CoMHWA

Consumers of Mental Health WA (Inc)

Consumers of Mental Health WA (CoMHWA) Submission

Senate Community Affairs Legislation Committee Inquiry into the *Social Services Legislation Amendment Bill 2015*

14th May 2015

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

CoMHWA
Consumers of Mental Health WA (Inc)

Consumers of Mental Health WA (Inc)
ABN: 95581286940
Business Address: 13 Plaistowe Mews West Perth WA 6005
Postal Address: PO Box 1078 West Perth WA 6872 **P**: (08) 9321 4994
W: www.comhwa.org.au **E:** admin@comhwa.org.au

13th May 2015

Dear Committee Secretary,

Consumers of Mental Health WA (CoMHWA) is a not-for-profit systemic advocacy organisation and peak body for mental health consumers in Western Australia, whose core purpose is to listen, understand and act upon consumers' voices.

CoMHWA opposes the Social Services Legislative Amendment Bill.

CoMHWA is aware of the vulnerability to human rights shortfalls and the voicelessness of mental health consumers and people with disability who are detained under mentally impaired defendant legislation.

The targeting of persons who fall under this legislation for this proposed $29.4 million DSP budget savings seems to represent, as were young people and categories of people with the disability support pension in the 2014-15 Budget, an 'easy target' for withholding of social security rights.

The Social Services Legislative Amendment Bill seeks to amend the definition of psychiatric confinement to provide that persons who are charged with a serious offence will be taken into psychiatric confinement, irrespective of whether they are undertaking a course of rehabilitation. Such persons will therefore – in line with the definition of psychiatric confinement- be ineligible for social security payments, health care cards or allowances. The Bill's fairness and implications cannot be understood without understanding 'psychiatric confinement', to be discussed below.

The basis on which we oppose the Bill is that it clearly falls short of Australia's human rights obligations, despite the *Statement of Compatibility with Human Rights ('Human Rights Statement')* outlined in the Bill's Explanatory Memorandum. In particular, it is not sufficient that a government provides for rights to protection and social security and the right to an adequate standard of living – it must do so consistent with the rights of equality and non-discrimination.

The Statement asserts that the Bill fulfils the requirements of Equality and Non-Discrimination under Article 26 of the International Covenant on Civil and Political Rights and Article 2(2) of the ICESCR, on the basis that the people the Bill affects:

CoMHWA
Consumers of Mental Health WA (Inc)

Consumers of Mental Health WA (Inc)
ABN: 95581286940
Business Address: 13 Plaistowe Mews West Perth WA 6005
Postal Address: PO Box 1078 West Perth WA 6872 **P**: (08) 9321 4994
W: www.comhwa.org.au **E:** admin@comhwa.org.au

i. will now be treated in the same way as a prisoner or person in remand awaiting trial; and
ii. will now be supported in an equal way to those who are psychiatrically confined, whose right to social security and adequate standard of living is provided by the state.

CoMHWA responds to these two claims below.

i. Fulfilment of Equality through Treatment Equal to Prisoners and Persons in Remand Awaiting Trial

Under the current *Social Security Act 1991*, psychiatric confinement is defined under s23(8):

> 23(8) Subject to subsection (9), ***psychiatric confinement*** in relation to a person includes confinement in:
>
> (a) a psychiatric section of a hospital; and
>
> (b) any other place where persons with psychiatric disabilities are, from time to time, confined.
>
> (9)The confinement of a person in a psychiatric institution during a period when the person is undertaking a course of rehabilitation is not to be taken to be ***psychiatric confinement.***

Currently, under the Act persons who are under psychiatric confinement (e.g. in mental health hospitals) are not eligible for social security benefits or health care cards but they *are* if they are undertaking rehabilitation[1]. In the Guide to Social Security Law, restrictions on payment for psychiatric confinement are focused on situations where the person is a *mentally impaired accused*- i.e. has criminal charges as a cause of hospitalisation and is not undertaking rehabilitation[2]. However, the definition of psychiatric confinement is so broad as to refer to the detention/confinement of persons with a mental illness generally, such as when they are treated in involuntary care or referred for mental health assessments.

