervision under the CMIA. Courts considering such orders can now be assured that there is a wide discretion to construct appropriate therapeutic or supervisory conditions as part of a non-custodial orders, not limited to treatment by DHHS or Forensicare.

It will be of particular importance in cases of dual disability and acquired brain injury, where people have often struggled to fit into the service provision models of either the forensic mental health system or disability service provision.

## The legal team

The litigation team involved in this appeal was a collaboration between three practice areas within VLA: Civil Justice, VLA Chambers and Criminal Law Appeals and Strategic Litigation. The team members included:

* Sarah Westwood, Senior Lawyer, Civil Justice (instructing solicitor), assisted by Elenore Fritze and Gudrun Dewey
* Tim Marsh, Chief Counsel, VLA Chambers (lead counsel)
* Helen Spowart, Senior Public Defender, VLA Chambers (advice and written case)
* Rebekah Sleeth, Senior Public Defender, VLA Chambers (lead counsel, bail application)
* Raphael de Vietri, Senior Advocate, Appeals and Strategic Litigation (junior counsel).

## Questions?

This case summary has been prepared by Raph DeVietri, Senior Advocate, Appeals and Strategy team, Victoria Legal Aid. It is the author’s own interpretation of the court’s decision and may contain inaccuracies. It should be read in conjunction with the entire judgement when providing legal advice or making submissions. Read the judgement of [Richards (a Pseudonym) v The Queen (No 2) [2017] VSCA 174](http://www.austlii.edu.au/au/cases/vic/VSCA/2017/174.html).

You can email raphael.devietri@vla.vic.gov.au or contact VLA’s Appeals and Strategy team by email to Appellate\_Crime@vla.vic.gov.au or phone (03) 9269 0145, if you have any questions about this case.