



Inclusion Australia

acting locally - representing nationally - connecting globally

Budget Savings (Omnibus) Bill 2016

Amendments to the Social Security Act - Psychiatric Confinement

**(First presented to the Community Affairs Committee's review of the SOCIAL SERVICES
LEGISLATION AMENDMENT BILL 2015)**

rehabilitation builds opportunity, punishment diminishes opportunity

7 Sept 2016

Inclusion Australia (NCID) is the national peak body for people with intellectual disability and their families.

Inclusion Australia has over 5,000 members representing all 8 states and territories. In addition to having people with intellectual disability on our Board, Inclusion Australia receives policy advice from Our Voice. Our Voice is a committee of Inclusion Australia's Board, the membership of which is exclusively people with intellectual disability representing all states and territories.

Inclusion Australia is the recognised national peak body with the single focus on intellectual disability, ie, our actions and priorities centre on issues that affect the lives of people with intellectual disability and their families.

Inclusion Australia's mission is to work to make the Australian community one in which people with intellectual disability are involved and accepted as equal participating members. We do this by:

- listening to people with intellectual disability and their families
- promoting and upholding the UN Convention on the Rights of Persons with Disabilities
- developing and promoting creative policies and practices
- speaking to politicians, public servants, business and community leaders about the lives of people with intellectual disability and their right to have equality of opportunity

Inclusion Australia is a social profit organisation. Inclusion Australia (NCID) was created in 1971 by parents and friends in an endeavour to improve the quality of life of people with intellectual disability and to fill the need for national unity and information.

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Statement of Principles

- ☀ All people have inherent dignity and worth and equal and inalienable rights.
- ☀ All people are valued members of the Australian Community.
- ☀ People with intellectual disability as equal participating members of the Australian Community have the same rights:
 - ☀ to respect for their individual autonomy and independence
 - ☀ to make their own choices
 - ☀ to participate in decisions which affect their lives
 - ☀ to pursue any grievance which affects their lives
 - ☀ to diversity of choice for housing, education, work, recreation and leisure
 - ☀ to equity and justice
 - ☀ to be empowered to take their full place in the Australian Community
 - ☀ to dignity and privacy in all aspects of their lives

Inclusion Australia will:

- ✓ work to make the Australian Community one in which people with intellectual disability have full and equal enjoyment of all human rights and fundamental freedoms and are involved and accepted as equal participating members.
- ✓ promote and protect the human rights of all persons with intellectual disability, including those who require more intensive support.

Consultation Statement

Inclusion Australia consults people with intellectual disability and family members through our State and Territory Agency Members. In particular we:

- ➔ conduct an annual survey of members and stakeholders
- ➔ hold two meetings a year, rotating through all States and Territories
- ➔ present at the Having a Say Conference each year, attended by over a 1,000 delegates the majority of whom have a disability
- ➔ hold forums on specific issues
- ➔ sponsor actions and representations on issues of importance to people with disability

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SOCIAL SERVICES LEGISLATION AMENDMENT BILL 2015 - OUTLINE

“This Bill provides that a person who is undergoing psychiatric confinement because they have been charged with a serious offence will be taken to be in psychiatric confinement for the purpose of the social security law, irrespective of whether the person is undertaking a course of rehabilitation. One of the effects of this is that relevant social security payments will not be payable to the person while the person is undergoing that psychiatric confinement.

The measure is due to be implemented from 1 July 2015, as announced in the 2014-15 Mid-Year Economic and Fiscal Outlook.

Currently, a 2002 Federal Court decision means 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. Prior to this case, many people in psychiatric confinement because of criminal charges could not receive social security payments. The amendments represent a return to the original policy intent for people who have been charged with a serious offence – so that a person cannot access social security payments while in psychiatric confinement as a result of criminal charges.

While 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. A serious offence for the purposes of this measure focuses on violent offences such as murder, attempted murder, manslaughter, rape, attempted rape and certain other offences involving loss of or serious risk to life, wellbeing or safety.

