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Dear Sir/Madam

Social Services Legislation Amendment Bill 2015

Please find enclosed Victoria Legal Aid's submission in response to the Social Services Legislation Amendment Bill 2015.

I can be contacted on [REDACTED] if you would like any further information about any of the issues raised in this submission.

Yours faithfully

KRISTEN HILTON

Director

Civil Justice Access and Equity



Submission to Senate Community Affairs Legislation Committee

Social Services Legislation Amendment Bill 2015

15 May 2015

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Written requests should be directed to Victoria Legal Aid, Research and Communications, 350 Queen Street, Melbourne Vic 3000.

Disclaimer. The case studies used in this submission are real and have been included with our client's consent. Names and identifying features have been changed to protect the client's privacy and to comply with relevant suppression orders.

About Victoria Legal Aid

Victoria Legal Aid (VLA) is a major provider of legal advocacy, advice and assistance to socially and economically disadvantaged Victorians, including people with disability.

Our organisation works to improve access to justice and pursues innovative ways of providing assistance to reduce the prevalence of legal problems in the community. We assist people with their legal problems at courts, tribunals, prisons and psychiatric hospitals as well as in our 14 offices across Victoria. We also deliver early intervention programs, including community legal education, and assist almost 100,000 people each year through Legal Help, our free phone advice service.

VLA is the primary provider of legal services to forensic patients in Victoria. We regularly provide assistance to forensic patients through our Criminal Law Program and Mental Health and Disability Advocacy Program. VLA assists clients from the beginning to the end of the legal process under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) (CMI Act)*. Our Criminal Law Program assists clients with hearings in relation to unfitness to plead and to pleas of not-guilty by reason of mental impairment. VLA also advocates for clients before the Forensic Leave Panel, in the County and Supreme Courts in reviews of custodial supervision orders (CSOs), applications for extended leave, applications for variation of CSOs to non-custodial supervision orders (NCSOs) and applications for revocation of NCSOs under the CMI Act.

Experienced lawyers from VLA's Mental Health and Disability Advocacy Program conduct a visiting service to Thomas Embling Hospital where we provide advice, assistance and representation on a wide range of civil and criminal issues for forensic patients. VLA also has a specialist Commonwealth Entitlements program, which includes our in-house social security practice. Lawyers in this team provide advice and on-going assistance to priority clients in relation to Centrelink decisions.

Our diverse practice areas provide VLA with a uniquely comprehensive perspective on the issues raised by the Social Services Legislation Amendment Bill 2015 (Bill). In this submission we have drawn on the experience of our Criminal, Social Security, Mental Health and Equality Law practices.

Key contacts

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Director

Civil Justice Access and Equity

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Executive Summary

VLA takes the view that the proposed amendments should not proceed. This view is informed by our practice experience across our criminal, social security, mental health and equality law practices. The proposed amendments contradict the rehabilitative intent of the Victorian CMI Act. Practically, without access to social security payments our clients will not be able to progress through the rehabilitation system.

This submission focuses on the following areas:

1. The interaction between the Bill and the Victorian criminal justice system.
2. The experience of our clients who rely on social security payments to continue to pay for basic costs of living and to progress through the rehabilitation system

1. Interaction between the Bill and the Victorian criminal justice system

Background

The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)* (the CMI Act) allows for people who are found unfit to plead or not-guilty by reason of mental impairment to be either discharged unconditionally or placed on a supervision order.¹ Supervision orders are indefinite and can either be custodial (meaning that a person is detained) or non-custodial (meaning that they reside in the community).² In practice, all people with mental illness on CSOs (forensic patients) in Victoria are committed to custody in Thomas Embling Hospital. Thomas Embling is a forensic psychiatric hospital operated by the Victorian Institute of Forensic Mental Health (Forensicare).

