

Chapter 2

Key issues

2.1 The Bill returns the payment of social security to the pre-2002 position, where payments were withheld from people held in psychiatric confinement as a result of being charged with an offence. However, the measure has been updated to restrict social security payments only from those people held in psychiatric confinement who have been charged with a serious offence. People who have been charged with a non-serious offence would not have their payments withheld.¹

2.2 The Department of Social Services (Department) provided evidence to this inquiry as to the intent of the Bill, and how its various provisions would be implemented and operate.

2.3 Participants in the inquiry expressed concern with elements of the proposed measures contained within the Bill, including:

- the definition of serious offences;
- the financial impact of the Bill;
- the impact on clinical service delivery and reintegration, and
- the definition of a period of reintegration.

Definition of serious offences

2.4 In order to give effect to the intent of the measure being introduced, the Bill includes a definition of what constitutes a serious offence for the purposes of restricting certain social security payments. The definition focuses on serious offences that involve harm, or risk of harm, to a person.²

The proposed amendment to 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.³

2.5 Submitters argued that the distinction between serious and non-serious offences was arbitrary, because people with a mental illness are deemed not morally culpable for their crimes, regardless of the seriousness of the offence.

Persons in psychiatric confinement are there because they have been found not to be morally culpable in the criminal justice system due to severe

1 EM, p. [3].

2 EM, p. 2.

3 *Submission No. 8*, p. [3].

mental illness, brain damage or intellectual disability. This applies equally to serious and non-serious offenders.⁴

2.6 Submitters argued that people affected by this bill are being detained for treatment, and argued that it was therefore not appropriate to treat their social security payments in the same punitive manner as used for convicted criminals:

The detention of these individuals in psychiatric hospitals (and the soon to be established Disability Justice Services in WA) is for the purposes of care and rehabilitation, not punishment or deterrence.⁵

... [T]he Bill effectively treats forensic patients in the same manner as those who have been found guilty of an offence and are serving a prison sentence. It is unjust to punish forensic patients by removing access to social security payments, when they have not been found to be morally culpable for criminal acts due to severe mental illness, intellectual disability or other cognitive impairment.⁶

2.7 However, the Department explained the intent of providing a distinction between serious and non-serious offences, was to protect the continued payments of social security for people who had not been charged with a serious crime.

The distinction between serious and non-serious crimes protects those people with disability who are charged with less serious offences and yet are confined. It is acknowledged that, in rare cases, certain individuals who have been accused of lesser offences may be confined for extended periods because there are not suitable services to support them in the community. The government was concerned that these individuals not be affected by this measure.⁷

2.8 The *Social Security Act 1991* currently restricts payments to a person in psychiatric confinement as a result of being charged with an offence.⁸ This bill would amend Social Security law to expand the eligibility of payments to people in psychiatric confinement who have not committed a serious offence, and to ensure that eligibility is expressly captured within legislation.

2.9 The Department also submitted that such a distinction between serious and non-serious offences is not intended to be punitive, but is intended to reflect that where people are charged with a serious offence, the duration of detention without need to pay for reintegration expenses was likely to be a long period.

4 National Welfare Rights Network, *Submission 1*, p. 3. The majority of submissions agreed with this view.

5 Western Australian Association for Mental Health, *Submission 17*, p. 2.

6 Law Institute of Australia, *Submission 6*, p. 4.

7 Ms Halbert, *Committee Hansard*, 21 May 2015 p. 34.

8 *Social Security Act 1991*, s1158.

People who are alleged to have committed serious crimes that do harm or are likely to harm others and who have been incarcerated by the state would usually be confined for a significant period due to the degree and length of time it takes for these patients to be ready to commence integration into the community.⁹

2.10 Some submitters were concerned that the definition was too broad in including acts that posed 'risk' of injury or property offences that endangered a person.

2.11 The Department provided evidence that acts which did not result in actual harm, or were not a property crime that endangered a person, would not meet the 'serious offence' test.

It always involves risk of harm, or actual harm to a person. I do not want to get into areas that are not my expertise, but you would imagine, if it was an innocuous act, that a person would be unlikely to be charged and unlikely to be confined due to that innocuous act.¹⁰

2.12 Submitters were concerned that the seven year sentence provision within the definition of 'serious offence' would be triggered by the indefinite nature of mental health orders:

All custodial supervision orders—except in I think, in New South Wales and South Australia, which have limiting terms attached to them—are, by nature, indefinite. It is not a sentence or a conviction and it is based on the risk of harm posed by the person, and the decreasing nature of the risk is what determines the length of time.

