



**Submission to the Senate Standing
Committee on Community Affairs Inquiry
into the Social Services Legislation
Amendment Bill 2015**

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Thank you for the invitation to make a submission to the Senate Standing Committee on Community Affairs Inquiry into the Social Services Legislation Amendment Bill 2015.

Mental Health Australia is very concerned about a number of aspects of this legislation, which we have detailed below.

The Explanatory Memorandum to the Bill does not provide any data on the number of people this might apply to, or the numbers of people being held across Australia who are unfit to plead, or found not guilty by reasons of mental illness. This lack of data is a concern, and makes it much harder to understand the practical implications of the Bill.

The Committee should seek detailed evidence from the Department of Social Services on the assumptions and the costings to better understand the implications of the Bill.

Remand

The Explanatory Memorandum for the Bill states:

These people will be treated in the same way as a person who is in gaol having been convicted of an offence, or who is remanded in custody while awaiting trial after being charged with an offence.

The government stated in the Mid Year Economic and Fiscal Outlook (MYEFO) that “[t]his will ensure the same social security treatment of people in the criminal justice system whether they reside in a psychiatric or penal institution.”

However, given that people with a mental illness are more likely to be remanded in custody than people without a mental illness, the practical impact of the Bill is discriminatory, and does not ensure the same treatment.

It is wrong to assume that, given that the Bill only applies to “serious offences,” the majority of people will be remanded in custody. Many of the offences covered by this Bill have a presumption in *favour* of bail (including many assault and wounding charges, using a weapon to resist arrest, and affray).¹ Therefore, the reasons why people are remanded in custody needs to be considered to understand the practical impact of this legislation.

Research indicates that mental health status appears to be a significant factor in decisions around remand and bail.²

Submissions to the New South Wales (NSW) Law Reform Commission’s report on *People with cognitive and mental health impairments in the criminal justice system*³ pointed out:

that the lack of an appropriate residence, treatment arrangements, provision for care and employment make it more difficult for a person with a cognitive impairment to be granted bail. In particular, the lack of appropriate supports and services may mean that it is difficult to satisfy the court’s concern about the protection of the community.

¹ All examples are from NSW. Source: http://www.judcom.nsw.gov.au/publications/benchbks/local/bail_presumptions.html

² http://www.jss.org.au/files/Docs/policy-and-advocacy/publications/Young_people_in_remand_in_Victoria_-_Balancing_individual_and_community_interests.pdf

³ <http://www.lawreform.lawlink.nsw.gov.au/agdbasev7/wr/lrc/documents/pdf/report%20138.pdf>



Indeed, even the NSW Director of Public Prosecutions recognised that it is “very hard for mentally impaired offenders to get bail.”

Victorian research also indicates that mental health and drug use is now a predominant factor in deciding bail - rather than the nature of the offence or the criminal history of the person.⁴

One research paper has found that “some bail decision-makers argue that defendants with mental illness were remanded ‘because there was a better prospect of defendants accessing some form of treatment.’... and bail decision-makers feel unable to grant bail without a secure facility to provide care for them.”⁵ This means people are being remanded as a form of forced treatment. It is not appropriate for the *Social Security Act* to treat these remandees in the same way as other remandees, particularly in cases where the person may not have been remanded if it wasn’t for their mental illness.

Thus, the proposed legislation creates indirect, systemic discrimination against people with mental illness. Therefore, the Bill should not proceed in its current state.

Instead, the government should focus on keeping people out of prison and remand in the first place, by ensuring that appropriate mental health services are being offered in the community.

Recommendation 1: The Bill should not proceed in its current state, as it further entrenches systemic discrimination against people with a mental illness.

Recommendation 2: Should the Bill proceed, it should be amended to only cover offences where there is a legislative presumption *against* bail, or where bail is only granted in exceptional circumstances, such as murder, drug offences involving children and certain firearms offences.

People who are unfit to plead, or found not guilty by reason of mental illness

The Bill also impacts on people who are under psychiatric confinement after being found unfit to plead, or found not guilty by reason of mental illness.

The circumstances under which this type of psychiatric confinement can occur differ from jurisdiction to jurisdiction. People held under mental impairment legislation have not been convicted of a crime. They have been found not to be morally culpable due to disability or mental illness, and their differing status under the law reflects this. They are held for the purpose of therapy and treatment – not because they are guilty of an offence. It is not appropriate that people under such legislation be treated equally with prisoners.

⁴ Sarre, Rick, Sue King, and David Bamford (2006). Remand in Custody: Critical Factors and Key Issues. Trends & issues in crime and criminal justice No 310. Canberra, Australian Institute of Criminology.

⁵ King, Sue, David Bamford, and Rick Sarre (2005). Factors That Influence Remand in Custody: Final Report to the Criminology Research Council. Criminology Research Council commissioned report. Canberra, Criminology Research Council.



In many jurisdictions there are no statutory limits on the period of detention for those found unfit to stand trial. This means people can be detained for much longer than they may have been imprisoned had they been found guilty. The Tasmanian Forensic Tribunal has found patients placed on a mental health order are confined for substantially longer than they would have been had they been found guilty of the same offence (with the exception of murder).⁶

We note that the Australian Law Reform Commission recommended:

*State and territory laws governing the consequences of a determination that a person is ineligible to stand trial should provide for: (a) limits on the period of detention that can be imposed; and (b) regular periodic review of detention orders.*⁷

Recommendation 3: The Commonwealth, through the COAG Law, Crime and Community Safety Council, should encourage states and territories to implement the recommendations of the Australian Law Reform Commission around the laws governing the consequences of a determination that a person is ineligible to stand trial.

