Office of the Public Advocate (Qld)

Systems Advocacy

Submission to the Standing Committee on Community Affairs

(Legislation Committee)

Social Services Legislation Amendment Bill 2015

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Queensland Government

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Introduction

The Public Advocate (Qld)

The Public Advocate was established by the *Guardianship and Administration Act 2000* (Qld) to undertake systems advocacy on behalf of adults with impaired decision-making capacity in Queensland. The primary role of the Public Advocate is to promote and protect the rights, autonomy and participation of Queensland adults with impaired decision-making capacity (the adults) in all aspects of community life.

More specifically, the functions of the Public Advocate are:

- promoting and protecting the rights of the adults with impaired capacity for a matter;
- promoting the protection of the adults from neglect, exploitation or abuse;
- encouraging the development of programs to help the adults reach the greatest practicable degree of autonomy;
- promoting the provision of services and facilities for the adults; and
- monitoring and reviewing the delivery of services and facilities to the adults.[1]

In 2015, the Office of the Public Advocate estimates that there are approximately 115,745 Queensland adults with impaired decision-making capacity (or 1 in 42 adults).[2] The primary factors that can impact decision-making capacity include (but are not limited to) intellectual disability, acquired brain injuries arising from catastrophic accidents, mental illness, ageing conditions such as dementia, and conditions associated with problematic alcohol and drug use.

It is important to note that not all people with these conditions will have impaired decision-making capacity, and that impaired decision-making capacity does not necessarily impact all areas of an adult's life, and may fluctuate in response to situational issues. It is likely, however, that many people with these conditions may, at some point in their lives if not on a regular and ongoing basis, experience impaired decision-making capacity in respect of a matter.

Interest of the Public Advocate (Qld)

People with psychiatric disability comprise 54% of the population of adults with impaired decision-making capacity in Queensland and it is reasonable to suggest that many of these people may have had contact with, or will have contact with, the Queensland mental health system.

The Public Advocate has a strong interest in the issue of the treatment of people with mental health issues. The regulation of mental health treatment and the challenges faced in ensuring that there is adequate consideration and application of Australia's human rights obligations at both the legislative and administrative levels falls well within the Public Advocate's purview, and is an issue of ongoing concern to the Public Advocate.

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[1] *Guardianship and Administration Act 2000* (Qld) s 209.
[2] Office of the Public Advocate, *The potential population for systems advocacy* (Fact Sheet, Office of the Public Advocate (Queensland), April 2015).

Equal and proper recognition of human rights must be afforded to all persons with disability, including those with impaired decision-making capacity. In particular, this submission is guided by the overarching obligation in the United Nations *Convention on the Rights of Persons with Disabilities* (the Convention) for state parties to recognise that people with disability are equal before the law and are entitled to equal benefit and protection of the law. It requires state parties to prohibit discrimination on the basis of disability and to provide people with disability with protection from discrimination.[3]

In Queensland, the *Mental Health Act 2000* (Qld) is the primary legislative instrument that deals with the rights of people with mental illness, setting the tone and aspiration for the care and treatment of people with mental illness in the state.

The Public Advocate is interested in promoting a framework of mental health legislation, policy and practice that has an ethical foundation, inclusive of a rights-based and recovery-oriented approach to mental health treatment, including for those people who are alleged to have committed an offence.

A key goal of any such approach should be a reduction in stigma and discrimination against people with mental illness, as well as balancing respect for the autonomy and self-determination of people with mental illness against the need to protect the person and the community from harm.

[3] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007 [2008] ATS 12 (entered into force 3 May 2008) art 5; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966 [1980] ATS 23 (entered into force 23 March 1976) art 26

Social Services Legislation Amendment Bill 2015

The *Social Services Legislation Amendment Bill 2015* (the Bill) seeks to amend the current *Social Security Act 1991* (Cth) (the Act) so that when a person is undergoing psychiatric confinement because the person has been charged with a "serious offence", they will no longer be eligible for relevant social security payments. The Bill removes the exception that currently allows such a person undertaking a course of rehabilitation to be eligible for social security payments.

The Public Advocate has a number of concerns with the policy that this Bill seeks to implement. First this Bill seeks to implement an arbitrary and discriminatory approach to social security entitlements, targeting certain people with mental illness. This is inconsistent with a rights-based and recovery-oriented approach. Moreover, the Bill's underlying principles represent a fundamental misunderstanding of the principles of criminal law and criminal justice.

