



21 May 2015

Submission to the Senate Community Affairs Legislation Committee Inquiry into the Social Services Legislation Amendment Bill 2015

1 Introduction

This submission on the Social Services Legislation Amendment Bill 2015 is prepared by the Australian Human Rights Commission and other members of the Australian Council of Human Rights Authorities (ACHRA) including the Australian Capital Territory, South Australia, Victoria, Queensland, the Northern Territory, Western Australia and Tasmania.

2 Summary

If the Bill is passed, forensic patients¹ charged with a 'serious offence' will not receive financial support while in psychiatric confinement, until they enter 'a period of integration back into the community'.²

Forensic patients are people charged with an offence who, because of a significant mental or intellectual impairment, are detained while being assessed for fitness to plea; or after being found unfit to stand trial; or not guilty of the offence because of their mental impairment. The purpose of their confinement is treatment and rehabilitation, not punishment.³

The Commission and other members of ACHRA are concerned that the measures proposed in the Bill have the effect of being punitive, and do not give adequate regard to the rights of forensic patients who are in psychiatric confinement. There are serious questions about the impact that removing financial support will have on the care and rehabilitation of forensic patients. This issue has not been adequately addressed in the Explanatory Memorandum.

3 Relevant international human rights obligations

As Australia has ratified the *Convention on the Rights of Persons with Disabilities* (the Convention), it has an obligation to ensure that persons with disabilities enjoy all their human rights without discrimination of any kind on the basis of disability.⁴ It is also required to 'take into account the protection and promotion of the human rights of persons with disabilities in all policies and programs' and to 'refrain from engaging in any act or practice that is inconsistent with' the Convention.⁵

The Convention does not provide a comprehensive definition of disability, but provides that 'persons with disabilities' include those who have long-term mental impairments and intellectual impairments. When a person's impairment interacts with various barriers that restrict a person's effective participation in society on an equal basis to others, they are considered to have disability.⁶

The National Mental Health Consumer and Carer Forum explains psychosocial disability as 'the disability experience of people with impairments and participation restrictions related to mental health conditions'.⁷ Forensic patients, the focus of this Bill, have psychosocial disability, as they are unable to participate in the criminal justice system on an equal basis as others because of their mental or intellectual impairment. Children with psychosocial disability who become forensic patients have particularly complex needs and require special consideration.⁸

Key human rights under the Convention and other international treaties which are relevant to the situation of forensic patients include:

- the right of persons with disabilities to access to justice on an equal basis with others⁹
- the right of persons with disabilities who are deprived of their liberty to 'guarantees in accordance with international human rights law' on an equal basis with others, including the right to be presumed innocent until proven guilty¹⁰
- the right to the enjoyment of the highest attainable standard of physical and mental health, including access to health services needed specifically because of their disabilities, and the right to rehabilitation¹¹
- the right to an adequate standard of living for themselves and their families, and their right to social protection (including social security), without discrimination on the basis of disability¹²

4 Forensic patients are different from prisoners

The Bill's Statement of Compatibility with Human Rights states that one of the effects of the Bill is to treat forensic patients who have been charged with a serious offence the same way as persons in gaol who have been convicted of an offence are treated.¹³ However, **forensic patients are in a fundamentally different situation** to persons who have been found guilty of an offence.

A person is placed in psychiatric confinement in a secure mental health facility, or (in some jurisdictions) in a prison, if a court finds that, because of their mental or intellectual impairment, the person charged either:

- is not able to participate in criminal proceedings (in the case of unfitness to stand trial) or
- should not be held legally responsible for the crime committed (in the case of a finding of not guilty by reason of mental impairment).

The purpose of the psychiatric confinement of forensic patients is therefore different from a sentence of imprisonment. Imprisonment is imposed (in part) as a form of punishment on a person who has been convicted of an offence.

Forensic patients have not been found to be guilty of an offence and therefore are not appropriate subjects for punishment.¹⁴ **The purpose of their psychiatric confinement is not punishment, but treatment and rehabilitation, and protection of the individual and the community.**¹⁵

The Statement of Compatibility with Human Rights does not acknowledge this important distinction. Psychiatric confinement is, by its nature, imposed on persons with psychosocial disability, or those undergoing assessment for psychosocial disability.¹⁶ Persons who do not have a mental or intellectual impairment are generally not detained if they are not proven guilty of an offence.

