



Parliamentary Joint Committee on Human Rights

Examination of legislation in accordance with the
Human Rights (Parliamentary Scrutiny) Act 2011

Interim Report—Social Security Legislation

Amendment (Fair Incentives to Work) Bill 2012

Fourth Report of 2012

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Membership of the committee

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Functions of the committee

The Committee has the following functions:

- a) to examine Bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue;
- b) to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on that issue;
- c) to inquire into any matter relating to human rights which is referred to it by the Attorney-General, and to report to both Houses of the Parliament on that matter.

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Abbreviations

Abbreviation	Definition
ACOSS	Australian Council of Social Service and 14 other signatories
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	UN Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
CPRD	Convention on the Rights of Persons with Disabilities
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
JETCCFA	Jobs, Education and Training Child Care Fee Assistance
PP	Parenting Payment

Executive Summary

On 15 June 2012 the committee received a request from the Australian Council of Social Security and 14 other signatories (ACOSS) asking the committee to consider the human rights compatibility of the bill.

The Social Security Legislation Amendment (Fair Incentives to Work) Bill 2012 was introduced into the House on 31 May 2012. Schedule 1 to the bill removes 'grandfathering' transitional arrangements with the result that from 1 January 2013, eligibility for parenting payment for all recipients will cease when the child of a partnered parent turns 6 or when the child of a single parent turns 8 years old. The committee understands that some 63,000 parenting payment recipients will be affected by the changes on the commencement date of 1 January 2013 and that the changes will eventually affect all 147,000 grandfathered parenting payment recipients, the majority of whom are single parents.

This matter came before the committee before it had established working practices around the routine scrutiny of legislation. Consideration of this bill has therefore been formative for the committee.

Recognising the desirability of placing information regarding the bill's engagement of human rights before the Parliament at an early opportunity, the committee held a public hearing on 21 June 2012 to allow ACOSS to elaborate on the concerns raised in its correspondence to the committee and to afford the government an opportunity to expand upon the claims made in the statement of compatibility. The committee considered that a hearing offered an efficient means for committee members to gain an understanding of the human rights issues raised by the bill while at the same time placing relevant information on the public record while the bill was still before the House.

Coincidental with the committee's consideration of the ACOSS request, the Senate initiated inquiries into this bill and into the related matter of the adequacy of the allowance payment system under Newstart. Recognising the likelihood that these inquiries would cover common ground and elicit evidence relevant to the committee's deliberations, the committee decided not to initiate a further public inquiry of its own at that time and instead focused its attention on establishing an appropriate analytical framework to assist in its analysis of the rights engaged by this bill and to ensure that it would be able to adopt a consistent approach in the subsequent consideration of other legislation.

That analytical framework and the committee's interpretation of the underlying human rights obligations and principles engaged by this bill are set out in this report.

In essence, the committee's consideration of the measures in this bill has focussed on three key questions:

- Whether the measures are aimed at achieving a legitimate objective;
- Whether there is a rational connection between the measures and that objective; and
- Whether the measures are proportionate to that objective.

The starting point for the committee's consideration of these questions was the statement of compatibility. Regrettably the statement of compatibility that accompanied the bill did not include a sufficiently detailed analysis of the bill's compatibility with human rights.

While the committee acknowledges that the government has since provided further information to the committee which has gone some way to address the lack of detail in the statement of compatibility, the committee notes that the provision of a more comprehensive statement at the introduction of the bill would have greatly assisted the committee in its scrutiny of this bill and would have improved the parliament's understanding of the precise impacts of these changes in a more timely way.

Through this bill the government seeks to provide greater incentives and opportunities for Parenting Payment recipients, particularly for single parents, to re-engage in the workforce and to provide greater equity and consistency in the eligibility rules for Parenting Payments. The committee considers that these are legitimate objectives.

However, the committee notes that it does not necessarily follow that the measures seeking equity are justified as it is not apparent to the committee that the government has considered any alternative options in this regard.

With regard to the question of whether there is a rational connection between the measures and the objective, the committee's examination of the available evidence indicates that this is not a matter that can be conclusively proven up front. The committee considers that on balance, the government has provided sufficient supporting evidence to suggest that the proposed measures may go some way in achieving the stated objectives.

