COMMUNITY AFFAIRS LEGISLATION COMMITTEE –

SOCIAL SERVICES LEGISLATION AMENDMENT BILL 2015

SUBMISSION BY THE VICTORIAN INSTITUTE OF FORENSIC MENTAL HEALTH

May 2015

Forensicare
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About Forensicare

Forensicare is Victoria's specialist forensic mental health service and provides mental health services in prisons, the community and at the Thomas Embling Hospital, a secure, 116 bed purpose built mental health facility. Forensicare also provides expert opinions to the Courts to assist with criminal disposition and sentencing and to the Office of Public Prosecutions in regard to fitness to plead and the defence of mental impairment, as well as undertaking research, training and professional education.

Forensicare is a statutory authority governed by a nine member Board that is accountable to Victoria's Minister for Mental Health. Forensicare is committed to providing recovery-orientated mental healthcare in which the principles of hope, social inclusion, personalised care and self-management are fundamental to practice.

One of Forensicare's most significant roles is the treatment and supervision of people found unfit to plead or not guilty by reason of mental impairment who are placed on supervision orders by the County and Supreme Courts in Victoria. A supervision order is an indefinite order that requires a person to be subject to conditions of supervision. These orders can be custodial – meaning that the person is detained in Thomas Embling Hospital as a forensic patient – or non-custodial – meaning that they reside in the community. The order requires the person to comply with treatment and the direction of Forensicare.

Forensic patients have consistently comprised the single largest group of patients managed at Thomas Embling Hospital (65%) and are detained as inpatients for an average of 6-8 years, before being granted extended leave to live permanently in the community. While in Hospital they undertake a graduated program of leaves to the community in preparation for discharge.

Under the proposed amendments to the *Social Security Act* contained in the *Social Services Legislation Amendment Bill* 2015, ("the Bill") most of the forensic patients at Thomas Embling Hospital would lose their social security payments and be without any access to income.

The views expressed in the submission reflect the formal position of Forensicare.

Submission Summary

Forensicare does not support the proposal to cease the payment of social security benefits to people who have been charged with a serious offence and who, due to a mental impairment, are in psychiatric confinement, including those who have been found unfit to stand trial or not guilty by reason of mental impairment by a Court. In our submission we will refer to these people as "*forensic patients*". It is our view that the effects of the Bill are contrary to the policy intentions underlying mental impairment legislation across the country and fly in the face of the mental health principles reflected in the system for the treatment, rehabilitation and community integration of those found not guilty by reason of mental impairment.

Removing income support for forensic patients is contrary to established principles of criminal responsibility which are fundamental to Australia's criminal justice system, and are reflected in the mental health legislation and criminal laws in each State. These principles have been reflected in social security legislation, which have generally enabled those who are found not guilty by reason of mental impairment to be eligible for income support in contrast to those convicted of a crime who are in prison.

A fundamental feature of the Bill is a distinction between serious offences and non-serious offences in determining eligibility for income support. The reality is that people found not guilty by reason of mental impairment are people who, *but for their illness*, would not have offended. The criminal justice system recognises this and diverts them from a criminal sentencing pathway to a treatment pathway in order to manage their illness and any consequent risk of reoffending. Their treatment and rehabilitation needs are related to the nature of their illness, not the seriousness of their offence.

The removal of all income support for forensic patients who are not in a 'period of integration' will leave this vulnerable group with no means to meet basic needs that are not provided by the facility and which are necessary in order to commence or continue a period of integration. Most particularly, it will significantly undermine the ability of forensic patients to obtain the accommodation they need in order to be granted leave and eventually be discharged from hospital to live in the community. The rehabilitation and leave system relies on gradual progress to ensure that recovery and risk are safely managed for the person and the community. Leave is granted in a graduated program, where the amount of leave granted increases as it is safe and appropriate to do so. Access to accommodation and increasing amounts of leave to reside at community based accommodation is critical to eventual discharge. More detail about the leave program and forensic system in Victoria is provided in section 6 of this Submission.

Under the proposals in the Bill, no income is available to a forensic patient until s/he has three nights per week of overnight leave. Without income, forensic patients will not be able to access the accommodation necessary to commence overnight leave as part of a leave program. The impact of this cut on our patients, their families, and our own budgets, is likely to be significant. This will slow down forensic patient progress through the Hospital and have a consequential impact on the capacity of the Hospital to continue to provide treatment to new forensic patients or patients transferred from prison.

This is not an issue of Federal/State cost shifting, it is an issue about the eligibility of *all* people with a mental illness to access the income support needed to support their recovery and lead contributing lives.

Forensic patients at Thomas Embling Hospital should not be put in a different position from long term patients in other mental health facilities in regard to their ability to access the income support necessary for their rehabilitation and return to the community.

It is particularly galling that the Commonwealth has decided to make this change without consulting with those directly affected to enable them to understand the likely impact on them and has taken no steps to communicate this decision to them so that they are aware of the change and able to take steps to prepare for it financially. Rather, it has been left to mental health services to communicate with patients, families and carers.

In the event that the proposed change is to proceed, Forensicare would ask that further consultation and consideration occur before finalising the circumstances in which a person in psychiatric confinement because of being charged with a serious offence is eligible for social security. The suggested definition of "period of integration" as six nights of overnight leave in a two week period is likely to present very significant impediments to discharge and leave for forensic patients in Victoria. In our State this is the maximum amount of leave available to forensic patients overnight and very few forensic patients access this level of leave.