The following submission reflects the perspective of the mental health and criminal justice system in Queensland, focusing upon the law and mental health treatment as they currently exist in this state.

Legal Principles

The principles underlying a criminal law defence of insanity

Madness (or insanity) has been recognised as an excuse for criminal responsibility since at least the 6th century.[4] The basis of the modern defence derives from the principle that an 'insane' person cannot be held responsible for his or her actions given the lack of reason he or she possessed when they are alleged to have committed the offence.[5] The form of the modern defence of insanity derives from two key cases – *R v Hadfield*[6] and *M'Naughten's Case*.[7]

Under section 27 of the Queensland *Criminal Code*, a person is not criminally responsible if, at the time of doing the act or making the omission, the person was in such a state of mental disease or natural mental infirmity as to deprive the person of capacity to understand what the person is doing, or of capacity to control the person's actions, or of capacity to know that the person ought not to do the act or make the omission.[8] Should a person be found to satisfy this criteria, then the person would be found not guilty of the offence because of the person's mental impairment.

It is clear under Queensland law that a finding of insanity under section 27 of the *Criminal Code* results in a person not being criminally responsible, meaning that they are not liable for the offence.[9] It provides a complete defence for their actions, much like self-defence[10] or provocation to assault.[11]

[4] S Bronnit and B Mc Sherry, *Principles of Criminal Law* (Law Book Company, 2001) 9.
[5] S Bronnit and B Mc Sherry, *Principles of Criminal Law* (Law Book Company, 2001) 210.
[6] *R v Hadfield* (1800) 27 State Tr 1281.
[7] *Daniel M'Naughten's Case* (1843) 8 ER 718.
[8] *Criminal Code Act 1899* (Qld) s 27.
[9] Ibid s 1.
[10] Ibid ss 270 & 271.
[11] Ibid s 269.

The approach taken by the Bill to criminal responsibility

The Bill seeks to treat people charged with a serious offence but in psychiatric confinement in the same way as a person who is in gaol having been convicted of an offence, or who is remanded in custody while awaiting trial after being charged with an offence.[12]

This approach reflects the notion that psychiatric confinement following a finding of insanity should be seen as being the same as criminal incarceration, and therefore punishment for a person's actions. Not only is this notion at odds with the purpose of psychiatric confinement in these circumstances, but it also represents a lack of understanding of the principles underlying English (and Australian) criminal law.

In particular the policy underlying the Bill:

- misunderstands the purpose behind psychiatric confinement following a finding of insanity;
- ignores that people in psychiatric confinement following a finding of insanity have not been subject to the full rigours (safeguards) of the criminal law; and
- imports a false distinction between serious and less-serious offences.

Not only is the Bill inconsistent with the principles underlying our criminal law and the purpose and intent of treatment for mental illness, but the Explanatory Memorandum indicates a lack of understanding of the criminal law.

For example, when explaining new subsection 23 (9A) and the position that a social security payment will not be payable to a person who is undergoing psychiatric confinement because the person has been charged with a serious offence, the Explanatory Memorandum explains that there must be a connection between the charge and the confinement. The notes acknowledge that:

> *"A person may be undergoing psychiatric confinement because they have been charged with an offence if, for example, the person… has been found not guilty of the charge because of the person's mental impairment."*[13]

In this case, if they had been charged with a serious offence, a social security benefit would *not* be payable.

Later, however, the notes go on to explain that a social security payment will continue to be payable in other circumstances where a person is undergoing psychiatric confinement. In this later explanation, the notes suggest that where a person has been charged with an offence but "was found not guilty of the offence on the basis that they did not commit the offence…"[14] then they would not be considered to be undergoing psychiatric confinement and may be eligible for social security benefits.

These two examples represent a distinction without a difference.

If a person is found not guilty of the charge because of their mental impairment, they have been found to not be criminally responsible. If they are not criminally responsible, technically they have not committed the offence.

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[12] Explanatory Memorandum, *Social Services Legislation Amendment Bill 2015* Statement of Compatibility with Human Rights p 2.
[13] Explanatory Memorandum, *Social Services Legislation Amendment Bill 2015* p 4.
[14] Ibid.

