



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HumanRights:JD:VK:717380

16 May 2013

The Hon. Bill Shorten MP
Minister for Education, Employment
and Workplace Relations
PO Box 6022
House of Representatives
Parliament House
Canberra ACT 2600

Dear Minister,

**Adequacy of the Newstart Allowance for jobseekers and the Social Security
Legislation Amendment (Fair Incentives to Work) Act 2012**

I am writing on behalf of the Human Rights Committee of the Law Society of NSW ('Committee') which is responsible for considering and monitoring Australia's obligations under international law in respect of human rights; considering reform proposals and draft legislation with respect to issues of human rights; and advising the Law Society accordingly.

The Committee thanks Mr Mat Tinkler of your Office for the letter dated 8 March 2013.

The Committee acknowledges the Government's view that "having a job is the best possible safeguard against poverty and a vastly better outcome than reliance on social security payments."

However, not all job seekers are able to return to work quickly, particularly in the current economic climate. For the reasons set out in the Committee's letter of 7 December 2012, the Committee's view remains that the evidence strongly indicates that the level of the Newstart Allowance ("NSA") may itself be a barrier to the job search process, and that entrenching NSA recipients into social exclusion and poverty may effectively close off the path back to work. The Committee notes again the findings of the Deprivation Report¹ that significant proportions of NSA recipients are unable to afford the basic necessities such as medical treatment and a substantial meal at least once a day. In the Committee's view, the NSA is inadequate and may not be in compliance with Articles 9 and 11 of the *International Covenant on Economic, Social and Cultural Rights* ("ICESCR").

¹ Peter Saunders and Melissa Wong, *Deprivation and Other Indicators of the Living Standards of Older Australians*, Draft Report commissioned by the Department of Families, Housing, Community Services and Indigenous Affairs, November 2008, Social Policy Research Centre (referred to as the "Deprivation Report").

The Committee also wishes to register its serious concerns in relation to the *Social Security Legislation Amendment (Fair Incentives to Work) Act 2012* (the "*Fair Incentives to Work Act*"). The Committee brings to your attention the letter of 19 October 2012 to the Australian Government from the UN Special Rapporteur on extreme poverty and human rights seeking clarification from the Australian Government on nine questions.

The Committee notes particularly the point below made in the letter of the UN Special Rapporteur:

States parties have immediate obligations in relation to the right to social security, such as the guarantee that the right will be exercised without discrimination of any kind (article 2, para. 2), ensuring the equal rights of men and women (article 3), and the obligation to take steps (article 2, para. 1) towards the full realization of articles 11, paragraphs 1 and 12 Such steps must be deliberate, concrete and targeted towards the full realization of the right to social security." (General Comment No. 19, para. 40.)

We would also like to draw the attention of your Excellency's Government to the provisions of article 2 paragraph 1 of the ICESCR, which states that States parties must devote the "maximum available resources" to ensure the "progressive realization" of all economic, social and cultural rights. Thus, cutting the existing level of support that single parents receive would imply a retrogressive measure taken in relation to the right to social security that could be in violation of the State's obligations under article 9 ICESCR read in conjunction with article 2 paragraph 1 ICESCR.

The Committee notes that the issues raised in this letter are urgent, as pursuant to the *Fair Incentives to Work Act* (parts of which have already commenced) all sole parents will stand to lose a proportion of their income, and in some circumstances they may lose up to 12.8% of their income, or \$223.23 per fortnight.² Given the Committee's concerns already set out above in relation to the inadequacy of the NSA, the Committee's view is that the *Fair Incentives to Work Act* is likely to push sole parents dependent on social security payments (a disproportionate number of which are women) into poverty.

While the Committee notes that the income-free area has been lifted, adding an estimated \$19 per week to the income of NSA recipients,³ the Committee's view is that this measure still does not raise the NSA to a level adequate to meet basic needs. The Committee's view is that increasing the income-free threshold only assists those who are currently able to earn an income. However, this measure does not address the deprivation faced by the most vulnerable group on the NSA; that is, those who are not currently able to earn any income.

The Committee was disappointed to note that the Federal Budget 2013 did not raise the level of the NSA, nor did it index the allowance to wages. The Committee continues to urge the Government to raise the NSA to a level at least adequate to meet the basic needs of its recipients.⁴ Given that over 100,000 sole parents now will

² ACOSS Letter to the UN Special Rapporteur on Extreme Poverty and Human Rights dated 5 October 2012 available online: http://www.acoss.org.au/media/release/un_asks_australian_government_to_explain_violation_of_single_parents_rights (accessed 6 May 2013).