1. PRINCIPLES OF CRIMINAL RESPONSIBILITY

A fundamental principle underlying the criminal justice system is that a criminal act has two components – a physical act (actus reus) and a mental intent (mens rea). In order to be found guilty of an offence, both components must be proven. In line with this principle, it has long been recognised in the common law that a person should not be held criminally responsible and punished for an offence if they are mentally ill at the time of their offending. This is the basis of the 'insanity defence', now termed 'mental impairment' which is established law in England and in all Australian jurisdictions. [1]

In the 1990's it was the Commonwealth which led a process of law reform to update and unify mental impairment legislation in all Australian jurisdictions with the underlying principle that the power to detain a person after a mental impairment verdict is based on an analogy with civil mental health commitment, not punishment.[2]

2. ELIGIBILITY OF FORENSIC PATIENTS TO SOCIAL SECURITY

The Explanatory Memorandum for the *Social Services Legislation Amendment Bill 2015* states that, prior to 2002, many people in psychiatric confinement because of criminal charges could not receive social security payments. The Explanatory Memorandum states that, therefore, the proposed amendments represent a return to the original policy intent that such people should not receive income support because the State is responsible for taking care of their needs, including funding their treatment and rehabilitation.

This is not the case. Prior to 2002 a significant number of forensic patients were being paid social security benefits whilst in psychiatric confinement. Accordingly, the Bill represents a change to established policy in this area, rather than a return to the original policy intention. A history of the relevant legislative provisions and their applicability to forensic patients is provided in Appendix Two.

3. THE IMPACT OF THE BILL ON RECOVERY AND REHABILITATION FOR FORENSIC PATIENTS

I just want to emphasise that people with mental health issues are a part of the community and that our lives matter. Not only that, but by denying people like me the chance to have a stable life, with stable housing and a reduction in poverty-related stress, you are also denying our kids and loved ones relief from those stresses. [3]

More detail about the framework for treatment of forensic patients in Victoria and their profile is contained in Section 6 and 7. There are currently 71 forensic patients at Thomas Embling Hospital on custodial supervision orders who receive income support. This income is vital in enabling these people to access the basic necessities of life and to engage in rehabilitation and eventual reintegration to the community. Access to income is also profound in its impact on dignity and autonomy of people with a mental illness and in providing them hope for a contributing life beyond their current psychiatric confinement. Ceasing income support for forensic patients who have not yet been granted the maximum amount of overnight leave available in hospital (three nights per week) will have a major

[1] See Victorian Law Reform Commission, Review of the *Crimes (Mental Impairment and Unfitness to be Tried) Act* 1997, Consultation Paper, June 2013, 19, quoting Janet Ruffles, The Management of Forensic Patients in Victoria: The More Things Change, The More They Remain the Same (PhD Thesis, Monash University, 2010) 4.

[2] Criminal Law Officers Committee of the Standing Committee of Attorneys-General , *Model Criminal Code Chapters 1 and 2 General Principles of Criminal Responsibility Report* (1992) 35. A more detailed explanation of the reform process is set out in Appendix One.

[3] Person with lived experience, Victoria, as quoted in Contributing lives, thriving communities. Report of the National Review of Mental Health Programmes and Services, Volume 1, Strategic Directions, Practical Solutions 1-2 years, 30 November 2014, 47.

impact and is contrary to recovery oriented mental health policy at both the State and Commonwealth levels.

Each year, an average of four forensic patients on custodial supervision orders are discharged to the community, to live independently with the treatment and support of Forensicare and mainstream mental health services. The discharge process is very gradual, with accommodation, training, employment and other community links being put in place while the person is in hospital to ensure a successful transition at the time of discharge. Access to income support is essential in establishing these links.

Forensic patients generally come from disadvantaged backgrounds, with low levels of formal education. However, this is not true for *all* patients. They come from all walks of life, with varying education. Many have worked, and some are again working part time as part of their recovery. Regardless of their backgrounds, all of those who are found not guilty of mental impairment have a serious mental illness. The majority of forensic patients have a diagnosis of schizophrenia. This is a serious, life-long disorder which can be profoundly disabling. A high level of treatment and support is needed in order for this group of people to successfully return to the community, in a way that is sustainable for the individual and safe for the community. In this section of our submission we outline the impact of the Bill on this rehabilitation and recovery pathway.

Access to basic necessities

The Statement of Compatibility with Human Rights for the *Social Services Legislation Amendment Bill 2015* is based on the assumption that people in psychiatric confinement are receiving '"benefits in kind' in lieu of a social security payment, in the form of food, clothing and housing provided by the state or territory psychiatric institution and therefore have their basic needs provided for". On the basis that the basic needs of people in psychiatric confinement are being met, the Memorandum concludes that the need for social security in the form of payments is negated.

However, this is not the case for forensic patients in Victoria. From the time of admission to Thomas Embling Hospital, income support provides patients with access to essential items such as clothing and toiletries. As patients progress through the rehabilitation programme, income support is utilised to access community facilities while on leave, transport, allied health services and transitional accommodation. In the 36 beds in our rehabilitation programs most patients utilise their pensions to buy food to cook for themselves each day as part of their rehabilitation.

The proposition that forensic patients should have their basic needs met through 'benefits in kind' from the State is concerning because it ignores the fundamental principles of respect, autonomy and empowerment that underpin the contemporary approach to mental health endorsed by the Commonwealth and the States. Access to social security benefits provides forensic patients an income that allows them to become independent and self supporting, both financially and psychologically. To have patients' clothing and other basic needs handed out 'in kind' by the psychiatric facility would be a retrograde step, a return to the paternalism of the old institutions and would undermine the self reliance and autonomy that is central to recovery philosophy.[4]

Access to housing and to the community

The most significant impact of the Bill is likely to be in relation to housing. Housing is essential to obtain access to overnight leave and income is essential to obtain access to housing. The structure of the proposal, with no entitlement to income support until a person has three nights per week of overnight leave, makes it impossible for forensic patients to obtain housing in order to be granted overnight leave. Without social security payments, patients will not be able to fund rental bonds, rent payments,

[4] A National Framework for Recovery-Oriented Mental Health Services: Policy and Theory, 2013, 22.

aged care costs, furniture, utility connection fees and other essentials. This will impede recovery and rehabilitation and progress through the Hospital.

