

Australian Greens' Dissenting Report

Introduction

1.1 The Australian Greens will not support this Bill, as it makes an arbitrary distinction about who should access federal support. It will achieve relatively small savings for the Government but will have a significant impact on the lives of those who are affected by it.

1.2 It seeks to punish those who a court has already found '*not guilty on the grounds of mental illness*' and in doing so, flies in the face of hundreds of years of jurisprudence. The NSW Mental Health Review Tribunal stated it is critical to understand that:

Those found not guilty on the grounds of mental illness have, since medieval times in English law (whose traditions Australia has long followed on this point) been regarded as 'not morally blameworthy' because of the illness from which they suffer, and no conviction is entered against them. They are detained for the purpose of therapy and treatment, not because they are guilty, but because they are unwell and need to be detained until they can be safely managed in the community.¹

1.3 Furthermore, often the indefinite incarceration of an individual who has been charged with a crime but considered incapable of facing a court comes after a difficult life journey to that point, marked by a lack of personal support and poverty. For many individuals, for many years, there was simply no next step, no way forward after being placed in a secure mental institution. This, in and of itself, represented a serious failure of our justice system where individuals who had no mental capacity to understand the seriousness of their behaviour were simply locked up.

1.4 A number of advocates have done incredible work to reverse this situation, by bringing it to the attention of State and Federal Parliaments, and building a coalition that fights for the rights of those who were indefinitely detained without a conviction.

1.5 The Australian Greens acknowledge the tireless work of these under-resourced advocates and thank them for providing detailed submissions to this inquiry.

1.6 Their work has resulted in the creation of many more options being available for those charged, but never convicted, of a crime due to cognitive impairment. This has in turn created a range of new challenges for state and federal governments in funding appropriate rehabilitation services. It seems that state governments are slowly rising to the challenge; take for example the Western Australian Government's creation of Disability Justice Centres. But disappointingly, the Federal Government's response appears to be to try and devolve all its caring responsibility to the states by denying its obligations under the Social Security Act.

1 Mental Health Review Tribunal, *Submission 3*, p.3.

1.7 The Australian Greens agree with the arguments put forward by many of the submitters that:

These persons have a very difficult treatment and rehabilitation journey ahead of them and society needs to support them in this arduous task.²

1.8 The evidence provided to the committee has demonstrated that through this Bill the Federal Government is abandoning its responsibilities to a small group of people who are already marginalised and clearly in need of government assistance.

The need for greater attention on indefinite incarceration

1.9 Governments are really only beginning to come to grips with the challenges presented by cognitive impairment but this is an issue that is likely to become more and more pressing because of the rising number of children born with Foetal Alcohol Syndrome Disorder (FASD).

1.10 There is growing evidence of the link between Foetal Alcohol Syndrome Disorder and socially unacceptable behaviour that sometimes results in harm to others, if not addressed through a rehabilitative program and ongoing care. But accessing care and support is often not straight forward. The reality of those born with FASD is often marked by an inadequate personal support network, poverty and unstable accommodation.

1.11 For these individuals, and many others in psychiatric facilities who have been charged with a serious crime, *but who are not convicted on mental illness grounds*, the relatively small Centrelink payment is a critical form of financial support.

Inappropriate to draw a distinction between serious and non-serious offence

1.12 Advocates for the relatively small group of individuals who will be affected by this legislation do tireless work to secure support for their clients. However, mental health funding is inadequate. Removing access to this basic payment puts their clients further at the mercy of over-stretched state mental health budgets. There are a number of mental health services who will run out of funding soon, because of the cuts at both a state and federal level. This will put pressure on all services but particularly on those who serve people on the edges of society.

1.13 The Government has clearly seen how removing access to Social Security payments will affect those who are detained by non-serious charges, because by excluding them from this legislation, they acknowledge that there is a clear risk that those who are charged with non-serious crimes may become further removed from the community if their payments are stopped while they are in care and they cannot continue to pay their rent or mortgage.

1.14 But there has been no clear justification provided to the committee as to why the Department has drawn a distinction based on the nature of the crime.

2 *Submission 3*, p.3.