...

In states where there are not any limiting terms, all orders are, by nature, indefinite. So, if they are indefinite, they will be captured. It does not matter whether you are serious or non-serious under the definitions proposed; all orders will be captured in the nature of this.¹¹

2.13 The Department outlined that the removal of payments is not triggered by mental health orders themselves, but whether the cause of the mental health order was a criminal charge for a serious offence.¹² The Department also discussed the consultations that had been undertaken with the states and territories on the process to determine which offences would be captured by the provision.

Again, we have consulted with the states and territories about how Centrelink will know whether that person falls into that category. Since we are talking about a limited number of institutions where a person is confined, rather than the whole community, one approach could be that we educate staff in those institutions about our proposed act—it would be an

9 Ms Halbert, *Committee Hansard*, 21 May 2015, p. 34.

10 Ms Halbert, *Committee Hansard*, 21 May 2015, p. 40.

11 Mr McGee, Coordinator, Aboriginal Disability Justice Campaign, *Committee Hansard*, 21 May 2015, p. 22.

12 Ms Halbert, *Committee Hansard*, 21 May 2015, p. 39.

act at that time—and what kinds of crimes are included in the definition of serious offence. They would simply inform Centrelink that this person falls into that category. That would be one approach we could take. Another approach that could be taken would be for Centrelink to be given information about what the charges were et cetera. That is not the preferred approach at this point, but we are still working through that. We would in either case be dependent on the states and territories knowing what the person had been charged with, of course.

2.14 A few submitters argued that the Department would have difficulty in defining 'serious offences' across multiple jurisdictions, each with their own criminal code.

It is understandable, as explained in the Memorandum, that it is not possible to define specific offences under (9F) considering the varying criminal laws of the states and territories. However, a number of questions arise in terms of the administration of these subsections.

The first relates to who in the Department of Social Security (the Department) will be responsible for assessing whether a charge is a serious offence, especially those that might fall within the latter, undefined, category. It would not be possible to simply have a specific list of offences within the Department for each jurisdiction as a particular offence may be part of this category depending on the factual circumstances, and not the charge itself.¹³

2.15 The Department outlined that further consultations will be undertaken by the Department to determine the implementation method, which involve either Centrelink or individual institutions themselves determining when a person meets criteria for suspension of payments.¹⁴

Financial impact of the Bill

2.16 The Department explained that social security payments, such as the disability support pension, are intended as a safety net for those in need. The Department provided information on the purpose of social security payments.

These payments should not be made where a person is confined under state and territory law and their basic needs, such as food and accommodation, are being met by the state or territory, as is currently the case for those in prison. Corrections health and residential mental health services are a state and territory responsibility.¹⁵

2.17 Some submitters raised concerns that security payments are often used by forensic mental health patients to meet ongoing financial obligations, such as maintaining housing or supporting family members.¹⁶

13 Office of the Public Advocate (Qld), *Submission 7*, p.12.

14 Ms Halbert, *Committee Hansard*, 21 May 2015, p. 38.

15 Ms Halbert, *Committee Hansard*, 21 May 2015, p. 34.

16 *Submission No. 6*, pp. 6-7.

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.¹⁷

2.18 The Department noted that the purpose of social security payments is to provide income support to meet people's daily needs. Where that person is confined by virtue of a state order, it is reasonable that those needs should be met by the state or territory.¹⁸ The Statement of Compatibility with Human Rights outlines that family members, where eligible, are able to receive social security payments in their own right.¹⁹

2.19 Submitters raised concerns that the measure would result in cost-shifting mental health services to states and territories, because in many cases patients are charged fees for their accommodation and treatment. The Queensland Department of Health estimated the Bill would result in a loss of \$2.17 million per annum for the Queensland Government, as fees could no longer be recovered from people impacted by this bill.²⁰

2.20 During the committee's public hearing into the Bill, the Victorian Institute of Forensic Mental Health (Forensicare) outlined that their organisation also charged fees at one point.

CHAIR: I have an email here with some information from, I think, one of your annual reports that suggests that patient accommodation fees are charged for long-term involuntary patients. I am trying to get to the bottom of this.