Forensic patients who are currently maintaining housing in the community which they access on leave will no longer be able to fund this and will be left with no ability to keep their link to the community or overnight leave. Such accommodation generally takes years to obtain. Ageing forensic patients are much less likely to have supports in the community, but are more likely to have accommodation commitments which they would be at risk of losing, probably permanently. This is punitive and entrenches economic dependence and disadvantage. In a system of such gradual advancement, the loss of something so hard won as accommodation is demoralising and crushing of hope for eventual return to a contributing life in the community. Should the Bill proceed the impact will be that forensic patients will have to rely on Forensicare to provide grants or benefits to access the necessary supports, bonds and furniture necessary to establish accommodation. This will put them in a different position than every other mental health patient in the country.

Access to education, training and other rehabilitation

Given their educational backgrounds and the impact of their illness, together with their generally long periods in secure psychiatric facilities, the transition of forensic patients to independent community living is gradual. It is well established that those with a psychiatric disability are disadvantaged in accessing ongoing employment, but with appropriate interventions and flexible participation requirements they can be supported in ways that enable them to gain and maintain ongoing employment.[5] Many forensic patients at Thomas Embling Hospital access community based support, including education, training and employment services. Some of these services are unsubsidised and delivered at full cost to the participant. The loss of social security eligibility will also affect eligibility for any State funded training programs and return to work programs. This will significantly impact on the ability of forensic patients to return to employment and independence. Critically, patients will not be able to fund transport for community access.

Impact on families and carers

The Statement of Compatibility with Human Rights states that the current arrangements for social security adequately provide for partners and children of people in psychiatric confinement. However, this is based on an assumption that those in psychiatric confinement receive 'benefits in kind', with their basic needs being provided for by the relevant State or Territory government. As explained above, this is not the case in Victoria and it is likely that families and carers will be put in the position of having to subsidise a variety of expenses for patients, such as clothing, transport and community activities. In addition to this, a number of patients currently utilise part of the pension to support family members in the community.

Families of patients may feel pressured to provide accommodation despite the difficulties associated with this. Many families and carers are also primarily benefit-dependent and will have an additional burden of having to support their family member. It is unlikely they would qualify for any 'carers' benefit to compensate for this extra financial burden.

Children of forensic patients are also likely to suffer. Patients with children currently use their social security benefits to maintain relationships with their children through phone, writing or face to face contact in the community. Maintaining relationships is very important to the patient and to their children, who have been greatly disadvantaged by their life circumstances.

[5] A New System for Better Employment and Social Outcomes. Interim Report of the Reference Group on Welfare Reform to the Minister for Social Services. Full Report, June 2014, 47.

Impact on dignity, autonomy and recovery

The complete cessation of income support to forensic patients is stigmatising and undermines the dignity and humanity of this group of mental health consumers. Forensic patients are generally subject to long-term incarceration with limited rights. Having been detained as a result of offending related to their illness, they face a long and demanding path to recovery and rehabilitation. Unlike those convicted of a crime, they do not have a definite release date that they can work towards. Rather they have to be able to demonstrate to a court that they are well enough to return to the community to live independently. It is difficult for most members of the community to imagine this experience. Whilst Forensicare and families and carers provide support, it is the person themselves who must be able to take responsibility to rebuild their life following the event that resulted in their incarceration. Autonomy and empowerment are essential to this and access to independent income is essential to autonomy and empowerment.

The proposal ties eligibility for social security to being in a "period of integration". It appears that this will be defined as taking a certain amount of leave each fortnight. It is well known that recovery from serious mental illness is not a linear process, but one based on continual growth, occasional setbacks and learning from experience. This is demonstrated through the leave process for forensic patients. Leave does not generally progress in a step by step process without any relapses or setbacks. Relapses and setbacks help individuals and treating teams to better understand a person's recovery and rehabilitation needs.

A forensic patient who has access to six nights of leave each fortnight may not take exactly that amount of leave. It is common for the amount of leave taken to vary from week to week for reasons that are outside the control of the person themselves, such as their family's commitments from week to week. For these reasons, a tightly defined period of integration that does not recognise the non-linear process of mental health recovery is likely to result in an increased administrative burden on Centrelink in managing access to social security.

Impact on forensic patients discharged to the community

The Bill will also impact on those who have progressed through the Hospital system to live in the community. Under the Victorian framework (described below), if a patient is living in the community on extended leave (which may typically be two to three years) and they require re-hospitalisation because their mental illness relapses, they are readmitted to Thomas Embling Hospital. On occasion this also occurs for people who live in the community on a Non-custodial Supervision Order. The provisions in the Bill mean that when people were readmitted in these circumstances they would lose their eligibility for social security benefits. This would put them at risk of losing their accommodation and falling into debt.