³ Stephanie Peatling, "Jobless can earn \$19 per week" *Canberra Times*, available online: <http://www.canberratimes.com.au/business/federal-budget/jobless-can-earn-19-more-a-week-20130514-2jkl8.html> (accessed 15 May 2013)

⁴ The Committee notes that the Australian Council of Social Service, in an open letter endorsed by many Prominent Australians, calls for an increase of \$50 per week, consistent with the recommendations

be relying on the NSA rather than the parenting payment⁵ because of the *Fair Incentives to Work Act*, the Committee submits also that a consideration of what is adequate must now take into account the basic needs of these sole parents. The Committee also urges the Government to respond meaningfully to the UN Special Rapporteur on extreme poverty and human rights without delay.

If your office has any questions, please contact Vicky Kuek, policy lawyer for the Committee on victoria.kuek@lawsociety.com.au or (02) 9926 0354.

Yours sincerely



John Dobson
President

made in the Report on Australia's Future Tax System 2010:
http://www.acoss.org.au/media/release/prominent_australians_support_increase_to_newstart_in_may_budget

⁵ See note 4.

NATIONS UNIES
HAUT COMMISSARIAT DES NATIONS UNIES
AUX DROITS DE L'HOMME

PROCEDURES SPECIALES DU
CONSEIL DES DROITS DE L'HOMME

Mandates of the Special Rapporteur on extreme poverty and human rights and the Working Group on the issue of discrimination against women in law and in practice

UNITED NATIONS
OFFICE OF THE UNITED NATIONS
HIGH COMMISSIONER FOR HUMAN RIGHTS

SPECIAL PROCEDURES OF THE
HUMAN RIGHTS COUNCIL

REFERENCE: UA Poverty (1998-11)
AUS 2/2012

19 October 2012

Excellency,

We have the honour to address you in our capacity as Special Rapporteur on extreme poverty and human rights and Chair-Rapporteur of the Working Group on the issue of discrimination against women in law and in practice pursuant to Human Rights Council resolutions 17/13 and 15/23.

In this connection, we would like to draw the attention of your Excellency's Government to information we have received regarding **legislation recently passed by the Australian parliament, namely the Social Security Legislation Amendment (Fair Incentives to Work) Act 2012.**

We would like to draw your Excellency's Government's attention to information received which alleges that a number of provisions within this Act would have the effect of threatening the enjoyment of human rights of some of the most marginalized and impoverished members of Australian society. In particular, it could entail a violation of several rights included under the International Covenant on Economic, Social and Cultural (ICESCR), to which Australia has been a party since 1975, such as the rights to social security (article 9 ICESCR), the right to an adequate standard of living (article 11 ICESCR), and the prohibition of non-discrimination in the enjoyment of these rights (article 2 paragraph 2 ICESCR). If implemented, it could also entail a violation of additional provisions of the ICESCR such as the prohibition of retrogressive measures (article 2 paragraph 1 ICESCR) and the general limitation clause (article 4 ICESCR). There could also be violations of the Conventions on the Rights of the Child and on the Elimination of All forms of Discrimination against Women.

According to the information we received:

In the May 2012 Budget, the Federal Government of Australia announced that it planned to save \$700 million by moving over 100,000 more single parents, of whom over 90% are women, from receipt of the Parenting Payment to the Newstart Allowance. The Parenting Payment provides an income equivalent to

90% of the relative poverty line in Australia, while the Newstart Allowance amounts to 77% of the official poverty line.

Allegedly, the Government proposes to do this through the Social Security Legislation Amendment (Fair Incentives to Work) Act 2012. The Act will remove the “grandfathering” provisions established in the 2006 “Welfare to Work” changes to protect sole parents on parenting payments. This means that if sole parents cannot obtain sufficient hours of paid work when their youngest child is eight years or older, they will have to apply for other income support payments, such as the much lower Newstart Allowance. All single parents, whether in casual or part-time employment will stand to lose a portion of their income, and in some circumstances they may lose up to 12.8% of their income, or \$223.23 per fortnight.

According to information we received, a Parliamentary Inquiry is currently underway in Australia investigating the adequacy of the Newstart Allowance. The two Government Inquiries into the Social Security Legislation Amendment (Fair Incentives to Work) Bill 2012 apparently emphasized concern about the decrease in social security payments in moving sole parents from the Parenting Payment to the Newstart Allowance, and recommended that the Bill be delayed until the completion of the Newstart Inquiry towards the end of this year.

Information we received indicates that Australia’s new Parliamentary Joint Committee on Human Rights looked at the Social Security Legislation Amendment (Fair Incentives to Work) Bill 2012 and found that:

- If Newstart combined with other benefits is not sufficient to provide an adequate standard of living for affected individuals, the measures risk being a violation of human rights under article 9 of the International Covenant on Economic Social and Cultural Rights.
- The Committee was not yet convinced that the affected single parents would be able to maintain access to appropriate levels of social security support if placed onto Newstart.
- As a result, it would be premature for the government to introduce these measures prior to the completion of the Newstart Inquiry.

