



Australian Government

National Mental Health Commission

15 May 2015

Committee Secretary
Senate Standing Committees on Community Affairs
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee Secretary

I am writing to provide the below submission from the National Mental Health Commission to the Community Affairs Legislation Committee's Inquiry on the Social Services Legislation Amendment Bill 2015.

The Commission provides independent reports and advice to the community and government on mental health. We work across all areas that promote mental health and prevent mental illness and suicide—not just government and not just health, but education, housing, employment, human services and social support. By leading, advising, collaborating and reporting we will help transform systems and promote change, so that all Australians achieve the best possible mental health and wellbeing.

The Commission has a number of concerns about the Social Services Legislation Amendment Bill 2015 in its current form:

- The bill determines access to social security support based on the offence with which people were charged, despite not being convicted as a result of mental illness or intellectual disability.
- The practical effect of removing access to social security payments would be detrimental to rehabilitation and recovery for people with a mental illness, especially without close consultation with the States and Territories
- Other provisions in the bill appear to be discriminatory or have negative symbolic effect.

These concerns are detailed below.

Legal status of people not convicted of an offence due to mental illness or intellectual disability

The bill fails to recognise the significant difference in legal status between those convicted of a criminal offence, and those who are not convicted due to mental illness or intellectual disability.

Persons found unfit to stand trial or who have not been convicted due to a mental impairment have been found not legally (or morally) culpable of the offences with

which they were charged. This vital distinction, which has a long history in English and Australian law, is not acknowledged in this bill.

In particular, subsection 23(9A)'s distinction between a person charged with a 'serious offence' (who would not receive social security payments) and others (who would continue to receive such payments) appears arbitrary. There is no clear rationale given for why a person charged with – but not convicted of – certain offences should be taken to be in psychiatric confinement, rather than undertaking a course of rehabilitation, while others charged with offences that do not classify as 'serious' are still taken to be undertaking a course of rehabilitation. The nature of the offence with which a person was charged – but not convicted – should not define whether they are taken to be in psychiatric confinement or undertaking a course of rehabilitation, nor should it be relevant to whether they have access to social security payments.

Practical effect of removing access to social security payments on rehabilitation and recovery

Detention in a forensic psychiatric facility is generally seen as a process of rehabilitation. However, a rapid shift placing the onus on state and territory health systems to fund rehabilitation would be likely to have a detrimental impact on the rehabilitation and recovery of affected people.

In his second reading speech, the Minister stated that: "it is the relevant state or territory government that is responsible for taking care of a person's needs while in psychiatric confinement, including funding their treatment and rehabilitation." This does not reflect current practice. In many facilities, patients contribute much of the funding for their hospital costs and other extra costs related to their rehabilitation.

The Commission acknowledges that there may be worthwhile policy and budgetary questions to explore about the adequacy of current funding arrangements, in which rehabilitation is subsidised by those undertaking a course of rehabilitation (using Commonwealth social security payments) rather than States or Territories. However, moving to alter the situation rapidly (as per the bill) could result in significant funding shortfalls that would impact on a person's rehabilitation and place greater financial burden on the individual's family and support people. Practical discussions between the Commonwealth and the States and Territories should be undertaken before such provisions are put into effect.

There also is the question of how ceasing social security payments to psychiatric patients will affect their recovery and rehabilitation after they leave forensic facilities. The Commission advocates for 'a contributing life' in promoting and maintain good mental health. A contributing life is a fulfilling life enriched with close connections to family and friends. It means having something to do each day that provides meaning and purpose, whether this is a job, supporting others or volunteering. It means having a home and being free from financial stress and uncertainty. In the case of a person undertaking a course of rehabilitation in a forensic psychiatric institution, social security payments may play a key role in enabling a contributing life. Although the bill includes provisions for allowing payments during periods of integration, it is unclear whether this would provide sufficient assistance to enable a transition to life

in the community, including in securing stable housing or paying for education and training.

Apparent discrimination related to periodic detention

Under proposed subsection 23(9D), the bill proposes to remove a person's access to social security payments even during periods of leave outside the psychiatric institution, if this is not taken to be a period of integration back into the community. No such provisions exist for people found guilty of an offence who are on periodic detention – they instead receive social security payments for any days outside detention. The Commission is concerned that this provision, in its present form, appears to discriminate against persons with a mental illness or intellectual disability.

Concerns about symbolic effect

Currently, the effect of subsection 23(9A) is to distinguish between psychiatric confinement, and undertaking a course of rehabilitation. The proposed amendments would serve to collapse this distinction, rendering rehabilitation a subordinate element of confinement. This sends a negative symbolic message, reinforcing stigmatised beliefs that people with mental illness or intellectual disability need to be confined first and rehabilitated second. The Commission argues that rehabilitation is and should be the prime aim of forensic psychiatric detention, and that relevant legislation needs to be consistent with this function.

Conclusion

Based on the concerns outlined above, it is the Commission's view that the bill should not proceed in its current form. Persons who have been charged but not convicted of an offence, 'serious' or otherwise, as a result of mental illness or intellectual disability should be appropriately supported in their rehabilitation, and not suffer discrimination. Where there are legitimate questions about funding for their rehabilitation, further consultation between the Commonwealth and States and Territories would be strongly advisable before any legislative changes are made.

Yours sincerely

Prof Allan Fels AO
Chair