The measure will also provide for circumstances in which a person is not taken to be undergoing psychiatric confinement (meaning that a social security payment will be payable) during a period that is ‘a period of integration back into the community for the person’.¹

¹ Explanatory Memorandum, Social Security Legislation Amendment Bill 2015

Introduction

This submission makes three claims:

1. That the UN Convention on the Rights of Persons with Disabilities (UNCRPD) and the Disability Discrimination Act both require the Commonwealth Government to treat people with intellectual disability equally. So, if a person charged with a serious offence is found to be not guilty or unfit to stand trial then the Commonwealth Government is required to treat them the same as other people who have been charged and been found to be not guilty.
2. That this Bill does not meet the Government's expectations of 'value for money', evidence based policy and congruency across all program areas.
3. That the intention of the Bill is not to address the real needs of people with intellectual disability but is another instance of people with intellectual disability being caught in the middle of a 'futile' argument between the Commonwealth and States.

Rehabilitation builds opportunity, punishment diminishes opportunity

The Explanatory Memorandum states:

While 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.

The purpose of all government legislation must be to ensure that people with intellectual disability have the best chance and opportunity to be full contributing members of society. Where people are well supported with evidence based practices they are able to contribute to the financial, social and cultural life of the community in which they live. The key is investment, intervening early to ensure that people have the opportunity to build on their skills and to gain a sense of value.

People with intellectual disability have a cognitive impairment and require concrete, practical experience to be able to learn and use the skills that they acquire. Denying people with intellectual disability income support (including the Disability Support Pension {DSP}) will have at least two effects;

1. it will cast people with disability into poverty. Without resources they will become a 'burden' to either the state government through being incarcerated for longer than necessary, or where they are eligible for the NDIS greatly increase the costs to the Commonwealth government through support to relearn skills and the need for housing.
2. It will inhibit learning and result in the loss of skills.

It has to be acknowledged that most people with intellectual disability who are charged with a serious offence will be people 'living on the margins of society'. As such they will have limited financial resources and support networks to assist them when they are released from the institution.

We know that without resources people with disability are often 'stuck' in institutions because they have no accommodation to move onto. This means greater expenditure for state governments and loss of skills and hope for people with intellectual disability as they remain incarcerated indefinitely.

Put simply, having money going into a bank account on a regular basis enables the staff supporting people with intellectual disability, in a very real way, to budget and to plan for life out of the institution; e.g., if I build up funds for a rental bond then I can talk, in a real way, about where is the best place for me to live and who with; regular money in the bank enables me, in a real way, to talk about budgeting for rent, food, etc. This does not only build skills but also expectation and hope. If my bank account is zero then all talk of housing, rent, budgeting, etc, is done in a vacuum and rightly will get the response, 'why bother, it is never going to happen'. Funds in the bank also gives the support staff the knowledge that their work will have a positive outcome, it will create a degree of certainty and thus higher expectations.

Of particular concern is the 'cost burden' on the NDIS if people with intellectual disability are not supported with evidence based practices while they are institutionalised. It is our contention that all people with intellectual disability are eligible for the NDIS² though the level of funded support that they will need will vary greatly depending on the support that they have had to acquire and maintain skills. The continuing investment in maintaining skills and building on these is vital for people to become increasingly independent of both support and welfare. As we have stated, people with intellectual disability learn in the real world, practical hands on day to day actual experience.

² See NDIS fact sheet, inclusionaustralia.org.au

This Bill will have a detrimental effect on both the maintenance of everyday skills and the learning of new skills. The effect will be that the NDIS will have a greater cost in re-skilling people, building up their expectations and providing additional support due to the lack of financial literacy during their incarceration. The cost will be greater than the pension paid during the person's incarceration!

A fact that has a direct bearing on pension costs is that a person with both skills and high expectations has a better chance of getting paid employment in the open labour market. We know from evidence based practice that a person with intellectual disability, with the right support, has a decreased reliance on the DSP when they enter the open labour market. This fact is recognised by the Commonwealth government through a number of employment measures that promote entry into the open labour market for people with intellectual disability. This Bill is at odds with other Government policy and clearly does not equal 'value for money'.

Governments talk about the positive effects of people being engaged in their community. The economic and social benefits of employment and the social and psychological benefits of voluntary work and being involved in cultural activities. This rhetoric must be consistent across all programs and where issues of Commonwealth/state responsibilities cross over these must be resolved without penalising people with intellectual disability.

It would appear that the Government, in trying to address a 'wrong' that it sees the Federal Court having inflicted on it, is not considering the consequences for people with intellectual disability nor for Commonwealth finances.

Statement of Compatibility with Human Rights

Trying to create rules for exceptional circumstances can be very complex and can create more complexity than is necessary for the number of people involved and for the original estimate of the cost/benefit of the measure.