Federal responsibility to provide basic living costs to those not convicted of a crime

1.15 Despite the attempts by the Department to equate psychiatric confinement with prison, there has not been sufficient evidence provided to the committee that there is a precedent for transferring the responsibility for accommodation and basic living costs from federal to state governments when someone is in a state-run care facility. A psychiatric facility is more akin to a nursing home, as it is a place where care is provided on an ongoing basis. The Federal Government accepts a clear responsibility to continue to provide for the basic costs of an individual living in a residential aged care facility. Young people living with a disability retain access to their disability pensions when they enter a residential care facility; regardless as to whether that facility is state operated or run privately. The Federal Government provides for basic living costs, which are paid to the individual who then (in many instances) transfers a percentage of this payment to the care facility. This occurs regardless of whether someone is undertaking a program of rehabilitation or receiving ongoing care without expectation of being able to leave the facility in the future.

1.16 These arrangements exist because the Federal Government has a clear responsibility, expressed through our Social Security Act, to pay the basic living costs of those who lack the means to pay themselves. This burden of responsibility is only shifted when someone has been convicted of a crime and transferred to a state penal facility.

1.17 The submissions make it extremely clear that the people affected by this Bill have not been convicted of a crime.

1.18 In order to be convicted, an individual needs to be legally responsible. This is clearly not the case here. The NSW Mental Health Review Tribunal sets this out very clearly in their submission:

Forensic patients are amongst the most challenged and vulnerable persons in our society. They are not criminals and should not in any way be regarded or treated as such. They have never been the subject of a formal criminal conviction. This is because the law has for centuries accorded them a very different status.

Those found unfit for trial have been so found because, due to their particular condition (usually a mental illness or an intellectual disability) it is not possible for them to receive a fair trial. Some persons who have been found unfit for trial may, in truth, be innocent, but are incapable of presenting to the court why this may be so.³

1.19 The Aboriginal Disability Justice Campaign further summarise the serious ethical and legal violations that this Bill would enact:

3 *Submission 3*, p.3.

The removal of social security payments amounts to a punishment of persons who have not been found guilty, in the same manner as if they had been found guilty and runs contrary to traditional legal principles.⁴

1.20 Given that psychiatric care is clearly not akin to prison, and that there is a clear distinction between being convicted and being detained for therapy, the Australian Greens do not believe there is sufficient evidence to demonstrate a legal basis for the withdrawal of federal assistance to individuals detained in psychiatric care

1.21 For the reasons outlined above it is also completely inappropriate to justify this Bill as a punitive measure intended to punish the individual by withdrawing their rights because they have been charged with a 'serious enough' crime.

1.22 It is a serious violation of the principles of natural justice to apply a punishment for a crime that has not been considered by a court. This takes a new level of significance when we consider cases such as that of Marlon Noble, who was recently released from 10 years in involuntary psychiatric care after it was established that was no evidence of his having committed the serious offence he was accused of.

1.23 The Department acknowledged during the inquiry that it will require significant education of staff in both the care facility and at Centrelink to be able to make a judgement as to whether the conditions of someone's involuntary detention in a care facility is enough like a criminal conviction to justify the withdrawal of federal support.⁵ It is inevitable that a number of people will be assessed incorrectly given the jurisdictional inconsistencies in defining a serious offence across the country. This assessment cannot be considered in any way equivalent to a ruling by a court, with its built in safeguards, burdens of proof and clear rights of appeal.

1.24 The evidence supplied to the committee suggests that the Department is aware of these natural justice issues and does not mean for the measure to be punitive, although in practice it clearly will be.⁶ The Australian Greens believe that this punitive effect, intended or not, is sufficient grounds to oppose the Bill.

Inappropriate to deny support because of duration of stay in psychiatric facility

1.25 The Department's evidence to the committee stated that the use of a serious offence criteria is not intended to be punitive but rather as a proxy measurement for the length of time that an individual will be in care.⁷ With this, the Department has also presumed a need for different accommodation and care arrangements compared to someone charged with a 'non-serious' offence.

1.26 Even if this is the case, it does not justify the withdrawal of support from the Federal Government. There is clearly a range of other ways to resolve the challenges

4 Australian Guardianship and Administration Council 2015, cited in *Submission 23*, pp [3-4].

5 Ms Halbert, *Committee Hansard*, 21 May 2015, p.38-39.

6 *Committee Hansard*, 21 May 2015, p.34.