However, the committee considers that the lack of decisive evidence highlights the need for appropriate monitoring mechanisms to accompany the proposed changes. The committee notes that it is not apparent that the government has taken steps to establish post-legislative mechanisms to evaluate whether the measures are indeed achieving their objectives or to monitor their impact on individuals and groups, particularly with regard to the risks of hardship and discrimination.

The committee notes that proportionality requires that even if the objective of a limitation is of sufficient importance and the measures in question are rationally connected to the objective, it may still not be justified, because of the severity of the effects of the measure on individuals or groups.

The committee notes that while individuals who are transitioned from Parenting Payment to Newstart will still have access to social security benefits, significant questions have been raised regarding the extent to which Newstart is adequate to provide a reasonable standard of living for jobseekers.

The committee considers that if Newstart combined with other benefits is not sufficient to provide an adequate standard of living for affected individuals, the measure to remove the grandfathered Parenting Payment provisions risk being incompatible with the obligation in article 9 of the International Covenant on Economic, Social and Cultural Rights to ensure minimum essential levels of social security.

The committee accepts that governments must be accorded a degree of discretion in public expenditure matters. However, the committee notes that there must be a reasonable basis and a relationship of proportionality between the legitimate aim pursued and the means used to achieve it. The committee is not yet convinced by the government's assertion that all affected individuals will maintain access to appropriate levels of social security support.

The committee notes that these are questions of fact, which are currently the subject of an inquiry by the Senate Education, Employment and Workplace Relations References Committee into the adequacy of the allowance payment system for jobseekers. The committee considers that it would be premature for the government to introduce these measures prior to the completion of that inquiry.

Recommendation 1

The committee therefore recommends that the government should defer these measures until the outcome of that inquiry is known.

The committee is grateful to the individuals and organisations who have facilitated the committee's consideration of these matters, either through their attendance at the hearing and through the preparation of written submissions. The committee also acknowledges the work of the Senate Standing Committees on Education, Employment and Workplace Relations.

Mr Harry Jenkins MP
Chair

Social Security Legislation Amendment (Fair Incentives to Work) Bill 2012

Introduced into the House of Representatives on 31 May 2012; passed 28 June 2012

Introduced into the Senate on 29 June 2012

Portfolio: Education, Employment and Workplace Relations

Background

1.1 On 15 June 2012 the Australian Council of Social Service and 14 other signatories (ACOSS) wrote to the Parliamentary Joint Committee on Human Rights (the committee) seeking an inquiry under section 7 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act) into the Social Security Legislation Amendment (Fair Incentives to Work) Bill 2012.

1.2 This interim report of the committee sets out the committee's deliberations to date.

Related Parliamentary inquiries

1.3 Coincidental with the committee's consideration of the ACOSS request, the Senate initiated inquiries into this bill and into the related matter of the adequacy of the allowance payment system under Newstart.

1.4 On 19 June 2012, the Senate Education, Employment and Workplace Relations Legislation Committee commenced an inquiry into the bill. This inquiry attracted submissions from 37 individuals and organisations and received evidence from seven organisations at a public hearing in Melbourne on 9 August 2012, including ACOSS and other cosignatories to the ACOSS' letter of 15 June 2012. That committee tabled its report on 22 August 2012.

1.5 On 26 June 2012, the Senate Education, Employment and Workplace Relations References Committee commenced an inquiry into the adequacy of the allowance payment system for jobseekers and others, the appropriateness of the allowance payment system as a support into work and the impact of the changing nature of the labour market. This inquiry will consider, among other things, the adequacy of Newstart Allowance.

1.6 To date, that inquiry has received 77 submissions and has held three public hearings in Melbourne and Canberra. The committee is due to table the report of this inquiry in the Senate on 29 November 2012.

The PJCHR's consideration of the bill

1.7 As an initial response to ACOSS' request, the committee held a public hearing in Canberra on 21 June 2012. The purpose of that hearing was to allow the committee to gather information that would enable it to properly consider the concerns raised in ACOSS' letter and to afford the government an opportunity to expand upon the claims made in the statement of compatibility. At that hearing the committee received evidence from representatives of ACOSS, the National Council of St Vincent de Paul Society, the National Council for Single Mothers, the Australian Human Rights Centre, the National Welfare Rights Network, the Social Policy Research Centre and the Department of Education, Employment and Workplace Relations (the Department)¹. Following this hearing, the committee received additional information from both ACOSS and the Department in answer to questions on notice.

