Legal Research on Pension Removal

Forensic patients currently held by the Health Department have received invoices demanding for payment for forced stay in hospital. Saeed Dezfouli has had $167 000 demanded from him for forcibly remaining in hospital for the last 15 years.

Goal

Building a case for Saeed Dezfouli to prevent Justice Health from taking the money he has saved from his pension. Argue it is his right or will cause his detriment.

Background

In 2015, there was a failed attempt to amend the *Social Security Act 1991.* It would have hindered any social security payments to anyone undergoing psychiatric confinement who was charged with a serious offence, except when they were being integrated back into the community. The *Social Security Act 1991* allows for income support payments if patients are undertaking a course of rehabilitation.

Information on the Social Services Legislation Amendment Bill 2015

The following information, as well as a copy of the failed amendment, can be found at: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1415a/15bd108

The Bills Digest at a glance

In some circumstances a person suffering from mental impairment can be held in psychiatric confinement after being charged with an offence even though they have not been convicted. This can happen when they are found unfit to stand trial because of mental impairment or are found not guilty because of mental impairment. People in this group are referred to as forensic patients.

Currently forensic patients are able to receive income support payments such as Disability Support Pension (DSP) if they are undertaking a course of rehabilitation. It appears that most are undertaking a course of rehabilitation and may be using their income support payments to pay hospital or accommodation fees related to their confinement. The Government has argued that this raises the issue of cost shifting from states and territories to the Commonwealth.

The *Social Security Act 1991* (the Act) states that people in psychiatric confinement because they have been charged with an offence *cannot* receive income support payments such as DSP. However, if they are undertaking a course of rehabilitation they are taken to be not in psychiatric confinement for the purpose of the Act and *can* receive income support payments.

Before 2002, the Department of Social Security (and then Centrelink) interpreted 'course of rehabilitation' narrowly when they administered the Act. However in a 2002 case, the Federal Court upheld a broader interpretation of 'course of rehabilitation' and Centrelink responded by incorporating the broader interpretation into its guidelines.

As a result of the change in the interpretation of 'course of rehabilitation' a larger number of forensic patients are now able to receive income support payments. The Government argues that the current situation does not reflect the original policy intent. The Social Services Legislation Amendment Bill 2015 (the Bill) amends the Act so that people who are undergoing psychiatric confinement because they have been charged with a serious offence cannot receive social security payments except during a period when they are being integrated back into the community. The current arrangements will continue to apply for those undergoing psychiatric confinement because they have been charged with a non-serious offense. It is not clear why the Government has adopted this approach rather than attempting to legislate a narrower definition for 'course of rehabilitation.' Neither the Explanatory Memorandum nor the Minister's second reading speech give a rationale for the distinction between serious and non-serious offences.

The Parliamentary Joint Committee on Human Rights has raised concerns about the Bill and the inadequacy of the Government's explanation of the measures in the Bill. The right to social security is protected by Article 9 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). The Committee drew attention to the principle in international human rights law which requires a 'backward step' to be given particular attention. Measures that involve a retrograde step with respect to this human right need particularly careful justification, which the Committee considers has not been provided. The Committee has therefore sought additional information from the Minister.

The Government argues that this is a return to the original policy intention and expects the Bill to produce savings of $29.5 million over the forward estimates.

Interest groups have raised a number of concerns with the Bill. These include a concern that the distinction between serious and non-serious offences is not relevant for decisions about eligibility for income support; that loss of access to income support payments would hinder patient recovery and reintegration into the community; that it discriminates against people because they have a mental illness or other impairment; and that it unfairly treats these patients in the same way as people who have been convicted of a crime.

Purpose of the Bill

The purpose of the Social Services Legislation Amendment Bill 2015 (the Bill) is to amend the *Social Security Act 1991* (the Act) so that people who are undergoing psychiatric confinement because they have been charged with a serious offence cannot receive social security payments except during a period when they are being integrated back into the community.[1]

Structure of the Bill

The Bill contains one schedule consisting of items that introduce **new subsections 23(9A)** to **(9F)** and other consequential amendments to the Act.

Background

In some circumstances a person suffering from mental impairment can be held in psychiatric confinement after being charged with an offence even though they have not been convicted. This can happen when they are found unfit to stand trial because of mental impairment or are found not guilty because of mental impairment. People in this group are referred to as forensic patients.

Mental impairment is a broad category that covers psychiatric impairment due to mental disorders such as schizophrenia and bipolar disorder as well as intellectual disability, acquired brain injury and other conditions that impair mental functioning.[2]

Forensic patients are usually released from custody through a staged process. For example, before the court considers discharging them into the community, forensic patients from Victoria's Thomas Embling Hospital generally undertake an 18 to 24 month program of graduated supported leave.[3]

Currently people in psychiatric confinement because they have been charged with an offence can receive payments such as Disability Support Pension (DSP) if they are undertaking a course of rehabilitation. A 2014 report in *The Daily Telegraph* referred to this as a 'loophole'.[4]

Under section 1158 of the Act:

> An instalment of a social security pension, a social security benefit, a parenting payment, a carer allowance, a mobility allowance or a pensioner education supplement is not payable to a person in respect of a day on which the person is:
>
> (a) in gaol; or
>
> (b) undergoing psychiatric confinement because the person has been charged with an offence.

