Aboriginal Disability Justice Campaign

Submission opposing the Federal Government's plan to cut welfare payments to people in psychiatric confinement who have been charged with serious offences as provided for in Schedule 20 of the Budget Savings (Omnibus) Bill 2016

The ADJC

The Aboriginal Disability Justice Campaign (ADJC) is a national advocacy campaign that is seeking to change legislation, policy and practice where people with psychiatric and cognitive disabilities are detained in our psychiatric units, gaols and forensic disability units, often indefinitely, as a result of mental impairment assessments and unfit to plead findings through the criminal justice process. The ADJC is specifically concerned about the vulnerability of Indigenous Australians to this process and the impact of such detention on them.

Introduction

Schedule 20 of the Budget Savings (Omnibus) Bill 2016 repackages the earlier Social Services Legislation Amendment Bill 2015 ('SSLAB') that failed to pass through the Senate in 2015. The SSLAB aimed to deny social security payments to people in psychiatric confinement who have been charged with a serious offence, saving the Commonwealth some $29.5 m over four years, according to the Mid-Year Economic and Fiscal Outlook 2014-15 ('MYFEO').

We strongly oppose this measure for its lack of intrinsic merit, for the reasons stated below, and particularly because it will massively and disproportionately affect indigenous Australians. The Aboriginal Disability Justice Campaign is aware of nine people with an intellectual disability or acquired brain injury detained via mental impairment legislation in the Northern Territory, and all of them are Indigenous Australians.

More than half of the people detained in the Community Justice Program in New South Wales are Indigenous Australians. Approximately one third of the people detained in Western Australia under the Criminal Law (Mentally Impaired Accused) Act are Indigenous Australians. Although there is a lack of quantitative data on how many people are detained via mental impairment legislation, the Aboriginal Disability Justice Campaign estimates that one hundred to one hundred and fifty people are detained in forensic psychiatric and disability units and prisons every year across

Australia via Mental Impairment Legislation and that one third of this population are Indigenous Australians.

When the SSLAB was referred last year to the Senate Community Affairs Legislation Committee ('the Committee') for inquiry and report,[1] all but one submission[2] opposed the measure, including those by the Australian and New Zealand College of Psychiatrists; the Australian Guardianship and Administration Council; the NSW Mental Health Review Tribunal; the National Welfare Rights Network; Mental Health Australia; Inclusion Australia; the Mental Health Legal Centre; the Australian Association of Social Workers; the Australian Human Rights Commission; the Victorian Institute of Forensic Mental Health; the Western Australian Association for Mental Health; the Aboriginal Disability Justice Campaign; the Queensland Government; the Victorian Institute of Forensic Mental Health; the South Australian Public Advocate; Queensland Advocacy Incorporated; the Victorian Government; the NSW Government; the Government of the ACT; Forensicare Recovery Committee; Victorian Legal Aid; Hallmark Disability Research Initiative; the Australian Council of Social Service; and the Victorian Mental Illness Awareness Council.
No sector stakeholders supported the SSLAB. To reintroduce an identical measure in Omnibus legislation is to reject the unanimous views of the experts in the sector and the intent of the parliamentary committee procedure.

Submission Summary

If enacted, Schedule 20 of the Budget Savings (Omnibus) Bill 2016 ('the Provision') would—

- Fail to achieve the stated aim of parity across the criminal justice systems. The people targeted are not criminally responsible for their actions.
- Defeat the public interest in the successful recovery and habilitation of citizens.
- Introduce arbitrary inequity and a punitive intent to the *Social Security Act 1991* (Cth) by denying income support to people charged with serious offences, but not to others.
- Save taxpayers no money in the short term, shifting costs from Commonwealth to states and territories, and
- Increase costs by prolonging institutionalisation and dependency.

[1] By 15 June 2015
[2] That of the Australian Government Department of Social Services.

- Cause financial hardship for people who have done no criminal act, and in some cases for their dependents who rely on the provision's targets for support.

- Cause administrative confusion over seven jurisdictions, requiring subjective evaluations regarding what constitutes 'transition' or a 'serious offence'.

- Impede recovery by denying detainees access to money and money-handling, and by making it more difficult for detainees to transition from detention.