1.8 The committee does not propose to invite public submissions or hold further public hearings at this time. The committee notes that the two Senate inquiries have elicited submissions and evidence from a broad range of organisations and individuals with relevant knowledge and expertise around the policy issues engaged by the bill. The committee does not propose to duplicate these inquiries.

1.9 The committee has monitored the submissions and evidence that these inquiries have brought onto the public record and has paid close attention to the findings of the Senate Education, Employment and Workplace Relations Legislation Committee. The committee has subsequently written to the Minister for Employment and Workplace Relations seeking clarification on several matters that have been highlighted through the committee's investigation of the bill.

Purpose of the bill

1.10 The bill proposes to change access to certain social security payments by amending the *Social Security Act 1991* to:

- remove the 'grandfathering' transitional arrangements for certain Parenting Payment recipients from 1 January 2013 (Schedule 1);
- reduce the length of the liquid assets waiting period for certain income support applicants by doubling the maximum reserve threshold for liquid assets to \$5000 for singles without dependants or \$10 000 for others from 1 July 2013 (Schedule 2); and
- clarify the definition of 'termination payment' for the purposes of the income maintenance waiting period to ensure it includes any payments connected with the termination of a person's employment (Schedule 3).

1 The list of witnesses who gave evidence can be found in Appendix 1.

1.11 The changes contained in Schedules 2 and 3 of the bill (relating to the liquid asset and income maintenance waiting periods) would appear to be beneficial and do not appear to raise any human rights concerns. These provisions are not subject to further consideration in this report.

Summary of the changes to Parenting Payment (Schedule 1 of the bill)

1.12 Schedule 1 of the bill removes the 'grandfathering' transitional arrangements, established on 1 July 2006, with the result that from 1 January 2013, eligibility for parenting payment (PP) for all recipients will cease when the child turns 6 for partnered parents, or turns 8 for single parents.

1.13 Currently, more than two thirds of PP recipients cease to receive PP once their youngest child turns 6 (or 8 for single parent families). However, one third of PP recipients, all of whom began claiming PP before 1 July 2006, are currently eligible for PP until their youngest child turns 12. The bill proposes to remove this distinction.

1.14 If the bill is passed, some 63 000 PP recipients will be affected on the commencement date of 1 January 2013. These changes will eventually affect all 147,000 grandfathered PP recipients, the majority of whom are single parents.

1.15 Parents who are no longer eligible for PP may apply for Newstart Allowance (Newstart).

Differences between PP and Newstart

1.16 Newstart provides for a lower payment rate than PP Single.² Newstart however provides the same payment rate as PP Partnered. The key impact of these measures is therefore likely to be on single parent families.

1.17 Newstart also has a stricter 'income free area', that is, the amount of money that may be earned without impacting a recipient's payment.³

2 In general terms, parents transferring from PP Single to the maximum Newstart rate for single principal carers would lose \$118.70 a fortnight. With the exception of the pensioner education supplement, the same supplementary payments and services are available on PP Single and Newstart.

3 Whereas on PP, single parents may earn \$174 a fortnight, plus an additional \$24.60 for each additional child, before being penalised, parents transitioned to Newstart would start to see a reduction in payments after they earn more than \$62 a fortnight: see Report of the Senate Education, Employment and Workplace Relations Legislation Committee Inquiry into the Social Security Legislation Amendment (Fair Incentives to Work) Bill 2012, August 2012, para 2.9.

1.18 In addition, not all PP recipients will be eligible to receive Newstart because the thresholds for the income and assets tests are lower for Newstart than under PP. The cutoff point for Newstart is approximately \$36 000 p.a, while the cut-off point for PP Single is \$47 000 p.a.⁴ It is estimated that just under 30% of PP Single recipients will not be eligible to transfer to Newstart.⁵

The committee's role in the legislative process

1.19 The committee's formal remit is to consider bills and legislative instruments introduced into the Parliament for compatibility with human rights as defined in the the Act.

