Peak body representing the community-based mental health sector in WA.

Submission to the Senate Economics Legislation Committee Inquiry into the *Budget Savings (Omnibus) Bill 2016*

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Dear Committee Secretary,

Western Australian Association for Mental Health (WAAMH) and Developmental Disability WA (DDWA) welcome the opportunity to make a submission to the committee on the *Budget Savings (Omnibus) Bill 2016* (the Bill). This Bill would cease income support payments for people who have been charged with a serious offence and are in psychiatric hospital due to mental impairment.

In Western Australia this would apply to individuals held on a custody order of the *Criminal Law (Mentally Impaired Accused) Act 1996* (the CLMIA Act). These individuals have been found either unfit to plead or not guilty due to unsound mind under the CLMIA Act.

WAAMH and DDWA do not support this Bill. We have several concerns regarding the Bill and the lack of coordination with states and territories, which are set out in this submission.

Equality of treatment with prisoners

The Bill's Explanatory Memorandum justifies the change to the Social Security Act on the grounds that people charged with a serious offence and in psychiatric confinement would henceforth be treated in the same way as a person who is in gaol having been convicted of an offence. While we agree that it is appropriate that people convicted of a crime and detained in prison do not access income support, the people affected by this Bill have not been convicted of a crime and are not prisoners.

The courts have determined that these individuals are either not morally culpable or not able to be tried for the alleged offence. These individuals have a different status to that of prisoners, which is established under international law. Criminal law legislation has been enacted in all Australian states and territories to reflect and respond to this differing status. Such legislation enacts differing judicial procedures and detention options that provide greater protections for individuals charged with an offence, require their treatment and care, and enable community safety.

The detention of these individuals in psychiatric hospitals (and the Disability Justice Services in WA) is for the purposes of care and rehabilitation, not punishment or deterrence. However, the effect of this punitive Bill would be to criminalise mental illness. It is deeply concerning that the Explanatory Memorandum determines comparable treatment with prisoners as appropriate.

Range of offences in the Bill

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 specify the exact offences. Rather, it sets out certain categories of offences; these are murder, attempted murder, manslaughter, rape and 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.[1]

The Explanatory Memorandum does not provide an explanation for why some types of offences should restrict access to income support, but not others. We do not agree with this; all people who will be affected by these changes have been found to be not morally culpable, and we do not support differential treatment based on the type of crime the person has been charged with.

We are also concerned that the definition of serious offences in the Bill potentially covers a very wide range of offences. 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.[2] Such offences should not be included in 'serious offences'.

[1] Section 23(9F), *Budget Savings (Omnibus) Bill 2016*

[2] National Welfare Rights Network, 'Submission to the Senate Community Affairs Legislation Committee Inquiry into the Social Services Legislation Amendment Bill 2015' http://www.welfarerights.org.au/nwrn-submission-social-services-legislation-amendment-bill-2015 accessed 30 April 2015

These offences are sometimes committed by people with mental illness whilst very unwell. Appropriate responses in such circumstances are access to treatment, support and resources, including income support, to enable successful recovery, community reintegration and social and economic inclusion.

We recommend that property offences be removed from the Bill, should the Bill proceed.

The right to social security and an adequate standard of living

The Bill removes the current access to income support for people charged with a serious offence and in psychiatric confinement. Social security payments are intended to provide for an adequate standard of living for people who are unwaged. The right to social security and an adequate standard of living 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; that they will be receiving 'benefits in kind'.

We are deeply concerned that this Bill would remove current access to a payment appropriate to people who are both unconvicted persons and some of the most vulnerable members of our community. Removal of income support will compromise dignity. It is also in opposition to the government's recent signals that indicate a move towards an actuarial model of social security.

We are also concerned that the Bill applies retrospectively.

We are further concerned by our understanding that the effect of the Bill would be to cancel payments (although this is not clear in the Bill), and that individuals affected would have to reapply for the DSP once released from psychiatric confinement.

We recommend that, should the Bill proceed, payments are suspended rather than cancelled.

The Bill would result in a barrier to community reintegration

We agree with the Bill's intent to enable people in psychiatric confinement who are undergoing a course of rehabilitation, and transitioning to community, access to income support. Access to income support is fundamental to enabling these individuals to safely transition to the community. However, we are concerned that the Bill will be a barrier to, rather than enabler of, successful community reintegration.

This barrier could occur at any stage for people held under the CLMIA Act including in hospital, during a period of community reintegration, and at consideration of conditional and unconditional release from the custody order.

During hospitalisation

Income support during the period of their hospitalisation allows people to maintain stable housing whilst in hospital. Stable housing is a key determinant of successful recovery and community living and is central to individuals being able to engage in community-based mental health treatment and rebuild a contributing life.

