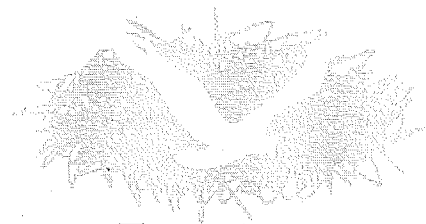


**SUBMISSION TO VICTORIAN LAW
REFORM COMMISSION –
REVIEW OF THE *GUARDIANSHIP
AND ADMINISTRATION ACT 1986 (VIC)***

MAY 2010

**THE ROLE OF GUARDIANS FOR
PERSONS SUPERVISED UNDER THE
*CRIMES (MENTAL IMPAIRMENT AND
UNFITNESS TO BE TRIED) ACT 1997
(VIC)***



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SUMMARY

This submission to the Victorian Law Reform Commission's review of the *Guardianship and Administration Act 1986* (Vic) (G&A Act) is made by the Victorian Institute of Forensic Mental Health, known as Forensicare. Forensicare is a statutory agency that is responsible for the provision of adult forensic mental health services in Victoria.

The submission focuses on a narrow aspect of the review's terms of reference outlined in the *Guardianship Information Paper* (Information Paper), namely the role of guardians in relation to persons affected by the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (CMIA). In particular, the submission outlines Forensicare's view regarding:

- (a) The role of guardians in judicial applications under the CMIA; and
- (b) The role of guardians in assisting persons detained under the CMIA during the period of their detention.

The views expressed in the submission reflect the formal position of Forensicare. It has been developed through consultation with senior clinicians and management of Forensicare. It is acknowledged that individual staff of Forensicare may hold different views.

INTRODUCTION

Forensicare is a statutory authority which was established by an amendment to the *Mental Health Act 1986* (Vic) in December 1997 and became operational in April 1998 (at the same time as the CMIA). Forensicare is governed by a ten member Council that is accountable to the Minister for Mental Health. Forensicare provides forensic mental health services to adults in Victoria – services that are required to meet the needs of mentally disordered offenders, the mental health and justice sectors and the community. Forensicare aims to meet these needs by providing clinical services, including the effective assessment, treatment and management of patients and clients in a secure hospital and the community, as well as undertaking research, training and professional education.

Forensicare is responsible for the management of all persons in Victoria who have committed a criminal offence but have been found not guilty by reason of mental impairment on the basis of a mental illness (as opposed to an intellectual disability) and have, subsequently, been placed on a supervision order, either custodial or non-custodial, under the CMIA. For the purpose of this submission, these persons will be collectively referred to as forensic patients.

Forensic patients who are on custodial supervision orders are detained in Thomas Embling Hospital, a 116-bed secure hospital with seven accommodation units covering acute, sub-acute, continuing care and rehabilitation, and including a separate women's unit. The Acute and Sub-Acute Care Programs are directed primarily towards involuntary patients from the prison system who are in need of psychiatric assessment and/or acute care and treatment, patients from the public mental health system who require specialised management and to forensic patients entering the

system. The Continuing Care Program is targeted to patients (predominantly forensic patients) who are assessed as requiring long-term care due to chronic symptomatology and/or behaviours that represent a risk to the community, as well as patients whose mental state has stabilised and who are assessed as ready to commence working towards community reintegration. Forensic patients have consistently comprised the single largest group of patients managed at Thomas Embling Hospital (58%) and are detained as inpatients for an average of 6-8 years, prior to beginning a slow, graduated program of leaves to the community.

Forensic patients on non-custodial supervision orders or those on custodial supervision orders who have been granted extended leave from Thomas Embling Hospital to reside in the community are managed on an out-patient basis by Forensicare's Community Forensic Mental Health Service. This service also provides assessment and multidisciplinary treatment services to high risk clients referred from the criminal justice system, Forensicare's inpatient facilities, mainstream mental health services, the courts and other agencies which have contact with mentally disordered offenders.

TERMS OF REFERENCE – RESPONSE

The Information Paper raises a broad range of issues regarding the operation of the G&A Act. This response will be limited to addressing those issues directly impacting on the clinical work of Forensicare and the interests of forensic patients.

The role of guardians in judicial proceedings under the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)

The CMIA applies to criminal trials where a person is unfit to plead or where they claim that they are not guilty by reason of mental impairment. Only the first of these circumstances relates to the mental capacity of the person at the time of their criminal trial. Where a person is found to be fit, but seeks to rely on a mental impairment defence, there is no reason to expect that a guardian should be required.

In fact, it is difficult to envisage a role for guardians in judicial proceedings under the CMIA overall. This is because, reflecting the vulnerability of the Act's target population and recognition of the need to ensure that an appropriate balance be struck between the protection of the community and the clinical needs of the mentally ill, the judicial process established by the CMIA contains a number of mechanisms designed to protect the interests of defendants in legal proceedings under the CMIA.

In particular, in determining the future treatment and management needs of defendants, the court is not bound by standard evidentiary rules and practices nor do any of the participating parties bear any onus of proof. Rather, the court is required to hold an open-ended, quasi-inquisitorial inquiry in the course of which it is entitled to inform itself of and consider any matter it deems relevant. Much of this information is drawn from independent expert psychiatric testimony regarding a defendant's psychiatric and psychological functioning. Additionally, persons the subject of CMIA proceedings are entitled to be legally represented in all CMIA matters (as occurs in the vast majority of such applications), thereby providing defendants with the opportunity to present any opposing evidence.

