

## SOCIAL SECURITY

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## Including Student Assistance Decisions

## Opinion

***In gaol, in psychiatric confinement, undergoing rehabilitation?***

A number of cases reported in this edition grapple with these questions. In accordance with s.1158 of the *Social Security Act 1991* (the Act) a person who is 'in gaol' or is 'undergoing psychiatric confinement because the person has been charged with committing an offence' has no entitlement to a social security pension. Section 23(5) extends the meaning of the term 'in gaol' to include:

For the purposes of this Act, a person is in gaol if the person:

- (a) is imprisoned in connection with the person's conviction for an offence; or
- (b) is being lawfully detained in a place other than a prison, in connection with the person's conviction for an offence; or
- (c) is undergoing a period of custody pending trial or sentencing for an offence.

'Psychiatric confinement' is also defined in ss.23(8) and (9). In particular s.23(9) excludes people who are 'undertaking a course of rehabilitation' in a psychiatric institution. Such people are not to be taken to be in psychiatric confinement.

**The meaning of the term 'in gaol' (s.1158(a)(i))**

In a previous Federal Court decision *Blunn v Bulsey* (1994) 53 FCR 572 Einfeld J addressed the meaning to be attached to the words 'in connection with' as set out in s.23(5)(b). In that case Bulsey was serving a term of imprisonment following a conviction for murder. Subsequently he was removed from prison and placed in hospital for treatment of a mental illness under the State mental health legislation. Einfeld J determined that detention in a place other than a prison 'in connection with' the person's conviction for an offence required more than a temporal connection. Although it did not require a causal relationship, there needed to be some real relevance of the conviction to the detention. In Einfeld J's view, that requirement could not be satisfied merely because Bulsey happened to be serving a prison sentence when hospitalised, even if it had some impact on the legal grounds for his admission as an involuntary patient under the State legislation. There was no connection between his mental condition and his detention in a psychiatric institution, and the of-

## In this Issue

**AAT Decisions**

Special benefit: applicable policy and rate of payment  
*Vu ... 127*

Youth allowance: need to live away from home  
*Thomas-Angelo ... 128*

Compensation: lump sum preclusion period; special circumstances  
*Gulcan ... 129*

Compensation: preclusion period; calculation  
*Morgan ... 129*

Psychiatric confinement: course of rehabilitation  
*Franks ... 130*

Parenting payment rate: whether carrying on a business; allowable deductions  
*Klewer ... 131*

Age pension: deprivation of assets; death benefit  
*Garbutt ... 132*

Newstart allowance: activity test; unemployed  
*Sahin ... 133*

**Federal Court**

Compensation: periodic payments or lump sum  
*Reid ... 133*

Disability support pension: in gaol  
*Garden ... 134*

Retirement assistance for farmers: meaning of 'make a request'  
*Haagar ... 135*

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fence for which he was convicted. His conviction for murder was not a criterion of his admission to hospital — this was entirely dependent on his mental state and his need for treatment. In those circumstances it was concluded that Bulsey was not detained in a place other than a prison in connection with the offence he had committed. As a result he could not be said to be 'in gaol' for the purposes of the Act.

In *Secretary to the DFaCS and Garden*, (2000) AATA 419, the AAT distinguished *Blunn v Bulsey* on the ground that Garden had been convicted and made subject to a hospital security order by way of sentence. He thus fell within s.23(5)(b), as being a person confined to a psychiatric facility in connection with his conviction for an offence. On appeal it was argued that Garden had, following his conviction, spent a two-year period in prison, before being transferred back to psychiatric institutions. It was submitted that Garden should therefore be treated as if he was a prisoner who had become ill while serving a sentence of imprisonment, and that the reasoning in *Blunn v Bulsey* applied. Gray J in the Federal Court (reported in this issue) noted that the AAT had made several findings of fact supporting a continued connection between Garden's conviction and detention in a psychiatric institution for treatment of his mental illness. The Federal Court did not consider that the AAT had incorrectly applied the law as set out in *Blunn v Bulsey*, and had not made an error in distinguishing the facts of Garden's case.