Psychiatric confinement is defined by subsection 23(8) of the Act to include 'confinement in a psychiatric section of a hospital, and any other place where persons with psychiatric disabilities are, from time to time, confined.' However, subsection 23(9) states: 'The confinement of a person in a psychiatric institution during a period when the person is undertaking a course of rehabilitation is not to be taken to be psychiatric confinement.' The *Social Security Act 1947* contained a similar subsection that referred to people 'undertaking a course of rehabilitation.'[5] This was introduced in a 1986 amendment. Neither the 1947 Act nor the current Act made a distinction between serious and non-serious offences.

In administering the Act the Department of Social Security (and then Centrelink) interpreted 'course of rehabilitation' narrowly. However in a series of cases where income support recipients challenged this interpretation in the Administrative Appeals Tribunal (AAT) a

broader interpretation has been developed. In a 2002 case, the Federal Court upheld a broad interpretation. Centrelink responded by incorporating the broader interpretation into its guidelines.

Recent media coverage — the Toki case

This issue attracted little public attention until recently. In March 2014 *The Daily Telegraph's* Geoff Chambers reported that convicted murderer Martin Toki had applied for and received a DSP while being held at Long Bay prison hospital.[6]Centrelink had cancelled his payment after discovering that he was serving a 22 year sentence for murdering his de facto wife in 2001. The case attracted media attention when Toki unsuccessfully appealed the decision in the Administrative Appeals Tribunal (AAT), but was not required to repay the money as the AAT characterised the payments as an administrative error by Centrelink.[7]

AAT senior member Jill Toohey found that Toki was not eligible for DSP. According to the *Social Security Act 1991*, a person who is in gaol cannot receive DSP (or other pension or social security benefits). However, she acknowledged that some people being held as 'forensic patients' could receive payments such as DSP.

According to *The Daily Telegraph*, Human Services Minister Marise Payne asked 'the department to investigate this urgently with a view to determining if there are further cases of similar payments that require immediate review'.[8]

While Toki was ineligible for DSP because he was serving a sentence after being convicted of an offence, the case drew attention to the fact that some people charged with serious offences could legitimately receive income support payments while they were held in psychiatric confinement. Their eligibility would in part depend on whether they were undertaking a course of rehabilitation.

The Government's rationale for the measure

The Bill implements a savings measure announced in the Government's 2014–15 *Mid-Year Economic and Fiscal Outlook* (MYEFO):

> The Government will achieve savings of $29.5 million over four years from 2014–15 by ceasing payment of social security benefits to people who are incarcerated or confined in a psychiatric institution under state or territory law due to serious criminal charges because they were considered unfit to stand trial or were not convicted due to mental impairment. This will ensure the same social security treatment of people in the criminal justice system whether they reside in a psychiatric or penal institution.[9]

Officers of the Department of Social Services (DSS) explained a rationale for the measure in response to questions in Senate Estimates hearings. According to Cath Halbert, manager of the Payments Policy Group:

> Currently under the Social Security Act, you cannot be paid income support payments if you are in jail because you have been charged and convicted; or if you are in jail because you have been charged and you are on remand; or if you have been charged and you are in psychiatric confinement but either have been unable to plead because

> you are unfit to plead or you have had a conviction but it has not been recorded by dint of mental impairment. So that is established policy in the Social Security Act now.
>
> However, there is an exception for psychiatric confinement, that if you are undergoing a course of rehabilitation you are considered not to be in psychiatric confinement. I can go into that a little. In 2003 [sic] a Federal Court case significantly broadened the definition of 'course of rehabilitation' such that almost anybody who had been charged and who was in psychiatric confinement could be paid income support payments. That was not the original intention of the measure. In this case I guess the government has decided to reinstate the original intention of the measure for people who have been charged with serious crimes.[10]

Social Services Minister Scott Morrison reiterated this rationale in his second reading speech where he referred to the Federal Court case and stated: '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.'[11]

The original policy intent

The policy originates with a 1985 amendment to the *Social Security Act 1947*. Prior to the amendment there was a general rule that a person could not receive an income support payment if they were imprisoned in connection with their conviction for an offence. The amendment extended that rule to people who were confined in a psychiatric institution after having been charged with an offence.[12]

The following year the bar on payments to people in psychiatric confinement was modified by another amendment that added a new subsection. According to the Explanatory Memorandum for that Bill, the new subsection:

> ... would modify the effect of the bar on payment of an income support payment under the Principal Act to a person confined in a psychiatric institution after being charged with an offence. The new provision would not apply the bar to such a person who was undertaking a course of rehabilitation. The modification would also apply retrospectively, so that persons adversely affected by the current bar could be restored to their previous position.[13]

This exception to the bar on payment of income support was carried over into subsection 23(9) of the *Social Security Act 1991*(a rewrite of the 1947 Act). According to the subsection:

The confinement of a person in a psychiatric institution during a period when the person is undertaking a course of rehabilitation is not to be taken to be psychiatric confinement.[14]

In 1999 the AAT considered the meaning of 'course of rehabilitation' in *Re Fairbrother*.[15] In making his decision, Deputy President Blow noted that neither the Explanatory Memorandum nor the second reading speech were of any use in determining the meaning. However he concluded that 'Parliament had in mind a formal course of rehabilitation with a finite duration, a structure, a beginning and an end'.[16]

In two later cases the AAT rejected Deputy President Blow's interpretation of 'course of rehabilitation.' In *Re Pardo* Senior Member John Handley rejected the claim that a course of rehabilitation must have a finite duration. Instead he found a period in which a person undertakes a course of rehabilitation 'will of course involve a structure and a beginning and an end but all of which may be flexible and may need to be reviewed from time to time.'[17] In *Re Franks*, Senior Member Keith Beddoe applied this reasoning when he found that Cyril Franks was undertaking a course of rehabilitation and was entitled to DSP.[18]

Franks had been receiving DSP when he was charged with an indictable offence and found unfit to plead. He was transferred to a psychiatric hospital with criminal proceedings against him deferred while he remained unfit to stand trial. After Centrelink suspended his payment he successfully appealed to the Social Security Appeals Tribunal (SSAT). The Secretary of the Department of Family and Community Services then appealed to the AAT arguing that Franks was not undertaking a course of rehabilitation.

The Department then took the issue to the Federal Court where Justice Richard Cooper set aside the SSAT's decision without reaching a view about the meaning of 'course of rehabilitation'.[19] Franks responded by appealing the decision in the Federal Court. This appeal was successful.

In this appeal the Court returned again to the issue of how to interpret 'course of rehabilitation' finding that, depending on the circumstances of the case, 'a planned series of activities that may include medical and other treatments directed towards improving the person's physical, mental and/or social functioning' could be a 'course of rehabilitation'.[20]

Committee consideration

Senate Community Affairs Legislation Committee

The Bill has been referred to the Senate Community Affairs Legislation Committee for inquiry and report by 15 June 2015. Details of the inquiry are at the inquiry webpage.[21]

Parliamentary Joint Committee on Human Rights

As required under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the Government has assessed the Bill's compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.[22]

In its *Twenty-second Report of the 44th Parliament* the Human Rights Committee found the statement of compatibility inadequate and requested the Minister to provide further information regarding the justification for the measures in the Bill, which otherwise might be seen to have contravened the right to social security protected by Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[23] The Committee explained that this right 'recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, particularly the right to an adequate standard of living and the right to health.' The

Committee also observes that '[u]nder Article 2(1) of ICESCR, Australia has certain obligations in relation to the right to social security. These include:

- the immediate obligation to satisfy certain minimum aspects of the right;
- the obligation not to unjustifiably take any backwards steps that might affect the right;
- the obligation to ensure the right is made available in a non-discriminatory way; and
- the obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right.[24]

In the light of these requirements that Committee found that the Minister has not provided sufficient information to justify the provisions in the Bill, which limit the right to social security, and in particular the Committee has asked for further information regarding:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.[25]

Position of major interest groups

Submissions from interest groups were critical of the Bill, arguing that it should not proceed in its current form. Interest groups expressed a number of common concerns. These are outlined below.

Original policy intent

The Victorian Institute of Forensic Mental Health challenges the idea that policymakers intended to exclude most forensic patients from income support payments before 2002:

> ... 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. This remains the position to date.[26]

Forensic patients should not be treated in the same way as those convicted of a crime

According to the National Mental Health Commission: 'The Bill fails to recognise the significant difference in legal status between those convicted of a criminal offence, and those who are not convicted due to mental illness or intellectual disability.'[27]

Many submissions made the same point and noted that the purpose of psychiatric confinement is care, rehabilitation and the protection of the community rather than punishment and deterrence.[28] In its submission, the Victorian Government noted its concern:

> ... that the Bill discriminates against people who have been found by a court to have no criminal responsibility for their offending behaviour because of mental impairment. It is a well established sentencing principle that persons who are not morally culpable for their offending behaviour should not be punished.[29]

The Bill discriminates against people with a mental impairment

Along with a number of other submissions, Mental Health Australia's submission argued that: 'The Bill should not proceed in its current state, as it further entrenches systemic discrimination against people with a mental illness.'[30]