4. INCOMPATIBILITY WITH OTHER COMMONWEALTH POLICY IN MENTAL HEALTH AND EMPLOYMENT SUPPORT

Cessation of income support for forensic patients is incompatible with the rehabilitation and recovery focus of current mental health policy at both State and Commonwealth levels. It threatens to undermine the progress of people with a mental illness and the work of mental health services and legal systems that support them to recover and go on to lead a contributing life. The National Mental Health Commission has called for a system that is 'underpinned by a strong focus on prevention, early intervention and support for recovery that is not just measured in terms of the absence of symptoms, but in the ability to lead a contributing life.' This means that the mental health system needs to provide

integrated, end-to-end support for individuals, regardless of when and where the system is accessed, to deliver better quality and outcomes which are demonstrably cost-effective'. [6]

Forensic patients, as people with serious mental illness and high support needs face significant obstacles in their recovery and the search for a contributing life. The particular challenges faced by forensic patients were recognised by the Commission in its *2013 Report Card* noting that 'the care of those under forensic orders is an area about which the Commission is highly concerned. It affects the human rights of individuals, as well as their access to appropriate and equitable treatment in forensic systems across Australia'.[7]

The Commission noted that research has documented the economic benefits of early intervention for forensic patients; that forensic patients have the right to treatment in the restrictive environment and to recovery supportive environments but that these are not universally assured. Whilst reconviction rates among forensic patients are reassuringly low, one of the key issues impacting forensic patients is inadequate 'step-down' and rehabilitative pathways, a problem likely to be exacerbated by the removal of social security payments.

> *The Commission knows of examples of contact with the criminal justice system and diversion schemes being an opportunity for people with a mental health problem to start on the path to a contributing life. All too often, however, this contact is not only damaging to their mental health but also to whole-of-life outcomes.*
>
> *People who experience mental health problems who are in contact with any part of the criminal justice system and their families and support people need approaches which support their mental health needs and improve personal outcomes, and which also reduce recidivism rates.*
>
> *The Commission finds that there are strong human rights, health and economic arguments to address these failings. It is in the community's interest for the criminal justice system to respond appropriately to mental health issues while a person is in corrections services, to prepare them to rejoin the community and to follow up with them on their release. The criminal justice system should not create or contribute to further mental health problems, and must provide opportunities for assessing and addressing mental health issues.*

A New System for Better Employment and Social Outcomes Review Report

The proposal is also incompatible with the recommendations made in the report of the review of Australia's welfare system, *A New System for Better Employment and Social Outcomes* which was released on 25 February 2015. The review's purpose has been to identify how to make Australia's welfare system fairer, more effective, coherent and sustainable and encourage people to work. The central theme of the Interim Report of the review – that Australia's income support system needs to have a stronger employment focus if it is to maximise employment and social outcomes, and to remain sustainable over the longer term – would seem to support the importance of providing financial support to forensic patients as a means to improving rehabilitative and community reintegration prospects.[8] This is apparent from the following findings of the Interim Report of the Review:

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[6] Contributing lives, thriving communities. Report of the National Review of Mental Health Programmes and Services, Volume 1, Strategic Directions, Practical Solutions 1-2 years, 30 November 2014, 47.

[7] http://www.mentalhealthcommission.gov.au/our-2013-report-card/feeling-safe,-stable-and-secure/in-focus.aspx#ForensicOrder

[8] A New System for Better Employment and Social Outcomes. Interim Report of the Reference Group on Welfare Reform to the Minister for Social Services. Full Report, June 2014.

- Continuing participation in employment and social activities can often be a positive experience for people with mental health conditions. Mental health professionals support a vocational rehabilitation approach that enables a person with mental health conditions to overcome barriers to employment.[9]
- The 'wrap around' model of service aims to achieve positive outcomes for people with mental health conditions. It works with the individual and family to develop plans for them to reintegrate into the community, building social supports and following education and employment pathways.[10]
- Gaining work can substantially improve outcomes for people with mental health conditions.[11]

The cessation of income support to forensic patients would be inconsistent with the objectives of the review as it will undermine their recovery and rehabilitation, increasing rather than reducing the barriers to their participation in employment. It will make it more difficult for them to access training and community based support and to become independent, contributing members of the broader community.

5. THE LIKELY IMPACT OF THIS PROPOSAL ON FORENSICARE'S OPERATIONS

Forensicare is a publicly funded mental health service responsible for the treatment and supervision of those who are subject to psychiatric confinement as a result of criminal offending (forensic patients). Forensic patients comprise the largest group of patients at Thomas Embling Hospital (currently 71 of the 116 patients). The number of forensic patients in Victoria has grown steadily from 24 when the hospital was opened in 2000. Forensic patients have an average length of stay of eight years at the hospital.

The cessation of income support to forensic patients will have an immediate budgetary impact on Forensicare as many necessities, activities and programs that forensic patients currently self fund out of their pensions will have to be met by Forensicare. Further, the inability of patients to fund community based accommodation will delay or prevent discharge, severely impeding admission of new forensic patients. Our current estimate of the financial impact for the Hospital is approximately $1.177 million per annum. This is calculated on the current 71 forensic patients all ceasing to receive their pensions and includes the extra costs associated with the 36 beds in our rehabilitation units where the patients currently pay for their own food and other items. This figure is based on the anticipated number of discharges on extended leave expected in the coming 12 months.

As Thomas Embling Hospital is the only facility in Victoria that provides mental health treatment to prisoners, the prison system will also be impacted. With 71 forensic patients, the hospital can currently only accommodate a maximum of 45 prisoner patients or patients requiring admission from other mental health services. The cessation of income support and consequent impact on discharge of forensic patients will further reduce capacity to admit and treat acutely unwell prisoners or patients from other mental health services.

6. THE FRAMEWORK FOR TREATMENT IN VICTORIA

The *Crimes (Mental Impairment and Unfitness to be Tried) Act* (the CMIA) was introduced in 1997 and sets out the law and procedure in Victoria regarding:

[9] *Ibid*, 91.
[10] *Ibid*, 91.
[11] *Ibid*, 104.

- the process and criteria for determining if a person is unfit to stand trial
- the process and criteria for the statutory defence of mental impairment
- the consequences of findings of unfitness to stand trial and of not guilty because of mental impairment
- the supervision and management of people found unfit to stand trial or not guilty because of mental impairment.

