



Committee Secretary  
Senate Standing Committees on Community Affairs  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Phone: +61 2 6277 3515  
Fax: +61 2 6277 5829  
[community.affairs.sen@aph.gov.au](mailto:community.affairs.sen@aph.gov.au)

Dear Committee Secretary

### **Inquiry into the Social Services Legislation Amendment Bill 2015**

Thank you for the opportunity to make a submission to this inquiry on the bill. The National Welfare Rights Network (NWRN) is the peak body for community which provide free legal services to people who need social security or family assistance. We make this submission after consultation with our member organisations.

The *Social Services Legislation Amendment Bill 2015* (the bill) amends the *Social Security Act 1991* (Cth) (the SSA) to give effect to a Mid-Year Financial Economic Outlook (MYEFO) 2014 measure intended to remove access to social security payments for certain persons in psychiatric confinement as a result of being charged with an offence.

NWRN does not support this MYEFO measure.

This submission sets out the various problems in the drafting of this Bill and our concerns at the lack of co-ordinated planning between Commonwealth and the States and Territories around this measure.

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## Background

From 1 July 2015 the bill will terminate social security payments to persons who are in psychiatric confinement as a result of being charged with a serious offence (as defined in the bill), except during a period of integration back into the community.

Currently, social security payments (including the Disability Support Pension) may not be paid to a person detained in prison. However, they may be paid to a person in psychiatric confinement as a result of being charged with a criminal offence if they are undertaking a course of rehabilitation. This may include persons being assessed for fitness to be tried, already found unfit to stand trial or found not guilty by reason of mental impairment such as severe mental illness, brain damage or intellectual disability.

The circumstances where a person in psychiatric confinement is taken to be undertaking a course of rehabilitation were considered by the Full Federal Court in *Franks v Secretary, Department of Family and Community Services (Franks)*.<sup>1</sup> The court found that a person is undertaking a course of rehabilitation if they are undertaking a planned series of activities aimed at improving their physical, mental and/or social functioning.<sup>2</sup> Although the bill's explanatory memorandum describes this definition as 'broad',<sup>3</sup> in truth, it does no more than give the phrase its common sense meaning.

The bill applies retrospectively to persons currently detained, many of whom are in receipt of income support payments. Its effect, therefore, is to cease payments to those persons if they have committed a serious offence (as defined in the bill), unless they are in a period of integration into the community prior to release. Payments will also continue to persons in psychiatric confinement as a result of being charged with non-serious offences, if they are undergoing a course of rehabilitation.

## Submission

We respond to the bill in the following points below.

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<sup>1</sup> [2002] FCAFC 436.

<sup>2</sup> *Franks* at [50].

<sup>3</sup> Social Services Legislation Amendment Bill 2015, *Explanatory Memorandum*, p. 2.

## **1 Limitation of the bill to persons who have committed a serious offence**

The bill ceases social security payments to persons in psychiatric confinement as a result of committing a serious offence, unless in a period of integration into the community prior to release. This means social security payments will continue to be paid to persons in psychiatric confinement as a result of being charged with non-serious offences, if they are undertaking a course of rehabilitation.

The bill's primary justification is said to be the fact that persons in psychiatric confinement have their basic needs met by the State or Territory institution in which they are confined.<sup>4</sup> However, this does not explain why the bill distinguishes between persons on the basis of whether they have committed serious or non-serious offences, as in both cases they have their basic needs met by the institution.

The absence of a reasonable justification for the distinction between serious and non-serious offences highlights the morally arbitrary nature of this distinction. There is no place for introducing morally arbitrary distinctions into the *Social Security Act*, which is concerned with a basic entitlement to adequate income. Persons in psychiatric confinement are there because they have been found not to be morally culpable in the criminal justice system due to severe mental illness, brain damage or intellectual disability. This applies equally to serious and non-serious offenders.

It is also unclear why a person who is undergoing a course of rehabilitation after committing a serious offence would receive less support from the Commonwealth. The public interest in the successful rehabilitation of persons in psychiatric confinement is arguably greater in the case of persons who have committed crimes of violence or other serious offences.

**We do not support the introduction of a distinction between serious and non-serious offenders into the Social Security Act.**

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<sup>4</sup> Statement of Compatibility with Human Rights, *Social Services Legislation Amendment Bill 2015*, p. 1.

## 2 Reduction in support for persons in psychiatric confinement

The effect of the bill may be to reduce support for State and Territory psychiatric institutions and persons confined in them. SA Health is reported, for example, as saying that the bill may “impact on the quality of care for the majority of our forensic patients and increase the burden on the South Australian health system”.<sup>5</sup> Experts working in the criminal justice system have also expressed concern about the importance of income support in helping people in psychiatric confinement successfully re-enter the community, including impacting on their ability to maintain stable housing.<sup>6</sup>

Criminal justice and psychiatric institutions are State and Territory responsibilities. It appears, however, that Commonwealth income support payments have been a source of support to persons in psychiatric confinement, which State and Territory institutions have been relying on.