---

[1] CoMHWA uses the term rehabilitation in keeping with this Act. In mental health and disability settings, care must be person-centred, strengths-based and focused on maximising capacity for independent community living. In mental health, the notion of permanent disability is challenged and support is focused on 'recovery'- a personal A personal process of attaining a life that is personally meaningful, empowered, fulfilling and characterised by active contribution as citizens, irrespective of the presence or absence of diagnosis and/or symptoms

[2] Australian Government. 2015. Guide to Social Security Law Version 1.212. Released 11 May 2015. 3.1.4.05 Payability During Periods in Gaol or Psychiatric Confinement. http://guides.dss.gov.au/guide-social-security-law/3/1/4/05 <Accessed 14/05/2015>

CoMHWA
Consumers of Mental Health WA (Inc)

Consumers of Mental Health WA (Inc)
ABN: 95581286940
Business Address: 13 Plaistowe Mews West Perth WA 6005
Postal Address: PO Box 1078 West Perth WA 6872 **P**: (08) 9321 4994
W: www.comhwa.org.au **E:** admin@comhwa.org.au

With respect to the detention of persons with a mental illness generally, consumers continue to be eligible for social security benefits while in hospital because 'rehabilitation' is no longer a possible scenario in psychiatric confinement, but is integral to, and morally essential to, lawful acts of detention of mental health consumers and persons with disability. This rehabilitation goal is *also integral* within forensic mental health services and disability justice facilities, where persons in psychiatric confinement charged with offences are detained. Such facilities are not old asylums- which were as segregated from community life and 'containment' as prisons, and in which people's needs were provided for 'in-kind'. They are places where rehabilitation and re-integration to community is as much as the goal as in general mental health hospitals.

Most importantly with respect to the first claim that the Bill fulfils obligations to equality and non-discrimination, punishment is not the goal of confinement in such cases. This is because the people so charged are not morally culpable for the offence, on the basis of impairment, either because they have not been tried at law (unfit to stand trial) or have been tried and found not guilty. They are not at fault, nor treated as at fault. CoMHWA can therefore see no basis on which treating them in the same way as prisoners, not persons with mental illness undertaking treatment, furthers Equality and Non-Discrimination. Nor can we see why, if the definition of psychiatric confinement excludes people undertaking rehabilitation, why people charged with serious offences should be discriminated from having access to benefits, when the goal and importance of rehabilitation remain the same for these persons.

iii. Fulfilment of Equality on the basis that they would be treated equally to those in psychiatric confinement, who are receiving benefits in kind and having their needs met

The second claim that has been made, is that persons who do meet the criteria for psychiatric confinement and are having benefits withheld, are still receiving benefits in kind and having their needs met by the state, and thus the amendment means that they will be treated differentially, but justifiably, with respect to their social and economic rights.

We have already discussed above that the definition of psychiatric confinement, with its exemption for persons undergoing rehabilitation, compared with the contemporary reality that rehabilitation is integral to detention for persons confined. CoMHWA therefore proposes that there are no persons in Australia who would meet the criteria for psychiatric confinement who those this Bill targets would be equal to, in receiving benefits in kind and having their needs met by the state. Indeed, CoMHWA would urge the parliamentary disclosure of places in Australia where psychiatric confinement is being undertaken *without* rehabilitation so that these places can be promptly investigated and shut down.

CoMHWA
Consumers of Mental Health WA (Inc)

Consumers of Mental Health WA (Inc)
ABN: 95581286940
Business Address: 13 Plaistowe Mews West Perth WA 6005
Postal Address: PO Box 1078 West Perth WA 6872 **P**: (08) 9321 4994
W: www.comhwa.org.au **E:** admin@comhwa.org.au

There are thus no persons, who fit the definition of psychiatric confinement, who the persons targeted under this Bill would be equal to if this Bill was passed as the definition is not concordant with contemporary rights and standards in care.