Psychiatric confinement in Queensland is for the purpose of rehabilitation

In Queensland, the law regarding when a person with a mental illness is to be detained is governed by the *Mental Health Act 2000* (Qld). Chapter 1, Parts 2 and 3 set out the purpose of the *Mental Health Act 2000* (Qld). Section 4 explains its purpose as:

> *The purpose of this Act is to provide for the involuntary assessment and treatment, and the protection, of persons (whether adults or minors) who have mental illnesses while at the same time—*
>
> *a) safeguarding their rights and freedoms; and*
>
> *b) balancing their rights and freedoms with the rights and freedoms of other persons.*[15]

This is to be achieved as per section 5 by providing for "the detention, examination, admission, assessment and treatment of persons having, or believed to have, a mental illness."[16]

Therefore, it is clear that the purpose of such detention is to provide for the management and treatment of people with a mental illness.[17] This has been confirmed by the Mental Health Court in Queensland.[18] There is no intention in the legislation for punitive detention. It has been made clear by the High Court that any such curtailment of the right of personal liberty requires clear and unambiguous language.[19]

The purpose behind the *Mental Health Act 2000* (Qld) is reflected in the way various orders made under that Act are administered. For example, when a person is charged and is found to have a defence of unsoundness of mind, the Mental Health Court generally imposes a Forensic Order, which can involve detention at a mental health facility, and a treatment plan must be prepared for the person which forms the framework for their treatment and care in the facility.[20]

A Forensic Order is regularly reviewed by the Mental Health Review Tribunal (a least every 6 months).[21] The object of the review is to consider factors such as the patient's mental state and their progress under their treatment plan.[22]

If the person is no longer suffering from a mental illness, then the Forensic Order must be revoked, despite any other factors, which confirms the purpose of detention in the *Mental Health Act 2000* (Qld) is for treatment of the mental illness only.[23]

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[15] *Mental Health Act 2000* (Qld) s 4.
[16] Ibid s 5.
[17] *Mental Health Act 2000* (Qld) Chapter 1, Parts 2 and 3; Re AKB [2005] QMHC 005.
[18] *Re AKB* [2005] QMHC 005.
[19] *Coco v The Queen* (1994) 179 CLR 427 at 437-438*; Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 at para [30] per Gleeson CJ.
[20] *Mental Health Act 2000* s 307.
[21] Ibid s 200(1).
[22] Ibid s 203(6A).
[23] *Re AKB* [2005] QMHC 005.

People in psychiatric confinement charged with a criminal offence have not been subject to the full rigour of criminal law processes

The conflation of psychiatric confinement following a charge for a serious offence with a finding of guilt following a criminal offence ignores the fact that those in psychiatric confinement have not been subject to the full rigour of the criminal law process (i.e. the general safeguards and principles that protect those who have been charged with a criminal offence under our system of law).

In a criminal proceeding, for a person to be sentenced and potentially placed in custody, the prosecution first has to discharge its burden of proof, that of beyond reasonable doubt, over the accused's presumption of innocence. In the case of a matter before the Mental Health Court in Queensland, no party bears the onus of proof, and matters are decided on the balance of probabilities.[24]

The distinction between serious and not serious offences

It is clear that the Bill is punitive in nature, as it is aimed only at those who have alleged to have committed more "serious" offences, having no effect for those who have alleged to commit lesser offences. This distinction however is meaningless where, under our system of law, a person is not held to be responsible for the offence, regardless of whether it is classified as serious or not serious. Currently the *Mental Health Act 2000* (Qld) does not provide for such a classification of offences.

Rather, the nature of the alleged offence is taken into account by the Mental Health Court only in the context of deciding whether to impose a Forensic Order after a finding by the Court. The Court must take into consideration:

- the seriousness of the alleged offence;
- the person's treatment or care needs; and
- the protection of the community.[25]

Under the *Mental Health Act 2000* (Qld), there is no provision for punitive considerations to form part of any orders. This differs to the laws underpinning a criminal proceeding where, for example, the *Penalties and Sentences Act 1992* (Qld) in relation to sentencing for criminal offences states that one of the purposes of sentencing is "to punish the offender to an extent or in a way that is just in all the circumstances".[26]

The potential for broader application in respect of persons on remand and those subject to assessment

The provision to preclude social security payments can also apply to those not yet found guilty or yet to be found of unsound mind, with section 1158 requiring either that a person is in psychiatric confinement because they have been "charged", or in gaol (gaol includes those who are awaiting sentence or trial[27]). There are, however, still important distinctions in the protections afforded to those who are proceeding under the criminal jurisdiction as opposed to those proceeding through the mental health system.

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[24] *Mental Health Act 2000* (Qld) s 405.
[25] Ibid s.288(4).
[26] *Penalties and Sentences Act 1992* (Qld) s 9(1)(a)
[27] *Social Security Act 1991* (Cth) s 23(5).