Detailed Commentary

The Government's purposes, as stated in the MYFEO and the explanatory notes to both the SSLAB and the Omnibus Bill, are

1. to return to the original policy intent, namely, the denial of social security payments to people in psychiatric confinement as a result of criminal charges

2. to achieve parity across the criminal justice system

Schedule 20 of the Budget Savings (Omnibus) Bill 2016 will not achieve these objectives, which we address below.

1. 'The provision restores the original policy intent'

On the contrary: if enacted, the provision would undercut the original policy intent. The original policy created an exception to the general rule that people in psychiatric confinement would not be entitled to social security payments. The exception would allow payments to go to people who are undergoing a course of rehabilitation, in recognition of the fact that income is essential to that process.
In 2002, *Franks*[3] widened the scope of what it means to participate in a course of rehabilitation, so that the majority of people in psychiatric confinement would be included. For the Government, it is *Franks* that distorted the original policy intent. Queensland's Office of the Public Advocate debunked that argument in its SSLAB submission, labelling the claim as 'disingenuous'.

> [T]he 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

[3] *Franks vs Secretary, Department of Family and Community Services* 2002 FCAFC 436.

> history of the legislation and the detailed exploration and interpretation of the Full Federal Court in *Franks*. [..] [I]t 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.[4]

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

> [F]orensic 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.[5]

2. 'The provision will achieve parity across the criminal justice system'

The idea of 'parity' depends on a misunderstanding of the legal basis for forensic detention. 'Parity' glosses over the fact that people in psychiatric confinement are not criminals, and have not been found guilty of an offence. The submission by Queensland Advocacy Incorporated explains it this way:

> Forensic processes and forensic detention stand apart from of the criminal justice system.[6] Blame and retribution are not part of the forensic calculus. In the Explanatory Notes, the use of the phrase 'people in psychiatric confinement because of criminal charges'[7] is misleading. They are not in confinement because of criminal charges in the same way that a person is sent to jail because of criminal charges, for a number of reasons. A person in psychiatric confinement is not guilty of an offence: there has been no determination of facts beyond a reasonable doubt, no finding of criminal responsibility, and no conviction. The order of the court is not about punishment or deterrence, which are key components of criminal sentences.

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[4] (Office of the Public Advocate (Qld) Submission to the Standing Committee on Community Affairs (Legislation Committee) Social Services Legislation Amendment Bill 2015)

[5] Victorian Institute of Forensic Mental Health, Submission to Senate Community Affairs Legislation Committee, *Inquiry into the Social Services Legislation Amendment Bill 2015*, May 2015, p. v, .

[6] Except, for example, where a prisoner develops a mental illness after their incarceration and is moved into psychiatric detention.

[7] Under the *Social Security Act* 'Psychiatric confinement' includes confinement of people with intellectual
impairments and people with mental health conditions. The conflation of mental illness and intellectual impairment is an all too frequent error in Commonwealth, state and territory legislation and policy.)

> The focus of forensic orders is habilitation, treatment and community protection.[8]

People in psychiatric confinement fall into one of two categories: in the first, there are those who the courts have determined to be not guilty because they were of unsound mind at the time of the alleged offence; in the second category are those who did not stand trial because the court determined that they were unfit to do so. None of the people in these categories has been convicted of an offence, and none has been detained in order to punish.

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.'[9] Governments in every state and territory have passed mental impairment legislation because they recognise, as the common law has done for centuries, that people who are of unsound mind or who are unfit to plead or to stand trial cannot rightly be held criminally responsible for their actions. The court will suspend the criminal justice process accordingly. Forensic detention, instead, is partly a matter of risk management and partly a matter of meeting therapeutic need.
Many submissions made the same point, noting that the purpose of psychiatric confinement is care, rehabilitation and the protection of the community rather than punishment and deterrence.[10] 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.[11]

Other problems with the measure

In addition to these criticisms, we note that:

- The provision discriminates against people with a mental impairment.
- The provision makes a punitive and unjustifiable distinction between serious and non-serious crimes.