Mental health consumers receive access to social security benefits while in general hospital in line with s23(8) and (9). Returning to the Explanatory Memorandum's argument that payment or cash is not required, where those confined receive benefits in kind and have their needs met, we refer to the reality that hospitalisation does not provide benefits in kind and meet social and economic needs that would fulfil Australia's obligations to provide social security and the right to an adequate standard of living. Hospitals provide food. They do not provide accommodation, except for the length of stay. Hospitals do not provide for the living expenses that continue to arise- as basic needs- while in hospital, including the basic necessities of utilities supply, rent, communication, transport, child care payments, loans repayments, clothing, toiletries, education and fee-based health care (e.g. dental care; GPs; and medications). Persons in hospital continue to receive payments unless their situation means they do not pass the general eligibility criteria for such payments (e.g. rent allowance, if the person does not pay for lodging costs in their place of accommodation).

Rehabilitation *within hospitals*, whether for physical health care, mental health care or disability care, rests on co-production: bringing together the rehabilitation goals of the facility's teams, equipment and facilities, and the person's community assets and resources. In Australia, these assets and resources are provided for by social security benefits, not the state, where the person has no sufficient, independent means of income. This is why people's health and social outcomes would be greatly disadvantaged if there payments were withheld while in hospital. This does not fundamentally change in forensic settings because, as discussed, rehabilitation is also the goal in forensic settings. Regardless of whether a person has been charged of offences that have brought them into rehabilitation partnership, their community assets and resources are just as essential during hospital, and in preparing them for discharge from hospital.

The definition of psychiatric impairment includes, but is not limited to, a person with an acquired brain injury and intellectual disability. We are advocating on behalf of mental health consumers, but assert that the rehabilitation goal is also integral and morally essential to those with disabilities detained, and that use of the person's basic means (their basic income) in the co-production process, are equally essential to rehabilitation.

CoMHWA
Consumers of Mental Health WA (Inc)

Consumers of Mental Health WA (Inc)
ABN: 95581286940
Business Address: 13 Plaistowe Mews West Perth WA 6005
Postal Address: PO Box 1078 West Perth WA 6872 **P**: (08) 9321 4994
W: www.comhwa.org.au **E:** admin@comhwa.org.au

In summary, in arguments the Explanatory Memorandum has put forward to propose the Bill satisfies human rights sufficiently, these turn upon a misguided interpretation of equality and a spurious depiction of contemporary hospital and facility-based care. We are not convinced that equality is furthered by withholding basic social security rights from groups of people on the basis that they will then be more equal to others deprived of these rights (in this case, mental health consumers in the old asylum facilities, where containment not rehabilitation was the goal). And we are not convinced that state facilities do, can or should provide for the social and economic needs of persons who are detained in psychiatric and disability hospitals or facilities, on the basis this would also reinstate 'asylum days' – living segregated lives where a person's basic means (their home, necessities, relationships) are provided for, and life lived inside, state institutions.

Concerningly, if this Bill is passed and this interpretation of equality accepted, it would seem to open doors to the future withholding of payments to all mental health consumers detained in a hospital or residential facility, in order to make their status more equal to those who are targeted under this Bill.

CoMHWA makes this submission in the faith that the Human Rights of vulnerable people are of central concern to and vigorously defended in the legislative assembly.

Should the Bill be debated in parliament, CoMHWA supports, as an alternative amendment to s23(8) and other relevant sections of the Bill, clear provisions that psychiatric confinement cannot be used as a basis for withholding benefits and supports in situations where a person would otherwise meet general eligibility criteria for payments. This would clearly support equality, in contradistinction with the Bill.

Sincerely,

Shauna Gaebler
Executive Director