Mr Dalton: For a period in fiscal year 2012-13 we did charge fees. Every other mental health service in the state charges fees for long-term patients who have been there more than 30 days whether they are involuntarily detained or not. If your brother or your sister has a mental illness and resides in long-term treatment in a mental health facility they will usually be asked to pay around 75 per cent to 80 per cent of their pension as an accommodation charge at that facility. That is in the general mental health system. For a period, Forensicare did charge those fees. We ceased that after a period because we were in litigation in relation to it. We settled that. Part of the effect of the settlement was that we ceased to charge fees.

CHAIR: You used to charge fees but you stopped. Why? Why did you stop charging fees? Was it because there was litigation?

17 Mental Health Review Tribunal, *Submission 3*, p.2. See also *Submission 6*, p. 6.

18 Ms Halbert, *Committee Hansard*, 21 May 2015, p. 33.

19 EM, p. [12].

20 Queensland Government Department of Health, *Submission 28*, p. 7.

Mr Dalton: It was part of litigation brought by a patient and the settlement of that.

2.21 The Department noted that in many cases, patients are charged up to 85% of their DSP by the states and territory mental health institution to pay for their treatment.²¹ The Department further noted that social security payments were not intended for this purpose:

I am just saying that the Social Security Act does not exist for the purposes of providing people with income support to support their health needs, clearly. That is a matter for health. In this case, it is, in the main, the responsibility of state and territory health agencies.²²

2.22 The committee notes that in jurisdictions where a person was paying 85% of their Disability Support Pension to the mental health institution where they are detained, that person would be left with a maximum of \$63.45 per week for other expenses. The majority of funds from the social security payment goes to the state or territory government or institution.

2.23 A submission from the Queensland Government Department of Health outlines that Queensland provides an indigent allowance payment of approximately \$42 per week to mental health consumers who have no access to social security benefits.²³

2.24 The committee notes that such a payment could be used by other states and territories to support people while in psychiatric institutions. This would be more appropriate than a social security payment.

Impact on clinical service delivery and reintegration

2.25 Submitters raised concerns that patients would be unable to pay for rehabilitation activities, such as education or accommodation costs during leave, and this would have negative impacts on their progression through the treatment regime.²⁴

2.26 The Department outlined that the provision of corrections health and mental health services, including rehabilitation activities, is the responsibility of the states and territories and social security payments are not intended for this purpose.²⁵

A lot of the comments in submissions have said the provision of income support is an integral part of rehabilitation and mental health support. I am just making the point that that is not why the Commonwealth is providing

21 *Submission 8*, p. [2].

22 Ms Halbert, *Committee Hansard*, 21 May 2015, p. 37.

23 *Submission 28*, p. 7.

24 The potential for negative impacts on the therapeutic process was a key concern of most submissions.

25 Ms Halbert, *Committee Hansard*, 21 May 2015, p. 37.

income support. The Commonwealth provides income support to meet people's basic daily needs.²⁶

2.27 Submitters raised concerns with the length of time and difficulty in resuming social security payments after they have been cancelled, and that this would delay reintegration. The Western Australian Association for Mental Health and the Mental Health Association of Australia both recommended that payments should be suspended rather than cancelled, to allow for payments to be more quickly resumed upon release.

2.28 The Department outlined that payments were intended to be suspended for two years in the first instance, and then cancelled after that period. This would allow for a faster resumption of payments when a person became re-eligible through release or by entering a period of reintegration.²⁷

2.29 The committee notes that the majority of submissions provided evidence around the impact that the removal of social security payments would have on the general population of forensic mental health patients. However, no submission provided any details specific to the cohort of patients who would be affected by this Bill - people who have been charged with a serious offence that involved risk of, or actual, personal harm.²⁸

Definition of a 'period of reintegration'

2.30 The Bill will be supported by a legislative instrument which will define the 'period of integration' during which social security payments would resume. This would allow easier modification of the definition, should this be required. The explanatory memorandum provided an example of what such a definition could include:

A legislative instrument made for the purpose of new subsection 23(9C) may provide, for example, that a period of integration back into the community for a person is where the person regularly spends six nights or more in a fortnight outside of the psychiatric institution. The legislative instrument may also provide that a person's day of integration back into the community is the first day of the fortnight in which the person spends six nights or more outside of the psychiatric institution. An effect of this would be that the person's social security payment is payable for the full fortnight, even if the person spends some days in that fortnight in the psychiatric institution.²⁹

26 Ms Halbert, *Committee Hansard*, 21 May 2015, p. 36.

27 Ms Halbert, *Committee Hansard*, 21 May 2015, p. 40.

28 Patients who have committed serious offences involving personal harm are likely to have a long period of detention prior to undertaking any rehabilitation activities that involve leave from the institution, both due to the seriousness of the mental health condition and the community safety concerns. Therefore the removal of payments would likely have much less impact on the clinical treatment of this particular group of patients than on the general cohort of mental health patients.