[8] Queensland Advocacy Incorporated Submission to Senate Community Affairs Legislation Committee, *Inquiry into the Social Services Legislation Amendment Bill 2015*, 15 May 2015.
[9] National Mental Health Commission, Submission to Senate Community Affairs Legislation Committee, *Inquiry into the Social Services Legislation Amendment Bill 2015*, 15 May 2015, p. 1
[10] Western Australian Association for Mental Health, Submission to Senate Community Affairs Legislation Committee, *Inquiry into the Social Services Legislation Amendment Bill 2015*, 15 May 2015, accessed 25 May 2015.
[11] Victorian Government, Submission to Senate Community Affairs Legislation Committee, *Inquiry into the Social Services Legislation Amendment Bill 2015*, 12 May 2015

- The provision would have a detrimental effect on rehabilitation and reintegration of psychiatric patients.
- There must be further consultation with states and territories.

The provision 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.'[12] ACT made a similar point.

> The ACT Government is concerned the provisions of the bill would unfairly discriminate against and disadvantage people with disabilities .. My Government's concerns centre on individuals suffering an immediate disadvantage associated with being deprived of both their liberty and a source of income during their confinement period. [13]

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.[14]

The South Australian Public Advocate argued that there is a greater obligation on the Parliament to articulate a sound justification for discriminatory provisions in the *Social Security Act*. In putting forward this Amendment Bill no such justification has been made, and by comparing the treatment of forensic patients to that of prisoners, the wrong comparator is used in the "Statement of Compatibility" with human rights.

> A forensic patient is not a convicted prisoner, or a charged person awaiting trial … The correct comparator [for the purposes of determining whether there has been discrimination] is an adult person with the same need for social services as the disabled person, but without the disability.[15]

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[12] Mental Health Australia, Submission to Senate Community Affairs Legislation Committee, *Inquiry into the Social Services Legislation Amendment Bill 2015*, May 2015, p. 4
[13] ACT Legislative Assembly, Submission to Senate Community Affairs Legislation Committee, *Inquiry into the Social Services Legislation Amendment Bill 2015*, May 2015, p. 1.
[14] National Mental Health Commission, op. cit., p. 3.
[15] South Australian Public Advocate, Submission to Senate Community Affairs Legislation Committee, Inquiry into the Social Services Legislation Amendment Bill 2015, May 2015.

The distinction between serious and non-serious crimes is arbitrary and 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.[16]

The South Australian Public Advocate argued 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.[17]
Subsection 9E of the Bill defines a serious offence to include murder, attempted murder, manslaughter, rape, or attempted rape. Subsection 9F of the bill extends that definition to other offences punishable by life in prison or a sentence of at least 7 years, if the offence involves loss of life or serious risk of loss of life, serious injury or serious risk of injury to a person or serious damage to property where this endangers the safety of a person.

The definition covers a potentially very wide range of conduct. For example, subsection 9F(b)(iii) extends the definition of serious offence to an offence punishable by at least 7 years in prison involving serious damage to property "in circumstances endangering the safety of a person". This may include offences involving damage to property where the only danger was to the person undergoing psychiatric confinement, because the definition refers to danger to any person, not another person. It may include offences where the person damaged property, and was not even aware that anyone else was endangered by it.

The National Welfare Rights Network submission states that:

> There is no explanation for this definition and why it should determine a person's entitlement to income support. It suffers the same problem that

[16] National Mental Health Commission, op. cit., p. 3.
[17] South Australian Public Advocate, Submission to Senate Community Affairs Legislation Committee, *Inquiry into the Social Services Legislation Amendment Bill 2015*, May 2015, pp. 9–10

> affects the bill itself, which is the arbitrariness of distinguishing within a group of people who have all been found not to be criminally or morally culpable for their offending. Even on its own terms, the definition seems too broad and poorly drafted.

The Bill will cause financial hardship and reduce prospects for recovery and rehabilitation.

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 …"[18]

People placed in psychiatric detention may still have financial responsibilities such as rent, the welfare of those dependent upon them, education and other necessaries. Depriving people of income promotes institutionalisation. It encourages dependency and helplessness.

The proposal will diminish the recovery prospects of detainees who have a mental illness. It will diminish prospects for habilitation and skills development for people who have intellectual impairment. Deprived on an income, a person loses an important link to the everyday world. It diminishes their capacity to function.

