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Committee Secretary
Senate Community Affairs Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: community.affairs.sen@aph.gov.au

Dear Committee Secretary,

Social Services Legislation Amendment Bill 2015

The Law Institute of Victoria welcomes the opportunity to contribute to the Senate Community Affairs Legislation Committee Inquiry on the Social Services Legislation Amendment Bill 2015.

Our submission is attached.

Please contact me or Laura Helm,
the issues raised in this submission further.

if you would like to discuss

Yours sincerely,

Katie Miller
President
Law Institute of Victoria

Social Services Legislation Amendment Bill 2015

LIV SUBMISSION



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INTRODUCTION

The Law Institute of Victoria (LIV) is Victoria's peak body for lawyers and those who work with them in the legal sector, representing 19,000 members. We advocate on behalf of our profession and the wider community, lead the debate on law reform and policy, lobby and engage with government and provide informed and expert commentary. This submission is informed by contributions from the LIV's Administrative Law and Human Rights Section.

The LIV welcomes the opportunity to make this submission to the Senate Community Affairs Legislation Committee (the Committee) in relation to its inquiry into the Social Services Legislation Amendment Bill 2015 (the Bill).

The Bill unfairly discriminates against people with a mental disability, by arbitrarily denying forensic patients charged with a 'serious offence' access to social security payments. The LIV is extremely concerned about the impact of the Bill on the rehabilitation of the 71 forensic patients currently confined in Victoria, who are some of the most vulnerable people in our community.

The LIV recommends that the Committee not support this Bill.

SUMMARY OF CHANGES PROPOSED BY THE BILL

The Bill amends the *Social Security Act 1991* (Cth) (the Social Security Act) to prevent access to social security payments for people in 'psychiatric confinement' who have been charged with a 'serious offence' (as defined by the Bill) (that is, forensic patients), unless they are undergoing 'a period of integration back into the community'.

Currently, most forensic patients are able to access social security because their confinement is for the purpose of rehabilitation. While s 1158 of the *Social Security Act* provides that social security payments are not payable to a person 'undergoing psychiatric confinement because the person has been charged with an offence', s 23(9) provides an exception for a person 'undertaking a course of rehabilitation'. The Full Federal Court held in *Franks v Secretary, Department of Family and Community Services (Franks)*¹ that 'course of rehabilitation' should have its ordinary English meaning and covers 'a planned series of activities that may include medical and other treatments directed towards improving the person's physical, mental and/or social functioning'.² The practical effect of this decision was that the vast majority of forensic patients are now able to access social security payments.

The Bill would amend s 23(9), so that where a person is held in psychiatric confinement because they have been charged with a 'serious offence', they will not be able to access social security payments (even if their psychiatric confinement is a course of rehabilitation). The Bill defines serious offence to include:

- Murder or attempted murder, manslaughter and rape or attempted rape (new subs 23 (9E)); and
- Offences punishable by imprisonment for 7 years or more where the offence involves loss of a person's life or serious personal injury (or a serious risk of these occurring) or serious damage to property in circumstances endangering the safety of a person (new subs 23 (9F)).

Forensic patients charged with a 'serious offence' will only gain access to social security payments once they are on a 'period of integration back into the community' (under new subs 23(9B)), which will be defined by the Minister in a legislative instrument (under subs 23(9C)).

The LIV understands that these changes will affect most of the 71 forensic patients currently confined in Victoria.³

¹ [2002] FCAFC 436.

² *Franks* [2002] FCAFC 436, at [50].

³ Victoria Legal Aid has reported that 67 of 71 forensic have been charged with a 'serious offence' within the definition outlined in the Bill.

PRINCIPLED OBJECTIONS TO THE BILL

1. Forensic patients should not be treated as offenders when assessing eligibility for social security

Forensic patients affected by the Bill have not been found guilty of an offence. They are likely to be patients that have been found unfit to stand trial or have been found not guilty on the basis of a mental impairment (in Victoria, they would be forensic patients under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic)).

Psychiatric detention for these individuals is intended to be primarily rehabilitative, not punitive. It is intended to divert them away from the criminal justice system so that their mental illness can be treated and they can be rehabilitated and re-integrated back into the community.

However, the 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. The Australian legal system recognises that forensic patients are not responsible for criminal acts and by treating them as if they are guilty, the Bill contravenes the principles of justice at the heart of our legal system.

Forensic patients should have access to social security payments on the same basis as compulsory patients (in Victoria, those under the *Mental Health Act 2014*), including people detained in secure extended care units. Compulsory patients in secure extended care units are analogous to forensic patients in the sense that they may be detained for extended periods (for years in some cases) in order to undergo both mental health treatment and rehabilitation programs.

2. The Bill arbitrarily distinguishes between serious and non-serious offences

The Explanatory Memorandum provides no rationale for the distinction between serious and non-serious offences for denying access to social security payments to forensic patients.

As forensic patients have not been found guilty of a crime, the seriousness of the offence they have been charged with should be irrelevant to the question of whether they should receive social security benefits. By causing some forensic patients (those charged with 'serious offences') to be treated less favourably than other forensic patients, the Bill appears to be seeking to punish forensic patients for 'serious crimes' for

which they are not morally culpable (while allowing forensic patients charged with non-serious crimes to continue to receive social security payments).

There is no distinction between serious and non-serious offences for eligibility of prisoners detained in gaol. All prisoners detained in goal, regardless of the length of detention or seriousness of the offence, are ineligible for relevant social security payments under s 1158.