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

of providing long-term care that don't involve removing an individual from the social security safety net. It is the view of the Australian Greens that the Government has a clear responsibility to meet the basic living costs of those living with a disability who have no personal means, whether that is defined as cognitive impairment or as a mental health disorder. Ensuring their access to Social Security safety net is the best way for the Federal Government to meet this responsibility.

Consequences of withdrawing Federal support

1.27 If the measures in this Bill do pass, submitters have demonstrated that there will be a very negative affect on their ability to meet the basic living costs for those affected. For example, the NSW Government states that:

As at 31 March 2015, approximately 154 forensic patients under the care of Justice Health and Forensic Mental Health Network across the high-secure Forensic Hospital and three medium-secure units at Bloomfield, Morisset and Cumberland hospitals would become ineligible to receive social security payments, one hundred of whom are located in the Forensic Hospital.

For the majority of forensic patients, social security benefits are the sole source of income and each would lose approximately \$981 per fortnight. The Commonwealth Government has a role to play in the funding of mental health care in Australia as well as the continued provision of social supports, including social security payments, to the community's most disadvantaged members.

While the primary objections of NSW in relation to this Bill relate to the impact on forensic patients, particularly their rights and their recovery, it is noted that the proposed legislative change would likely result in an estimated revenue loss to NSW of \$3.2 million per annum as patients would no longer have the financial capacity to contribute to the cost of their care.⁸

Choice and control – a federal responsibility

1.28 Even if the Department could demonstrate that withdrawing support to these individuals would not have serious consequences because State and Territory Governments had committed to fully replacing it, this is not in the spirit of the Social Security Act. Nor does it reflect Australia's commitment to those living with disability as a signatory to the UN Convention on the Rights of Persons with Disabilities as highlighted by the Submission from the Human Rights Commission.⁹ Having a basic living allowance (i.e. social security payment) that is attached to an individual, rather than a facility or service provider also ensures that the individual (or their guardian) is able to exercise choice and control (albeit within the confines of limited options) over where and how they receive their rehabilitation or care. This means that slow reintegration into the community is not reliant on first jumping through hoops to

8 NSW Government, *Submission 29*, p3.

9 Australian Human Rights Commission, *Submission 27*, p.1.

secure funding. A broader range of options become available if basic living costs are automatically covered by Social Security arrangements.

1.29 The Parliament recently affirmed its commitment to these principles of individual control, including for those experiencing cognitive impairment or mental health problems, by creating a transformative National Disability Insurance Scheme. The Australian Greens believe that this Bill should be considered using the same principles.

Period of reintegration

1.30 The need for flexible support that is attached to an individual is clear when considering the likely exit pathway for an individual who has been in a psychiatric institution.

1.31 The Mental Health Commission of New South Wales describe in their submission how that transition will begin with one or two nights a fortnight in a non-institutional setting and gradually build up to a point where the individual is spending the majority of their time in the community.¹⁰

1.32 WAAMH highlights how slow the community transitions can be, stating:

... it is often the case in Western Australia that an individual can spend years on a Leave of Absence order of less than six nights.¹¹

1.33 Yet, the proposition outlined by the Department in the Explanatory Memorandum would only trigger access to Centrelink payments after spending six nights of the fortnight in the community.

1.34 While it is clear that the Department has spent a lot of time trying to develop a formula, it is clear that it still leans towards what is administratively straight forward to administer rather than what is fair. There is no reason, other than the administrative complexity, as to why payments cannot be pro-rata based on the time spent in the community.

1.35 Being able to pay for accommodation and other basic needs is a critical component of transitioning out of care. Yet as WAAMH's submission highlights: 'Many individuals on a Leave of Absence order have no personal support people able to fund or contribute to the purchase of daily necessities, and have extensive barriers to employment.'¹²

1.36 The Bill's Explanatory Memorandum notes that these needs can be funded by state government agencies. However, we do not consider this appropriate as no state government agency had previously considered this its role nor is it a mandated requirement if the right to social security is removed through this Bill.

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

11 Western Australian Associations for Mental Health, *Submission 17*, p.4.

12 *Submission 17*, p.2.

Administrative barriers to re-entry into the community

1.37 The clarification that Centrelink would suspend rather than cancel payments in the first two years reflects the Department's understanding of the challenges that people transitioning from care will face in re-establishing themselves in the community.

