

Labor Senators' Dissenting Report

1.1 Labor Senators do not support the Social Services Legislation Amendment Bill 2015 in its current form and highlight the need for further consultation on this issue.

1.2 The Committee received submissions from state and territory governments, statutory and advisory bodies, peak and representative groups, service providers, clinicians and patients all opposed to the intent and form of the Bill.

1.3 As noted in the majority report participants in the inquiry raised a number of practical and technical issues with the Bill, including:

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

1.4 Labor Senators are of the view that the justifications and responses provided by the Department of Social Services did not adequately address these issues and further consultation is warranted.

Policy Rationale

1.5 The Government asserts that the Bill 'represents a return to the original policy intention for people in these circumstances.'¹

1.6 However, a number of submitters to the inquiry refuted this. In their submission the Victorian Institute of Forensic Mental Health stated that:

... forensic patients have remained eligible for social security payments throughout the various legislative changes, with the exception of a fifteen month period in 1985/6. However, the 1986 amendments applied retrospectively, so in effect forensic patients had full entitlement to social security payments up until 1985 after which time the payment of social security was limited to forensic patients who were undertaking a course of rehabilitation.²

1.7 In their submission the Queensland Government also rebutted the assertion that the measure in the Bill represented a return to the original policy intention arguing:

1 The Hon. Scott Morrison MP, Minister for Social Services, *House of Representatives Hansard*, 25 March 2015, p. 3353.

http://www.aph.gov.au/Parliamentary_Business/Hansard?wc=23/03/2015

2 Victorian Institute of Forensic Mental Health, *Submission 15*, Attachment 2 p. 5.

... Queensland's experience is that for at least the last 12 years, and (anecdotally) since the *Blunn v Bulsey* decision in 1994, forensic patients have received benefits while they are detained in psychiatric institutions under mental health legislation. It has not been Queensland's experience that payments have routinely or regularly been ceased for patients upon the making of a forensic order or when an involuntary patient is charged with an offence.³

The definition of serious offence

1.8 An overwhelming number of submissions raised concerns about the distinction between the 'serious' and 'non-serious' offences which the Department was not able to satisfactorily address.

1.9 These concerns related to both the appropriateness of making the distinction given the legal status of all forensic patients and the appropriateness of the range of offences that could be captured by the definition as proposed in the Bill.

1.10 The arbitrary distinction between someone charged with a 'serious offence' and others is questioned in the submission from the National Mental Health Commission:

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.⁴

1.11 Similarly in his evidence to the Committee, Mr Matthew Lawrence, Principal Lawyer, Welfare Rights Centre, National Welfare Rights Network stated that the organisation has major concerns with the distinction between persons charged with serious and non-serious offences:

In [the National Welfare Rights Network's] view, there is no acceptable justification for this distinction. All persons in psychiatric confinement have been found not culpable by the criminal justice system, and it is unacceptable for social security law to distinguish between them in this way.⁵

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

3 Queensland Government, *Submission 28*, p. 1.

4 National Mental Health Commission, *Submission 13*, p. 2.

5 Mr Lawrence, Principal Lawyer, Welfare Rights Centre, National Welfare Rights Network, *Committee Hansard, 21 May 2015*, p. 28.

1.13 In her evidence to the Committee, Mrs Alison Xamon, President of the Western Australian Association for Mental Health, highlighted this concern, explaining:

... damage to property and the sort of scenario where people lash out in periods of great distress under psychosis unfortunately do occur, and yet there is no intent behind it. These are not people who are intrinsically dangerous in the sense that they are morally culpable; these are people who are in the grip of being seriously unwell. That is the sort of scenario that is very likely to occur, and I think that there are going to be a number of people who will be captured as a result.⁶

1.14 To illustrate her point Mrs Xamon provided the following real life example of what would constitute a 'serious offence' under the definition in the Bill:

I was assisting a man who was in this position. He was a man who lived with schizophrenia. He had been living successfully in the community for a long time, but unfortunately he went through a period of decline. The neighbours were alarmed that he seemed to be not coping so they called the police to see if the police would intervene and take him to a mental health facility, as per the Mental Health Act. He was undergoing a very severe psychosis at the time. He actually struck a police officer because he thought he was being attacked. He did not even recognise them as police. He was subsequently charged with assault of a public officer. Now that is a serious offence that would be captured under these provisions.⁷

Financial impact of the Bill

1.15 As detailed in the majority report, some participants raised concerns about the financial implications of the Bill, in particular submitters raised concerns about the possibility of increased costs for service provision due to the impact on the forensic patients' rehabilitation⁸ and others raised concerns that the measure would result in cost shifting between the Commonwealth and State and Territory Governments⁹.