1.20 The Act defines human rights by reference to the rights and freedoms contained in seven core human rights treaties to which Australia is a party. These treaties are:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the on the Elimination of All Forms of Discrimination Against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- Convention on the Rights of Persons with Disabilities

1.21 The committee recognises that the nature and scope of the rights and freedoms expressed in these treaties requires some interpretation on the committee's part. The committee considers that, where relevant and appropriate, the views of human rights treaty bodies and international and comparative human rights jurisprudence can provide useful sources. At the same time, the committee considers that its interpretation of these rights and freedoms must have relevance within an Australian context.

1.22 In undertaking its consideration of this bill the committee has been mindful of the importance of establishing a robust analytical framework. The committee

4 See Report of the Senate Education, Employment and Workplace Relations Legislation Committee Inquiry into the Social Security Legislation Amendment (Fair Incentives to Work) Bill 2012, August 2012, para 2.5.

5 Letter from the Minister for Employment and Workplace Relations to the Chair of the Parliamentary Joint Committee on Human Rights, 18 September 2012.

considers that such a framework will not only aid its analysis of this bill, but will enhance the committee's ability to adopt a consistent approach to the analysis of other legislation that engages similar human rights principles. The committee has therefore devoted some time to considering how it will approach its examination of legislation and examining key sources on the application of the specific human rights and principles engaged by this bill.

1.23 The committee has determined that, consistent with the approaches adopted by other human rights committees in other jurisdictions, it will test legislation for its potential to be incompatible with human rights, rather than considering whether particular legislative provisions could be open to an interpretation that is compatible with human rights. The starting point for the committee is whether the legislation could be applied in ways which would breach human rights and not whether a consistent meaning may be found through the application of statutory interpretation principles.

Statement of compatibility

1.24 A key element in the committee's consideration of human rights in the legislative process is the statement of compatibility. The Act requires that all bills and legislative instruments introduced into the Parliament must be accompanied by a statement of compatibility.⁶

1.25 This bill was introduced with a statement of compatibility, as required by the Act which was prepared by the Department of Education, Employment and Workplace Relations.

1.26 The statement of compatibility noted that the changes contained in schedule 1 of the bill engaged the right to social security in article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and provided the following explanation:

The changes to the eligibility rules for 'grandfathered' parenting payment recipients will make access to parenting payment consistent for all claimants regardless of when they first claimed payment. The justification for this is to accelerate the closing of the grandfathered conditions for parenting payments which will help to restore equity across the parenting payment population. This limitation is further justified because it will encourage parents with older children to re-enter the workforce earlier, thereby reducing long term welfare reliance and, over time, the prevalence of intergeneration welfare dependency. A person's access to social security is not impacted, as recipients who are affected by this

6 See section 8.

measure are entitled to apply for other income support payments, such as Newstart Allowance.

1.27 The statement concluded that the bill is compatible with human rights because it generally advances human rights and that to the extent that it may have an adverse impact on human rights, that impact is reasonable and for legitimate reasons.

1.28 The committee considers that, while the statement of compatibility correctly identified the removal of the 'grandfathering' provisions as engaging the right to social security, the analysis contained in the statement fell short of the committee's expectations.

1.29 The committee regrets the fact that the government did not provide Parliament with a statement of compatibility which included a detailed analysis of the bill's compatibility with human rights. Providing such information to Parliament would have assisted the committee in its scrutiny tasks and also improved Parliament's understanding of the precise impacts of these changes in a more timely way.

1.30 The committee however acknowledges that the government has since provided further information to the committee which has gone some way in providing the level of detail that was absent in the statement of compatibility.

Human rights issues

Right to social security

1.31 Article 9 of ICESCR recognises the right to social security and provides that:

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

1.32 The right to social security is also recognised in the International Convention on the Elimination of All Forms of Racial Discrimination (article 5(e)(iv)); the Convention on the Elimination of All Forms of Discrimination Against Women (articles 11(1)(e) and 14(2)(c)); the UN Convention on the Rights of the Child (article 26) and the UN Convention on the Rights of Persons with Disabilities (article 28).⁷

7 The discussion on the right to social security in this report primarily focuses on the ICESCR but the same standards are applicable to these other international human rights treaties.

Is parenting payment a form of social security?