Forensic patients may apply to the Forensic Leave Panel for on-ground leave or limited off-ground leave.³ Limited off-ground leave allows a forensic patient to be absent from Thomas Embling between curfew hours (6.00 am to 9.00 pm) or outside of curfew hours for a maximum of three days in any seven day period (overnight leave).

Forensic patients may apply to court for a grant of extended leave.⁴ Patients on extended leave can be absent from Thomas Embling for a period of up to 12 months.⁵ Extended leave is subject to conditions and may be suspended by the Victorian Chief Psychiatrist or the Secretary to the Department of Health and Human Services (the Secretary), and may also be revoked by the court.⁶

A forensic patient who has completed at least 12 months of extended leave may apply to court for variation of their CSO to an NCSO.⁷ If a person is non-compliant with the conditions of an NCSO, the Court may, on the application of the Secretary, vary the NCSO to a CSO.⁸

¹ *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)*, s 17(2)(c) (unfit to be tried but found to have committed the offence at a special hearing), and s 23(a) (not guilty by reason of mental impairment).

² *Ibid*, s 26.

³ *Ibid*, s 54.

⁴ *Ibid*, s 57.

⁵ *Ibid*, s 56.

⁶ *Ibid*, s 58.

⁷ *Ibid*, s 31.

A person on an NCSO may apply to court for revocation of the order.⁹

Forensic patients are not comparable to sentenced prisoners

The statement of compatibility compares the position of forensic patients under the Bill to “a person who is in gaol having been convicted of an offence.”¹⁰ This does not reflect the legal status of forensic patients under the Victorian criminal justice system.

In Victoria sentenced prisoners have been found guilty of an offence and placed in custody for reasons that include punishment. By contrast, forensic patients have *not* been found guilty of an offence and the purpose of custodial supervision is for the protection of the public, treatment and rehabilitation, not punishment. This reflects the long-standing common law principle that a person who is mentally unwell when they offend cannot be held criminally responsible.

Under the CMI Act, psychiatric confinement does not necessarily follow a finding of not guilty by reason of mental impairment or unfitness to be tried. Unlike in sentencing for criminal offenders, punishment is not a legitimate purpose for making a CSO.¹¹ In making its decision, the court must ensure that any restrictions on a person’s freedom should be kept to the minimum consistent with the safety of the community.¹² The court must also have regard to the following factors: the nature of the persons’ mental impairment; the relationship between the impairment and the offending conduct; whether the person is likely to endanger themselves, another person or other people generally because of their mental impairment; the need to protect people from such danger; and whether there are adequate resources available for the treatment and support of the person in the community.¹³ Unlike in sentencing, the nature and gravity of the offending conduct is not in and of itself a mandatory consideration.¹⁴

The position of forensic patients is more analogous to that of any other person who needs to be treated in a hospital for a medical condition. In this respect it is relevant that people who are detained for psychiatric treatment under inpatient treatment orders under the *Mental Health Act 2014* (Vic) (compulsory patients), are not precluded from receiving social security payments. This includes patients in extended care units, who may be detained for many years.

Inappropriate to introduce seriousness of offending into social security law

The Bill proposes to introduce into the Act eligibility based on a distinction between “serious” and “non-serious” offending. Nowhere else in the Act is eligibility dependent on not having committed a “serious offence”. Applying this distinction only to people in ‘psychiatric confinement’ unfairly differentiates on the basis of mental illness. For example, the eligibility for social security of people who are in hospital or supervised care for other reasons is not dependant on whether they have committed a “serious offence”.

⁸ Ibid, s 34.

⁹ Ibid, s 34.

¹⁰ Explanatory memorandum, statement of compatibility, p 2.

¹¹ *C/f Sentencing Act 1991* (Vic), s 5(1).

¹² *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, s 39.

¹³ Ibid, s 40(1).

¹⁴ *C/f Sentencing Act 1991* (Vic), s 5(2)(c).

The statement of compatibility states that any discrimination is justifiable on the basis that ‘those in psychiatric confinement are receiving benefits in kind (in the form of adequate food, clothing and housing) and having their needs met.’ This purported justification does not provide a rationale for differential treatment and is inaccurate in the Victorian context.