The National Mental Health Commission argued that in one respect, the Bill treats forensic patients less favourably than people convicted of an offence:

> Under proposed subsection 23(9D), the Bill proposes to remove a person's access to social security payments even during periods of leave outside the psychiatric institution, if this is not taken to be a period of integration back into the community. No such provisions exist for people found guilty of an offence who are on periodic detention – they instead receive social security payments for any days outside detention. The Commission is concerned that this provision, in its present form, appears to discriminate against persons with a mental illness or intellectual disability.[31]

The distinction between serious and non-serious crimes is not relevant

A number of submissions argued that the distinction between serious and non-serious crimes is not relevant to eligibility for income support. According to the National Mental Health Commission:

> 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.[32]

The South Australian Public Advocate argues that distinguishing between people charged with serious crimes and those charged with non-serious crimes undermines the Government's argument that state and territory governments should be responsible for the cost of supporting forensic patients.[33]

Impact on rehabilitation and reintegration

Many submissions argued that the proposed measure would have a negative impact on rehabilitation and reintegration.

According to the National Mental Health Commission, 'The practical effect of removing access to social security payments would be detrimental to rehabilitation and recovery for people with a mental illness ...'[34]

Professor Dan Howard SC, President of the NSW Mental Health Review Tribunal argues that, if passed, the proposal will 'have a seriously detrimental impact upon the wellbeing and therapeutic progress of this group of forensic patients, who are one of the most vulnerable (and most poorly understood) groups in our society.' He notes that NSW has over 400 forensic patients (the largest number of any Australian jurisdiction) and that the majority have been charged with offences that would fall within the Bill's definition of 'serious offence.'[35]

A submission by the Victorian Government argues that the Bill will limit the effectiveness of a highly successful model of rehabilitation that involves a gradual release into the community.[36] Explaining how income support helps people move from confinement back into the community, one Victorian patient said: 'In order to be discharged we need to have housing, many of us rent houses prior to discharge and would not be able to fund renting a home without the pension.'[37]

Need for consultation with states and territories

In some cases when forensic patients have been receiving income support, state and territory government institutions have taken a share of the payment as a fee. Matthew Butt of the Welfare Rights Network has raised concerns that suddenly removing a source of funding may affect the quality of care available to those in psychiatric confinement. He argues that there needs to be more consultation with experts and state and territory governments.[38] The National Mental Health Commission has raised similar concerns. The Commission acknowledges:

> ... that there may be worthwhile policy and budgetary questions to explore about the adequacy of current funding arrangements, in which rehabilitation is subsidised by those undertaking a course of rehabilitation (using Commonwealth social security payments) rather than States or Territories. However, moving to alter the situation rapidly (as per the Bill) could result in significant funding shortfalls that would impact on a person's rehabilitation and place greater financial burden on the individual's family and support people. Practical discussions between the Commonwealth and the States and Territories should be undertaken before such provisions are put into effect.[39]

Financial implications

The Government expects the Bill to produce savings of $29.5 million over the forward estimates.[40]

Key issues and provisions

Meaning of 'course of rehabilitation'

According to departmental officers (see background above), the Federal Court interpreted 'course of rehabilitation' in a broader way than the drafters intended.[41] The Bill does not attempt to impose a narrower interpretation and allows the Federal Court's interpretation to stand, instead creating specific provisions that will preclude those charged with a 'serious offence'.

The term 'course of rehabilitation' appears currently in section 23(9) of the Act, which states: 'The confinement of a person in a psychiatric institution during a period when the person is undertaking a course of rehabilitation is not to be taken to be psychiatric confinement.'[42] The Bill proposes the insertion of an exception to this 'course of rehabilitation' provision in the case of serious offenders, rather than more generally narrowing the meaning of 'course of rehabilitation'.

Introduction of a distinction between serious and non-serious offences

The Bill introduces a distinction between serious and non-serious offences. **New subsection 23(9A)**, at **item 6** of the Bill, states that subsection 23(9) does not apply to a person whose confinement in a psychiatric institution is because they have been charged with a serious offence.

The Bill provides a definition of 'serious offence' in two **new subsections: 23(9E)** and **23(9F)**.

The distinction between serious and non-serious offences appears to be a new addition to the Act not directly related to the original policy intent.

Meaning of Serious Offence

New subsection 23(9E) provides that an offence is a serious offence if it is murder or attempted murder, manslaughter or rape or attempted rape.

New subsection 23(9F) further provides that an offence is also a serious offence if it is an offence against the law of the Commonwealth or a state or territory, punishable by imprisonment for life or for a period, or maximum period, of at least seven years, and if the conduct constituting the offence involves:

- loss of life or serious risk of loss of life
- serious personal injury or serious risk of serious personal injury or
- serious damage to property in circumstances endangering the safety of a person.