If so, then this is not a rational way to approach funding for psychiatric institutions and the persons confined in them. But, equally, these media reports suggest that there has been no consultation between the Commonwealth and the States and relevant experts about ensuring funding for adequate and appropriate funding and support for these institutions and the persons detained in them, aimed at ensuring their successful re-entry into the community. If this is the case, this is an unacceptable disregard for the interests of an extremely vulnerable population, as well as the public interest in successful rehabilitation for psychiatric detainees.

Although the bill may go some way to addressing those concerns by allowing for payment to persons charged with serious offences during a period of integration back into the community, the bill should not proceed until the community has confidence in the adequacy of arrangements for supporting psychiatric detainees.

**We do not support the bill unless there has been proper consultation to ensure adequate funding and support for persons detained in psychiatric institutions.**

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<sup>5</sup> Siebert, B. *Guilty/not guilty: feds want them treated the same*, Indaily, accessed at: <http://indaily.com.au/news/2015/03/24/guilty-not-guilty-feds-want-them-treated-the-same/>.

<sup>6</sup> Ibid.

### **3 Definition of serious offence**

Subsection 9E of the bill defines a serious offence to include murder, attempted murder, manslaughter, rape, attempted rape. Subsection 9F of the bill extends that definition to other offences punishable by life in prison or a sentence of at least 7 years, if the offence involves loss of life or serious risk of loss of life, serious injury or serious risk of injury to a person or serious damage to property where this endangers the safety of a person.

The definition covers a potentially very wide range of conduct. For example, subsection 9F(b)(iii) extends the definition of serious offence to an offence punishable by at least 7 years in prison involving serious damage to property “in circumstances endangering the safety of a person”. This may include offences involving damage to property where the only danger was to the person undergoing psychiatric confinement, because the definition refers to danger to any person, not another person. It may include offences where the person damaged property, and was not even aware that anyone else was endangered by it.

There is no explanation for this definition and why it should determine a person’s entitlement to income support. It suffers the same problem that affects the bill itself, which is the arbitrariness of distinguishing within a group of people who have all been found not to be criminally or morally culpable for their offending. Even on its own terms, the definition seems too broad and poorly drafted.

**We do not support the extension of the definition of serious offence to property crimes.**

### **4 Retrospective application of the bill**

The new bill applies to persons who have already been charged with a serious offence or are already undergoing a period of psychiatric confinement as at 1 July 2015. Its justification for this is that it ensures consistent treatment of people in the same circumstances.

The justification for the retrospective operation of this law is inadequate. Major changes to social security law affecting qualification for payment have traditionally “grandfathered” current recipients, protecting them from the change, because of concern that the impact on them will be unfair if they have ordered their affairs on the basis of the previous rules. The severely mentally ill, intellectually disabled and persons with a brain injury should get the benefit of that principle.

It seems possible that this may have an adverse impact on particular individuals who currently receive social security payments. For example, a person who is receiving the disability support pension and using it to maintain housing in the community may suddenly find that their payments stop on 1 July (if they have committed a serious offence and are not in a period of integration), and they lose their housing. This may in turn set back their re-integration into the community.

**We do not support the retrospective application of this bill.**

## **5 Ceasing payments to persons even when not detained in the institution**

Subsection 23(9D) of the bill deems a person to be in psychiatric confinement on days when the person is not in a psychiatric institution. This is aimed at preventing payments to persons who may not be confined full-time, unless they are in a period of integration.

This treats a person in psychiatric confinement less favourably than a person found guilty of a criminal offence and serving their sentence by way of periodic detention. In that case, the person is not paid an income support payment only for the days actually in detention.<sup>7</sup>

In the absence of a legitimate reason for treating persons with severe mental illness, brain damage or intellectual disability who have not been found guilty of an offence less beneficially than people convicted of a criminal offence and on periodic detention, this bill amounts to unjustifiable discrimination on the basis of disability.

**The bill should only prevent payment to a person who is not confined full-time to an institution for the days they are in the institution.**

## **6 Use of legislative instrument to define a period of integration**

Subsection 23(9B) provides that person who is confined in a psychiatric institution because they have been charged with a serious offence is taken not to be in psychiatric confinement when in a period of integration back into the community. Subsection 23(9C) provides that the circumstances when a person is taken to be in a period of integration back into the community will be defined in a legislative instrument.

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<sup>7</sup> Guide to Social Security Law, 3.1.4.10 at <http://guides.dss.gov.au/guide-social-security-law/3/1/4/10>.

It appears that this new exception is intended to recognise that persons in psychiatric confinement typically have a period in which, although still in confinement, they are progressively assisted to re-enter the community and need income support to help them with the costs of living and provide some independence.

The explanatory memorandum says that this is a matter to be left to legislative instrument because of the level of detail and the need to adjust the rules over time.<sup>8</sup>

We do not support this approach to drafting. The *Social Security Act* deals with basic entitlements to adequate income support. The bill deals with basic qualification for income support. The main criteria should be set out in the primary legislation. Then the detail can be filled in and adjusted over time by legislative instrument.

**The primary criteria for determining when a person is in a period of integration back into the community should be set out in the primary legislation.**

Yours sincerely

Maree O'Halloran AM  
President

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<sup>8</sup> Social Services Legislation Amendment Bill 2015, *Explanatory Memorandum*, p. 5.