3. Property offences should not be considered to be serious offences

The LIV is concerned that 'serious damage to property' has been classified as a serious offence in subs 23(9F)(b)(iii). The qualifier 'in circumstances endangering the safety of a person' is a much lower threshold than subs (ii), which requires serious injury, or serious risk of injury, to a person.

PRACTICAL IMPLICATIONS OF THE BILL

1. The Bill will make it difficult for forensic patients to meet financial obligations and other basic needs

Social security payments promote greater autonomy and dignity to forensic patients by supporting their basic needs and allowing them to maintain their connection and contribute to the broader community. The LIV does not agree with the claim in the Statement of Compatibility (at p3) that the Bill does not breach the human rights of forensic patients because the basic needs of forensic patients are met by State and Territory governments.

Forensic patients in psychiatric detention are some of the most vulnerable members of our society. They have severe mental illnesses and do not necessarily have family support. For the vast majority of these patients, their sole or main source of income is the Disability Support Pension (DSP), with some receiving the Age Pension. In our members' experience, forensic patients rely on their social security income to meet a broad range of expenses such as payment of existing mortgages, rent, debts, storage and car repayments.

We understand that a number of forensic patients at Thomas Embling maintain outside accommodation, where they stay for three days leave per fortnight.⁴ Without their social security income, they will be unable to continue payments and will lose this housing. We are also aware of at least one Victorian forensic patient who uses the DSP to make child support payments – if he is no longer eligible, this will impact negatively on his child.

Without social security payments, we are told that many forensic patients will also struggle to afford basic necessities such as food, clothing and toiletries.

2. The Bill will impede the safe and effective reintegration of forensic patients into the community

The Bill's withdrawal of social security payments is also likely to compromise forensic patients' rehabilitation by preventing them from accessing rehabilitation programs, educational and vocational courses, secure accommodation (including for overnight leave and when they are discharged) and funding transport costs and recreational activities while on leave.

In Victoria, forensic patients detained in Thomas Embling Hospital must apply to the Forensic Leave Panel (FLP) for leave (including on-ground leave, off-ground day leave and overnight leave). The FLP may only

⁴ As advised by Thomas Embling Hospital.

grant such leave if it is satisfied that, having regard to the purpose of the leave as articulated in the person's leave plan, the leave will contribute to the person's rehabilitation.⁵ Increasing periods of leave are granted based on the extent of a person's rehabilitation and safety within the community. The maximum amount of off-ground leave that a person can be granted is six nights per fortnight.⁶

LIV members have reported that the FLP will usually only grant leave where a person can show they are able to undertake specific activities (e.g. educational courses, shopping for clothing or food or toiletries and accommodation on overnight leave). The Bill would effectively deny forensic patients the opportunity to progress towards greater amounts of leave and impede their ability to rehabilitate and reintegrate into the community, if they are not be able to demonstrate there are sufficient funds to meet the costs arising from the proposed leave.

3. The scope of the 'period for integration' exception is unclear and arbitrary

The Bill allows for social security payments where a forensic patient is undertaking 'a period of integration back into the community' (new subs 23(9B)), with the definition of a 'period of integration' to be decided by the Minister in a legislative instrument (new subs 23(9C)). The Explanatory Memorandum provides an example of a 'period of integration' being defined as 'where the person regularly spends six nights or more in a fortnight outside of the psychiatric institution.'

As identified above, in Victoria the maximum duration of off-ground leave that a person can be granted is six nights per fortnight. If 'period of integration' is defined to be six nights per fortnight, then only those patients with the maximum possible leave will be able to receive social security payments. We understand that currently only eight forensic patients of 71 in Victoria have access to six nights leave per fortnight.⁷ Most forensic patients will therefore be denied an opportunity to receive social security payments and to save and plan for their move back into the community as, importantly, they need money to enable them to obtain accommodation ahead of discharge.

Furthermore, as described above, the purpose of detention for forensic patients is to enable them to participate in both treatment and rehabilitation programs. The distinction between 'a period of re-integration back into the community' and 'undertaking a course of rehabilitation' is in practice an arbitrary one. All forensic patients it can be said are participating in tailored rehabilitation programs designed to enable them to reintegrate back into the community, regardless of how much leave the person has and the different rates at which they undergo their rehabilitation. Prescribing a definition of the point at which a person is said to be undergoing a 'period of reintegration' by reference to the amount of leave a person has away from the detention facility is therefore arbitrary.

⁵ See sections 54, 54A and 54B of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic)

⁶ Section 53(b) *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

⁷ These figures have been provided by Victoria Legal Aid.

CONCLUSION AND RECOMMENDATIONS

The LIV recommends that Committee recommend that the Bill not be passed.

If the Bill is passed, it will unfairly and adversely affect some of the most vulnerable people in our community. Forensic patients need strong financial support to participate in rehabilitation and be able to re-integrate into the community. Social security payments are often their primary or only income and it allows them to gain independence, buy basic necessities and undertake vocational and rehabilitative activities and courses, without which they would be unable to undergo rehabilitation and be safely and effectively integrated into the community.

Forensic patients have not been found guilty of a crime and should not be punished by denying them access to social security payments. Their eligibility should be determined on an equal basis with compulsory patients under compulsory mental health treatment orders.

If the Bill is passed, we recommend as a minimum that the Bill be amended to delete subs 23(9F)(b)(iii) (to remove serious damage to property in circumstances endangering the safety of a person from the definition of serious crime).