1.33 The UN Committee on Economic, Social and Cultural Rights (CESCR)⁸ has stated that the term 'social security' in article 9 covers the risks involved in the loss of means of subsistence for reasons beyond a person's control and that it encompasses the right to access and maintain benefits, whether in cash or in kind in order to secure protection from (a) lack of work-related income, (b) unaffordable healthcare, or (c) insufficient family support.⁹

1.34 The committee considers that PP is likely to be a form of 'social security' for the purposes of article 9 of ICESCR.

Nature and scope of obligations

1.35 States' obligations in relation to the right to social security, as with all human rights, rest on the need to respect (ie not interfere with), to protect (ie take measures to prevent others from interfering with), and to fulfil (ie take positive measures to fully realise) rights. In other words, they entail both negative and positive obligations.

1.36 Economic, social and cultural rights also involve obligations of immediate effect and obligations of progressive realisation. The former broadly comprise obligations not to unjustifiably deprive individuals of their existing access to a right (ie the obligation to respect); to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights; and to ensure that individuals enjoy these rights without discrimination. The latter, based on the recognition that their full realisation may not be possible immediately, involves obligations to adopt measures that are capable of facilitating the full realisation of economic, social and cultural rights over time. States are therefore accorded a margin of discretion with regard to the progress of realisation.

1.37 In relation to the right to social security, the CESCR has identified various immediate obligations. For example, the duty to ensure minimum essential levels of social security requires that individuals are able to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education. Part of the minimum core is also respect of existing social security schemes. This relates to the right not to be subject to arbitrary and unreasonable restrictions of existing social security coverage as well as the right to

8 The CESCR monitors compliance by states parties with their ICESCR obligations. To assist parties in complying with their obligations under the ICESCR, the CESCR issues 'General Comments'. General Comments are not legally binding but they indicate the interpretation of the provisions of the ICESCR adopted by the CESCR, and have persuasive effect on the interpretation of the ICESCR by the parties.

9 CESCR, General Comment No 19 (2008), paragraph 2.

equal enjoyment of adequate protection from social risks and contingencies (that is, the right of access to such schemes on a non-discriminatory basis – in other words, any distinction on prohibited grounds must be reasonable and justified in the circumstances).¹⁰

1.38 The CESCR has also stated that social security should be available, adequate and accessible.¹¹

Limitations and retrogressive measures

1.39 Limitations: Like all economic, social and cultural rights, the right to social security in article 9 of ICESCR is not absolute and may be subject to permissible limitations.¹² Article 4 of ICESCR provides that economic social and cultural rights may be subject only to such limitations 'as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'. The CESCR has stated that limitations must be proportional, and must be the least restrictive alternative where several types of limitations are available, and that even where such limitations are permitted, they should be of limited duration and subject to review.¹³

1.40 Retrogressive measures: The ICESCR does not contain a definition of retrogressive measures, but these are generally understood to mean measures that directly or indirectly lead to backward steps being taken with respect to the rights recognised in the ICESCR. A deliberate retrogressive measure has been described to mean any measure which implies a backwards step in the level of protection of ICESCR rights as a consequence of an intentional decision by the state and includes any unjustified reduction in public expenditure in the absence of adequate compensatory measures aimed to protect the affected individuals.¹⁴ Deliberate retrogressive measures are not prohibited per se under international human rights law but will require close justification. For example, the CESCR has explained that:

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

10 CESCR, General Comment No 19 (2008), paragraphs 2 and 59.

11 CESCR, General Comment No 19 (2008).

12 See article 4 of ICESCR.

13 See eg, CESCR, General Comment No 14 (2000), paragraph 29.

14 M Sepúlveda *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (ed.) in *School of Human Rights Research Series Volume 18* Intersentia Antwerpen (2003) page 323-324.

context of the full use of the maximum available resources of the State party. The Committee will look carefully at whether: (a) there was reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation of affected groups in examining the proposed measures and alternatives; (d) the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realization of the right to social security, an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to the minimum essential level of social security; and (f) whether there was an independent review of the measures at the national level.¹⁵

Are these measures retrogressive or a limitation on the right to social security?