29 EM, p. 5.

2.31 Submitters raised concerns with this proposed definition, primarily because reintegration is a gradual process, starting with one or two occasional nights of community leave, increasing until reaching a quantum of nights in the community that would trigger the resumption of payments. Submitters argued that without income support, patients would not be able to meet accommodation costs for overnight stays, which is a community-leave eligibility requirement set by most psychiatric institutions.³⁰

2.32 Some submitters argued that if payments are to be suspended, the same methodology used for periodic detention should be used, where payments are only suspended for each night spent in detention.³¹

2.33 The Department provided information that during consultations with the states and territories, it was agreed by the majority that the most helpful mechanism would be a trigger point at which the full amount of payments were resume, rather than payments being made for single nights spent outside the institution.

No approach has been settled. We are consulting on precisely that. There are two obvious ways you could go. You could pay a person for a day that they are out of psychiatric confinement, or you could pick a tipping point at which more time is being spent or a certain amount of time is being spent in the community and therefore they get their whole payment back. As I said, it is not settled yet, but in consultations with the states and territories, on balance, the view seemed to be that it would be better to take the second approach, because if a person is transitioning back into the community and if they are out for six days in a fortnight, as is the current proposal, they would need their whole payment to re-establish themselves in the community.³²

2.34 As noted above, the Department explained that the approach has not yet been settled, and that further consultations would be undertaken.

Senator CAROL BROWN: So, you are consulting in terms of developing the legislative instrument with the states and territories. Is it a broader consultation?

Ms Halbert: We have—I have given away my list now!—consulted with some other key stakeholders in the sector as well, and we will continue to do so.³³

30 This issue was raised in submissions from the Law Institute of Victoria, Victoria Legal Aid, the Hallmark Disability Research Initiative, Western Australian Mental Health Association, Office of the Public Advocate (SA), NSW Government, Queensland Government, Australian Association of Social Workers and the Australian Guardianship and Administration Council.

31 This position was proposed by Mental Health Australia, National Mental Health Commission, Australian Council of Social Service and National Welfare Rights Network.

32 Ms Halbert, *Committee Hansard*, 21 May 2015, p. 37.

33 *Committee Hansard*, 21 May 2015, p. 38. The consultation list is available via the Inquiry website at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Social_Services_2015/Additional_Documents

Committee view

2.35 The Bill seeks to ensure that social security payments are not made to persons in psychiatric confinement who have committed a serious offence and who are not in any period of reintegration into the community. The committee agrees that the Bill will achieve this purpose.

2.36 Many participants in the inquiry did not agree with the premise of the Bill, which seeks to ensure that persons held in psychiatric confinement as a result of being charged with a serious offence should be treated in the same manner as a person in gaol, in respect of social security payments. However, the committee notes that this is not a new measure, and that social security law has included such an approach since 1947.

2.37 The committee notes that this Bill would amend social security law, so that people who are held in psychiatric confinement after committing a non-serious offence would have their eligibility for social security payments expressly protected by legislation for the first time since at least 1947.

2.38 Submitters and witnesses expressed concern with the proposed definition of the 'period of integration' which triggers the resumption of payments. Submitters questioned the formula given as an example in the explanatory memorandum. The Department noted that this proposed formula was drafted in consultation with the states and territories, and was based on the majority view from those consultations as to the formula most beneficial to patient recovery.

2.39 The Department advised that the definition of the 'period of integration' would be contained within a legislative instrument and further consultations would occur before any implementation. The committee is satisfied that this process would allow for any additional concerns to be appropriately addressed. The committee notes that if this is brought forward as a disallowable instrument, the definition will be the subject of parliamentary scrutiny.

2.40 With these findings in mind, the committee makes the following recommendations:

Recommendation 1

2.41 The committee recommends that the Social Security Legislation Amendment Bill 2015 be passed.

Recommendation 2

2.42 The committee recommends the Department continue with its proposed consultation on the definition of a 'period of integration.'

Senator Zed Seselja

Chair