If a person does not have a mental illness, for an accused to be remanded in custody through being denied bail, a number of considerations must be made by a magistrate or judge. Specifically, for bail not to be granted, the person must be deemed to present an unacceptable risk of failing to appear, commit another offence, or endanger themselves or others.[28] To make such an assessment, the judge can note such factors as the accused's otherwise good character or the strength of the prosecution case.[29] Such oversight by the courts is not given to those who proceed through the mental health system.

As per the Explanatory Memorandum to the Bill, a person can be considered to be in psychiatric confinement before any findings by the Mental Health Court, as one of the examples provided is if a person is confined to have "their fitness to stand trial […] assessed".[30] This would, under Queensland law, include a person under involuntary treatment who came to the attention of health authorities after being charged with an offence. In such circumstances, a person can be admitted as an in-patient of an authorised mental health service through the order of a psychiatrist.[31]

Should the Bill proceed, persons in psychiatric confinement in the above circumstances are at risk of having their income completely curtailed on the basis of the medical opinion of a doctor if the person has been charged with a "serious offence".

An argument could be made that a person who did not have a mental illness is given more rights in this situation as their liberty can at least be determined in an open court, and bail is often granted to even those who have committed a "serious offence".

The Bill essentially risks penalising a person for having a mental health condition serious enough to warrant in-patient treatment.

The impact of the approach taken by the Bill on the rights of people with mental illness

In summary the policy underlying the Bill imports a discriminatory approach into the social security system for people with mental illness by making a false and discriminatory distinction between people with mental illness and people with mental illness who are charged with offences (but found unsound of mind); and people with mental illness charged with "serious offences" and people with mental illness charged with offences that are not "serious offences".

Such an approach belies a misunderstanding of the principles of criminal law as well as the purposes of treatment for mental illness. People who have been found unsound of mind in relation to an alleged offence, are under existing systems, excused from criminal liability. They are diverted into a system that will provide treatment for their mental illness. They are not the same as prisoners who have been found guilty of a crime. People who have been found unsound of mind are not in detention as a punishment, but instead because they require treatment for a mental illness.

Treating people who have been found unsound of mind as being the same as people who have been found guilty of a crime reinforces the stigma regularly faced by those with mental illness and is discriminatory. Neither is it not consistent with a rights-based or recovery-oriented approach to mental illness.

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[28] *Bail Act 1980* (Qld) s 16.
[29] *Williamson v DPP* [2001] 1 Qd R 99; [1999] QCA 356.
[30] Explanatory Memorandum, *Social Services Legislation Amendment Bill 2015* p 4.
[31] *Mental Health Act 2000* (Qld) s 108.

Debating the policy position behind the Bill

The Explanatory Memorandum notes that one of the Bill's primary objectives is to reverse the decision made by the Full Federal Court in the decision of *Franks v Secretary, Department of Family and Community Services.*[32] It is stated that the amendments "represent a return to the original policy intent" at least as far as people who have been charged with a "serious offence".[33]

However, the legislative history, as explored in the case of *Franks*, suggests that the "original policy intent" was indeed to recognise someone undertaking a course of rehabilitation as being validly exempted in respect of the disentitlement for social security benefits while under psychiatric confinement.

The legislative history began with section 52 of the *Social Security Act 1947* (Cth), which empowered the Director-General of Social Security to suspend a pension or forfeit an instalment of a pension if the pensioner was imprisoned following their conviction for an offence.

This section was then repealed, and a new section 135THA was inserted into the *Social Security Act* by Act No 78 of 1984, which provided for a person to be disentitled to their social security benefit after a conviction. This section included that the person can be held in prison or any other place where they can be lawfully detained.[34]

This was soon amended by Act No 95 of 1985, which specified that the disentitlement should now extend to those people either "imprisoned in connection with his or her conviction for an offence;" or "confined in a psychiatric institution, whether by order of a court or otherwise, in consequence of having been charged with the commission of an offence".[35] This amendment therefore extended the disentitlement to those who have been confined in a psychiatric institution after being charged, but who were not yet convicted.