The United Nations Committee on the Rights of Persons with Disabilities recently noted with concern that in Australia:

persons with disabilities, who are deemed unfit to stand trial due to an intellectual or psychosocial disability can be detained indefinitely in prisons or psychiatric facilities without being convicted of a crime, and for periods that can significantly exceed the maximum period of custodial sentence for the offence.¹⁷

People with mental illness are among the most excluded and most disadvantaged in society, according to a recent report by the Committee for Economic Development of Australia.¹⁸ Many people with mental illness experience 'social and economic hardship as a direct result of their illness' and 'live in a cycle of entrenched disadvantage.'¹⁹

The Australian Human Rights Commission has previously highlighted that Aboriginal and Torres Strait Islander people with psychosocial disability are particularly vulnerable to being indefinitely detained as forensic patients.²⁰ For example, Marlon Noble was detained in a prison for 10 years after having being found unfit to plead because of his cognitive impairment.²¹

5 Importance of rehabilitation for forensic patients

All forensic patients have the right to enjoy the highest attainable standard of health, and accordingly to access health-related rehabilitation services, including those which they need specifically because of their disabilities.²² The Convention, under article 26, also imposes a specific obligation on States Parties to support the holistic rehabilitation of persons with disabilities.²³

Accordingly, a human rights-based approach to the question of financial support for forensic patients would focus on what is necessary for their treatment and rehabilitation. This approach would also be consistent with the aims of psychiatric confinement, as the Victorian Law Reform Commission has noted:

rehabilitation of [forensic patients] through successful community reintegration is the best way to ensure protection of the community, as well as restoring the person to a state in which they can be a functioning member of that community.²⁴

However, the measures in the Bill do not appear to be designed to address the treatment and rehabilitation of forensic patients. The cut-off for payment of financial support under the Bill is not based on an assessment of the needs of the forensic

patient and/or their dependents, but whether the offence charged against the patient was sufficiently serious. Under the Bill forensic patients who have been charged with a serious offence will not receive financial support even if they are undertaking a course of rehabilitation.²⁵

The differential treatment under the Bill of patients charged with a ‘serious’ offence (punishable by at least seven years’ imprisonment), compared with patients charged with a non-‘serious’ offence (punishable by anything less), seems arbitrary.

The fact that the Bill would only remove access to social security for the former group, along with the comparison made to prisoners mentioned above, suggests that the Bill has a punitive, rather than therapeutic focus.

6 Concerns Bill will negatively impact on the rehabilitation of forensic patients

The Australian Human Rights Commission and other members of ACHRA are concerned the removal of financial support for forensic patients charged with a serious offence may impact on the quality of the care and rehabilitation services they receive. It may consequently impair their ability to transition out of psychiatric confinement and to access the necessary resources to rebuild their lives in the community. Forensic patients are not likely to have access to any income-earning activities and such, will be more disadvantaged than prisoners. There is also limited understanding about how the Bill will affect families/dependents of forensic patients.

The justification given for removing financial support for forensic patients charged with a serious offence is that it is unnecessary because they have their basic needs (such as food, clothing and housing) met by the State or Territory governments which run the secure mental health facilities in which they are confined. However, the Explanatory Memorandum does not adequately address how the costs associated with the care, treatment and rehabilitation of forensic patients beyond the basic necessities will be covered by the State and Territory governments (or failing that, the patients themselves).

As forensic patients have significant mental health conditions, their recovery and progression towards rehabilitation and reintegration is a gradual process.²⁶ A forensic patient’s successful rehabilitation requires development of the person’s physical, mental, social and vocational abilities, as article 26 of the Convention recognises. Social security provides them with money to help take steps to progress in their rehabilitation (for example, payment of fees for educational courses to develop skills and acquire vocational knowledge or rent for transitional accommodation).

According to the Explanatory Memorandum, prior to the forensic patient entering a ‘period of integration back into the community’ (as defined by the Minister under proposed sub-s 23(9C)), the patients ‘could expect that the State or Territory would meet their requirements for support, treatment and activities designed to further their recovery.’²⁷ It is not clear how the States and Territories will cover these costs.

The Australian Human Rights Commission and other members of ACHRA also have concerns about the mechanism in sub-s 23(9C) for determining when a forensic patient charged with a serious offence has entered a 'period of integration back into the community', and therefore becomes entitled to financial support. Proposed sub-s 23(9C) leaves all the detail of how a 'period of integration' will be defined to be determined by the Minister in a subsequent legislative instrument. The Explanatory Memorandum suggests it may consist of blanket requirements set by the Minister (for example, a number of days of leave from the facility).²⁸

If the Bill passes, the definition of a 'period of integration' will effectively become the new threshold for certain forensic patients gaining access to social security. There is a lack of detail in the Explanatory Memorandum about this definition. There is no detail about how this new threshold will operate in practice. It is not clear who will make the determination that a particular patient has reached a 'period of integration'.

