



**Australian Government**  

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**Department of Social Services**

**Serena Wilson PSM**  
Deputy Secretary

Senator Zed Seselja  
Chairperson  
Senate Community Affairs Committee  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

Dear Senator Seselja

**SUBMISSION TO THE SENATE COMMUNITY AFFAIRS LEGISLATION COMMITTEE**

Please find attached the Department of Social Services submission to the Senate Community Affairs Committee inquiry into the Social Services Legislation Amendment Bill 2015.

Thank you for providing the department with an opportunity to make a submission.

Yours sincerely

Serena Wilson

// May 2015

Lead by example  
value diversity | respect diversity | celebrate diversity

## Department of Social Services

### Submission to the Senate Community Affairs Legislation Committee Inquiry into the Social Services Legislation Amendment Bill 2015

#### Background

##### *Legislation*

1. Since 1908, there have been provisions in social security law to cease payments for people undergoing psychiatric confinement. Section 1158(b) of the *Social Security Act 1991* provides that a person in psychiatric confinement, because the person has been charged with an offence, is to be treated the same as a person in gaol. There have been provisions similar to section 1158(b) in social security law since at least 1947.
2. In 1986, a new section was added to the legislation so that the bar to payment of an income support payment would not apply to a person undergoing psychiatric confinement who is undertaking a course of rehabilitation.

##### *Federal Court decision 2002*

3. A judgement by the Federal Court in 2002 (*Franks v Secretary, Department of Family and Community Services* [2002] FCAFC 436) found that a course of rehabilitation can include a broad spectrum of treatments. Prior to 2002, most people undergoing psychiatric confinement could not receive social security payments.
4. The outcome of this judgement has meant that essentially anyone who is undergoing psychiatric confinement is taken to be undergoing a course of rehabilitation and accordingly is paid. This includes people who were not on income support, or were on income support payments for which they cannot qualify while in confinement (e.g. Newstart Allowance or Parenting Payment), receiving new grants of Disability Support Pension (DSP) after entering psychiatric confinement. In some institutions the standard intake procedures include assisting new arrivals to claim DSP.
5. This is not reflective of the original intent of the legislation.
6. Although state and territory governments have responsibility for corrections, health and mental health services, in many cases they are currently using people's Commonwealth income support to help fund the person's own confinement. We understand that this can include charging a fee of up to 85% (not the same in every state or territory) of a person's pension while they are in psychiatric confinement. Prior to the 2002 Federal Court decision this was not possible in the majority of cases.

*Social Services Legislation Amendment Bill 2015*

7. This Bill provides that a person who is undergoing psychiatric confinement because they have been charged with a serious offence will be taken to be in psychiatric confinement for the purpose of the social security law, irrespective of whether the person is undertaking a course of rehabilitation. One of the effects of this is that relevant social security payments will not be payable to the person while the person is undergoing that psychiatric confinement. The Bill will also provide for circumstances in which a person is not taken to be undergoing psychiatric confinement (meaning that a social security payment will be payable) during a period that is 'a period of integration back into the community for the person'.
8. The proposed amendment to the social security law will only capture those persons who have been charged with a serious offence. The amendments define a serious offence as murder or attempted murder, manslaughter, rape or attempted rape as well as other violent offences that are punishable by imprisonment for life or for a period (or maximum period) of at least seven years.
9. It is estimated that this measure will affect approximately 350 people on implementation and 50 people each year afterwards.

**Human Rights**

10. The Bill is compatible with human rights because people in psychiatric confinement receive 'benefits in kind' in lieu of a social security payment. Their basic needs are provided for by the relevant State or Territory government through the hospital or psychiatric facility. The current arrangements for social security payments adequately provide for partners and children of people in psychiatric confinement.
11. *Rights to social protection and social security and the right to an adequate standard of living*
12. Article 28(1) of the Convention of the Rights of Persons with Disabilities (the CRPD) provides for the right of persons with disabilities to an 'adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions'.
13. Article 28(2) of the CRPD, and article 9 of the International Convention on Economic, Social and Cultural Rights (the ICESCR) recognise the rights of everyone to social protection and social security.
14. Individuals affected (and their families) will have their rights to an adequate standard of living, and to adequate health, habilitative and rehabilitative care services fulfilled.
15. There is no explicit obligation to provide social security benefits in the form of payments or cash. Rather, where social security systems are in place to provide for certain social risks or contingencies, article 28 of the CRPD requires that the benefits for the relevant persons, including benefits in kind, must suffice to ensure that people can realise their right to the adequate standard of living. People in

psychiatric confinement are receiving 'benefits in kind' in lieu of a social security payment, in the form of food, clothing and housing provided by the state or territory psychiatric institution, and therefore have their basic needs provided for. When such benefits are being provided, the need for social security in the form of payments is negated.

16. The Bill provides for circumstances in which a person is not taken to be undergoing psychiatric confinement (meaning that a social security payment will be payable) during a period that is 'a period of integration back into the community for the person'. This will ensure that the person's right to an adequate standard of living are provided for in the period that a person is re-establishing themselves in the community. What constitutes a period of integration will be defined in a legislative instrument. The instrument may provide, for example, that a period of integration is where the person is spending six nights or more in a fortnight outside of the psychiatric institution.

#### *Rights of equality and non-discrimination*

17. Article 26 of the International Covenant on Civil and Political Rights and article 2(2) of the ICESCR recognise the rights of equality and non-discrimination.

18. While people who are undergoing psychiatric confinement may have a disability, any differential treatment of these persons is justifiable as those in psychiatric confinement are receiving benefits in kind (in the form of adequate food, clothing and housing) and are having their needs met.

#### *Safeguards for families*

19. Articles 28(1) and 23(2) of the CRPD, article 11 of the ICESCR, and article 26 of the Convention on the Rights of the Child recognise the impact of social security payments on partners and children.

20. The current arrangements for social security payments to partners and children are adequate to meet their needs, and provides appropriate safeguards. While a recipient's partner is imprisoned or in psychiatric confinement because the partner has been charged with committing an offence, the recipient can be paid a higher partnered rate of a social security payment.

21. Where a recipient was a carer for a child (or other person) and that caring responsibility has passed to another person, that other person is able to claim income support in respect of the child (or person), subject to all standard eligibility criteria. This may include Parenting Payment, Family Tax Benefit, Carer Payment and Carer Allowance.

22. This measure is justifiable, reasonable and proportionate and thus consistent with Australia's international human rights obligations.