Then in 1986, this same section was amended again by the *Social Security and Veterans' Affairs (Miscellaneous Amendments) Act 1986* (Cth) (Act No 106 of 1986) through the insertion of a new section 135THA(9). This new subsection stated that section 135THA does not apply, "and shall be deemed never to have applied, to a person who is confined in a psychiatric institution during any period during which the person is or was undertaking a course of rehabilitation."[36]

The judgment in *Franks* identified that this amendment "required some persons to be treated differently from how they would have been dealt with under s135THA for the reason that, while in psychiatric confinement, they were undertaking a course of rehabilitation."[37] This interpretation is clearly supported by the Explanatory Memorandum that accompanied the Bill, which states:

> *New subs135THA(9) 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.*

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[32] [2002] FCAFC 436.
[33] Explanatory Memorandum, *Social Services Legislation Amendment Bill 2015* Outline.
[34] *Social Security Act 1947* (Cth) s 135THA(6) as inserted by Act No 78 of 1984.
[35] *Social Security Act 1947* (Cth) s 135THA(2) & (4) as amended by Act No 95 of 1985.
[36] *Social Security Act 1947* (Cth) s 135THA(9) as inserted by Act No 106 of 1986.
[37] *Franks v Secretary, Department of Family & Community Services* [2002] FCAFC 436 at [31].

It seems clear that the original policy intention was to create an exception to the disentitlement of benefits to a person in a psychiatric institution *after* being charged with an offence if they were undertaking a course of rehabilitation. The application of this exception provides for the recognition that there is, and should be, a clear distinction between criminal culpability and circumstances where a person's mental illness discharges their criminal responsibility for the offence.

If this was not the policy intention, it would be difficult to reconcile not only the words of the Explanatory Memorandum as extracted above, but the fact that it was inserted at all when previous to this amendment this exception did not exist.

The *Social Security Act 1947* was then replaced by the *Social Security Act 1991* (Cth); the purpose generally being to restate the old Act in plain English.[38] A number of changes were made including the section numbers themselves and the construction of the sections, but the wording in section 23(9) of the current Act clearly reflects the amendments as made in 1986. Section 23(9) still creates an exception for those persons "undertaking a course of rehabilitation" in relation to the disentitlement of social security benefits.

The decision in *Franks* demonstrates that this was also the interpretation of the Full Federal Court in respect of this legislation.

Therefore, through careful analysis of the history of the *Social Security Act*, it can be seen that the policy intention since 1986, well before the establishment of the *Social Security Act 1991* (Cth), has been to create an exception to those undertaking a course of rehabilitation. To suggest otherwise would be to ignore both the history of the legislation and the detailed exploration and interpretation of the Full Federal Court in the decision of *Franks*.

The acknowledgement in the legislation of the need to continue supporting a patient through their treatment and rehabilitation reflects the realities and necessities of mental health treatment. As per the evidence given by Dr Sidney Poulter (a qualified and experienced social worker who worked with mental health patients) in an Administrative Appeals Tribunal decision from Victoria[39] that applied the case of *Franks* in relation to whether a patient could receive psychiatric treatment but not rehabilitation:

> *"The two are not divisible, it is a false dichotomy. That our mandate is rehabilitative, and that occurs, and psychiatric treatment does not occur independent of rehabilitative treatment."*

Another point made in the Explanatory Memorandum of the Bill is that *Franks* interpreted the term "course of rehabilitation" broadly.[40] It should be noted that *Franks* simply used the ordinary meaning of the words, making reference to the Macquarie Dictionary.[41] In other words, the Court used only what the meaning could entail in plain English. Had the legislative intent been to restrict the meaning and have it not read in plain English, there had been ample opportunity (since 1986) to have done so.

Therefore it seems disingenuous to state that the object of the Bill is to return to the original policy intention. Rather the object of the Bill seems to be to introduce a *new* policy intention; that being a policy premised on discriminating against certain people with mental illness in respect of their entitlement to social security benefits.

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[38] Ibid at [36].
[39] *Re Siev Vuch Chhit and Secretary, Department of Family & Community Services* [2004] AATA 744 at [27].
[40] Explanatory Memorandum, *Social Services Legislation Amendment Bill 2015* p 2.
[41] *Franks v Secretary, Department of Family and Community Services* [2002] FCAFC 436 at [47].

Other practical / technical issues

The Public Advocate would also like to raise a number of other practical and technical issues with the Bill. There are a number of issues that arise due to the way in which the Bill is currently constructed that result in either uncertainties or the potential for application of the legislation to extend beyond what is intended in the Explanatory Memorandum. These issues are considered particularly against the legislative framework in Queensland.

While the Public Advocate cannot comment on the interaction of these proposed amendments with the legislative framework in other jurisdictions, it is likely, given the complexity of and differences between such frameworks in other states and territories, that similar unintended consequences may arise as a result of these proposed amendments.

