



Mental Health
Review Tribunal

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22 April 2015.

The Senator Members
C/- The Secretary,
Senate Standing Committee on Community Affairs
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Senators

**Re: Social Services Legislation Amendment Bill 2015
Proposal to deny payment of social security benefits to forensic patients who
are detained**

I make this submission in relation to the above proposed changes that will have the effect of denying social security payments to persons in psychiatric confinement who have been charged with a serious offence, and who will only again become entitled to such payments if they are involved in a 'course of rehabilitation' whilst engaged in a period of integration back into the community. In New South Wales the people affected by the proposed change would generally be considered as 'forensic patients' as defined in the *NSW Mental Health (Forensic Provisions) Act, 1990* (the 'MHFP Act').

The proposal, if passed, would have a seriously detrimental impact upon the wellbeing and therapeutic progress of this group of forensic patients, who are one of the most vulnerable (and most poorly understood) groups in our society. I can only assume that the proposal, however well-intentioned in pursuit of budget savings, has been put forward by persons who have little, if any, understanding of how the forensic mental health system in Australia works.

NSW has the largest number of forensic patients of any Australian jurisdiction (currently over 400). Under the MHFP Act, forensic patients fall into two groups:

1. those persons charged with an indictable offence and found unfit for trial and who are detained either in a forensic mental hospital or a correctional centre - there are some 50 forensic patients in NSW in this category; and
2. those persons charged with an indictable offence and found not guilty on the grounds of mental illness who are detained (usually in a forensic mental health facility or in a correctional centre pending a bed becoming available in a mental health facility) or who have been conditionally released into the community. There are approximately 350 forensic patients in NSW who fall into this category, of whom

slightly less than one third are currently conditionally released to the community. The balance are in psychiatric detention.

The vast majority of forensic patients in NSW have been charged with offences that would fall within the definition of 'serious offence' proposed in the amendment bill. The issue of fitness for trial and also the raising of the mental illness defence occur much more commonly in relation to serious offences than other less serious charges.

Under the current *Social Security Act, 1991 (Cwlth)* as interpreted in *Franks v Secretary, Department of Family & Community Services* [2002] FCAFC 436, forensic patients detained in psychiatric confinement have generally been held to be engaged in a 'course of rehabilitation' and so entitled to receive social security benefits.

As President of the New South Wales Mental Health Review Tribunal, I am regularly engaged, as are my eight Deputy Presidents, in presiding over Review hearings of forensic patients under the MHFP Act, which must be conducted at least every six months for each forensic patient. My Tribunal conducted over 900 reviews and other hearings in relation to forensic patients during 2013/14. It is the function of the Tribunal to make determinations as to detention, treatment, care and control of forensic patients, as well as determinations for leave and release.

At forensic patient reviews, the Tribunal has close regard to the rehabilitative progress of the patients, who are invariably engaged in a difficult and challenging course of therapy and treatment designed to assist them in their efforts to progress with their rehabilitation and to re-enter the community when they are well enough and safe enough to do so. We consider psychiatric and other reports presented by the treating team, evidence from the patient and any other relevant material, including from relatives and, where applicable, from registered victims.

Forensic patients are amongst the most challenged and vulnerable persons in our society. They are not criminals and should not in any way be regarded or treated as such. They have never been the subject of a formal criminal conviction. This is because the law has for centuries accorded them a very different status.

Those found unfit for trial have been so found because, due to their particular condition (usually a mental illness or an intellectual disability) it is not possible for them to receive a fair trial. Some persons who have been found unfit for trial may, in truth, be innocent, but are incapable of presenting to the court why this may be so.

Those found not guilty on the grounds of mental illness have, since medieval times in English law (whose traditions Australia has long followed on this point) been regarded as 'not morally blameworthy' because of the illness from which they suffer, and no conviction is entered against them. They are detained for the purpose of therapy and treatment, not because they are guilty, but because they are unwell and need to be detained until they can be safely managed in the community. These persons have a very difficult treatment and rehabilitation journey ahead of them and society needs to support them in this arduous task.