The additional offences which would be included by **proposed subsection 23(9F)** have been criticised as being too broad and for possibly including property damage offences in which the offender was the only person injured or at risk, or in instances of arson where there may have been no awareness of any danger to other people.[43]

By way of comparison, the term 'serious offence' is used in many other pieces of legislation. The term is defined differently in many instances and is adapted according to the circumstances.

For example, under the *Proceeds of Crime Act 2002* (Cth),[44] a 'serious offence' is defined as an offence which is punishable by three years or more imprisonment and various other offences defined in section 338. Generally the offence in question must be a financial crime under the *Criminal Code Act 1995* or involve a financial benefit or loss of at least $10,000.

Under the *Criminal Code Act 1995*, a serious offence is variously defined as one which, for example, attracts a penalty of at least 12 months, two years or five years imprisonment.[45]

Under the *Migration Act 1958*, a 'serious Australian offence' means an offence against a law in force in Australia, where the offence is punishable by imprisonment for life or not less than three years, and involves violence against a person; is a serious drug offence; involves serious damage to property; or is one of certain offences relating to immigration detention.[46]

Finally, the *Telecommunications (Interception and Access) Act 1979* defines serious offences as offences involving murder, kidnapping, terrorism and other higher level offences under the *Criminal Code*, as well as offences punishable by imprisonment for life or at least seven years and which involve harm or risk of harm to a person, or arson, trafficking, fraud or corruption.[47]

The definitions **proposed in subsection 23(9E)** and paragraph 23(9F)(a) may thus be considered to fall within the higher range of seriousness of offences covered by the term elsewhere. However, as noted by National Welfare Rights Network, the phrasing of subparagraphs 23((F)(b)(i) to (iii) expands the scope of the term to include offences in which the endangerment or harm to a person may be ancillary to the offender's behaviour. [48] This broadening of scope is mitigated by the requirement in paragraph 23(9F)(a) that such offences be punishable by imprisonment for life or a maximum term of at least seven years.

The criticisms regarding the possible inclusion of an offence such as arson, or other damage in in circumstances in which no other person was put at risk, should also be considered in light of the seriousness with which Australian jurisdictions consider such offences.[49]

Overall, however, arguments about the appropriate boundaries for 'serious' and 'non-serious' offences would seem to miss the key criticism of the Bill, which focuses on the principle that the offender in all these cases has not been found guilty of any criminal offence due to their psychiatric condition. Thus distinctions between serious and non-serious offences are immaterial, since none of the offenders can be regarded as 'morally culpable', however serious the offence. The offences were performed by a person who has been found incapable of bearing guilt on the grounds of their psychiatric condition and they do not, therefore, possess the requisite degree of moral culpability, however much the charge itself may reflect a distinction between serious and non-serious offences.

Period of integration back into the community

The Bill allows a person confined in a psychiatric institution because they have been charged with a serious offence to receive income support payments during 'a period of integration back into the community.' It does this in **new subsections 23(9B) and 23(9C)** which provide that a period of integration back into the community is not taken to be psychiatric confinement.

The Bill does not define 'a period of integration back into the community' but provides for the Minister to determine whether a period is a period of integration into the community through a legislative instrument. The Department of Social Services has been consulting with state governments about how they integrate people back into the community.[50] The previously discussed need to justify any 'backward step' in relation to the right to social security will be made more difficult in the case of arrangements to be made by legislative instrument, which would preclude consideration of the precise arrangements by the Human Rights Committee.

The Explanatory Memorandum notes that '(i)t is appropriate for a period of integration back into the community to be worked out in accordance with a legislative instrument to enable the relevant factors to be set out with the necessary detail and to allow for modification of the period over time'.[51] However, the National Welfare Rights Network has noted that this definition affects basic income support qualifications and believes that, as a result, the main criteria for such periods should be set out in legislation.[52]

Responsibilities of the states/territories and the Commonwealth

One of the effects of the 2002 Federal Court decision in *Franks v Secretary, Department of Family and Community* Services was to shift responsibility for supporting certain people in psychiatric confinement away from state and territory governments towards the Commonwealth. When people in psychiatric confinement receive income support payments, state and territory governments may be able to capture some of this income by charging accommodation fees.[53] A consequence of this Bill may therefore be that state and territory governments experience some reduction in the income derived from payments which would no longer be provided to persons undergoing psychiatric confinement because they have been charged with a serious offence.

In his second reading speech for the Bill, Minister Morrison 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.' However he also acknowledged that 'a social security payment will continue to be payable to a person who is undergoing psychiatric confinement because the person has been charged with an offence that is not a serious offence, if a person is undertaking a course of rehabilitation'.[54]

While the Bill pushes responsibility for support back towards state and territory governments, it does not directly enforce the principle that the care of people in psychiatric confinement is a state and territory responsibility.

Concluding comments

Allowing people in psychiatric confinement to receive income support payments after they have been charged with a serious offence is a politically sensitive issue. On a number of occasions the issue has attracted critical media attention.