Transitioning to community

In Western Australia, the Mentally Impaired Accused Review Board (MIARB) manages individuals under a custody order of the CLMIA Act. MIARB policy 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.

The Bill's Explanatory Memorandum notes that the details of what will constitute a period of reintegration back into the community will be established through a new legislative instrument. The Memorandum refers to 'short periods of time' in the community, but it does not specifically define what is meant by this.

Leave of Absence orders can be made for any period, and it is often the case in Western Australia that an individual can spend years on a Leave of Absence order of short periods. 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. Individuals who are still under an order but transitioning to community must be able to purchase daily necessities including but not limited to accommodation, food, clothing and mental health medications. It is essential that the individual have access to income support during this time.

The Bill's Explanatory Memorandum notes that these can be provided or funded by state government agencies. However, we do not consider this appropriate. Access to and the use of personal funds for daily necessities enables people to retain their dignity, which is essential for their recovery. It also supports people to develop and maintain personal responsibility and budget management skills, which are essential for effective community reintegration. We further submit that requiring state

governments to provide or funds these necessities represents a transfer of Commonwealth responsibilities to the states.

We are further concerned that the primary legislation does not set out the specific criteria for access to income support in community reintegration circumstances. In our view, such criteria are of sufficient import that they should be included in the Bill itself.

We recommend that the Bill specify that individuals be eligible for income support once they are regularly spending two or more nights in the community as part of a planned program of rehabilitation, community reintegration or release.

We recommend that the criteria for access to income support should be set out in the primary legislation, rather than in a separate legislative instrument.

Conditional and Unconditional Release

The effects of the Bill as currently drafted will also result in a barrier to release on a conditional or unconditional release order, when individuals live full time in the community either with or without conditions.

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'.[3]

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.[4] 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.

The MIARB notes in its Annual Report 2013/14 that 'the supports for them [mentally impaired accused] which are often necessary to satisfy us that they can be safely released are frequently inadequate and services not readily available'.[5] A recent report by the Inspector of Custodial Services has outlined barriers to release for

[3] Section 33 (5) (d), *Criminal Law (Mentally Impaired Accused) Act 1996*
[4] Government of Western Australia, '2013/14 Annual Report Mentally Impaired Accused Review Board' http://www.miarb.wa.gov.au/_files/MIARB_Annual_Report_2013_2014.pdf accessed 30 April 2015.
[5] Ibid.

these individuals in more detail; these include fragmented release planning and difficulty accessing funding for appropriate levels of support in the community.[6] We commend this report to the Senate Committee.

As drafted, rather than continuing the Commonwealth's present role of provision of income support, the Bill presents an additional barrier to the states' endeavours to reintegrate people with mental illness into the community.

We are extremely concerned that the burden of additional costs for the state government, which will have to fund daily living expenses for people transitioning to community should this Bill come to pass, will add further impediments to an already slow and challenging release process.

We recommend that government consult with relevant state and territory ministers and government agencies in drafting new provisions that specify what will constitute a period of reintegration.

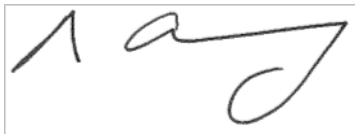
Disability Justice Service

It is not clear whether the Bill would apply to people residing in a Disability Justice Service under the Declared Places (Mentally Impaired Accused) Act who will be neither in prison nor in psychiatric confinement.

The same concerns as outlined in this submission apply to people who will be detained in this centre.

We recommend that people detained in a Disability Justice Service and transitioning to community be eligible to access income support.

Yours faithfully



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Cc. Hon. Andrea Mitchell MLA

Hon. Michael Mischin MLC

[6] 2014, Office of the Inspector of Custodial Services, 'Mentally impaired accused on 'custody orders': Not guilty, but incarcerated indefinitely'

Western Australian Association for Mental Health (WAAMH) was incorporated in 1966 and is the peak body representing the community-managed mental health sector in WA. With around 150 organisational and individual members, its vision is to lead the way in supporting and promoting the human rights of people with mental illness and their families and carers, through the provision of inclusive, well-governed community-based services focused on recovery. WAAMH advocates for effective public policy on mental health issues, delivers workforce training and development and promotes positive attitudes to mental health and recovery. Further information on WAAMH can be found at http://www.waamh.org.au

Developmental Disability WA (DDWA) was established in 1986 and is the peak body representing people with intellectual and other developmental disabilities and their families and carers. With more than 1,200 individual and organisational members, its vision is that people with intellectual and other developmental disabilities live their lives their way. DDWA creates lasting positive change by supporting people with developmental disability and their families to have a strong voice, partnering with others to develop more connected and inclusive communities, and influencing government and other decision makers. Further information on DDWA can be found at http://www.ddc.org.au