Suspects' rights

The Bill purports to balance the new power with provisions for the rights of arrested suspects to contact family, friends, and legal advisers. This comment will concentrate on the crucial issue of access to legal advisers. Here, the Bill's promise of rights is a sham: the right has no substance because nothing has been done to provide public funding for legal advice at police stations or to organise a duty solicitor scheme. It is hypocrisy to claim a power is 'balanced' by a right which very few suspects will be able to exercise. Legal advice is not an optional extra: investigative detention is not acceptable unless accompanied by a substantial right of access to a lawyer. Experience clearly shows the dangers of lengthy custodial interrogation. Audo-visual recording is a step forward, but is not enough. Lawyers are able to offer several vital services. Their presence can ensure evidence is obtained fairly and reliably (so serving the interests of both suspects *and* police). This is not to ignore the deficiencies of legal advice scheme elsewhere.[4] The appropriate response is to learn from such precedents in constructing legal advice arrangements.

There is another major problem with the proposed suspects' rights: the duty to inform suspects of their rights rests with 'the police officer concerned', presumably the investigating officer. One lesson which should have been learnt from the experience of *PACE* is that the key to legal regulation of investigative detention is to divide responsibility between investigating officers and officers with specific duties relating to the suspects' detention and welfare.

The Bill, correctly, does not allow police to refuse legal advice (in contrast to access to family and others, which can be refused in specified circumstances). Lawyers are only given two hours to get to a station before the obligation to delay questioning or other investigation expires. This is likely to encourage officers arresting suspects thought likely to be able to employ a lawyer to do so at inconvenient times. Ironically, a principal argument against fixed detention lengths was that they would be impractical in rural areas but a short period is considered adequate for the arrival of legal advice.

Special groups are dealt with only in permissive sections on interpreters and by providing that a suspect's age, and physical, mental and intellectual conditions are to be taken into account in determining a 'reasonable' detention length. No reference is made to Aboriginality.

It is hard to avoid the conclusion that the 'rights' in this Bill are designed to do no more than legitimate the extension of formal police powers.

A missed opportunity

The faults of this Bill run deeper than the specific deficiencies noted. It is founded on the antagonistic dichotomy of police powers versus suspects' rights. Because police powers are prioritised, suspects' rights are insubstantial. This is to ignore a vital lesson from contemporary developments in criminal procedure elsewhere: legal regulation, combining powers and rights, can contribute to the production of more professional police practices in a way which benefits both police and suspects. The fundamental failing of this Bill is that it expresses a conception of criminal justice which is outdated and potentially dangerous and which serves the real interests of neither suspects nor police.

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SOCIAL SECURITY

Madness or badness?

DOMINIQUE SAUNDERS, TOM HALL AND GARY MORRIS applaud a recent decision of the SSAT on the entitlement to a pension of two involuntary patients in a psychiatric hospital.

The Social Security Appeals Tribunal has determined a question of entitlement to a pension for two people detained under a hospital order pursuant to s.93(1)(d) of the *Sentencing Act 1991* (Vic.). Both applicants are involuntary patients detained at the Rosanna Forensic Psychiatry Centre. The issue before the Tribunal was whether the applicants are in gaol or in psychiatric confinement within the meaning of the *Social Security Act 1991* (Cth). Section 1158 says a pension is not payable to a person who is in gaol or undergoing psychiatric confinement because they have been charged with committing an offence.

The Department of Social Security (DSS) argued that as patients involuntarily detained in the psychiatric centre they were 'in gaol' within the meaning of the Act. The DSS relied on s.23(3) of the *Social Security Act* and submitted that the detention was 'in connection with a person's conviction for an offence'. Counsel for the applicants argued that the provisions did not apply because the effect of the section relating to people having been charged with an offence ceased once they had been found guilty and no conviction had been recorded.

The applicants are detained under a s.93(1)(d) *Sentencing Act* hospital order. The legislation says that if, after a trial, a person is found guilty, the court may make a hospital order instead of passing sentence if the court is satisfied on psychiatric evidence that:

- the person appears to be suffering a mental illness requiring treatment;

- the treatment can be obtained by their admission and detention; and
- the person should be admitted for their own health and safety or for the protection of members of the public.

Under the relevant provisions there is no reference to any requirement for the court to record a conviction. The legislation gives a restricted meaning to conviction and provides that a finding of guilt without recording a conviction must not be taken to be a conviction for any purpose. The Tribunal in this case found the use of the word 'conviction' in the *Social Security Act*, in conjunction with an offence, impresses a technical meaning on the word. The Tribunal commented that if a court has not recorded a conviction then the applicants have not been convicted of an offence.

The Tribunal found the applicants had been found guilty of committing an offence but had no conviction recorded in respect of that finding and were entitled to payment.

The social context

One of the applicants, aged in his thirties has suffered a schizophrenic type illness for ten years. He has been admitted to psychiatric hospital for brief and prolonged periods on five occasions.

He had completed education to year nine, and had a history of limited periods of unskilled employment. The relationship between the applicant and his family was greatly strained from periods of being unwell and behaviour involving serious assault when unwell.

At the commencement of the current admission for psychiatric treatment, the applicant presented with persecutory delusions, hallucinations and ideas of reference. During the period of hospitalisation he assaulted staff and patients on a number of occasions, at which times he appeared motivated by delusional preoccupations. He was charged with criminal assault. Having been found guilty of the offences, he was remanded in prison for further psychiatric assessment. The court, taking into account the relationship between the mental illness and the offending behaviour gave him a hospital order.

Rehabilitation

Following the hospital order, the applicant was admitted to a forensic psychiatric rehabilitation ward. The purpose of the ward is to provide rehabilitation and to assist with a person's non-offending transition back into the community. The ward-based program consists of rehabilitation groups including psychiatric education, living/social skills and anger management. Additionally, responsibility for meal preparation, washing, cleaning, gardening and minor repairs is undertaken by the people on the ward. An integral component of the rehabilitation program is the provision of leave which ranges from restrictive to extended overnight leave. Such leave provisions are essential for gradual and successful re-integration into the community.

The DSS found that because of the hospital order status, which constituted being 'in gaol' the pension was not payable, and cancelled the entitlement. The Department file records that payment should be cancelled because the applicant was 'imprisoned'.

The prospect of not being entitled to pension payments had serious consequences. The applicant's movement through the rehabilitation program was problematic because financial independence could not be secured, and he could not take full advantage of the gradual leave because of a lack of finances. The most concerning aspect was the inability to accumulate funds to assist with reintegration back into the community. The lack of financial resources resulted in further limiting appropriate discharge options and quality of life.

Reflections on the process

The classic dichotomy for forensic psychiatry patients has been revisited. The 'madness and badness' issues ever present in the relevant literature were applied in the practical area of pension entitlement. Under the *Social Security Act*, pensions are not paid to people who have committed offences and are institutionalised in a prison setting. The legislation extends an exemption to that exclusion for people confined in a psychiatric hospital and undertaking courses of rehabilitation. In this way the disability is emphasised as having priority over the offending behaviour.

This tussle over the payment of pensions reflects the same ambivalence of the community to forensic psychiatry patients. Is madness or badness the issue? Public resolution of issues like eligibility to pensions gives patients an opportunity to see the community's ambivalence towards offending behaviour. Achieving a successful result empowers this group of marginalised people to have the courage to look towards a hopeful future. An unsuccessful result, whereby this group of disenfranchised people would have been denied a right to an income because of a combination of criminal behaviour and mental illness, would have been a severe injustice. It would also be a significant disincentive for defence lawyers in submitting to a court that a hospital order would be an appropriate disposition.

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