Therefore, the Joint Committee recommended that the Bill be delayed.

The Parliamentary Joint Committee on Human Rights also found that the Government’s Statement of Compatibility with Human Rights that accompanied the Bill “regrettably ... did not include a sufficiently detailed analysis of the bill’s compatibility”.

However, these recommendations were allegedly rejected and we understand that the Social Security Legislation Amendment (Fair Incentives to Work) Bill 2012 was passed by the Senate on 9 October 2012 and is therefore now an Act of Parliament.

There are serious concerns that the implementation of the Social Security Legislation Amendment (Fair Incentives to Work) Act will impede the enjoyment of human rights of those sole parents dependent on social security payments. According to information received, the Act will place well over 100,000 single parents, and all of their children, at even greater risk of poverty and homelessness by moving single parents from the Parenting Payment to the Newstart Allowance from 1 January 2013.

Allegedly, the proposed cuts target some of the most marginalized and impoverished members of Australian society, many of whom are struggling with basic living costs on existing social security payments. The sole parents affected may be therefore unable to afford food, clothing, housing, water and sanitation.

There are thus concerns the legislation will have significant and detrimental impacts on the human rights of over 100,000 Australians, many of whom are currently living in poverty, will provide an institutional obstacle to the full enjoyment of human rights for people living in extreme poverty and increase discrimination against sole parents, the majority of whom are single mothers.

While we do not wish to prejudge the accuracy of these allegations, we would like to draw the attention of your Excellency's Government to the applicable international human rights norms and standards and, in particular, the following:

Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Australia is a party, enshrines the right of everyone to social security. This right includes contributory and non-contributory schemes. Social assistance schemes (non-contributory) refer to the benefits that are received by those in a situation of need. Read in conjunction with article 2 ICESCR, States parties to the Covenant must progressively ensure the right to social security to all individuals within their territories, without discrimination of any kind and providing specific protection for disadvantaged and marginalized individuals and groups.

In General Comment 19, the Committee on Economic, Social and Cultural Rights (CESCR) has noted that one of the elements that the right to social security (including the right to social assistance) must comply with is "adequacy". This means that "the benefits must be adequate in amount and duration in order that everyone may realize his or her rights to family protection and assistance, an adequate standard of living and adequate access to health care, as contained in articles 10, 11 and 12 of the Covenant. States parties must also pay full respect to the principle of human dignity contained in the preamble of the Covenant, and the principle of non-discrimination, so as to avoid any adverse effect on the levels of benefits and the form in which they are provided." (General Comment No. 19, para. 22.)

The Committee has also stressed that the adequacy of benefits should be monitored regularly to ensure that beneficiaries are able to afford the goods and services

they require to realize their Covenant rights. (General Comment No. 19, para. 22.) The benefits must be sufficient to ensure that the recipients are able to enjoy at least minimum essential levels of the right to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions” (article 11 ICESCR).

According to the information received, the majority of single parent recipients of the benefits that will be cut are women. If this is the case, they will be suffering from indirect discrimination in their enjoyment of the right to social security, which is prohibited by the Covenant. When reading article 9 ICESCR together with article 2, paragraph 2 and article 3 of the ICESCR, States must ensure that everyone enjoys the right to social security without discrimination of any kind (article 2, paragraph 2 of the Covenant), and that the right is enjoyed equally between men and women (article 3). As noted by the Committee “the Covenant thus prohibits any discrimination, whether in law or in fact, whether direct or indirect, on the grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation, and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to social security” (General Comment No. 19, para. 29). States parties should give special attention to those individuals and groups who traditionally face difficulties in exercising this right, such as single mothers (General Comment No. 19, paras. 30 and 32).

These are obligations of immediate character not subject to progressive realization. As stated by the Committee, “While the Covenant provides for progressive realization and acknowledges the constraints owing to the limits of available resources, the Covenant also imposes on States parties various obligations which are of immediate effect. States parties have immediate obligations in relation to the right to social security, such as the guarantee that the right will be exercised without discrimination of any kind (article 2, para. 2), ensuring the equal rights of men and women (article 3), and the obligation to take steps (article 2, para. 1) towards the full realization of articles 11, paragraphs 1 and 12 Such steps must be deliberate, concrete and targeted towards the full realization of the right to social security.” (General Comment No. 19, para. 40.)

We would also like to draw the attention of your Excellency’s Government to the provisions of article 2 paragraph 1 of the ICESCR, which states that States parties must devote the “maximum available resources” to ensure the “progressive realization” of all economic, social and cultural rights. Thus, cutting the existing level of support that single parents receive would imply a retrogressive measure taken in relation to the right to social security that could be in violation of the State’s obligations under article 9 ICESCR read in conjunction with article 2 paragraph 1 ICESCR.