However, Gray J, by way of obiter, also went on to express his disagreement with the test set out in *Blunn v Bulsey*. He stated:

The legislative assumption is that a sentence will be served either in prison or in some other place of detention. In either case, the removal of the right to social security benefits by the *Social Security Act* is intended to follow. If the legislation be viewed in this way, it matters not that the person might be transferred back and forth between a prison and a hospital, depending upon variations in his or her mental condition. Throughout the time of detention, the person will be either imprisoned or detained in a place other than a prison while serving a sentence imposed by the court following conviction for an offence.

It is therefore incorrect to say, as Einfeld J did in *Blunn v Bulsey*, that there must be more than just a temporal coincidence between the detention and the conviction. In my view, the temporal coincidence between detention and the continuation of a sentence of imprisonment imposed following conviction is of primary importance. To be lawful, detention in a place other than a

prison must result from the exercise of power to detain. In the case of a prisoner transferred to a place other than a prison because of his or her mental condition, the detention would usually only be lawful because the person continues to serve a sentence of imprisonment.

(Reasons, paras 24 and 25)

**Meaning of phrase 'undergoing psychiatric confinement because the person has been charged with committing an offence' (s.1158(a)(ii))**

Gray J also discussed the application of the second limb of s.1158(a), and pointed out that it was designed to deal with people who have been charged, but not convicted of offences. It operates in relation to people who have been remanded in custody while awaiting trial, those who have been found unfit to be tried because of their mental condition and those who have been acquitted on the ground of their mental condition. It operates to deprive such people of the right to a social security payment if they are undergoing psychiatric confinement as a result of being charged with the commission of an offence. This is so unless they are undertaking a course of rehabilitation.

**Rehabilitation**

It had been argued before Gray J, that the legislative intent was that anyone undergoing a course of rehabilitation in respect of a mental illness came within the exemption set out in s.23(9). As Garden was undertaking rehabilitation at Thomas Embling Hospital he was entitled to a social security payment.

Gray J rejected this argument and noted that the exception related only to s.1158(a)(ii). That is, it could not apply as an exception for people gaoled in connection with their conviction for an offence, but only to people undergoing psychiatric confinement because they have been charged with committing an offence. Gray J noted that in such cases, successful rehabilitation would lead to a right to be released on bail, a trial with the possibility of acquittal or to release. On the other hand, in the case of a person who was convicted of an offence, successful rehabilitation would lead to a return to prison.

The meaning of the term 'rehabilitation' has been the subject of a number of AAT decisions, the most recent being the case of *Secretary to the DFaCS and Franks* (reported this issue). With the exception of the decision in *Secretary to the DFaCS and Fairbrother* (1999) 56 ALD 784, the AAT has taken a broad view of the meaning of the term rehabilitation. In *Fairbrother* the AAT said:

It remains for me to consider whether the respondent's confinement has been 'confinement of a person in a psychiatric institution during a period when the person is undertaking a course of rehabilitation' within the meaning of s.23(9) ... I think the use of the word 'period' in conjunction with the use of the term 'course of rehabilitation' makes it clear that Parliament had in mind a formal course of rehabilitation with a finite duration, a structure, a beginning and an end.

However, this approach has been rejected in subsequent AAT decisions. In the decision of *Pardo and Secretary to the DFaCS* 4(7) SSR 84 it was said that the word 'period' should be interpreted as meaning:

the duration of the period within which a person undertakes a course of rehabilitation. That period will of course involve structure and a beginning and an end but all which may be flexible and may need to be reviewed from time to time. Of course the program will begin and eventually one would assume that it would end. But to impose limitations on the 'period' may interfere with the adequacy of the outcome of the rehabilitation.

Instead the AAT focused on the programs provided to Pardo at the Thomas Embling Hospital. It noted that the programs were structured and interdependent and that participants were individually assessed and could only progress to the next program after successful rehabilitation in each phase.

While these AAT decisions may well be justified on the particular facts as found, there will be patients detained in Thomas Embling Hospital, a long-term rehabilitation facility and like institutions, for a considerable and indefinite period of time. Whether it was the intention of the legislature to provide an exemption from the general rule for people in such circumstances, is questionable. The broad brush approach taken by the AAT, however, appears to contemplate that all people involved in structured programs within such a facility (provided they are confined as a result of being charged with, rather than convicted of, an offence) will fall within the exception regardless of the likely duration of their stay within the facility, their prognosis or progress.

[A.T.]