1.16 In their evidence to the Committee, the Department argued that social security payments were not intended to pay for the treatment of those in mental health institutions, stating:

This is a matter of health. In this case, it is, in the main, the responsibility of state and territory health agencies.¹⁰

6 Mrs Xamon, President of the Western Australian Association for Mental Health, *Committee Hansard*, 21 May 2015, p. 21.

7 Mrs Xamon, *Committee Hansard*, 21 May 2015, p. 21.

8 Impact on rehabilitation is explored below.

9 Mental Health Review Tribunal, *Submission 3*, p. 13.

10 Ms Halbert, Group Manager, Payments Policy Group, Department of Social Services, *Committee Hansard*, 21 May 2015, p. 37.

1.17 Labor Senators are of the view that this response is inadequate, particularly given the complete lack of consultation with state and territory governments as detailed below. As the National Mental Health Commission states in its submission:

Where there are legitimate questions about funding for [forensic patients] rehabilitation, further consultation between the Commonwealth and States and Territories would be strongly advisable before any legislative changes are made.¹¹

Impact on clinical service delivery and reintegration

1.18 Labor Senators are also particularly concerned by the Department's inadequate response to the significant evidence about the negative and prohibitive impact this Bill could have on the rehabilitation and reintegration of forensic patients.

1.19 Significant evidence was presented to the Committee about the costs incurred by patients, including forensic patients, and the importance of meeting these costs as part of a patient's rehabilitation.

1.20 In his second reading speech, the Minister stated:

... 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.¹²

1.21 The National Mental Health Commission submission highlighted that the Minister's statement did 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.¹³

1.22 The submission from the Queensland Government outlined some of the costs that forensic patients would be expected to self-fund while they are confined to a psychiatric facility.

These include payment for telephone calls, course costs and study materials for a range of skills training and study options. Consumers commonly incur other costs through participation in a range of other community activities. The cost of public transport and the purchase and maintenance of a mobile phone (which may be required to access unescorted day leave) are met by patients. The absence of a source of income for forensic patients would preclude engagement in community activities.¹⁴

1.23 Similarly on their Submission to the Inquiry, the Victorian Government highlighted their concerns that the Bill would limited the effectiveness of rehabilitation and as a consequence adversely impact on patients because:

11 National Mental Health Commission, *Submission 13*, p. 3.

12 The Hon. Scott Morrison MP, Minister for Social Services, *House of Representatives Hansard*, 25 March 2015, p. 3353.

13 *Submission 13*, p. 2.

14 *Submission 28*, p. 5.

[i]t is critically important that forensic patients have access to income support to enable them to engage in a wide range of community-based daily activities to promote recovery and community participation, including maintaining relationships with family and friends, participation in external therapeutic programs, transportation, education and employment activities. These activities go well beyond the support, treatments and rehabilitation activities provided by the Victorian government within the hospital environment.¹⁵

1.24 Evidence to the Committee highlighted that being unable to meet the cost of these items and activities would seriously jeopardise a forensic patient's ability to engage in activities necessary to their rehabilitation, would severely hinder patients' ability to access leave and ultimately impact on the time a patient is in psychiatric confinement.

