

## WAAMH Policy Brief

### Loss of DSP payments for people detained under mental impairment legislation: *Social Services Legislation Amendment Bill 2015*

#### Background

The *Criminal Law (Mentally Impaired Accused) Act 1996* (the CLMIA Act) enables the legal administration, care and disposition of people with a mental impairment who have been found either mentally unfit to stand trial or not guilty due to unsound mind. Under the CLMIA Act, mental impairment means intellectual disability, mental illness, brain damage or senility.<sup>1</sup>

The *Social Security Act 1991* provides for the payment of social security pensions, benefits and allowances. The *Social Security Act 1991* provides that a social security pension or benefit is not payable to a person who is in gaol (either sentenced or on remand) or psychiatric confinement. Psychiatric confinement is defined as confined in a psychiatric institution because the person has been charged with a criminal offence.

However, people who have not been convicted because of mental impairment, and who are undertaking a ‘course of rehabilitation’, are currently entitled to the payments. The *Guide to Social Security Law* describes a course of rehabilitation as ‘a planned series of activities that may include medical and other treatments/activities directed towards improving the person’s physical, mental and/or social functioning’.<sup>2</sup> Many forensic hospital patients in WA have met the requirements to date.

Mentally impaired accused held in prison may be unable to access the DSP, as they do not usually meet the requirements for undertaking a ‘course of rehabilitation’. However, those on a Leave of Absence Order (LOA) under the CLMIA Act may be approved for DSP payments, on the basis that the LOA, which provides for a structured and gradual return to community, constitutes a course of rehabilitation.

Although legally entitled, people held under the CLMIA Act and similar legislation in other jurisdictions have at times been denied these payments, particularly if their impairment was due to an intellectual disability or acquired brain injury. The Aboriginal Disability Justice Campaign successfully advocated for their inclusion in 2012-2013 with the result that rule about a course of rehabilitation applied ‘equally to those not fit to stand trial or not guilty regardless of the type of mental impairment’.<sup>3</sup> It also applies to those whose mental fitness to stand trial is being assessed.<sup>4</sup>

#### Current Situation

##### Bill to cut DSP access for people under mental impairment legislation

The 2014-15 Mid Year Economic and Fiscal Outlook (MYEFO) released in December 2014 proposes cutting access to the DSP for unconvicted persons confined in a psychiatric institution and charged with serious offences. The MYEFO paper states this will result in a budget saving of \$29.5 million over four years from 2014-15. No data or workings to explain this figure are currently available.

<sup>1</sup>

[http://www.slp.wa.gov.au/pco/prod/FileStore.nsf/Documents/MRDocument:26839P/\\$FILE/Criminal%20Law%20%28Mentally%20Impaired%20Accused%29%20Act%201996%20-%20%5B03-e0-00%5D.pdf?OpenElement](http://www.slp.wa.gov.au/pco/prod/FileStore.nsf/Documents/MRDocument:26839P/$FILE/Criminal%20Law%20%28Mentally%20Impaired%20Accused%29%20Act%201996%20-%20%5B03-e0-00%5D.pdf?OpenElement), Section 8

<sup>2</sup> <http://guides.dss.gov.au/guide-social-security-law/3/1/4/20>

<sup>3</sup> Kathy Casey, Adviser, Office of the Hon Kevin Andrews MP, Minister for Social Services, letter to Patrick McGee, 11.12.2013

<sup>4</sup> <http://guides.dss.gov.au/guide-social-security-law/3/1/4/20>

The *Social Services Legislation Amendment Bill 2015* (the Bill) amends the *Social Security Act 1991*.<sup>5</sup> It was introduced to the Commonwealth House of Representatives on 25 March 2015. The Bill is currently under Senate Inquiry, with submissions closing on 15 May 2015.<sup>6</sup>

The Bill removes the current access to social security payments for people who are charged with a serious offence as defined by the Bill, confined in a psychiatric institution and undergoing a course of rehabilitation.

In Western Australia, this change would apply to people on remand and being assessed for fitness to be tried, and people who have been found unfit to stand trial or not guilty due to unsound mind under the CLMIA Act. The Bill would apply retrospectively, that is to people in psychiatric confinement who were charged with a serious offence prior to the legislation's commencement, many of whom currently access income support.

The Bill would allow people to access the payment during a 'period reintegration back into the community', but does not define what this entails.

People who have been charged with non-serious offences will still be able to access income support if they are undergoing a course of rehabilitation.

There are several key problems with this Bill.

#### ***The Bill criminalises mental illness and disability***

The stated rationale for the Bill is to treat people equally with prisoners.

Article 26 of the International Covenant on Civil and Political Rights and article 2(2) of the International Covenant of Economic, Social and Cultural Rights recognise the rights of equality and non-discrimination.

The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) sets out the rights of persons with disabilities, including persons with mental illness, to equal recognition before the law (Article 12), access to justice (Article 13) and liberty and security (Article 14) on an equal basis with others.

The effect of the Bill is that a social security payment will not be payable to people charged with an offence and held in psychiatric confinement. The Bill's Explanatory Memorandum justifies this on the ground that they "will be treated in the same way as a person who is in gaol having been convicted of an offence".