In 2002 *The Age*'s Padraic Murphy reported:

> Some of Victoria's most dangerous individuals are building financial nest eggs worth up to $50,000 from fortnightly disability pensions being paid to them in the state's highest security hospital for the criminally insane.
>
> ... A spokesman for the federal Health and Community Services Minister, Amanda Vanstone, said there were about 400 forensic psychiatric patients receiving pension benefits nationwide.
>
> He said the minister was considering a review of the legislation.
>
> "Successive governments have tried to tighten the rules in this area, but have consistently met with resistance. It's another example why the disability support pension needs to be looked at under welfare reform," the spokesman said.[55]

On the other hand cutting the Disability Support Pension to psychiatric patients can also be a sensitive issue, with headlines such as '[w]arnings as welfare cut for mentally-ill' provoking concern amongst other sections of the community.[56]

The stated intent of the Bill is to return to the original policy intent for people who have been charged with a serious offence, whereby prior to the 2002 Federal Court decision, people who had been in psychiatric confinement after being charged with criminal offences were not able to access social security payments.

The Bill defines serious offence but has been criticised for drawing an arbitrary distinction between serious and non-serious offences for the purposes of restricting social security payments.

The Government has asserted that it is appropriate to withhold payments in these circumstances because '(w)hile the person is undergoing psychiatric confinement, the relevant state or territory government is responsible for taking care of their needs, including funding their treatment and rehabilitation.'[57]

Interest groups have argued that income support payments help a vulnerable group of patients to rehabilitate while in detention and to build up modest savings that help them reintegrate with the community on release.

Parliamentary second reading key debates

Below are summaries and quotes of the points made by politicians and parties, including the ALP and Greens, who refused to support the amendment bill during the 2015 Parliamentary Debate. All key debates can be found under 'All second reading speeches' at: https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22legislation/billhome/r5442%22
Key words: "Forensic patients", "pension", "pension rights"

Senator CAROL BROWN (Tasmania):
(ALP)

'These are people who experience very serious mental health issues **like schizophrenia or bipolar disorder**, or who have intellectual disabilities or an acquired brain injury. **These are some of the most vulnerable in our society**, and the government is seeking to have these people in psychiatric confinement treated in the same way as a person in jail who has been convicted of their crime.' (4703)

In fact, since 1986, the legislation has provided that a person undergoing psychiatric confinement who is undertaking a course of rehabilitation can receive income support payments. (4703)

This income support enables forensic patients to participate in a range of daily activities to promote recovery, rehabilitation and community participation. Patients use the support to meet basic expenses—to pay for transport, pay bills and buy clothes. Patients use the support to take part in external therapeutic and education programs. Patients use the support that they receive to assist in maintaining relationships with their family and friends and to maintain contact with their children. (4704) (could cut this out if Saeed is in jail for life)

The submission from the Queensland government outlined **some of costs that forensic patients would be expected to self-fund while they are confined to a 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 submission from the Queensland government went on to say: The absence of a source of income for forensic patients would preclude engagement in community activities.** (4704)

They will not be able to maintain that vital contact with the outside community—be it through their family or friends—because they will not have access to funds to support that. (4705)

'Not only does this Bill **risk long-term institutionalisation of people with mental illness** and intellectual disability but it also, as a consequence, will increase the cost of care and the rehabilitation of these people.' (4705)

'They might better understand the impact this bill would have on the rehabilitation of forensic patients if they had spoken to mental health advocacy organisations or clinicians.' (4706).

Senator Penny WRIGHT (South Australia):
(Australian Greens)

'Access to disability support pensions allows people to plan a way out of detention and back into the community.' (4708)

Mr Peter McGee of the Intellectual Disability Rights Service has pointed out that withdrawing payment from patients may lead to indefinite detention for people—for instance, with intellectual disabilities—because courts will be unlikely to release them into the community without stable housing (4708)

It is also important to note that this bill seeks to sidestep a sensible and far-sighted Federal Court ruling that 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. This case created a fairer precedent and now the government is seeking to tear that down. (4708)

Senator David Fawcett (Liberal)

Note: despite being Liberal (as they were the ones recommending the amendment, his statement supports our case)

The government recognised that that is an unusual case, as opposed to the more serious offences where it is expected that people will be confined for a much longer period.

The Social Security Act 1991 currently restricts payments to a person in psychiatric confinement as a result of being charged with an offence. But this bill amends the law to expand the eligibility of payments to people in psychiatric confinement who have not committed a serious offence. That means we are actually providing more access to people who are likely to be entering that transition period sooner so that they get that support.

The part about cost shifting that has come up is important to consider in that, at present, people who are inpatients in that kind of a scenario are often charged up to 85 per cent of their Commonwealth payments by the state and territory mental health institution. We saw that a number of organisations presenting to the inquiry highlighted that they took payments from the people who were in detention.

