The Senate

Community Affairs Legislation Committee

Social Services Legislation Amendment Bill 2015 [Provisions]

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44th Parliament

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Chapter 1
Introduction

Referral

1.1 On 26 March 2015, the Senate referred the Social Services Legislation Amendment Bill 2015 (Bill) to the Community Affairs Legislation Committee (committee) for inquiry and report by 15 June 2015.[1]

Purpose of the Bill

1.2 The Bill ceases social security payments to a person who is undergoing psychiatric confinement because they have been charged with a serious offence.[2]

1.3 The intention of the Bill is not to enact new measures within the *Social Security Act 1991*. The Bill seeks to return the system of social security payments to people in psychiatric confinement to the original intention of amendments made in 1986:[3]

> This essentially represents a return to the original policy intention for people in these circumstances—that a person cannot access social security payments while in psychiatric confinement as a result of criminal charges.[4]

1.4 The Bill would give effect to the government's position that the relevant state or territory is responsible for taking care of a person's needs while in psychiatric confinement, with the exception of certain circumstances, such as when people are integrating back into the community.[5]

1.5 The explanatory memorandum submits that the Bill would have a financial impact, resulting in net savings for the Social Services portfolio of $29.5 million over the forward estimates.[6]

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1 Journals of the Senate, *No. 90—26 March 2015, pp. 2458-2459.* http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate

2 Social Services Legislation Amendment Bill 2015, *Explanatory Memorandum (EM)*, p. 2. http://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=r5442

3 EM, p. [3].

4 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

5 The Hon. Scott Morrison MP, Minister for Social Services, *House of Representatives Hansard*, 25 March 2015, p. 3353, and Department of Social Services, *Submission No. 8*, p. [2].

6 EM, p. [3].

Background

1.6 Since 1908, there have been provisions in social security law that restrict payments to persons undergoing psychiatric confinement.[7] Currently, the *Social Security Act 1991* (Social Security Act) restricts certain social security payments from being made to persons who are in gaol or psychiatric confinement following being charged with any offence.[8] There have been similar measures in social security law since at least 1947.[9]

1.7 In 1986 an additional provision was included,[10] which allowed that for a person in psychiatric confinement, a period where they are undertaking a course of rehabilitation is not to be taken as psychiatric confinement.[11] The intention of this provision was to recognise that people would need income support as they transitioned back into the community.[12]

1.8 A decision by the Federal Court in 2002 provided a ruling on defining a 'course of rehabilitation', which found that most people confined in a psychiatric institution may be considered to be participating in a course of rehabilitation and therefore attract social security payments.[13] Prior to this case, many people in psychiatric confinement because of a criminal offence did not receive social security payments.[14]

1.9 The Department of Social Services (the Department) contends that this broad definition of a 'course of rehabilitation' was not the original intent of the 1986 amendment.[15]

Key provisions of the Bill

1.10 The Bill seeks to amend the Social Security Act, to ensure that people who have been confined to a psychiatric institution because they have been charged with a serious offence are not eligible for certain social security payments, regardless of

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7 *Submission No. 8*, p. [2].

8 See *Social Security Act 1991*, s. 1158. http://www.comlaw.gov.au/Details/C2015C00217/Html/Volume_1

9 *Submission No. 8*, p. [2].

10 See *Social Security and Veterans' Affairs (Miscellaneous Amendments) Act 1986* s. 51 http://www.comlaw.gov.au/Details/C2004A03347

11 *Social Security Act 1991*, ss. 23(9), http://www.comlaw.gov.au/Details/C2015C00217

12 Ms Halbert, Group Manager, Payments Policy Group, Department of Social Services, *Committee Hansard*, 21 May 2015, p. 33.