One of the main reforms introduced by the CMIA was the introduction of a choice of disposition options following a finding under the CMIA, including supervision orders which may be served in a custodial or a non-custodial setting. A custodial supervision order commits a person to custody in a designated mental health service as defined under the *Mental Health Act 2014* (in practice Thomas Embling Hospital) and makes them a forensic patient under the *Mental Health Act*. Supervision orders are indefinite and do not come to an end until revoked by the Court that made the order.

A non-custodial supervision order is an order for a person to live in the community, under the treatment of their local mental health service and the direction and supervision of Forensicare. These people do not generally reside in mental health services or residential care, although they may have an admission to their local mental health service under the *Mental Health Act 2014* from time to time. They generally reside in office of housing or private rental accommodation.

As the CMIA is based on the premise that no criminal responsibility flows from the offence, the purpose of a supervision order is not punishment, but rehabilitation. A supervision order diverts those found unfit to plead or not guilty by reason of mental impairment from the usual criminal trial process and the usual criminal sentencing pathway. Forensic patients (who are on a Custodial Supervision Order) have not been convicted and sentenced and should not be equated with prisoners. They are patients not prisoners and it is the Department of Health and Human Services, rather than correctional authorities who have governmental responsibility for their detention and supervision.

The CMIA framework is intended to provide a system of treatment and supervision that ensures safe rehabilitation and transition to the community through the graduated reduction of supervision with the oversight of the Court.

Thomas Embling Hospital, a purpose-built secure forensic mental health facility operated by Forensicare, is the only facility providing custodial supervision under the CMIA. Policies and procedures have been developed by Forensicare to support development of leave plans to safely and effectively provide rehabilitation in the least restrictive manner possible. A forensic patient at Thomas Embling Hospital accesses leave by applying to the independent Forensic Leave Panel (FLP) which considers and formally approves all leave outside the hospital. The FLP can grant unlimited leave between the hours of 6am and 9pm and a maximum of three overnight leaves each week. Access to leave and reintegration to the community is intended to be a gradual process which allows the person on the order to develop the strengths and skills necessary for independent community access and sustainable discharge from custody. It also allows clinical staff to assess, monitor and manage risk appropriately.

In the Hospital Forensicare works with forensic patients to engage them in treatment which addresses their mental health needs. This includes medication, but also broader work so that they understand their illness, symptoms and relapse indicators. A key aspect of our recovery oriented approach is engaging with the individual to identify their strengths and goals. We provide therapeutic programs which address occupation, daily living skills, recovery, drug and alcohol issues, and violence and offending issues. In all these aspects it is critical to identify individuals' goals and strengths, in a collaborative way.

A forensic patient on a custodial supervision order remains in custody in a mental health service until the Court orders that they can live in the community on 'extended leave'. The Court can only release a person on extended leave if satisfied that doing so will not result in a risk of serious endangerment to the person on the order or any member of the public. Extended leave can be suspended at any time by the Chief Psychiatrist of Victoria if the person presents a risk. A person on extended leave generally resides in office of housing or private rental accommodation, although some people reside in community care units in mental health services.

Once a person has been on extended leave for a minimum of 12 months, the Court can vary their custodial order to a non-custodial supervision order. Once again, the legal test for variation is risk based. A person on a non-custodial supervision order resides in the community, under the treatment of their local mental health service and the direction and supervision of Forensicare.

A person on extended leave is treated and supervised by Forensicare's Community Service (CFMHS). The treating psychiatrist from the hospital and from the CFMHS will be expected to provide the Court with opinions in regard to the risk the person will present in the event that the leave is granted. In order for these opinions to be provided and for appropriate community support to be put in place, a referral from the hospital to the Community Service is generally made about six months in advance of the anticipated extended leave application. On referral, the individual is allocated a case manager and psychiatrist to work in collaboration with the patient and the inpatient team to ready them for move to full-time community living. The case manager and CFMHS psychiatrist are then responsible for management upon granting of extended leave.

The availability of the different dispositional options – custodial and non-custodial, as well as the interim period of extended leave – reflects the gradual and staggered rehabilitative pathway that underpins the system of supervision established by the CMIA. In short, the CMIA envisages a pathway for release for a person subject to a supervision order, where a forensic patient receives increasing leave entitlements (from on-ground leave, both supervised and unsupervised, to off-ground leave, both supervised then unsupervised, including overnight leave and then extended leave), eventually 'graduates' to a non-custodial supervision order and is finally released following revocation of the order. This reflects 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' which must be applied by courts in making any decision under the CMIA.[12]

The gradual scheme of the CMIA was described by Kellam J as follows:

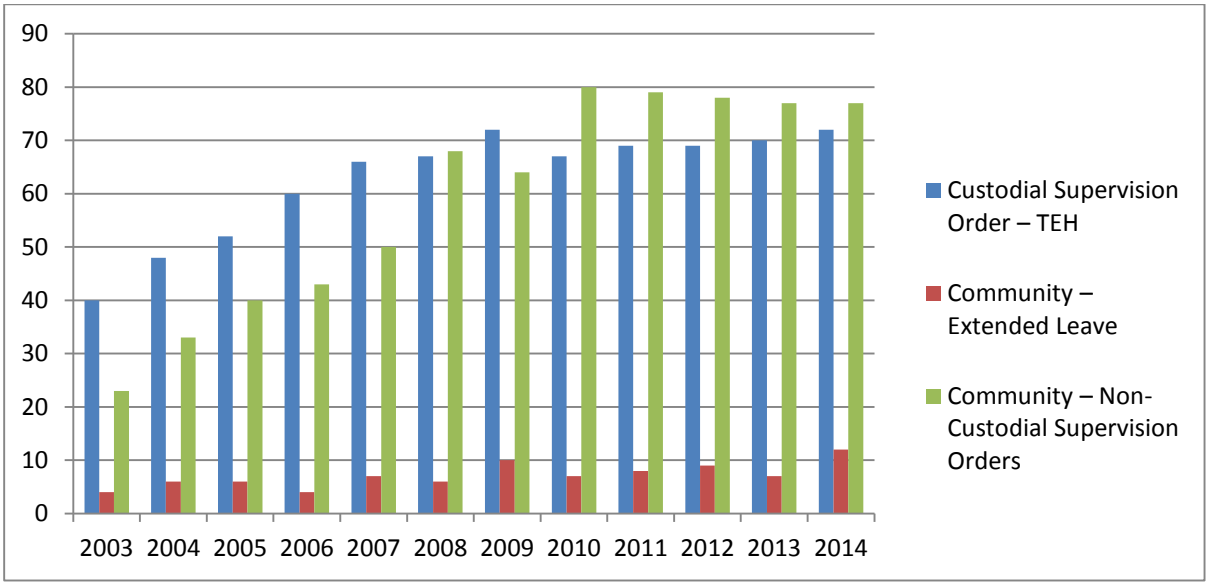
> *It is clear that the process envisaged by the Act is a "step by step" approach. The scheme makes it clear that a forensic patient should be granted progressively more and more leave under less and less supervision and restriction, ultimately leading to extended leave and then to permission to reside in the community if this is possible and consistent with the safety of the community and the patient in question. It is a progressive process and if the forensic patient demonstrates that he or she is well controlled, taking the necessary medication, and is not a danger to the himself or herself, or any other person and can relate and mix with members of the community, then he or she is well placed to take in taking the path to final reintegration into the community. Extended leave is part of the process, eventually leading to revocation of the supervision order in appropriate cases. However, each progressive step should not be taken until the forensic patient has demonstrated satisfactorily that he or she is coping with the then present regime and can confidently be expected to cope with a change in regime.*[13]

[12] *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 39.
[13] Re MB *[2005] VSCR 118 at [17].*

7. FORENSIC PATIENT PROFILE

There are currently 71 people on custodial supervision orders in Victoria. These people are forensic patients who are detained at Thomas Embling Hospital. So far this year, 44 forensic patients have used unescorted leave granted by the Forensic Leave Panel to attend community based training and programs or to spend time with their families in the community. Fourteen of these people have used overnight leave to spend time in self-funded community based accommodation.

The following graph shows the number of people on custodial supervision orders, non-custodial supervision orders and extended leave under the CMIA over the last 12 years.



	CSO Thomas Embling	CSO Extended Leave	NCSO
2003	40	4	23
2004	48	6	33
2005	52	6	40
2006	60	4	43
2007	66	7	50
2008	67	6	68
2009	72	10	64
2010	67	7	80
2011	69	8	79
2012	69	9	78
2013	70	7	77
2014	72	12	77

Table One – Number of people on custodial supervision orders, non-custodial supervision orders and extended leave under the CMIA over the last 12 years.

Forensicare has learned through research that most forensic patients come from disadvantaged backgrounds, with family histories involving mental illness. They have generally had involvement with psychiatric services, including at least one involuntary admission to a psychiatric facility before their offence was committed. However, we also know that forensic patients generally do not have a history of criminal convictions prior to the offence that leads to their forensic order. Rather, it is common for

this offence to be an isolated event, arising in the context of an episode of mental illness that is not recognised or treated, usually schizophrenia.

Those found not guilty by reason of mental impairment have generally committed a violent act against another person, most commonly a family member or close acquaintance. Of the current forensic patients in our Hospital 65% are detained following a homicide or attempted homicide. In 85% of these cases the victim was a family member or known to the patient, with 53% of victims being family members. Recovery for a person who has offended as a result of their illness is complex and involves overcoming not just the circumstances of illness but also the impact of their offence on themselves and their family.

However, Forensicare has also learned from our research and experience that forensic patients can recover and can lead contributing lives, given the right treatment and support. The motivation of the individual is central to their recovery, the belief that people can and do overcome the significant barriers they face. A number of our forensic patients who have access to leave participate in TAFE programs in the community. On return to the community a number work part time, or in a volunteer capacity.

An average of four forensic patients are discharged from the hospital each year to reside in the community on extended leave under Forensicare's supervision. Since the hospital opened in 2000, a total of 55 people have been discharged from the hospital to live independently in the community on extended leave under the supervision of Forensicare. Currently there are 11 forensic patients living in the community on extended leave. Since 2000 there have been no cases where a person on extended leave has committed a further offence.

APPENDIX ONE - Legislative History – Reform of Criminal and Mental Impairment Legislation

In June 1990, the Standing Committee of Attorneys-General placed the development of a uniform criminal code for Australian jurisdictions on its agenda.[14] In July 1990 the Review of Commonwealth Criminal Law (the Gibbs Committee) released its Report, *Principles of Criminal Responsibility and Other Matters*.

The Standing Committee of Attorneys-General established the Criminal Law Officers Committee, to work towards uniform principles of criminal responsibility, as these principles are the very foundations of the criminal justice system.

The December 1992 report of the Criminal Law Officers Committee reported on the circumstances in which there is no criminal responsibility. The report confirmed the longstanding principle that a person should not be held criminally responsible for an offence, if at the time of carrying out the conduct, the person was suffering from a mental impairment that had the effect that:

a) the person did not know the nature and quality of the conduct; or

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

c) the person was unable to control the conduct.[15]

The power to detain a person after a mental impairment verdict is based on an analogy with civil commitment, not punishment.[16]

The Criminal Law Officers Committee made recommendations for reform of the Governor's pleasure system to the Standing Committee of Attorneys-General. The Standing Committee referred the matter to Parliamentary Counsel's Committee for preparation of a model bill based on the Criminal Law Officers Committee recommendations.