2. Forensic patients rely on social security payments to progress through the rehabilitation system

The proposed amendments will significantly hamper forensic patients’ rehabilitation, and therefore their progress towards discharge. Our clients rely on social security to:

- maintain pre-existing obligations in the community;
- pay for basic living costs, leave expenses and rehabilitation activities; and
- secure accommodation for discharge.

Need to maintain pre-existing obligations in the community

The Bill seeks to introduce into the Act a distinction between periods of ‘rehabilitation’ and ‘reintegration back into the community’. This distinction is artificial and inconsistent with our client’s experiences. Our clients have multiple and varied obligations in the community, which they need to maintain while they are in hospital. For example, forensic patients may have to pay for rent, storage facilities, mortgage payments or child support while they are in hospital.

In VLA’s experience it is vital to many clients’ rehabilitation and progress through the forensic system that that they are able to maintain these obligations and connections to the community while they are in hospital. In particular, without income, patients will lose their existing housing, compounding the difficulty of their situation and prolonging their time in custody. In this respect, the circumstances of forensic patients differs to sentenced prisoners. If a prisoner loses his or her accommodation, they will still be released at the end of their sentence. Conversely, forensic patients will only be released from hospital if they have appropriate accommodation in place.

Joan

“Six years ago I was found not guilty by reason of mental impairment of lighting fires. The judge put me on an NCSO. I’m over retirement age now, but I’ve spent a lot of my life in rooming houses. A few years ago I was lucky enough to obtain a social housing unit. It was such a relief to be away from rooming houses after so many years. Recently my doctors diagnosed me as having a relapse of my mental illness, so I was taken into hospital to recover and my NCSO was varied to a CSO. It’s only expected to be a medium-length stay in the hospital. My psychiatrist said that my accommodation is very high quality and that I would be unlikely to find anything as good as it again, so my treating team is keen to make sure I don’t lose it. If my pension is cut while I’m in hospital I won’t be able to keep paying my rent and I’ll lose my accommodation. I’ll become homeless. I’m not sure what would happen to my belongings as I wouldn’t even be able to pay for storage. I have been told that the waitlist for public housing can be up to ten years. So I’d either be back to a life of rooming houses, surrounded by younger people and illegal drugs, or I’d have to stay in hospital for much longer than my doctors think I need to.”

Need to pay for basic living costs, leave expenses and rehabilitation costs

The explanatory memorandum to the Bill states that ‘any period of leave from the psychiatric institution that is not a period of integration back into the community is likely to be a short period, and the person’s basic needs will continue to be provided for by the psychiatric institution during that period’.¹⁵ This assumes that patients do not need income while they are in hospital. In VLA’s experience this is not correct. Our clients have various needs during their time in hospital, well before the point at which they receive three nights overnight leave per week.

Patients require income to pay for necessities such as toiletries, clothing and food. Although it would theoretically be possible for these to be provided by the hospital, this would not be compatible with our clients’ sense of dignity or their status as patients rather than sentenced prisoners.

The bulk provision of clothing, food and other necessities would also not be conducive to patients’ maintaining life skills while in hospital. One of the greatest impediments to progressing back into the community is institutionalisation. In VLA’s experience, the Forensic Leave Panel and the court are unlikely to grant off-ground and extended leave to patients who are not able to attend to activities of daily living due to institutionalisation. Removing the opportunity for patients to budget and use their own income will inevitably lead to institutionalisation and unduly delay discharge into the community.

Further, patients have a particular need for income to use when on off-ground leave. In VLA’s experience the first time off-ground leave is generally granted by the Forensic Leave Panel is to the café next to the hospital, and then to the nearby shopping centre. Such outings necessarily require small amounts of spending money. Later, patients might take leave to go to the gym or other recreational activities. Such activities require money. Patients also take leave to travel to visit family, which requires money for public transport.