People held under mental impairment legislation have not been convicted of a crime. They have been found not to be morally culpable due to disability or mental illness, and their differing status under the law reflects this. The CLMIA Act, unlike the Criminal Code, does not consider deterrence or punishment, when determining the custodial order. Rather, such legislation is intended to support access to treatment and care whilst protecting the community.

It is not appropriate that people under such legislation be treated equally with prisoners.

#### ***The range of offences is too broad***

The Bill would apply to people who have been charged with serious offences. Due to differing criminal law in Australian jurisdictions the Bill does not specific the exact offences. Rather, it sets out certain categories of offences; these are murder, attempted murder, manslaughter, rape and

<sup>5</sup> [http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bld=r5442](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r5442)

<sup>6</sup> [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Community\\_Affairs/Social\\_Services\\_2015](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Social_Services_2015)

attempted rape. The Bill also includes as serious offences, those that are punishable by imprisonment of at least seven years and involving:

- loss of life or serious risk of loss of life; or
- serious personal injury or serious risk of serious personal injury; or
- serious damage to property in circumstances endangering the safety of a person.<sup>7</sup>

The Explanatory Memorandum does not provide an explanation for why some types of offences should restrict access to income support, but not others, especially given that all people who would be affected by the Bill have been found to be not morally culpable.

The definition of serious offences in the Bill potentially covers a very wide range of offences. WAAMH is especially concerned about the inclusion of property offences in 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, and may include offences where the person damaged property but was not aware that anyone else was endangered by this.<sup>8</sup>

Property offences are sometimes committed by people with mental illness whilst unwell. This Bill criminalises mental illness, when appropriate responses in such circumstances are access to treatment, support and resources, to enable successful recovery and social and economic inclusion.

### ***The Bill removes the right to social protection and social security and an adequate standard of living***

The Bill removes the right of people charged with a serious offence and in psychiatric confinement to access social security payments. These rights are enshrined in:

- Article 28(1) of the Convention of the Rights of Persons with Disabilities (the CRPD) provides for the right of persons with disabilities to an ‘adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions’; and
- Article 28(2) of the CRPD, and article 9 of the International Convention on Economic, Social and Cultural Rights (the ICESCR) recognise the rights of everyone to social protection and social security.

The Explanatory Memorandum notes that there is no obligation to provide social security benefits in the form of payments or cash and that while in psychiatric confinement states and territories are responsible for the provision of personal care, treatment and rehabilitation. The Memorandum justifies the removal of access to social security on the grounds that while an individual is spending ‘short periods’ of time in the community, the state would continue to be responsible for funding their needs.

We are deeply concerned that this change removes current access to a payment appropriate to unconvicted persons, who are some of the most vulnerable members of our community, that

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<sup>7</sup> Section 9F  
<sup>8</sup>

supports their safe transition to the community. The effect of this would be an inability to maintain stable housing whilst in hospital. We are further concerned that the Bill applies retrospectively, and that all individuals affected by the Bill would have to reapply for the DSP once released from psychiatric confinement.

### ***The effect of the Bill is likely to result in a barrier to community integration***

The Bill deems a person to be in psychiatric confinement on days when they are not in a psychiatric institution, but in the community.

The Bill would allow people to access the payment during a ‘period of reintegration back into the community’, but does not define what this entails. The Explanatory Memorandum notes that a new legislative instrument to specify the details of such a period will need to be made by the Minister. The Memorandum refers to ‘short periods’ in the community, and suggests that a period of reintegration may constitute an individual regularly spending 6 nights or more in the community.<sup>9</sup>

WAAMH is concerned about this suggested time period.

In WA, the Mentally Impaired Accused Review Board (MIARB) manages individuals under an order of the CLMIA Act. The MIARB generally requires a gradual transition to community to ensure that the individual has the skills, support and resources to be successful. This is achieved via Leave of Absence Orders, which are initially for a few hours a week, progressing to a few nights, and can be granted for a maximum of 13 out of 14 days.

During a Leave of Absence Order, the MIARB and government agencies ensure the effective provision of treatment and supports. Leave of Absence orders can be made for any period. In Western Australia where custody orders have no time limit and release can only be approved by the Governor, it has been the case that an individual can spend years on a LOA of less than 6 nights. Access to the disability pension during this time enables the purchase of daily necessities including accommodation, food, clothing and mental health medications, whilst the individual is still under an order but transitioning to community. It is not the role of state governments to provide for daily necessities. It is appropriate that people purchase these with their own funds; personal responsibility and budget management are key skills for effective community reintegration.

WAAMH is also concerned that the criteria for access to income support should be set out in the primary legislation, rather than in a separate legislative instrument.

### ***Time period for implementation***

The Bill proposes an implementation period of 1 July 2015 which does not allow state and territory governments sufficient time to consider the impact of these changes and develop appropriate responses. Should this Bill be passed, a time period of 1 July 2016 would be more appropriate.

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<sup>9</sup> The Parliament of the Commonwealth of Australia, 2015, ‘Social Services Legislation Amendment Bill 2015 Explanatory Memorandum’