As noted by the Committee “there is a strong presumption that retrogressive measures taken in relation to the right to social security are prohibited under the Covenant. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of

all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant, in the context of the full use of the maximum available resources of the State party” (General Comment No. 19, para. 42).

In adopting retrogressive measures, States must demonstrate that they have been introduced after “the most careful consideration” of all alternatives and that they are “fully justified by reference to the totality of the rights provided for in the Covenant”. This is so even during times of severe resource constraints, whether caused by a process of adjustment, economic recession, or by other factors. (General Comment No. 3, paras. 9-12).

In line with the standards developed by the CESCR, when adopting retrogressive measures, States must take several steps, such as (a) putting forward a reasonable justification for the action; (b) examining alternatives comprehensively; (c) consulting with affected groups in examining the proposed measures and alternatives; and (d) avoiding any discriminatory impact (direct or indirect), or negative impact on the realization of the right to social security.

Furthermore, any restriction on the enjoyment of the Covenant’s rights must comply with a set safeguards enumerated in article 4 ICESCR. This means, that any restriction on the enjoyment of the Covenant’s rights, including those imposed on article 9 ICESCR must not only be legally established, but should also be non-discriminatory, proportional to the aim sought, compatible with the nature of the right and designed to further the general welfare. The burden falls upon the State to prove that a limitation imposed upon the enjoyment of the Covenant’s rights is legitimate.

In line with the information, received, we would also like to draw to the attention of your Excellency’s Government that, in line with article 3 paragraph 1 of the Convention on the Rights of the Child (CRC), to which Australia is also a party (since 1990), “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children’s rights and interests are or will be affected by their decisions and actions - by, for example, a proposed or existing law or policy, including those which are not directly concerned with children, but indirectly affect children (Committee on the Rights of the Child, General Comment 5, para. 12). In line with this Convention, Australia must also ensure the right to an adequate standard of living for all children without discrimination of any kind (CRC article 27).

We would also like to remind your Excellency’s Government that under human rights law, a discriminatory intent is not a necessary element of discrimination (Committee on Economic, Social and Cultural Rights, General Comment No. 20, paras. 10 and 12; Human Rights Committee, General Comment No. 18, para. 9; Committee on the Elimination of Racial Discrimination, General Recommendation No. 14, para. 1; Committee on the Elimination of Discrimination Against Women, General

Recommendation No. 28, para. 16). Any measure with the effect of nullifying or impairing the equal enjoyment of human rights constitutes a violation of States' human rights obligations, regardless of the intention. Thus, despite the formal neutrality of a law, a disproportionate impact on women could be contrary to Australia's obligation under the ICESCR and the Convention for the Elimination of All Forms of Discrimination against Women, to which the State is also a party since 1983.

Finally, we would like to note that "economic and social status" is also a prohibited ground for discrimination, implied in the phrase "other status" in article 2 of the ICESCR. Thus, measures which discriminate against individuals because they live in a situation of poverty may amount to a contravention of the principle of non-discrimination (CESCR, General Comment 20 paras. 34 and 35).

It is our responsibility under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention. Since we are expected to report on these cases to the Council, we would be grateful for your cooperation and your observations on the following matters:

1. Is the above information pertaining to the content of the Act accurate?
2. What measures have been put into place to ensure that individuals and families affected by the Act enjoy their rights to social security and to an adequate standard of living without discrimination of any kind?
3. Were alternative measures carefully considered? If so please provide details of this examination.
4. Was an impact assessment conducted with regard to the impact of the Act on the level of enjoyment of the right to an adequate standard of living by the individuals and families affected by the Act?
5. Was an impact assessment carried out with regard to the impact of the Act on children's rights and interests?
6. Where those affected by the measures in any way consulted? If so, please provide details.
7. What measures have been put in place to ensure that the implementation of the Act would not indirectly discriminate against women?
8. What monitoring mechanisms have been put in place to assess the implementation of the Act and its impact on the rights of those affected? What processes or mechanisms for redress will be included?

9. The Statement of Compatibility with Human Rights stated that, to the extent that the Act may have any adverse impact on human rights, that impact is reasonable and for legitimate reasons. Please give details of how this conclusion was reached.

We undertake to ensure that your Excellency's Government's response to each of these questions is accurately reflected in the report we will submit to the Human Rights Council for its consideration.

While waiting for your response, we urge your Excellency's Government to take all necessary measures to guarantee that the rights and freedoms of the above mentioned person are respected and, in the event that your investigations support or suggest the above allegations to be correct, the accountability of any person responsible of the alleged violations should be ensured.

Please accept, Excellency, the assurances of our highest consideration.

Maria Magdalena Sepúlveda Carmona
Special Rapporteur on extreme poverty and human rights

Kamala Chandrakirana
Chair-Rapporteur of the Working Group on the issue of discrimination against
women in law and in practice