1.25 This impact was clearly articulated in the submission from the Victorian Institute of Forensic Mental Health who stated that:

The removal of all income support for forensic patients who are not in a 'period of integration' will leave this vulnerable group with no means to meet basic needs that are not provided by the facility and which are necessary in order to commence or continue a period of integration. Most particularly, it will significantly undermine the ability of forensic patients to obtain the accommodation they need in order to be granted leave and eventually be discharged from hospital to live in the community.¹⁶

1.26 This position was echoed in the submission from the Mental Health Commission of New South Wales:

The loss of access to Commonwealth benefits, would severely jeopardise the ability of individuals to engage in these activities given it is frequently their only source of income. This will hinder their recovery and ultimately delay their release, presenting real risks of institutionalisation and the consequential impact of increasing the level of resources required to support the to live in the community in the longer-term.¹⁷

1.27 Given the overwhelming concern expressed by participants to the inquiry about the potential impact on forensic patients' rehabilitation and reintegration, it is insufficient for the Department to simply say that rehabilitation and mental health support is not the purpose of the provision of income support.¹⁸

1.28 This position is particularly concerning given the lack of consultation undertaken with states and territories, which the Department claims should be responsible for all the aforementioned costs.¹⁹

15 Victorian Government, *Submission 24*, p. 1.

16 Victorian Institute of Forensic Mental Health, *Submission 15*, p. 3.

17 Mental Health Commission of New South Wales, *Submission 5*, p.1.

18 See paragraph 2.26 of the Majority Report.

19 See paragraph 2.26 of the Majority Report.

Consultation

1.29 Evidence from a range of stakeholders, including a number of state and territory governments, highlighted the lack of consultation on the measure in the Bill and a failure to recognise or address the weighty concerns raised in relation to the proposal.

1.30 As the New South Wales Government stated in their submission:

For a measure that has such potential for adverse impacts on the psychological, social and financial wellbeing of these patients and their families and carers, as well as impacting on the resources and operations of public health services and the wider health system, this level of formal consultation with jurisdictions and key stakeholders is considered inadequate.²⁰

1.31 In relation to these concerns the National Welfare Rights Network stated that the lack of consultation showed:

... an unacceptable disregard for the interests of an extremely vulnerable population, as well as the public interest in successful rehabilitation for psychiatric detainees.²¹

1.32 This view was similarly reflected in the evidence from Victorian Institute of Forensic Mental Health which stated:

It is particularly galling that the Commonwealth has decided to make this change without consulting with those directly affected to enable them to understand the likely impact on them and has taken no steps to communicate this decision to them so that they are aware of the change and able to take steps to prepare for it financially. Rather, it has been left to mental health services to communicate with patients, families and carers.²²

1.33 A number of participants in the inquiry detailed concerns with the consultation process including the fact that no one was consulted prior to the announcement of the measure in the mid-year financial and economic outlook and that, when it did take place, consultation often only occurred after the stakeholder made contact with the Department or Minister.²³

20 New South Wales Government, *Submission 29*, p. 3.

21 National Welfare Rights Network, *Submission 1*, p. 4.

22 *Submission 15*, p. 3.

23 Mr Dalton, Chief Executive Officer, Victorian Institute of Forensic Mental Health, *Committee Hansard, 21 May 2015*, p. 14. Mr McGee, Coordinator, Aboriginal Disability Justice Campaign, *Committee Hansard, 21 May 2015*, p. 22. Dr Brayley, Public Advocate, Office of the Public Advocate, South Australia, *Committee Hansard, 21 May 2015*, p. 25.

Definition of a 'period of reintegration'

1.34 Participants in the inquiry also raised concerns about the definition of a period of reintegration which would be included in a legislative instrument, specifically the definition proposed in the Explanatory Memorandum.²⁴

1.35 In their evidence to the Committee, the Department indicated that the definition in the Explanatory Memorandum was not settled and further consultation would be undertaken.²⁵ Recommendation 2 of the majority report recommends that the Department continue with its proposed consultation on the definition of a 'period of integration'.

1.36 Labor Senators are of the view that proposed consultations should go further than just the definition of a 'period of reintegration' to the broader issue of support for forensic patients.

Conclusion

1.37 Participants to the inquiry presented significant evidence that the measure in this Bill would likely have serious negative impacts on rehabilitation arrangements and outcomes of forensic patients in psychiatric confinement. Labor Senators are persuaded by this evidence.

1.38 Labor Senators also noted that the consultation process undertaken in relation to this Bill has been completely inadequate, particularly given the significant concerns outlined by stakeholders on the serious effects of removing access to social security payments for forensic patients.

Recommendation 1

1.39 Labor Senators recommend that the Bill should not proceed in its current form.

Senator Carol Brown

Senator Nova Peris OAM

Senator Claire Moore

24 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.

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