> [T]he Disability Support Pension is essential in giving patients the means by which they can engage in the many rehabilitative programs in the community. Patients self-fund their external rehabilitation activities, modes of transport to attend the activities, and any supplies required to carry them out. Removing the financial structures and therefore opportunity to engage with the community will slow down recovery in a practical sense of not being able to acquire the skills to tackle being outside of the hospital environment, but also have a personal impact on patients feelings of self-worth, autonomy, and ability to achieve meaningful goals. Continued institutionalization will be the daily reality faced by many as a patient commented: "You become so institutionalized, rock up, get feed, not learning shopping, cooking and budgeting."[19]

The establishment of modest savings (e.g. enough to pay a bond for a rental property, or to enrol in a TAFE course) whilst in detention dramatically assists these persons to rehabilitate from the circumstances that lead to the alleged commission of a crime and

[18] National Mental Health Commission, op. cit., p. 1.
[19] Forensicare- Victorian Institute of Forensic Mental Health: Submission to Senate Community Affairs Legislation Committee, *Inquiry into the Social Services Legislation Amendment Bill 2015*, 22 April 2015, p. 2.

provides treating teams with more effective options for their rehabilitation in the wider community.

Even if detained for short periods, people may lose their accommodation/tenancy, or be deprived of the means to re-establish themselves in suitable accommodation on release. Stable accommodation is the most important factor in a person's recovery from mental illness, and lack of accommodation is the most serious barrier to post-detention reintegration for people with intellectual disability. Incarceration detrimentally affects anyone's life skills, but incarceration for someone with a mental illness or intellectual impairment is worse.

> Access to and the use of personal funds for daily necessities enables people to retain their dignity, which is essential for their recovery. It also supports people to develop and maintain personal responsibility and budget management skills, which are essential for effective community reintegration.[20]

Newly released detainees require assistance to find a safe place to live, work or other personal development. Support reduces recidivism. Post-release care and support is critical for increasing the probability of the inmate succeeding in the community. Professor Dan Howard SC, President of the NSW Mental Health Review Tribunal argued 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 noted 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.'[21]

A submission by the Victorian Government argued that the Bill would limit the effectiveness of a highly successful model of rehabilitation that involves a gradual release into the community.[22]http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1415a/15bd108 - _ftn36 Explaining how income support helps people move from confinement back into the community, one Victorian patient said: 'In order to be

[20] Western Australian Association for Mental Health, Submission to Senate Community Affairs Legislation Committee, *Inquiry into the Social Services Legislation Amendment Bill 2015*, 22 April 2015.
[21] NSW Mental Health Review Tribunal, Submission to Senate Community Affairs Legislation Committee, *Inquiry into the Social Services Legislation Amendment Bill 2015*, 22 April 2015, pp. 1–2
[22] Victorian Government, Submission to Senate Community Affairs Legislation Committee, *Inquiry into the Social Services Legislation Amendment Bill 2015*, 12 May 2015,

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.'[23]

The RANZCP argued that the Bill does not account for how consumers would continue to pay their rent or mortgage or service their loans or make credit card payments, for example.

> The long term impact of the Bill will be to have vulnerable consumers return to the community in a worse position than when they were admitted to hospital, in greater debt, less likely to have been able to maintain housing and without the savings required to pay a bond, rent in advance, purchase whitegoods, or afford any of the other costs associated with re-establishing a productive and comfortable life. The Bill would essentially create two classes of forensic patients, discriminating between those who have committed a serious offence and those who have committed a minor offence and as such appears punitive, since no other justification for the differences in the treatment of the two groups is offered. The RANZCP strongly recommends that the Bill should not be implemented due to its potential for harmful and discriminatory impacts on vulnerable consumers and the likelihood that any savings accumulated will translate into deeper costs elsewhere.[24]

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 raised concerns that suddenly removing a source of funding may affect the quality of care available to those in psychiatric confinement. He argued that there needs to be more consultation with experts and state and territory governments.[25] The National Mental Health Commission raised similar concerns. The Commission acknowledged:

> ... 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

[23] Forensicare Patients, Submission to Senate Community Affairs Legislation Committee, *Inquiry into the Social Services Legislation Amendment Bill 2015*, 8 May 2015, p. 3
[24] Royal Australia and New Zealand College of Psychiatrists (RANZCP) submission on the Social Services Amendment Bill 2015
[25] M Butt, 'Bill to restrict income support payments to people in psychiatric confinement', WelfareWrites weblog, 26 March 2015

people. Practical discussions between the Commonwealth and the States and Territories should be undertaken before such provisions are put into effect.[26]

Conclusion

We urge you to oppose Schedule 20. This Provision and the policy reasons behind it are flawed— in our view, irremediably so. No modification of the key terms will improve it, and we urge you to reject it outright.

Any short term savings to the Commonwealth will be costs to individuals confined, to the states and territories, and to communities that would benefit from the long-term recovery and habilitation of their most vulnerable members.

Organisations and Individuals Endorsing This Submission Include:

Jesuit Support Services
New South Wales Council for Intellectual Disabilities
Criminal Lawyers Association of the Northern Territory
People with Disabilities Australia
Dr Piers Gooding University of Melbourne
Ms Miranda Bain Funds In Court Supreme Court of Victoria
Australian Centre for Disability Law
Inclusion Australia
Mental Health Coordinating Council

Patrick McGee
Coordinator
Aboriginal Disability Justice Campaign

[26] National Mental Health Commission, op. cit., p. 2.

APPENDIX A
Supplementary Submission to the Senate Enquiry on the Amendment to the Social Services Bill 2015

Senate Committee for Community Affairs

Responding to the Submission by the Commonwealth Department of Social Services drawing on information already provided to the Senate Enquiry in submissions from the Victorian Institute of Forensic Mental Health and the Queensland Office of the Public Advocate

Legislation

'Since 1908 there have been provisions in the social security law to cease payments for people undergoing psychiatric confinement. Section 1158(b) of the Social Security Act 1991) provides that a person in psychiatric confinement, because the person has been charged with an offence is to be treated the same as a person in gaol. There have been provisions similar to section 1158(b) in social security law since 1947." (DSS Submission)

The provisions to which the DSS Submission refer (section 52(1) of the Social Security Act 1947) actually identify pensioners imprisoned following a ***conviction*** for an offence. Under section 52 forensic patients were eligible to social security payments as they had ***not been convicted*** of an offence. Further to this discretion 52(2) provides to the Director-General the ability to 'authorize the payment of the whole or any portion of' the wife and child who were dependent upon the pensioner' The only time since 1947 where there has been provision similar to 1158(b) where a person is in psychiatric confinement because they have been charged with an offence and is therefore treated the same as a person in gaol was the Amendment Act No. 95 of 1985. The Amendment extended disentitlement to people in psychiatric confinement after being charged, but who were not yet convicted.

The 1985 Amendment was repealed in 1986 by the *Social Security and Veterans Affairs (Miscellaneous Amendments) Act 1986 (Cth) (Act No 106 of 1986).* This 1986 Amendment states 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 the period during which the person is or was, ***undertaking a course of rehabilitation***"

The Explanatory Memorandum to the 1986 Amendment Bill underscores the intent of the legislation in ensuring people confined in a psychiatric institution after being charged with an offence who were undertaking a course in rehabilitation could access income support payments by applying it retrospectively so that people "adversely affected by the current bar could be restored to their previous position"
The Franks decision makes this clear in paragraph 35, "The legislative intent of subs(9) was to place both persons imprisoned and persons charged and psychiatrically confined without conviction on the same footing, but not as the learned judge indicated, by barring both categories of persons from a pension: the legislative intent was to the opposite effect in that it relieved both categories of persons from that bar during the period such a person was confined in a psychiatric institution and was undertaking a course of rehabilitation

Social Services Legislation Amendment Bill 2015
Submission 23 - Supplimentary Submission

Federal Court decision 2002

"A Judgement by the Federal Court in 2002 (Franks vs Secretary, Department of Family and Community Services 2002 FCAFC 436) found that a course of rehabilitation can include a broad spectrum of treatments. Prior to 2002, most people undergoing psychiatric confinement could not receive social security payments.