13 FCAFC 436 (20 December 2002), http://www.austlii.edu.au/au/cases/cth/FCAFC/2002/436.html

14 EM, p. [3]

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

whether they are undertaking a course of rehabilitation, but will be eligible for payments during a period of reintegration back into the community.[16]

1.11 Schedule 1 Items 1, 2, 4, 7, 8 and 9 are consequential technical amendments.

1.12 Items 3 and 6 amend subsection 23(1) and create new subsections 23(9E) and 23(9F). Taken together, these changes insert a definition of serious offence which includes the offences of 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 of at least seven years.[17]

1.13 Items 5 and 6 amend subsection 23(9) and create new subsection 23(9A), which amends the existing provision that allows for social security payments to be made to a person in psychiatric confinement while the person is undertaking a course of rehabilitation,[18] so that it does not apply to a person who is in psychiatric confinement because the person has been charged with a serious offence.

1.14 Item 6 also creates the following new subsections:

(a) subsection 23(9B) allows that a period of integration back into the community is not to be taken as psychiatric confinement for persons who have been charged with a serious offence;

(b) subsection 23(9C) provides that the definition of a period of integration is to be made by a legislative instrument made by the Minister for the purposes of the Social Security Act; and

(c) subsection 23(9D) provides that during a social security payment instalment period, if a person is undergoing psychiatric confinement on one or more days during the instalment period, all days within the instalment period are taken to be in psychiatric confinement. This provision is to ensure that social security payments are not made to persons on a period of leave from psychiatric confinement, but who are not in a period of integration back into the community.[19]

1.15 Should the Bill be passed, the measure is due to be implemented from 1 July 2015, as announced in the 2014-15 Mid-Year Economic and Fiscal Outlook.[20]

1.16 The measure is expected to affect approximately 350 people on implementation and 50 people each year afterwards.[21]

16 EM, p. 2.

17 EM, p. 6.

18 *Social Security Act 1991*, ss. 23(9).

19 EM, p. 5.

20 EM, p. 2.

21 *Submission 8*, p. [3] and *Committee Hansard*, 21 May 2015 p. 34.

Consideration of the Bill by other committees

1.17 The Bill was considered by the Senate Standing Committee for the Scrutiny of Bills (Scrutiny committee) on 13 May 2015[22]. The Scrutiny committee made no comment on the Bill.

1.18 The Parliamentary Joint Committee on Human Rights (Human Rights committee) reviewed the Bill and in its report of 13 May 2015 stated:

> The measures in the bill would result in certain individuals who are in psychiatric confinement because they have been charged with a serious offence losing existing entitlements to social security payments. The bill engages and limits the right to social security. [23]

1.19 The Human Rights committee also reviewed the Statement of Compatibility with Human Rights[24] contained in the Explanatory Memorandum, which concluded the legislative instrument did not give rise to human rights concerns because people in psychiatric confinement receive 'benefits in kind' in lieu of a social security payment by having their basic needs provided for by the relevant state or territory government. Additionally, the partners and children of people in psychiatric confinement are adequately provided for under existing social security arrangements.

1.20 Further advice has been sought from the Minister for Social Services by the Human Rights committee in relation to the impact of these measures.[25]

Conduct of the Inquiry

1.21 Details of the inquiry, including links to the bills and associated documents, were placed on the committee's website[26]. The committee also wrote to 55 organisations, inviting submissions by 15 May 2015. Submissions continued to be accepted after that date.

1.22 The committee received 35 submissions, which are listed at Appendix 1. All submissions were published on the committee's website.

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22 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 5 of 2015*, p. 29. http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Alerts_Digests/2015/index

23 Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament*, p. 105.

24 EM, pp. [11-13]

25 For example: the objective of the measure and the connection between the limitation on rights and achieving the objective.

26 See: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Social_Services_2015.

1.23 The committee held a public hearing in Canberra on 21 May 2015. A list of witnesses who appeared at the hearing is at Appendix 2, and the *Hansard* transcript is available through the committee's website.[27]

Acknowledgement

1.24 The committee thanks those organisations who made submissions and who gave evidence at the public hearing.

Note on references

1.25 References to the committee *Hansard* are to the proof *Hansard*. Page numbers may vary between the proof and the official *Hansard* transcript.

27 See: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Social_Services_2015/Public_Hearings.

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

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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.

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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]

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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?

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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]

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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]

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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

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:

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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.

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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' rehabilitation[8] and others raised concerns that the measure would result in cost shifting between the Commonwealth and State and Territory Governments[9].