1.41 If there is more than one way to provide adequate social security the government is obviously entitled to make a choice. The government however acknowledges that that some parents may be less well-off overall as a result of these changes. In a letter to the committee on 18 September 2012, the Minister for Employment and Workplace Relations said that:

The financial status of each parent impacted by the changes will vary depending on each individual family's circumstances, including their levels of employment income, other government payments received and their level of taxation. When all these are taken into account, some parents may experience a reduction in their total fortnightly income.

1.42 If particular PP recipients who are transitioned to Newstart are likely to be worse off overall – for example, because the reduction in income support will be not be adequately met by some other benefit or through earning income – these measures are likely to be considered as either retrogressive or a limitation on the right to social security because they reduce existing social security entitlements.

1.43 The committee therefore considers that these measures should be justified accordingly.

Right to non-discrimination

1.44 Various community organisations have raised concerns that removing the 'grandfathered' arrangements may indirectly discriminate against women because most PP Single recipients are women.

1.45 Article 2(2) of ICESCR guarantees the right to non-discrimination in the exercise of economic, social and cultural rights. Article 2(2) therefore prohibits any

15 ICESCR, General Comment No 19 (2008), paragraph 42.

direct¹⁶ or indirect¹⁷ discrimination, whether in law or in fact, on prohibited grounds, including sex, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to social security.¹⁸

1.46 The right to non-discrimination is also recognised in the International Covenant on Civil and Political Rights; the Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Rights of the Child; the Convention on the Elimination of All Forms of Discrimination Against Women; and the Convention on the Rights of Persons with Disabilities.

1.47 A difference in treatment on prohibited grounds, however, will not be directly or indirectly discriminatory provided that it is (i) aimed at achieving a purpose which is legitimate; (ii) based on reasonable and objective criteria, and (iii) proportionate to the aim to be achieved.

1.48 The committee considers that if the measures are found to be compatible with the right to social security, then they are also likely to be consistent with the right to non-discrimination.

The committee's assessment

Framework for analysis

1.49 It should be evident from the discussion above that there is considerable overlap between limitations on rights and retrogressive measures, particularly when they interfere with an existing enjoyment of a right. Both can generally be considered through the same lens in the sense that they broadly require the government to demonstrate that the measures in question pursue a legitimate objective and have a reasonable relationship of proportionality between the means employed and the objective sought to be realised.¹⁹

1.50 In essence, the inquiry is three-fold:

- (i) Whether the measure is aimed at achieving a legitimate objective;

16 Direct discrimination occurs where a person is subject to less favourable treatment than others in a similar situation because of a particular characteristic.

17 Indirect discrimination occurs where apparently neutral criteria are applied to make decisions but which have a disproportionate impact on persons who share a particular characteristic.

18 See CESCR, General Comment No 19 (2008), paragraph 29, and General Comment No 20 (2009).

19 See, eg, Amrei Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights' (2009) 9 Human Rights Law Review 557.

- (ii) Whether there is a rational connection between the measure and the objective; and
- (iii) Whether the measure is proportionate to that objective.

Legitimate objective

1.51 A legitimate objective is one that addresses an area of public or social concern that is pressing and substantial enough to warrant limiting the right.

1.52 The government has stated that the purpose of these measures is to:

- provide greater incentives and opportunities, particularly for single parents, to re-engage in the workforce, and
- provide greater equity and consistency in the PP eligibility rules by ensuring that all parents are assessed the same, regardless of when they first claimed income support.

1.53 In its submissions to this committee and the Senate Education, Employment and Workplace Relations Legislation Committee, the government submitted that:

Findings by the OECD and in other literature show that long periods in receipt of income support are associated with high levels of social and economic disadvantage, often extending to children in these families and future generations. There is also evidence that helping parents find work can be more effective than providing cash payments. Joblessness among families is a significant social and economic problem facing this country. Australia has one of the highest proportions of children living in jobless families in the OECD.²⁰

1.54 Both the majority and minority reports on the bill by the Senate Education, Employment and Workplace Relations Legislation Committee affirmed the importance of supporting parents to participate meaningfully in the workforce, particularly as their children get older and their capacity to work increases.²¹

1.55 The committee considers that these are legitimate objectives. However, the committee notes that it does not follow that the measures seeking to achieve

20 Department of Education, Employment and Workplace Relations, Submission to the Parliamentary Joint Committee on Human Rights on the Social Security Legislation Amendment (Fair Incentives to Work) Bill 2012, 25 June 2012, pp 5-6; Department of Education, Employment and Workplace Relations, Submission to the Senate Education, Employment and Workplace Relations Legislation Committee Inquiry into the Social Security Legislation Amendment (Fair Incentives to Work) Bill 2012, August 2012, p. 4.