Consider the question, 'how long is a judicial sentence? Is it the maximum? Is it until a person is paroled? Is it until a person is actually released? This is an important question because for many people with intellectual disability it is until they are released from their incarceration and this can be years after the maximum sentence for the crime that they have been charged with. This Bill will deny them the Disability Support Pension (DSP) where a non-disabled person sentenced to gaol, and released on parole, will be eligible for income support.

This example is a clear instance of inequality, though we would contend that the Bill at its core treats people with intellectual disability unequally.

The Explanatory Memorandum states:

The effect of new subsection 23(9A), together with current section 1158, will be that a social security payment is not payable to a person who is undergoing psychiatric confinement because the person has been charged with a serious offence. This will be the case even if the person is taken to be undertaking a course of rehabilitation.

A person may be undergoing psychiatric confinement because they have been charged with an offence if, for example, the person:

- is having their fitness to stand trial assessed;
- has been found unfit to stand trial because of the person's mental impairment; or
- has been found not guilty of the charge because of the person's mental impairment.

There would need to be a connection between the charge and the psychiatric confinement before a person would be taken to be undergoing psychiatric confinement because the person has been charged with a serious offence. A social security payment will continue to be payable to a person who is undergoing psychiatric confinement for reasons unrelated to the commission of an offence. A person would also not be taken to be undergoing psychiatric confinement because the person has been charged with an offence if the person:

- was found not guilty of the offence on the basis that they did not commit the offence; and
- remains in psychiatric confinement following the not guilty finding.

It is likely that a person who is found guilty of an offence but who is remanded in a psychiatric institution following the guilty finding, would be taken to be in gaol for the purpose of the social security law. Subsection 23(5) of the Social Security Act currently provides that a person is in gaol for the purposes of the social security law if the person is being lawfully detained (in prison or elsewhere) while under sentence for conviction of an offence and not on release or licence. Relevant social security payments are not currently payable to people in gaol. This Bill has no impact on people who are in gaol.³

A person who is "found not guilty of the charge because of the person's mental impairment" is not guilty, as is a person who is found to be 'unfit to stand trial'. Their official status is the same as that of all people who have been found to be not guilty and that is they are not guilty. Therefore, the treatment of them by the Commonwealth in relation to the DSP must be the same as all non guilty

³ pp 3-4, Explanatory Memorandum, Social Security Legislation Amendment Bill 2015

people, e.g., equal treatment. Two people are involuntarily admitted to a psychiatric institution, one through the courts and one from the community, both are not guilty of a crime, one gets the DSP the other does not? Similar situation, similar need for rehabilitation and integration back into the community, similar need for money to aid their rehabilitation and integration - to treat them differently for income support purposes is clearly discriminatory.

Both the UNCRPD and the DDA allows for 'special measures' and so an argument cannot be made that people with intellectual disability must be treated the same as all others who have been charged and jailed for a serious crime. As with all government policy we should be maximising the rehabilitation outcomes not hindering them with false revenue saving measures or artificial arguments about which level of government is responsible for particular expenditure.

Afterword

In our consultations concern was raised that the Bill implied that people with disability commit serious crimes due to their having a disability; and, that this feeds into the myths about people with disability being violent and/or behaviourally different. It was suggested that this needs to be addressed and one way of looking at it (and hence the wording of the Bill) was to both challenge this assumption and to look at which part of the whole process (from violent act to release from an institution) interacts most acutely with a person's impairment.

There would need to be a connection between the charge and the psychiatric confinement before a person would be taken to be undergoing psychiatric confinement because the person has been charged with a serious offence. A social security payment will continue to be payable to a person who is undergoing psychiatric confinement for reasons unrelated to the commission of an offence.

This statement in the Explanatory Memorandum raises an interesting question, 'can a serious criminal charge (act) ever be because of an intellectual disability?' People with intellectual disability share a number of characteristics, one of which is not violent behaviour; as all people who display violent behaviour do not have intellectual disability. A person may be found 'unfit to plead' or 'not guilty of the charge because of (their) mental impairment, but this is because of the interaction of their understanding and the court processes not because of the interaction of their impairment and the violent act.

Therefore the relationship between the charge and the person's impairment is only indirect. The direct relationship is between the person's impairment and the court processes. The next question is whether a person is disadvantaged because of the court processes, e.g., can they be incarcerated for a period longer than a person on a similar charge who does not have a disability? With the answer to this question being a clear 'yes', what sets them on a different pathway is not same crime but the different court processes.