We recommend that decisions as to whether a person in psychiatric confinement should receive the Disability Support Pension should follow similar processes to the determination made for people in the community.²⁹ Children who access the Disability Support Pension from 16 years may require special considerations. In particular, a person's health care team would be able to assess the rehabilitation and progress of individual patients. Re-integration activities may include study or skills training commenced while in care, but don't necessarily come with significant days spent outside of the facility.

The mechanism proposed in sub-s 23(9C) contains no assurance of sufficient flexibility to ensure that forensic patients can access the social security necessary to fund important steps in their rehabilitation.

7 Conclusion

The Australian Human Rights Commission and other members of ACHRA consider that the Explanatory Memorandum provides insufficient evidence to conclude that removal of the financial support for forensic patients charged with a 'serious offence' is consistent with those forensic patients' rights to rehabilitation.

Recommendation 1: The criteria used to determine eligibility for Disability Support Pension, for people in psychiatric confinement, should be similar to the eligibility criteria for people in the community.

Recommendation 2: The Bill not proceed unless the Government provides evidence that the removal of the Disability Support Pension and associated benefits from people in psychiatric confinement will not negatively impact on their rehabilitation.

Recommendation 3: That the Bill not proceed unless and until, the Government provides specific detail in the Explanatory Memorandum, of how a 'period of integration back into the community' for the purposes of sub-section 23(9B) will be defined, and there has been a further opportunity to provide comment on the proposed approach.

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- ¹ Mental Health Coordinating Council, *Mental Health Rights Manual: A Consumer Guide to the Legal and Human Rights of People with Mental Illness in NSW* (3rd ed, 2011) Part 4 Section K, 4K.1 (p 56). At <http://mhrc.mhcc.org.au/chapter-4/4k.aspx> (viewed 21 May 2015).
 - ² Social Services Legislation Amendment Bill 2015, cl 6. The Bill defines the term 'serious offence' as including murder, attempted murder, manslaughter, rape, attempted rape, and other offences involving risks to the safety of others that are punishable by at least seven years' imprisonment: see proposed sub-ss 23(9E) and (9F).
 - ³ See, for example, *Mental Health (Forensic Provisions) Act 1990* (NSW), s 40; New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: criminal responsibility and consequences*, Consultation Paper 6 (January 2012), paras 6.53 – 6.57. At http://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_completed_projects/lrc_peoplewithcognitiveandmentalhealthimpairmentsinthecriminaljusticesystem/lrc_peoplewithcognitiveandmentalhealthimpairmentsinthecriminaljusticesystem.aspx (viewed 21 May 2015); Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997: Report* (2014), paras 2.101- 2.105. At <http://www.lawreform.vic.gov.au/projects/crimes-mental-impairment/crimes-mental-impairment-and-unfitness-be-tried-act-1997-report> (viewed 21 May 2015).
 - ⁴ *Convention on the Rights of Persons with Disabilities*, 2006, arts 4(1) and 5(1) and (2). At <http://www.un.org/disabilities/convention/conventionfull.shtml> (viewed 21 May 2015).
 - ⁵ *Convention on the Rights of Persons with Disabilities*, 2006, art 4(1)(c) and (d).
 - ⁶ *Convention on the Rights of Persons with Disabilities*, 2006, art 1.
 - ⁷ National Mental Health Consumer & Carer Forum, *Unravelling Psychosocial Disability: A position statement by the National Mental Health Consumer & Carer Forum on psychosocial disability associated with mental health conditions* (2011), p 16. At <http://nmhccf.org.au/publication/position-statement-unravelling-psychosocial-disability> (viewed 21 May 2015).
 - ⁸ See Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997: Report* (2014), paras 6.21- 6.31. At <http://www.lawreform.vic.gov.au/projects/crimes-mental-impairment/crimes-mental-impairment-and-unfitness-be-tried-act-1997-report> (viewed 21 May 2015).
 - ⁹ *Convention on the Rights of Persons with Disabilities*, 2006, art 13(1); *International Covenant on Civil and Political Rights*, 1966, art 14. At <http://www.austlii.edu.au/au/other/dfat/treaties/1980/23.html> (viewed 21 May 2015).
 - ¹⁰ *Convention on the Rights of Persons with Disabilities*, 2006, art 14(2); *International Covenant on Civil and Political Rights*, 1966, art 14(2); *Convention on the Rights of the Child*, 1989, art 40(2)(b)(i). At <http://www.austlii.edu.au/au/other/dfat/treaties/1991/4.html> (viewed 21 May 2015).
 - ¹¹ *Convention on the Rights of Persons with Disabilities*, 2006, arts 25 and 26; *International Covenant on Economic, Social and Cultural Rights*, 1966, art 12(1). At <http://www.austlii.edu.au/au/other/dfat/treaties/1976/5.html> (viewed 21 May 2015); *Convention on the Rights of the Child*, 1989, arts 24(1) and 40(1).
 - ¹² *Convention on the Rights of Persons with Disabilities*, 2006, art 28(1) and (2); *International Covenant on Economic, Social and Cultural Rights*, 1966, arts 9 and 11(1); *Convention on the Rights of the Child*, 1989, arts 23 and 27(1).
 - ¹³ Statement of Compatibility with Human Rights, Explanatory Memorandum, Social Services Legislation Amendment Bill 2015, p 2.
 - ¹⁴ See for example, New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: criminal responsibility and consequences*, Consultation Paper 6 (January 2012), paras 6.53 and 6.54. At http://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_completed_projects/lrc_peoplewithcognitiveandmentalhealthimpairmentsinthecriminaljusticesystem/lrc_peoplewithcognitiveandmentalhealthimpairmentsinthecriminaljusticesystem.aspx (viewed 21 May 2015); Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997:*