1.38 However, for those re-entering the community after a longer period of time, there are also clear physical and administrative barriers to establishing a relationship with Centrelink.

1.39 Without an advocate to work with Centrelink to ensure the correct paper work is filled in and to demonstrate that an individual is close to being released and will require payments to resume community living, it is impossible to imagine how an individual who has been in psychiatric care for more than two years would navigate these challenges. It is also not clear whether Centrelink will grant access to payments without the individual first re-entering the community for a period of time.

1.40 Yet without access to payments, they will not be able to exit care. The WAAMH submission shows this through an explanation of the process that is followed in WA when releasing someone on a custody order:

Under the CLMIA Act, release of people on custody orders is by the Governor on the advice of the Attorney General and the MIARB. When making a recommendation to the Attorney General for the release of a person on a custody order, the MIARB must have regard to the factors outlined in the CLMIA Act. These include issues pertaining to risk, the person's need for treatment and their likely compliance with conditions. The MIARB must also consider 'the likelihood that, if released, the accused would be able to take care of his or her day to day needs, obtain any appropriate treatment and resist serious exploitation'.

The MIARB has no funds to provide individuals under the Act with housing, support or daily living requirements. Thus, to enable release the MIARB requires extensive government collaboration to develop a comprehensive release plan with associated supports. For individuals detained in jail without access to income support, we understand that in recent years the Disability Services Commission has funded the purchase of daily necessities on their release, until the person is able to access income support. **This was not the case in the past however, as no state government agency had previously considered this its role nor is it a mandated requirement.**¹³ (emphasis added)

1.41 This highlights the paradox of this situation where neither state nor federal government has a mandated responsibility to support individuals in transitioning from a psychiatric institution. The Australian Greens believe it would be better for payments to continue, and for a different way of sharing the costs of basic living between state and federal governments to be established.

1.42 For all of the reasons outlined above, this bill should not proceed.

Amending the definition of serious offence

1.43 If the Bill is to proceed, the definition of serious offence should be tightened up further. The WAAMH submission states that:

The inclusion of property offences in the Bill is particularly problematic. As defined by the Bill, these would involve 'serious damage to property in circumstances endangering the safety of a person'. This may include offences where the only danger to a person was to the unwell person, because the Bill refers to danger to any person not any other person. It may also include offences where the person damaged property but was not aware that anyone else was endangered by this. Such offences should not be included in 'serious offences'.¹⁴

1.44 The Australian Greens agree with the conclusion of WAAHM that 'property offences be removed from the Bill, should the Bill proceed'.¹⁵

Right of appeal

1.45 As discussed above, the assessment process that triggers a withdrawal of federal support payments is not sufficiently robust. If this Bill is to proceed, then appeal rights must be established.

1.46 Those appeal rights should not be simply administrative, but should also allow for consideration of the evidence that led to a serious offence charge being laid in the first place.

1.47 The appeal rights should be made available in Easy English and information about how to ask for an appeal should be readily available to the public.

Conclusion

1.48 This Bill is flawed; it seeks to punish people who have not been convicted of a crime and contravenes hundreds of years of jurisprudence. It does not reflect the intention of both the Social Security Act and the UN Declaration on the Rights of People with Disabilities, and will result in significant additional barriers to re-integrating those who have been in care back into the community. It is also likely to result in further financial strain on state mental health budgets that will limit the resources available to provide appropriate care to those who need it most.

1.49 If this Bill does pass, it should be amended to reduce the scope for the inevitable failures of natural justice that will see individuals punished under this bill.

Recommendation 1

1.50 That the Bill not be passed.

14 Submission 17, p.2.

15 Submission 17, p.2.

Recommendation 2

1.51 That the Federal Government continues to work with its state and territory counterparts to establish an alternative method of sharing the costs of gradual reintegration into the community and reflects the intention of both the Social Security Act and the UN Convention on the Rights of Persons with Disabilities.

Recommendation 3

1.52 That if the Bill is to pass, the definition of serious offence should be improved so as to clarify that it refers only to harm to others (not self-harm) and references to property offences should be removed.

Recommendation 4

1.53 That if the Bill is to pass, a robust appeal right is established and access to that right is clearly explained in Easy English documents, so as to ensure that a ruling on whether the charges constitute a serious offence can be appealed, not merely on administrative grounds but also on evidentiary ones.

Senator Rachel Siewert