In 1995 the Model Criminal Code Officers Committee, comprising officers from all Australian jurisdictions, was given a reference by the Standing Committee of Attorneys-General to prepare model legislation to reform the law in relation to the Governor's pleasure system and develop the Mental Impairment and Unfitness to be Tried (Criminal Proceedings) Model Bill.

The Community Development Committee of the Parliament of Victoria conducted an inquiry into the detention, management and release of persons detained at the Governor's pleasure in 1995 and commented on the Model Bill. The Committee made 89 recommendations, and as a result legislation to abolish the Governor's Pleasure system and establish a new system was introduced into Victoria's Parliament in the form of the *Crimes (Mental Impairment and Unfitness to be Tried) Bill*.

[14] Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapters 1 and 2 General Principles of Criminal Responsibility Report* (1992) i.
[15] *Ibid* 32.
[16] *Ibid* 35.

APPENDIX TWO - Legislative History – Payment of Social Security to Forensic Patients

Between 1 July 1947 and the 1 July 1991 social security payments were governed by the *Social Security Act 1947 (Cth)*, otherwise known as the *Social Security Consolidation Act*.

Prior to 25 June 1984, section 52 of the *Social Security Act 1947 (Cth)* enabled the Director-General of Social Security to suspend a pension or forfeit an instalment of a pension if the pensioner was imprisoned following a conviction for an offence. Under this provision, forensic patients were eligible to social security payment as they had not been *convicted* of an offence.

> 52.-(1.) If a pensioner is imprisoned, following upon his conviction for an offence, the Director-General may suspend his pension during the term of imprisonment or may forfeit any instalment of the pension falling due during the term of imprisonment.
> (2.) Where, in any such case, the pensioner has a wife or child dependent on him, the Director-General may authorize the payment of the whole or any portion of-
>
> *(a)* any instalment of the pension which would have been payable to the pensioner if his pension had not been suspended; or
>
> *(b)* any instalment of the pension so forfeited, as the case may be, to his wife or child or to some other person approved by the Director-General for the benefit of the wife or child.

Section 52 was repealed by section 57 of the *Social Security and Repatriation Legislation Amendment Act 1984* and a new section 135THA inserted into the *Social Security Act 1947*. This amendment commenced on 25 June 1984. The new section extended the operation of the previous section, in that it also applied to *convicted* persons lawfully held in a place other than a prison due to the operation of subsection (6). The general rule was that social security payment would not be made to a person during a term of imprisonment, however subsection (5) provided a discretion to pay.[17] Under these amendments, forensic patients remained eligible for social security payments.

> 57. After section 135TH of the Principal Act the following section is inserted:
>
> Payment of pension, benefit, &c., during term of imprisonment
> 135THA. …
> (2) Where-
> (a) a person would, but for this sub-section, be entitled to be paid-
> (i) a pension under Part III or IV; or
> (ii) a benefit under Part IVAAA;
> (b) the person is imprisoned in connection with his or her conviction for an offence; and
> (c) 2 or more pension pay days occur after the first day of the period of the imprisonment of the person and before the last day of that period, that entitlement ceases immediately after the earliest of those pension pay days and revives immediately before the last of those pension pay days.
> (3) Where-
> (a) entitlement to a pension or benefit has ceased by virtue of sub-section (2); and
> (b) the spouse of the person or child is dependent on the person, the Director-General may authorize the payment of the whole or any part of an instalment of that pension or benefit which, but for that sub-section, would have been payable to the person, to the spouse of the person or child, as the case may be, or to some other person approved by the Director-General for the benefit of that spouse or child.

[17] Explanatory Memorandum, Social Security and Repatriation Legislation Amendment Bill 1984, page 29.

(4) Where-
  (a) a person would, but for this sub-section, be entitled to be paid a benefit under Part VII; and
  (b) the person is imprisoned in connection with his or her conviction for an offence, that benefit is not payable to that person in respect of the period during which the person is imprisoned.

(5) Where-
  (a) a person would be eligible to be paid an allowance under Part VIIA but for the imprisonment of the person in connection with his or her conviction for an offence;
  (b) while undergoing a term of imprisonment, or within such period after the person ceases to be imprisoned as the Director-General, in special circumstances, approves, the person lodges a claim for a pension under Part III or IV; and
  (c) the pension is granted, the Director-General may, notwithstanding anything contained in section 39 or 68, determine that the pension may be paid from a date before the date on which the claim for the pension was lodged but not before the date on which the person was imprisoned but, if the Director-General determines that pension may be paid from a date before the person ceases to be imprisoned, sub-sections (2) and (3) apply in relation to the person as if the person had been entitled to be paid a pension immediately before the person was imprisoned.

(6) In this section, a reference to a person being imprisoned shall be read as including a reference to that person being lawfully detained in a place other than a prison and a reference to a term of imprisonment shall be construed accordingly.''.

Section 135THA was amended by section 116 of the *Social Security and Repatriation Legislation Amendment Act 1985*, which commenced on 5 September 1985. The amendments extended the rule that a person is not to be paid social security if they are imprisoned in connection with a conviction for an offence, to include a person confined to a psychiatric institution as a consequence of having been *charged* with the commission of an offence. For the first time, forensic patients were precluded from receiving social security payments and therefore treated in the same way as a person convicted of an offence and imprisoned.