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- Report* (2014), para 2.101. At <http://www.lawreform.vic.gov.au/projects/crimes-mental-impairment/crimes-mental-impairment-and-unfitness-be-tried-act-1997-report> (viewed 30 April 2015).
- ¹⁵ See, for example, *Mental Health (Forensic Provisions) Act 1990* (NSW), s 40; New South Wales Law Reform Commission, above, paras 6.53 – 6.57; Victorian Law Reform Commission, above, paras 2.101- 2.105.
- ¹⁶ The Statement of Compatibility with Human Rights only acknowledges that ‘...people who are undergoing psychiatric confinement **may** [emphasis added] have a disability...’ Explanatory Memorandum, Social Services Legislation Amendment Bill 2015, p 5.
- ¹⁷ UN Committee on the Rights of Persons with Disabilities, *Concluding Observations on the initial report of Australia, adopted by the Committee at its tenth session (2–13 September 2013)*, UN Doc CRPD/C/AUS/CO/1 (2013), para 31. At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5 (viewed 21 May 2015).
- ¹⁸ Committee for Economic Development of Australia, *Addressing entrenched disadvantage in Australia* (April 2015) p 83. At <http://www.ceda.com.au/research-and-policy/policy-priorities/disadvantage> (viewed 21 May 2015).
- ¹⁹ Committee for Economic Development of Australia, above, p 83.
- ²⁰ See M Gooda, *Social Justice Report 2012*, Australian Human Rights Commission (2012), pp 62-4. At <http://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/social-justice-report-11> (viewed 21 May 2015); M Gooda, *Social Justice and Native Title Report 2013*, Australian Human Rights Commission (2013), p 55. At <http://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/social-justice-and-native> (viewed 21 May 2015).
- ²¹ M Gooda, *Social Justice Report 2012*, Australian Human Rights Commission (2012), pp 63-4. At <http://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/social-justice-report-11> (viewed 21 May 2015).
- ²² *Convention on the Rights of Persons with Disabilities*, 2006, arts 25 (b) and 28(1).
- ²³ Article 26 reads: ‘States Parties shall take effective and appropriate measures, including through peer support, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life. To that end, States Parties shall organize, strengthen and extend comprehensive habilitation and rehabilitation services and programmes, particularly in the areas of health, employment, education and social services, in such a way that these services and programmes:
- a. Begin at the earliest possible stage, and are based on the multidisciplinary assessment of individual needs and strengths;
 - b. Support participation and inclusion in the community and all aspects of society...’
- ²⁴ Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (2014), para 2.105. At <http://www.lawreform.vic.gov.au/projects/crimes-mental-impairment/crimes-mental-impairment-and-unfitness-be-tried-act-1997-report> (viewed 21 May 2015).
- ²⁵ Explanatory Memorandum, Social Services Legislation Amendment Bill 2015, p 3.
- ²⁶ See, for example, Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (2014), para 2.101. At <http://www.lawreform.vic.gov.au/projects/crimes-mental-impairment/crimes-mental-impairment-and-unfitness-be-tried-act-1997-report> (viewed 21 May 2015).
- ²⁷ Explanatory Memorandum, Social Services Legislation Amendment Bill 2015, p 6.
- ²⁸ Explanatory Memorandum, Social Services Legislation Amendment Bill 2015, p 5.
- ²⁹ See Department of Social Services, Australian Government, *Eligibility basics for the Disability Support Pension*, <http://www.humanservices.gov.au/customer/services/centrelink/disability-support-pension> (viewed 21 May 2015).