We even had one case that I outlined where the Victorian Institute of Forensic Mental Health, Forensicare, charged fees during 2012-13, so people who had been there for more than 30 days were asked to pay between 75 and 80 per cent of their pension. That was challenged by a patient and Forensicare had to actually cease those fees because of litigation. Part of the settlement was that they ceased those fees. What we see there is that there is some contention, even within the courts, in terms of whether or not the federal government payments should actually be going to the institutions paying for the care. (4722).

http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/1ad4b6d5-8af2-4ce1-bd93-f29da3fb0a3a/0022/hansard_frag.pdf;fileType=application%2Fpdf

Former Senator Jenny McAllister (New South Wales) (ALP)

'The bill is simply an attempt to find a **quick and easy budget saving without regard to the potentially serious impact that these changes would have on the people** who are confined to psychiatric treatment'. (4723)
I am concerned about the **impacts that the measure will have on the rehabilitation outcomes** of the affected individuals (4723)
I am even more concerned about the **lack of consultation with affected people**, with their families or with the system that supports their rehabilitation. (4723)

'**What concerns me most is the attempt to liken people with a mental illness and no criminal conviction to people who have been convicted of a crime'**. (4723)

'They are patients that have been found unfit to stand trial or have been found not guilty on the basis of mental impairment. To the extent that they are detained, the reason **they are in psychiatric detention is not to punish them**; it is not intended to be punitive; it is intended to be rehabilitation' (4723)

'Submissions to the Senate committee inquiry have outlined the likely detrimental effect that these changes will have on the rehabilitation and reintegration outcomes that are currently being pursued within the mental health system'. (4724)

'As you can see if you peruse the submissions to the Senate inquiry, many **patients in these facilities routinely access their social security payments to contribute to the costs of their rehabilitation.'** (4724)

- All of us come from correctional centres where we are provided with jail-issue clothes. Once in the hospital centre, **we have to acquire our own clothing**. We would never be able to do this without our allowances. We also **have to buy our own toiletries: soap, toothpaste, shampoo, razors, feminine hygiene products, hairbrushes**. How would we do this without our pensions? Is the government going to require these underfunded facilities to manage … as well as to start providing us with clothing and toiletries?
- We are encouraged **to learn how to budget our money and shop, clothe and cook for ourselves**. Our spending money goes towards public transport, food and leisure activities such as films and very modest lunch/dinner outings.

All of us are required to participate in vocational training. Many do TAFE and tertiary study. For this we spend our **allowances on fees, books, stationery and other study expenses. Without our allowances we would not be able to pay for our courses**. (4724)

Former Senator Jacqui Lambie (Tasmania) (Independent)

'I am going to take the hard road on this issue and vote against this government legislation'. (4727)
'It seems that the government is trying to undermine the courts' rulings and punish these people'. (4727)

'The federal government has already taken $80 billion in health and education funding from our state governments—and I sure as hell know that Tasmania cannot afford that—and the federal government continues to place a greater health burden onto the states. Tasmania's heath system is in a terrible crisis. They are some of the reasons I refuse to support this government bill'. (4728)

Senator Lisa Singh (Tasmania) (ALP)

'Bill will clearly have a detrimental effect on the rehabilitation and recovery of people with serious mental illness in psychiatric care. The second reason is the lack of consultation: it will leave patients, their families and carers, and facilities for the psychotic, unprepared for this change. Thirdly, **it is fundamentally discriminatory to people who have been determined to be suffering from a serious mental illness'**. (4731)

'Treating them in the same way as a person who is in jail, convicted of an offence, of a serious crime. That should not be the case. It is right that social security payments may not be paid to a person in prison, but we are not talking here about people in prison. We are talking about people who have been charged with a serious offence. There is indeed a **significant difference between people in psychiatric confinement who have been charged with an offence and who because of mental impairment are found not criminally responsible for their actions and people in prison who are responsible for their actions**.' (4731)

'Taking income support payments away from people who are in desperate need of rehabilitation, who are subject to psychiatric confinement and who have been charged with a serious offence, is no way to treat those people. It is no way to treat people who are vulnerable in our community'. (4731)

'For the miniscule saving that this Commonwealth government will make, does it really think that it is in the best interests of our society, of those families and carers of those individuals in this particular category who are undergoing this rehabilitation, to take that income support payment away?' (4732)

'There has been no consultation. **This government did not speak to patients or, in fact, to anyone impacted by the outcomes of this legislation. It did not speak to families. It did not speak to carers. It did not speak to state or territory governments. It did not speak to psychiatric institutions that provide the care.** This shows that there has been no genuine effort made by this government to communicate its decision and to ensure that those impacted by the measures in this bill are aware of the change and can then of course make some preparations accordingly'. (4732)

'I understand the Senate inquiry was robust in the sense that there was a submission process. But **not one of those submissions supported these changes in this bill**'. (4732)

'**In fact, Minister Morrison's own department's submission provides no justification for this bill'**. (4732)
Morrison was Minister for Social Services at this time.