In VLA’s experience, the Forensic Leave Panel is extremely unlikely to grant leave unless the leave sought is for a particular purpose. It is not regarded as therapeutic or safe for patients to access leave with no activity in mind. As activities such as these generally cost money, if patients do not have income, they will not be able to secure leave from the Forensic Leave Panel and will languish in the system.

Sonny

“I’ve been diagnosed with schizophrenia, a brain injury and substance use disorder. Around six years ago I was found not guilty by reason of mental impairment of intentionally cause injury and threat to kill. The judge put me on an NCSO. I was doing alright in the community but my doctors thought that I was drinking too much. They were worried that the drink would interact with my schizophrenia, so they took me into hospital and changed my order to a CSO. My doctors say its very important for my recovery for me to be doing activities and engaging in the community. They are trying to think of things to do to keep me occupied. I have leave to take the train to the market in the community where I am from and where I can buy food from my culture. I’m pleased because recently the FLP gave me leave to play indoor soccer once a week. I couldn’t do these things if I didn’t have any money. I wouldn’t even be able to pay for a train ticket. The FLP doesn’t give you leave just to wander around the city. So I would just end up sitting around the hospital not doing much. This would set back all my hard work.”

¹⁵ Explanatory memorandum, statement of compatibility, p 2.

Need to secure accommodation before discharge

The proposal assumes that forensic patients will only need money for accommodation once they are regularly spending six nights or more in a fortnight outside of the psychiatric institution. This assumption is not consistent with VLA's experience of forensic patients' needs in Victoria.

Ordinarily, patients will need to have secured accommodation prior to being granted overnight leave by the Forensic Leave Panel. Securing accommodation requires the payment of a bond and rent in advance. Further, patients' access to overnight leave will often be staggered, so that they will be trialled with one night of over-night leave for a time, followed by two nights and then three nights. For our clients it is not possible to obtain secure, ongoing accommodation for one or two nights' only – a whole week's rent must be paid for regardless of how many nights the patient is staying in the accommodation.

There are also substantial expenses involved in setting up new accommodation, in the form of whitegoods and furniture.

Johnno

"When I was 22 years old I became unwell. I didn't get help at the time because I didn't know that I was unwell. Now I've learnt that not knowing you're unwell is a symptom of schizophrenia. While I was unwell I committed a violent offence. I can't actually remember it myself because I was so unwell at the time. I was found not guilty by reason of mental impairment and put on a CSO. I remained pretty unwell for over a year after I arrived in hospital. With medication I started to improve, but then I got very depressed and suicidal as I started to realise what I had done and how it had affected my family. Slowly I got better and started to focus on the future. A day doesn't go by when I don't think about what happened, but I get by the best I can. I'm one of the lucky ones because my family has stood by me.

People don't realise but you still have to pay for most of your everyday living expenses when you are in hospital – clothes, shaving gear and other toiletries, Myki cards, gym memberships, everything. Even when you are in the sub-acute unit you have to buy food and cook it to prove that you have enough life skills to move on to the rehab units. Also the leaves you get are to go to the café and to go shopping. There'd be no point in going on those leaves if you didn't have any money. In fact you wouldn't even be given leave in the first place because you can't get leave just to do nothing.

Before I got overnight leave I had to have secure accommodation. Before I came into hospital I was living with my family, but because my offence happened at home I couldn't go back there. So I needed to find my own place. Thankfully the Salvation Army helped me find a unit of my own. You don't think about it but there are a lot of expenses setting yourself up in a unit. It was totally empty so I had to get a fridge, washing machine, tv, bed, linen – everything. On top of that I had to pay for bond and rent in advance. That was all before I even got the leave.

Now I'm 29 and I'm living in the community on extended leave. I'm working full-time so I'm not on the DSP anymore, but if I hadn't had it while I was in hospital, I don't think I would have ever gotten to the point I'm at today."