The Aboriginal Disability Justice Campaign came to this issue in 2012 after it became clear that despite the legislative intent spelt out in 1986 Explanatory Memorandum and clarified by the Franks Decision in 2002 to allow people in psychiatric confinement who were unconvicted and participating in a course of rehabilitation access to the Disability Support Pension, such access was still being denied.
Even in 2012 there was discrepancy in the application of the legislation as regards to the intent of the legislation, the policy practice resulting in confusion over who was eligible and who was not.

Two people known to the Aboriginal Disability Justice Campaign who were detained, unconvicted and participating in a course of rehabilitation were provided access to the Disability Support Pension and two people in identical situations were not provided with access to the Disability Support Pension.

This discrepancy had to be settled by both the involvement of the Commonwealth Ombudsman and the intervention of Minister Andrews, the Minister for Social Security Policy at the time.

It seems reasonable to conclude given this set of 2012 circumstances that legislative intent and policy practice may have become blurred in the case by case application of 1158(b). What the DSS Submission failed to illuminate when stating, "*Prior to 2002, most people undergoing psychiatric confinement could not receive social security payments",* was the legislative history was clear that disentitlement only applied to people in psychiatric confinement who were convicted of a crime. If most people undergoing psychiatric confinement who were participating in a course of rehabilitation could not receive social security payments, then this would be due to a misinterpretation of the legislation on the part of the agency authorised to assess such claims not the original intent of the legislation.

This dissonance between legislative intent and case practice was the reason for the full bench of the Federal court considered the case. The Franks decision simply confirmed the legislative intent. It is extremely disingenuous of the Departments Submission to suggest otherwise

The outcome of this judgement has meant that essentially anyone who is undergoing psychiatric confinement is taken to be undergoing a course of rehabilitation and accordingly is paid.

From 1947 onwards the legislation has always been clear that if you were convicted of an offence, confined in a psychiatric institution then access to income support would not be possible and you would not be paid accordingly. Point 3 of the DSS Submission seems to miss out on including a significant and oft repeated concept and phrase relating to the people in psychiatric confinement and participating in a course of rehabilitation being paid accordingly were ***unconvicted***

This was consistent with the approach of the Administrative Appeals Tribunal and the Social Security Appeals Tribunal, "the AAT concluded that 'rehabilitation' of persons with psychiatric disabilities could not, in my view be laid out as a week by week program as might be appropriate for a person with physical disabilities. It cannot be the intention of beneficial legislation to provide for the exclusion from the operation of s1158 on a basis that would have little regard to the real life circumstances likely to occur from day to day"

Social Services Legislation Amendment Bill 2015
Submission 23 - Supplementary Submission

The Franks decision from the Full Federal Court stated that a 'course of rehabilitation' should be given its ordinary English meaning; paragraph 47 of the Franks decision states, “It is not suggested that the phrase ‘course of rehabilitation’ in the context of section 23(9) as applied to s11589b) has a particular technical meaning or that experts involved in psychiatric care have a particular understanding of what is involved in something they describe as a course of rehabilitation”

The Institute of Forensic Mental Health wrote to the ADJC to clarify this point: “The term ‘a course of rehabilitation’ is understood in mental health practice, but the Department seeks to replace it with a term not understood or used in mental health practice, a 'period of reintegration', which does not equate with the practice adopted by any forensic service in all the jurisdictions in Australia.”

This includes people who were not on income support, or were on income support payments for which they cannot qualify while in confinement (e.g. Newstart Allowance or Parenting Payment), receiving new grants of Disability Support Pension (DSP) after entering psychiatric confinement. In some institutions the standard intake procedure include assisting new arrivals to claim DSP

If people are eligible for access to the Disability Support Pension as per the legislative intent and the Franks decision which confirmed the legislative intent, people are eligible for access to the Disability Support Pension. The geographical location of the where the application is begun irrelevant. The fact that applications for access to the Disability Support Pension were initiated when a person was involuntarily detained in a forensic psychiatric reflects a lack of appropriate and targeted support enabling the exercising of the right to income support than a conspiracy to defraud the government.