'There is **no evidence that these measures will assist in the rehabilitation of people in psychiatric confinement and therefore there is no justification for supporting this bill'**. (4732)

'**The training, employment and other community links put in place whilst a patient is in psychiatric confinement to help ensure a successful transition at the time of discharge are incredibly important. Access to income support is absolutely crucial to establishing these links**. Patients self-fund their external rehabilitation activities—their transport to attend activities and any supplies required to carry them out—from their income support payments'. (4732)

'**The cost of accessing general health care and purchasing medications in the community is also met by the patient, obviously with the concessions from their healthcare card'**. (4732)

‘Chair of the Mental Health Commission, Professor Allan Fels, really summed up these issues in the commission's submission to the Senate inquiry:
The practical effect of removing access to social security payments would be detrimental to rehabilitation and recovery for people with a mental illness, especially without close consultation with the States and Territories’. (4733)

These people should not be treated in the same way as those who have already been convicted and imprisoned. **They have been charged and in this country, as I understand it, they are innocent until proven guilty’**. (4733)

Senator Jan McLucas (Queensland) (ALP)

‘The National Mental Health Commission made submissions to the Senate inquiry and said:
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 payment’.

‘Whilst people to be impacted by this measure have been charged with very serious offences, they are also people who are suffering significant mental health issues and need to be supported properly in their rehabilitation’. (4739)

Forensicare argues that, regardless of their offence, forensic patients should have the same right to social security benefits because they equally need rehabilitation and services, which support a return to the community’. (4739)

‘Professor Allan Fels said that the **legislation is discriminatory and reinforces the stigma of mental illness and the view that confinement comes before rehabilitation**.
There is a point of consistency here that we need to explore. Let's always remember: these people have not been found guilty; they are not in the prison system; they are still in the mental health system and they are not guilty’. (4739)

‘-Clothing; phone calls, including mobile phones that are needed when people have leave from confinement; court costs; costs of training that they are undertaking as part of their rehabilitation program; and public transport in particular. **Those costs will now become the costs of a family’**.
‘**For many of these people family support is not high**; let's be frank. For many of these people, **the capacity of their family to support them is also not high**. (4739)

‘It has been put to me that, **if there is no access to any funds to support that person's transition, the ability for success is not going to be high**’. (4739)

‘Without income, patients will not be able to access the accommodation necessary to commence overnight leave as part of a leave program, which **Mental Health Australia has warned could leave people homeless’**. (4740)

‘**Without social security payments and related concessions, patients will have limited capacity to engage in external activities that assist in recovery, including education and training programs’**. (4740)

‘**This bill was opposed by all submitters to the Senate inquiry’**. (4740)

‘**The Queensland government, the Victorian government, the New South Wales government and the ACT government all oppose this bill**, with their submissions outlining the significant impact this legislation will have on the recovery of individual patients’. (4740)

‘As we have heard, **we are talking about 350 people who are very unwell and who have not been convicted of a crime. They have serious mental illness**’. (4740)

‘In order for them to undertake a program of rehabilitation and to see a light at the end of what must be a very dark tunnel, the **answer is not to take away their disability support pension’**. (4740)

'If this bill passes the potential for successful rehabilitation of this small number of Australians who have potentially committed, but have not been convicted of, serious crimes—and **whom we would all want to recover—will be diminished'**. (4740)

'The idea that we will save $29.5 million—nearly $30 million—over four years but potentially damage the lives of 350 people is a false equation'. (4740)

Senator Nova Peris (Northern Territory) (ALP)

'We do not support the bill in its current form as it has unacceptable negative outcomes for those undergoing rehabilitation which do not assist them to get well and rejoin the community. (4742)

'**People in confinement are some of the most disadvantaged people in my constituency of the Northern Territory, and they do not deserve to be disadvantaged because of their illness'**. (4742)

'These people do not deserve to be treated as criminals. **They must be recognised as people who are unwell, who are in need of medical help and who deserve to be treated with a bit of dignity**. (4742)

'Many of these people are suffering from the illnesses because they were vulnerable and unable to support themselves in the first place. **This amending legislation seeks to make them even more vulnerable'**.

'None of the submissions presented to the inquiry supported this amendment and the government has not consulted properly with the community or the industry. **Those in psychiatric confinement are under medical care. Surely those in medical care cannot be legislated on without proper research and consultation'**. (4742)

'**While I understand that these people have committed serious offences, these people have also been found to be unfit for trial in relation to these offences. They do not know right from wrong; they are often unaware of their surroundings or have little control of their own actions. I do not see the point of criminalising these people**'. (4742)

'**We do not need to punish them by taking away their income support, taking away their dignity and making it harder for them to rehabilitate themselves**'. (4743)