Subsections 23(9B) & (9C)

Subsections (9B) & (9C) state:

> *(9B) The confinement of a person in a psychiatric institution, because the person has been charged with a serious offence, during a period that is a period of integration back into the community for the person is not to be taken to be* ***psychiatric confinement****.*
>
> *(9C) For the purposes of subsection (9B), the question whether a period is a period of integration back into the community for a person is to be worked out in accordance with a legislative instrument made by the Minister for the purposes of this subsection.*

The Explanatory Memorandum indicates that these sections are drafted in such a way as to recognise that people in rehabilitation are granted various forms of leave from the psychiatric institution before they are unconditionally released. Therefore, a legislative instrument could provide that a "period of integration" back in the community may include the "first day of the fortnight in which the person spends six nights or more outside of the psychiatric institution."[42]

The proposed approach creates a level of uncertainty for those persons undergoing a period of integration into the community. Questions arise as to when this "legislative instrument" will be implemented, what it will contain and who will be consulted.

Further, there is an associated risk that authorised doctors may be influenced by the rules concerning when a patient would be entitled to benefits when planning periods of integration back into the community as opposed to focussing on appropriate treatment options and how to achieve the best clinical outcomes. For example, if a patient is only entitled to benefits after six nights in a fortnight, the doctor may consider that the options for integration back into the community are limited by this, and potentially allow a release too early into the person's period of rehabilitation, or unduly keep the patient as an in-patient for longer if the patient does not have any other means of support.

Decisions about a patient's reintegration into the community should be premised on appropriate treatment and rehabilitation and any potential risk posed to themselves and the community, not the availability or otherwise of social security benefits.

[42] Explanatory Memorandum, *Social Services Legislation Amendment Bill 2015* p 5.

Subsection 23(9D)

Subsection (9D) states:

> *(9D) If:*
>
> *(a) on one or more days, but not all days, in what the Secretary is satisfied would be an instalment period of a person if the person were receiving a social security periodic payment, the person is undergoing psychiatric confinement because the person has been charged with a serious offence; and*
>
> *(b) the remaining days in that period would, apart from this subsection, not be days on which the person is undergoing psychiatric confinement;*
>
> *then the remaining days in that period are taken to be days on which the person is undergoing **psychiatric confinement** because the person has been charged with a serious offence.*

The Explanatory Memorandum notes that the purpose of this section is to preclude a person's entitlement to social security benefits when, during a period of confinement, the person has short periods of leave granted that are not considered part of a period of "integration back into the community". The way in which it is currently drafted means that this part could apply far beyond the purpose of the situation contemplated in the Memorandum.

The subsection effectively works to disentitle any benefits for an instalment period if a person is in psychiatric confinement on at least one day during the instalment period. This would have the effect of potentially nullifying the provisions of subsections (9B) and (9C) because if the person is released from confinement during the instalment period, even if the remaining days are considered to be a "period of integration" back into the community, (9D) would operate to disentitle the person for the remainder of the instalment period.

There are also other undue effects arising from this subsection in that a single day of confinement can disqualify payment for an entire instalment period. An "instalment period" can be up to 14 days.[43] If, for example, a person is arrested by the police over an offence and it comes to their attention that the person may have psychiatric issues and the person is then taken to a hospital for involuntary treatment and observation overnight, this could mean that they qualify as having undergone psychiatric confinement "on one day" and therefore disqualify them for a fortnight.

To extend the disentitlement beyond the days of actual confinement also results in a broader reach than the provisions have had in the past. Section 1158 of the Act, which is the section that bars persons from receiving benefits if in gaol or confinement, has only ever provided that the person should be disentitled only in respect of the day that they are actually held.

It appears from the Explanatory Memorandum that these adverse effects are not intended. However, in its current form, the above examples definitely fall within the wording that is used within the relevant section of the Bill. There needs to be serious rewording of this subsection in order to avoid undue burdens on people who are already disadvantaged as a result of their medical conditions.

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[43] *Social Security (Administration) Act 1999* (Cth).