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]

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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:

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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]

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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]

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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.

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.

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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.

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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 be 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 being 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 of 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 detainment 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 offense 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 offense 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

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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.

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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.

13 *Submission 17*, p.4-5.

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.

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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

APPENDIX 1

Submissions and additional information received by the Committee

Submissions

1 National Welfare Rights Network

2 Australian Guardianship and Administration Council (plus an attachment)

3 NSW Mental Health Review Tribunal

4 Mental Health Australia

5 Mental Health Commission of NSW

6 Law Institute of Victoria

7 Office of the Public Advocate (Queensland)

8 Department of Social Services

9 National Mental Health Consumer and Carer Forum

10 Forensicare Patients

11 Forensicare Recovery Committee

12 Victoria Legal Aid

13 National Mental Health Commission

14 Hallmark Disability Research Initiative, The University of Melbourne

15 Victorian Institute of Forensic Mental Health (Forensicare)

16 Consumers of Mental Health WA

17 Western Australian Association for Mental Health

18 Australian Council of Social Service

19 Queensland Advocacy Incorporated

20 Victorian Mental Illness Awareness Council

21 Tandem Inc

22 Office of the Public Advocate SA

23 Aboriginal Disability Justice Campaign (plus a supplementary submission)

24 Victorian Government

25 Inclusion Australia

26 Name Withheld

27 Australian Human Rights Commission and other members of Australian Council of Human Rights Authorities

28 Queensland Government Department of Health

29 NSW Government

30 Australian Association of Social Workers

31 Royal Australian and New Zealand College of Psychiatrists

32 Private Mental Health Consumer Carer Network (Australia)

33 ACT Government

34 Patients at Bunya Unit, Cumberland Hospital

35 Mental Health Legal Centre Inc

Answers to Questions on Notice

1 Answers to Questions taken on Notice during 21 May public hearing, received from Department of Social Services, 29 May 2015

Tabled Documents

1 Additional submission: Concerns with the rationale for the Bill in the Explanatory Memorandum and 2nd Reading Speech, tabled by Mental Health Australia, at Canberra public hearing 21 May 2015

2 Additional submission: People with mental health disorders and cognitive impairment in the criminal justice system, tabled by Aboriginal Disability Justice Campaign, at Canberra public hearing 21 May 2015

3 Department of Social Services Consultations: a list of organisations consulted as part of developing the measures contained within the Social Services Legislation Amendment Bill, tabled by Department of Social Services, at Canberra public hearing 21 May 2015

APPENDIX 2

Public hearings

Thursday, 21 May 2015

Parliament House, Canberra

Witnesses

Mental Health Australia
FEAR, Mr Josh, Director, Policy and Projects
CASEY, Mr Daniel Karl, Manager, Policy and Projects

Inclusion Australia
PATTISON, Mr Mark, Executive Director

Mental Health Review Tribunal of New South Wales
JOHNSON, Ms Anina, Deputy President

Victorian Institute of Forensic Mental Health (Forensicare)
DALTON, Mr Tom, Chief Executive Officer

Aboriginal Disability Justice Campaign
McGEE, Mr Patrick, Coordinator

RONALD, Mr, Private capacity

Western Australian Association for Mental Health
XAMON, Mrs Alison, President

Australian Guardianship and Administration Council
SMITH, Ms Anita Jane, Chair

Office of the Public Advocate, South Australia
BRAYLEY, Dr John, Public Advocate

National Welfare Rights Network
MEERS, Ms Amelia, Executive Officer
BUTT, Mr Matthew Lawrence, Principal Lawyer, Welfare Rights Centre

Australian Centre for Disability Law
FRENCH, Mr Phillip, Director

Tasmanian Anti-Discrimination Commission

BANKS, Ms Robin, Chair, Australian Council of Human Rights Authorities

Department of Social Services

HALBERT, Ms Catherine, Group Manager, Payments Policy Group
STAWYSKYJ, Ms Michalina, Branch Manager, Age, Disability and Carer Payments Policy Branch, Payments Policy Group
BICKERSTAFF, Mr David, Departmental Officer