

**VICTORIAN LAW REFORM COMMISSION –
THE FORFEITURE RULE**

**SUBMISSION BY THE
VICTORIAN INSTITUTE OF FORENSIC
MENTAL HEALTH**

28 April 2014



Forensicare

VICTORIAN INSTITUTE OF FORENSIC MENTAL HEALTH

Victorian Institute of Forensic Mental Health
Yarra Bend Road
Fairfield 3078

telephone 03 9495 9143

www.forensicare.vic.gov.au

SUMMARY

This submission to the Victorian Law Reform Commission's review of the forfeiture rule 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 *Forfeiture Rule Consultation Paper* (Consultation Paper), namely whether the absolute exception to the forfeiture rule for persons found not guilty by reason of mental impairment should be retained.

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. 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 committed to providing a recovery-orientated healthcare delivery environment in which the principles of hope, social inclusion, personalised care and self-management are fundamental to practice.

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 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*.

TERMS OF REFERENCE – RESPONSE

The Consultation Paper raises a broad range of issues regarding the forfeiture rule. This response will be limited to addressing those issues directly impacting on the interests of persons found not guilty by reason of mental impairment.

Should the absolute exception to the forfeiture rule for persons found not guilty by reason of mental impairment be retained?

Forensicare considers that the absolute exception to the forfeiture rule for persons found not guilty by reason of mental impairment should be retained.

The exception is generally accepted and flows from the long established criminal law principle that a person should not be held criminally responsible for an offence if, at the time the offence occurred, they did not have the capacity to form a guilty mind in committing the offence because of a mental impairment. If there is no 'guilty mind' or *mens rea*, moral blame cannot attach to the behaviour and the person cannot, therefore, be held criminally responsible.

Retaining the exception is important to ensure that the rights of persons found not guilty by reason of mental impairment are safeguarded and that they are not held accountable for actions for which they are not morally or criminally responsible. While the exception may be inconsistent with the absolute and inflexible nature of the forfeiture rule in other circumstances in which the killer is not criminally responsible or where the killing was unintentional, this is not an argument for removing the absolute exception that applies to those persons found not guilty by reason of mental impairment. Rather, there may be good reason to moderate the strict application of the rule in other circumstances.

Should the court have a discretion to apply the rule in the circumstances of the case?

Forensicare submits that the court should not have a discretion to apply the forfeiture rule following a finding of not guilty by reason of mental impairment. The exercise of such a discretion implies a degree of scepticism about a finding that a person is not guilty of an offence by reason of mental impairment. If the elements of the defence have been established, the principle that moral and criminal responsibility should not attach to the offence should stand and the person's rights should be safeguarded. Factors such as those identified by the New South Wales Supreme Court in *Re Fitter; Public Trustee v Fitter* [2005] NSWSC 1188 and *Guler v NSW Trustee and Guardian* [2012] NSWSC 1369, including a lack of remorse, absence of blameworthy conduct by the victim and a prior history of violent behaviour, should have no relevance in any subsequent assessment of a person's conduct if a court has previously determined that the person is not criminally responsible for their conduct on the basis of mental impairment.

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.