Subsections 23(9E) & (9F)

Subsections (9E) and (9F) define the term "serious offence" as follows:

> *(9E) An offence is a serious offence if it is:*
>
> *(a) murder or attempted murder; or*
>
> *(b) manslaughter; or*
>
> *(c) rape or attempted rape.*
>
> *(9F) An offence is also a serious offence if:*
>
> *(a) it is an offence against a law of the Commonwealth, or a State or Territory, punishable by imprisonment for life or for a period, or maximum period, of at least 7 years; and*
>
> *(b) the particular conduct constituting the offence involves:*
>
> *(i) loss of a person's life or serious risk of loss of a person's life; or*
>
> *(ii) serious personal injury or serious risk of serious personal injury; or*
>
> *(iii) serious damage to property in circumstances endangering the safety of a person.*

It is understandable, as explained in the Memorandum, that it is not possible to define specific offences under (9F) considering the varying criminal laws of the states and territories. However, a number of questions arise in terms of the administration of these subsections.

The first relates to who in the Department of Social Security (the Department) will be responsible for assessing whether a charge is a serious offence, especially those that might fall within the latter, undefined, category. It would not be possible to simply have a specific list of offences within the Department for each jurisdiction as a particular offence may be part of this category depending on the factual circumstances, and not the charge itself.

For example, the offence of "assault occasioning bodily harm while armed" has a maximum penalty of 10 years imprisonment.[44] This charge could have been committed if the offender struck a victim with an innocuous object, such as a stick to the torso of the victim, or if the offender struck the victim with a brick to the victim's head. Both could result in relatively minor injuries depending on the situation and cause "bodily harm". However, the former scenario would not satisfy the definition of serious offence in the Bill as there was no "serious" injury or risk of such, while the latter scenario would satisfy the definition as there would certainly be a "serious risk of serious personal injury". This type of nuance would require careful analysis of each case by someone who has a level of expertise of the criminal law.

The second question that arises would be what material evidence the person assessing each case would rely upon in assessing whether the charge is a serious offence. If this assessment is being done from police case summaries (QP9 Police Briefs in Queensland), these summaries are often done from preliminary information that police have received and not necessarily from sworn statements from witnesses. A reliable analysis of the case can only be made from actual evidence such as witness statements and exhibits, which it is not likely that the Department would be able to access.

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[44] *Criminal Code Act 1899* (Qld) s 339(3).

The third question seeks to ascertain how closely the Department will be monitoring the charges before the Court. Charges could be withdrawn through a lack of evidence or a withdrawal of complaint. Charges are also often changed by prosecuting authorities depending on the evidence and circumstances surrounding the case.

The issue with the way in which a serious offence might affect a person's entitlement to benefits is that, under subsection (9A), it is only required that they be "charged" with a serious offence and that the reason the person is under psychiatric confinement is "because" of this. There are no provisions that the charge be current and continuing. If the charge is then withdrawn the next day but the person continues under psychiatric confinement, then they will still lose all entitlements even if the charge was initially vexatious and there is no evidence to support it. This would also be the case even if the charge is discontinued for some other reason or if it is downgraded/changed due to a lack of evidence or even a mistake by the charging police officer.

As explored previously, in the criminal jurisdiction, the prosecution has a high burden of proof before a person's liberties are taken away. A system has been put in place to ensure that there are many checks and balances requiring the scrutiny of police officers, Crown Prosecutors, magistrates, judges and juries before the rights of an individual can be affected due to allegations brought by the state. There appears to be no such protections put in place regarding the new provisions proposed in the Bill, which effectively act as a form of penalty for the alleged commission of "serious" offences.

In summary, given the complexities of each jurisdiction's mental health system, the Bill as drafted may have unintended consequences in the operationalisation of certain provisions. This may give rise to adverse effects for certain people undergoing involuntary treatment. Serious consideration should be given to clarifying the amendments as they currently stand to address these issues.

Responsibility for the cost of treatment

One of the justifications given for the Bill is that the relevant state or territory governments should be responsible for taking care of the needs, including treatment and rehabilitation, of patients.

The justification does not fully take into consideration the entire purpose for which patients may use social security benefits. While a fee may be payable to the relevant service, this does not represent the entirety of their entitlement.

During rehabilitation, as acknowledged in the Explanatory Memorandum, patients are often granted various forms of leave. Subsections 23(9B) and (9C) are therefore designed to provide benefits to these patients as long as it is considered to be part of the "period of integration" back to the community (although section 23(9D) may have an adverse, unintended effect to this).

However, patients may have various forms of leave during their confinement that may not be considered to be part of a period of integration but that are integral to their treatment and rehabilitation.

In Queensland, for example, patients who are otherwise an in-patient can be granted limited community treatment (LCT).[45] Limited community treatment (LCT) can consist of:

- escorted LCT (on or off hospital grounds), which requires the patient to be accompanied by a health service employee;

[45] *Mental Health Act 2000* (Qld) s 129.