116. Section 135THA of the Principal Act is amended-
  (a) by omitting paragraph (2) (b) and substituting the following paragraph:
    "(b) the person is -
      (i) imprisoned in connection with his or her conviction for an offence; or
      (ii) confined in a psychiatric institution, whether by order of a court or otherwise, in consequence of having been charged with the commission of an offence; and";
  (b) by inserting in paragraph (2) (c) "or confinement" after "imprisonment";
  (c) by omitting paragraph (4) (b) and substituting the following paragraph:
    "(b) the person is -
      (i) imprisoned in connection with his or her conviction for an offence; or
      (ii) confined in a psychiatric institution, whether by order of a court or otherwise, in consequence of having been charged with the commission of an offence,";
  (d) by inserting in sub-section (4) "or confined" after "imprisoned" (last occurring);
  (e) by omitting paragraph (5)(a) and substituting the following paragraph:
    "(a) a person would be eligible to be paid an allowance under Part VIIA but for -
      (i) the imprisonment of the person in connection with his or her conviction for an offence; or
      (ii) the confinement of the person in a psychiatric institution, whether by order of a court or otherwise, in consequence of having been charged with the commission of an offence;";
  (f) by inserting in paragraph (5) (b) "or confinement" after "imprisonment";
  (g) by inserting in sub-section (5) "or confined" after "imprisoned" (wherever occurring); and
  (h) by adding at the end the following sub-section:
    "(7) In this section, a reference to a psychiatric institution shall be read as including a reference to a psychiatric section of a hospital and to any other place where persons with psychiatric disorders are, from time to time, confined."

Section 135THA was amended by the *Social Security and Veterans' Affairs (Miscellaneous Amendments) Act 1986*. The amendments came into operation on 1 December 1986. The amendments provided that a forensic patient, undertaking a course of rehabilitation, would not be barred from receiving a social security payment. These amendments applied retrospectively and therefore any person affected by the 1985 amendments would be restored to their previous position. [18]

> 51. Section 135THA of the Principal Act is amended-
> (a) by omitting from sub-section (7) "disorders" and substituting "disabilities"; and
> (b) by adding at the end of the following sub-section:
> "(8) A reference in this section to a person who is imprisoned in connection with his or her conviction for an offence includes a reference to a person who is being held in custody pending trial or sentencing for an offence.
> "(9) This section does not apply, and shall be deemed never to have applied, to a person who is confined in a psychiatric institution during any period during which the person is or was undertaking a course of rehabilitation."

The amendments also enabled prisoners, who developed a mental illness and were transferred from prison to a psychiatric institution for treatment, to become eligible for social security payment if they were undertaking a course of rehabilitation. Therefore the legislation treated persons convicted and imprisoned, and persons charged but not convicted, the same in relation to entitlement of social security payment, if they were in psychiatric confinement and undertaking a course of rehabilitation. Persons convicted of an offence and detained in prison were still not eligible for a social security benefit.

The *Social Security Act 1947* was repealed 1 July 1991 with the commencement of the *Social Security Act 1991 (Cth)*. The 1991 Act was a clear English rewrite of the 1947 Act.[19] Section 1158 changed the 1986 position, and reinstated the 1984 position, by providing that a pension is not payable to a person who is either in gaol or in psychiatric confinement because of a criminal *conviction*. This change enabled forensic patients to be eligible for social security benefits, without limitation, as they did not have a *conviction*.

> 1158. An age pension, invalid pension, wife pension, carer pension, sole parent pension, widowed person allowance, widow B pension or special needs pension is not payable to a person on a pension payday if:
> (a) on that payday the person is in gaol or undergoing psychiatric confinement because of a criminal conviction; and
> (b) that payday is not the first pension payday and not the last pension payday in the period of imprisonment or confinement. Note: if someone else is receiving a payment that depends on the person in gaol receiving one of these payments, that other person's payment is not payable during the period identified in this section: that other person may, however, become qualified for a sole parent pension - see subparagraph 249 (1) (a) (ii).
> 23 (8) Subject to subsection (9), "psychiatric confinement" in relation to a person includes confinement in:
> (a) a psychiatric section of a hospital; and
> (b) any other place where persons with psychiatric disabilities are, from time to time, confined.
> (9) The confinement of a person in a psychiatric institution during a period when the person is undertaking a course of rehabilitation is not to be taken to be psychiatric confinement.

[18] Explanatory Memorandum, Social Security and Veterans' Affairs (Miscellaneous Amendments) Bill 1986, Page 59.
[19] Explanatory Memorandum, Social Security (Rewrite) Amendment Bill 1991, Outline and Financial Impact Statement.

Section 1158 was amended by section 4 of the *Social Security (Rewrite) Amendment Act 1991*. This amendment acted reinstated the policy position that was in effect from 1986 – 1991, which provided that forensic patients were only eligible for a social security benefit when they were undergoing a course of rehabilitation.

> Section 4, Schedule 2
> Paragraph 1158 (a): Omit the paragraph, substitute the following:
> "(a) on that payday the person is:
> (i) in gaol; or
> (ii) undergoing psychiatric confinement because the person has been charged with committing an offence; and".

Under the 1991 Act, forensic patients undertaking a course of rehabilitation were not taken to be in psychiatric confinement and they were therefore eligible for social security benefits.

In the matter of *Franks v Secretary, Department of Family and Community Services [2002] FCAFC 436* the Federal Court of Australia considered section 1158 after the appellant, Mr Franks, had his disability pension suspended by Centrelink, after he was ordered to be detained in a psychiatric institution after been charged with an indictable offence. The court found that a “course of rehabilitation”, under the *Social Security Act 1991*, has its ordinary English meaning, namely the undertaking of a planned series of activities that may include medical and other treatments/activities directed towards improving the person's physical, mental and/or social functioning.

Therefore forensic patients have remained eligible for social security payments throughout the various legislative changes, with the exception of a fifteen month period in 1985/6. However, the 1986 amendments applied retrospectively, so in effect forensic patients had full entitlement to social security payments up until 1985 after which time the payment of social security was limited to forensic patients who were undertaking a course of rehabilitation. This remains the position to date.