Finally, the CMIA establishes special proceedings to deal with persons found unfit to plead, in which defendants are taken to have pleaded not guilty and are entitled to raise any defence that could be raised in a standard criminal trial (s 16). It is also noted that the question of fitness to be tried (or fitness to plead as it is referred to under the CMIA) can be called into question at any stage of the proceeding by either the defence or the prosecution (s 22). Ultimately, any decision by the court regarding the future treatment and management needs of a defendant must reflect the CMIA's overriding principle that "restrictions on a person's freedom and personal autonomy should be kept to the minimum consistent with the safety of the community" (s 39).

Taken together, these judicial measures provide a number of layers of protection to advance the rights and interests of mentally ill offenders during the course of judicial proceedings under the CMIA. The appointment of a guardian to make decisions in relation to any such proceeding is, therefore, in Forensicare's submission, unnecessary and superfluous. Accordingly, Forensicare is in agreement with the decision of *In the Matter of R* (unreported, VCAT, Deputy President Sandra Davis, 13 October 1999) (see also *PL (Guardianship)* [2007] VCAT 2485) which held that there is no self-evident role for a guardian in legal proceedings under the CMIA.

However, as acknowledged by VCAT in *PL (Guardianship)* [2007] VCAT 2485, there is potential for advocates provided by the Office of the Public Advocate (OPA) to play an important role in assisting persons the subject of legal proceedings under the CMIA. That is, while the decision-making role of a guardian in CMIA proceedings is considered unnecessary, the provision of an advocate may be helpful in assisting forensic patients in the navigation of the legal process, including the attainment of legal representation and the communication of instructions to the legal representative.

It is noted, however, that for a person who has legal representation and has capacity to provide instructions to their lawyer, the role of "advocate" may be redundant and could potentially even create the potential for conflict or confusion in the advice and assistance provided in these two roles. However, the effectiveness of such legal representation relies on the ability of the lawyer to understand and overcome the particular challenges that can be involved in providing advice to and obtaining instructions from a person with a mental illness.

The role of guardians in assisting persons detained under the CMIA during the period of their detention

Persons detained under the CMIA as forensic patients may or may not have the requisite decision-making capacity to make those decisions necessary during their detention. In the event that they do not, an application for a guardian or administrator can be made under the G&A Act as is the case for any other patient under the *Mental Health Act* 1986. The majority of forensic patients detained at Thomas Embling Hospital do not have a guardian or administrator appointed in an ongoing capacity.

However, in practice the circumstances of forensic patients differ from other patients under the *Mental Health Act* 1986 in an important respect. The system for the treatment and management of forensic patients established by the CMIA involves, by definition, the involuntary detention of individuals, often for extended periods of time.

During the period of this detention, forensic patients are divested of considerable decision-making power. For example, section 17A of the *Mental Health Act 1986* (Vic) provides for the Authorised Psychiatrist of Forensicare to consent to treatment for a mental illness on behalf of a forensic patient, whilst section 85 allows the Authorised Psychiatrist to provide treatment for non-psychiatric medical complaints. Additionally, issues of access to the community and accommodation are determined by the Forensic Leave Panel (in relation to applications for leave from Thomas Embling Hospital by forensic patients on custodial supervision orders) and the courts (in relation to applications for extended leave to reside in the community whilst on a custodial supervision order and applications for the downgrading of supervisory status under the CMIA).

While the principle of least restriction and the best interests of the forensic patient underpin these decision-making points, the fact remains that the system established by the CMIA reposes in Forensicare a great deal of power in relation to the management of forensic patients. Furthermore, in contrast to the public mental health system, many forensic patients are subject to this decision-making power for a lengthy period of time.

This unique situation raises the potential for the appointment of guardians to provide an important check on the way in which the broader day-to-day treatment and management of forensic patients is undertaken (beyond the confines of the judicial process), ensuring that the interests and wishes of forensic patients are taken into account. Examples of instances where the independent oversight of a guardian may be useful include the timing of leave applications and applications for reduced CMIA supervision, and decisions regarding the appropriateness of accommodation placements on discharge (such as aged care residential services or continuing care units). Here, it is important to note that, while the decision to apply to the court for the next stage of release under the CMIA is theoretically made by the individual forensic patient, the timing of that decision is strongly driven by the views of the patient's treating team. These views may be informed by pessimistic beliefs regarding judicial prospects of an application's success, rather than being purely based on the rehabilitative progress of the applicant. The upshot for the forensic patients is the potential to be detained longer than is necessary to satisfy treatment and protection requirements.

Such benefits associated with the appointment of a guardian have been recognised by Forensicare in certain circumstances. However, attempts by Forensicare to seek a guardianship order in relation to forensic patients have generally been resisted by OPA on the basis that, in relation to involuntary patients under the *Mental Health Act 1986* (Vic), it is less restrictive for the authorised psychiatrist to act on their behalf. This position has been informed by OPA's broad interpretation of the definition of treatment under section 3 of the *Mental Health Act 1986* (Vic). In particular, OPA has advised Forensicare in the past that decisions related to accommodation placement on discharge from Thomas Embling Hospital fall within the boundaries of treatment. This interpretation raises some disquiet and places Forensicare in a difficult position in regards to the preservation of the therapeutic relationship, particularly where a forensic patient objects to the accommodation proposal. In such instances, a guardian may provide valuable independent oversight of the appropriateness of the proposal, benefitting both Forensicare and, ultimately, the court

when adjudging the issue. Here, the potential for the guardian to give evidence before the court may provide valuable judicial assistance and ensure that the interests of the forensic patient remain at the forefront of the decision-making process.

Conclusion

Forensicare welcomes the opportunity to provide input into this review and would be happy to discuss the issues covered in this submission in more detail with the review team at any time.