Most forensic patients make steady progress through the forensic system, and this is in large part due to their own efforts to engage with programs and treatments offered by their treating teams. These programs focus on important areas including management of their mental condition, cognitive skills, social skills, activities of daily living and skills necessary for ensuring successful independence when they re-engage with the community including, importantly, ability to manage their finances.

Forensic patients are responsible for their hospital expenses, and are encouraged to pay for these because this is an important step for them to make by acknowledging that they have an illness that requires treatment, which they then take responsibility for. Accepting that responsibility is well recognized as a critical step in their rehabilitation, as is having an income that they are responsible for managing appropriately.

The vast majority of forensic patients in psychiatric detention are entirely dependent on social security entitlements for their income in order to pay their hospital fees, pay for simple comforts and to meet other important financial obligations that may include previously incurred debts, meeting ongoing commitments and maintaining their spouse and children. Family support, engagement and connectedness, is another critical element in the management of a forensic patient's recovery.

To remove entitlement to social security payments would not only remove a vital tool in the therapeutic advancement of forensic patients, but also would be to discriminate against them because they have a mental illness, or some other condition that may have rendered them unfit for trial. This would send a very harmful, demoralizing and potentially devastating message to these vulnerable individuals. To equate them with convicted criminals on the matter of social security entitlements, is to fail completely to understand their status and the nature and purpose of the forensic mental health system.

The fact that the changes proposed by the bill are directed at persons who have been charged with a 'serious offence', reveals a lack of understanding of the forensic mental health system and the criminal law. A person who commits murder due to a mental illness, is no more morally blameworthy at law than someone who commits a petty theft due to mental illness – both are entitled to be acquitted on the grounds of mental illness. The key issue is that the nature of the respective risks such persons present needs to be managed, by treatment and rehabilitation that addresses that risk. To distinguish between serious and non-serious offenders in this context is no different to discriminating against someone who has Ebola as against someone who has the flu. The question of difference is how they are managed, not whether they are both entitled to be treated equally as citizens and given the medical care they need. To carry this analogy further, the rationale underpinning this bill is the same as withdrawing pharmaceutical benefits from someone with Ebola, because they have Ebola and not just the flu.

The statement of compatibility with human rights contained in the explanatory memorandum to the bill fails to consider the important and fundamental issues I have raised above, and, with respect, is shallow and perfunctory in its analysis.

I fear that the real motivation behind the proposed bill is to shift, as far as possible, the cost of supporting forensic patients from the Commonwealth to the States and it is in reality doing so by misconceiving the status, and the needs of forensic patients in psychiatric detention.

As someone with the responsibility to review and make important orders and decisions about forensic patients, I have reviewed hundreds of forensic patients and am in no doubt that, if this proposal proceeds, many forensic patients' therapeutic progress will suffer an enormous setback and many are likely to suffer depression, despair and loss of hope. It would not surprise me if a suicide resulted. This would run entirely counter to the tremendous efforts that both they and their treating teams are investing in their treatment and rehabilitation.

I believe I have as deep an understanding of Australia's forensic mental health system as any other person – it has been a large part of my professional and academic career. I urge, in the strongest terms possible, that this proposed measure be abandoned as utterly contrary to the interests of the recovery and rehabilitation of forensic patients. It would be unfairly discriminating against these persons because they happen to be mentally ill, or to suffer from circumstances (usually intellectual disability or mental illness) that have rendered them unfit for trial.

I would be very happy to amplify any aspect of this submission or to appear before the committee in order to explain any aspect of the forensic mental health system. To proceed with this proposal would be an egregious error, and would demonstrate a complete ignorance of the nature and purpose of the forensic mental health system. The damage that would be done and the human cost would far outweigh the relatively small amount of budgetary savings achieved.

Yours sincerely,

Professor Dan Howard SC
President
NSW Mental Health Review Tribunal

CC to The Hon Scott Morrison MP, Federal Minister for Social Services
Prof Alan Fells AO, Chair of the National Mental Health Commission
Hon Pru Goward MP, NSW Minister for Mental Health
The Hon Susan Ley MP, Federal Mental Health Minister
John Feneley, NSW Mental Health Commissioner
Julie Babineau, CEO Justice Health.