Assisting people to transition back into society

The proposal provides that social security payments may recommence “during.... a period of integration back into the community.” However, the Bill doesn’t define that period, and instead gives the power to the Minister to set out the definition of “a period of integration.” The Explanatory Memorandum explains:

After a point in this period of integration, it will be necessary for a person to have access to funds to assist the person with costs of living and to provide the person with autonomy as they prepare for re-establishing themselves in the community.

However, it goes on to give an example that “a period of integration back into the community for a person is where the person regularly spends six nights or more in a fortnight outside of the psychiatric institution.” If this example was implemented, it could mean people who have leave from an institution five nights a fortnight would receive no payments. This would make it impossible for them to effectively integrate back into the community, and would likely lead to homelessness.

This should be amended to be consistent with periodic detention. Currently, if a person is detained periodically, they are not paid a social security payment for those whole days that they are imprisoned. For example, a person in weekend detention from Friday night to Sunday afternoon is only imprisoned for one whole day, i.e. Saturday. This means the person’s payment is only suspended for one day as a result of this detention.⁸

⁶ https://www.alrc.gov.au/sites/default/files/pdfs/publications/fr124_chapter_7_access_to_justice.pdf

⁷ Ibid

⁸ Guide to the Social Security Law, Section 3.1.4.10 (<http://guides.dss.gov.au/guide-social-security-law/3/1/4/10>).



Recommendation 4: Should the Bill proceed, it should be amended to ensure whenever a person is granted leave from a psychiatric institution and expected to sleep outside the institution, their payments should be re-activated, consistent with the rules around periodic or weekend detention.

It is also unclear whether the impact of this Bill will be that payments will be “suspended” or “cancelled.” This can make a significant difference for individuals, as if the payment is only “suspended” it can be very quickly reinstated when the person leaves or psychiatric confinement. However, if the payment is cancelled, the person needs to completely re-apply for the payment, which is time consuming, complex and confusing – in particular if the person hasn’t had access to appropriate mental health care while in confinement. Instead, it should be made consistent with section 96 of the *Social Security (Administration) Act 1999*, which provides that payments can be suspended for up to two years (rather than cancelled) when a person obtains paid work.

Recommendation 5: Should the Bill proceed, it should be amended so payments are only suspended (not cancelled) when a person is on remand or confined for less than two years.

A better use of the savings

If the measure does proceed, it is vital the Government reinvest the forecast savings (\$29.5m over four years, and approximately \$12m per year after that) into mental health services for people in prison and transitioning back into the community after being released. It is not good enough that these funds are used to “repair the budget,” as stated in MYEFO. The National Mental Health Commission’s 2013 Report Card showed:⁹

- *In 2012 almost two in five people when entering prison reported they had a history of mental illness. This is almost double the 12-month prevalence of mental illness in the general population.*
- *In a 2012 survey 33 per cent of prisoners who had been told they had a mental health condition had been in prison five or more times, compared to 26 per cent of prisoners who had no condition.*
- *People in the community who have been in prison report twice the prevalence of any 12-month mental disorder compared to people with no history of imprisonment.*

The National Mental Health Commission’s 2013 Report Card included detailed recommendations on the interaction between mental health and the criminal justice system, including:

Recommendation 17: Where people with mental health difficulties, their families and supporters come into contact with the justice system and forensic services, practices

⁹ <http://www.mentalhealthcommission.gov.au/our-2013-report-card/feeling-safe,-stable-and-secure/the-justice-system-and-mental-health.aspx>



which promote a rights and recovery focus and which will reduce recidivism must be supported and expanded. These include:

- *diversion services to create pathways for people with mental health problems away from prison and into support and treatment;*
- *justice reinvestment for Aboriginal and Torres Strait Islander peoples and people with mental health issues who are in contact with the justice system; and*
- *arrangements that give better rights protection, supported transitions and followup for people with mental health issues in custody, prison and forensic facilities when they are released or discharged. These must include step-down forensic services and supported community accommodation¹⁰*

This area was also identified as a priority in successive National Mental Health Plans.

Recommendation 6: Should the Bill proceed, the savings should be redirected into other mental health services, in particular for people being released from prison, remand or other psychiatric confinement.

About Mental Health Australia

Mental Health Australia is the peak, national non-government organisation representing and promoting the interests of the Australian mental health sector and committed to achieving better mental health for all Australians. It was established in 1997 as the first independent peak body in Australia to represent the full spectrum of mental health stakeholders and issues. Mental Health Australia members include national organisations representing consumers, carers, special needs groups, clinical service providers, public and private mental health service providers, researchers and state/territory community mental health peak bodies.

Mental Health Australia aims to promote mentally healthy communities, educate Australians on mental health issues, influence mental health reform so that government policies address all contemporary mental health issues, conduct research on mental health issues, and carry out regular consultation to represent the best interests of our members, partners and the community. These endeavours in education and policy reform are matched by our commitment to researching more innovative approaches to the provision of mental health care. In addition, Mental Health Australia continues to focus on the human rights of people with a mental illness.

Mental health issues affect one in every five Australians. We cannot afford to be complacent in our efforts to achieve changes to our mental health care system when we consider the impact of mental health on our community.

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¹⁰ http://www.mentalhealthcommission.gov.au/media/94321/Report_Card_2013_full.pdf



Mental Health Australia



Mentally healthy people,
mentally healthy communities

Mental Health Australia is the peak independent, national representative body of the mental health sector in Australia.

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