- unescorted LCT (on or off hospital grounds), which includes LCT where the patient may be accompanied by a responsible adult (e.g. relative or NGO worker) and LCT where the patient is unaccompanied;
- overnight LCT; and
- more than overnight LCT (e.g. living in the community).

Which of these LCT programs might be considered a "period of integration" back to the community is uncertain (the uncertainty of the relevant subsections having already being explored above), but each can incur expenditure that is currently provided for by the patient's social security benefits, for example transport costs, course fees, etc. There are numerous circumstances in which a patient undergoing psychiatric confinement may require an income stream. These may relate just as importantly to a person's treatment and rehabilitation to reduce the impact of their mental illness and/or the risk of recidivism as they do to enabling a "period of integration".

Also, for patients who are inpatients for a shorter period of time, there are other expenses that they incur that need to be paid for. The disability support pension, which many of the patients may be in receipt of, is intended to be the person's income as they cannot otherwise work due to the nature of their disability. Those who are confined still face the prospect of ongoing expenses such as rent at private accommodation and bills for electricity and telecommunication services. Should the Bill seek to deny benefits to these persons, they will have no ability to pay for such expenses, which would make reintegration back to the community much more difficult.

This may result in patients potentially being confined for longer as arrangements will need to be made for the patient to regain appropriate accommodation and supports to enable, in Queensland for example, the Mental Health Review Tribunal to consider it appropriate and of sufficiently low risk to revoke their order and allow their reintegration back into society. The fact that this type of funding is also relied upon in other states is reflected in the evidence of Dr Sidney Poulter. If a person does not received social security benefits:

> *"... it severely disadvantages and retards their rehabilitation process and almost makes it a self-fulfilling prophesy. For instance, people who do not have an income cannot apply for public housing, so it is very difficult to start that process. Also as people achieve more unrestrictive leave, our process is that we wean people off from internal programs and we have people plugging into community external programs of work, leisure, education, we have a TAFE campus in the hospital, but when people get to that later level we get them to take that up, and, of course, they have to pay the costs of that, we can't do that, and it stops people and, in fact, we have people being retained in the system because of the difficulties we have had in fighting these issues, that are transition plans, the trajectory of people have been slowed by the fact that we have had trouble getting them on the pension."*[46]

Persons in situations of psychiatric confinement require more than simply "support, treatment and activities" in the context of medical treatment. Such patients are still members of the community who require access to continued social security benefits in order to provide for appropriate supports and services, timely reintegration, and the development/redevelopment of necessary skills to enable independent living.

[46] *Re Siev Vuch Chhit and Secretary, Department of Family & Community Services* [2004] AATA 744 at [28].

Concluding comments

While this submission discusses a number of technical issues with the drafting of the Bill, more significantly, the Public Advocate does not support the policy that this Bill seeks to implement which belies a lack of understanding of the principles underpinning both our system of criminal law and mental health treatment and rehabilitation, while also failing to uphold our human rights obligations.

If implemented it will have the practical effect of denying people with mental illness the income that they need to contribute to the costs of their care and support while detained in authorised facilities, the cost of accessing appropriate supports to facilitate their treatment and rehabilitation, and their ongoing costs of living.

Furthermore, as a result of its potentially negative impact on the effectiveness of rehabilitation and/or treatment programs, this may also extend the length of time that the patient might have otherwise been detained. Reduced effectiveness of rehabilitation may also lead to increased recidivism and therefore result in further costs to the State as a result of the person cycling back through the system following release.

Most importantly, however, the Bill fails to recognise and uphold the human rights of persons with mental illness. Already within Australia, we are sadly lacking in respect of the extent to which we adequately realise our obligations under the United Nations *Convention on the Rights of Persons with Disabilities*. The proposed Bill not only does little to recognise this but risks Australia taking a backwards and discriminatory approach to the needs of persons with mental illness.

It is hoped that the Bill might be reconsidered in respect of its approach to the extremely complex issue of persons subject to psychiatric confinement to better acknowledge the law as it pertains to the circumstances of these individuals and, in doing so, ensure that such persons have continued access to benefits that enable access to appropriate supports that facilitate sustainable outcomes and promote their acceptance as productive members of the community.

In closing, thank you for the opportunity to provide a submission in relation to the proposed Bill. I would be pleased to further discuss the issues that I have raised in this submission should additional information be required.

Yours sincerely,

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