21 Report of the Senate Education, Employment and Workplace Relations Legislation Committee Inquiry into the Social Security Legislation Amendment (Fair Incentives to Work) Bill 2012, August 2012, paragraph 2.53 (Majority report) and paragraph 1.2 (Dissenting report).

equity are justified as an alternative and ostensibly fairer approach would be to give later recipients the same benefits as earlier recipients, rather than reducing the benefits of earlier recipients. It is not apparent to the committee that the government considered any alternative options in this regard.

Rational connection

1.56 The key issue here is whether the measures in question are likely to be effective in achieving the objective being sought. It is not sufficient to put forward a legitimate objective if, in fact, the measure limiting the right will not make a real difference in achieving that aim. In other words, the objective might be legitimate but unless the proposed measure will actually go some way towards achieving that objective, the limitation of the right is likely to be impermissible.

1.57 In its submissions to this committee and the Senate Education, Employment and Workplace Relations Legislation Committee, the government cited evidence indicating that previous changes to PP, including the introduction of participation requirements for parents with school aged children, did increase workforce participation and reduce income support reliance for some parents during 2006-07. In particular, the government pointed to a 2010 Welfare to Work Evaluation Report which showed that:²²

- Recipients left income support faster, primarily for jobs. During 2006–07, 38 per cent of single principal carer parents with a youngest child aged eight to 15 years on Newstart Allowance had left income support after six months compared to only 15 per cent in the years immediately preceding;
- The proportion of those parents with children aged six to 15 who were in paid employment after six months increased to 29 percent from 20 per cent;
- Over 70 per cent principal carer parents left income support for employment; and
- 70 per cent of principal carer parents directly affected by Welfare to Work participated in employment services throughout the year.
- In addition, an increased demand for Jobs, Education and Training Child Care Fee Assistance (JETCCFA) indicates that more parents on income support want to undertake training, studying and working activities. In 2006-07

22 Department of Education, Employment and Workplace Relations, Submission to the Parliamentary Joint Committee on Human Rights on the Social Security Legislation Amendment (Fair Incentives to Work) Bill 2012, 25 June 2012, p 6; Department of Education, Employment and Workplace Relations, Submission to the Senate Education, Employment and Workplace Relations Legislation Committee Inquiry into the Social Security Legislation Amendment (Fair Incentives to Work) Bill 2012, August 2012, p. 4.

around 18,000 parents were assisted by JETCCFA. In 2010-11, this had increased to over 31,000 parents.

1.58 In further information provided to the committee on 18 September 2012, the government said that its research shows that:

65% of principal carer parents on Newstart are able to find paid employment, compared to 55% of all job seekers. Further, thirteen weeks after placement in a job, these parents on Newstart are nearly 10% more likely to still be in work, and after 26 weeks they are 5% more likely to still be in paid work than all job seekers.²³

1.59 Various submissions to the Senate Education, Employment and Workplace Relations Legislation Committee however suggested that moving grandfathered recipients from PP Single to Newstart would result in a reduction in support for vulnerable families, while also failing to provide recipients with an incentive to obtain work, or increase the amount of work they undertake. The Senate Education, Employment and Workplace Relations Legislation Committee's report on the bill cites several examples:²⁴

- ACOSS submitted that the proposed change would be negative rather than incentivising, as the vast majority of parents affected by the proposals are already required to seek part time employment and would face no additional job seeking requirements.
- Mission Australia suggested that while single parents may have casual work, it could cite no evidence to support the proposition that parents who moved from Parenting Payment to Newstart were more likely to obtain 'sustainable work'.
- The National Welfare Rights Network pointed out that any increase in participation rates could not necessarily be attributed to reduced payment rates, but rather to the activity requirements and increased support to obtain employment.

1.60 The committee notes that the Senate Education, Employment and Workplace Relations Legislation Committee majority was not convinced by the

23 Letter from the Minister for Employment and Workplace Relations to the Chair of the Parliamentary Joint Committee on Human Rights, 18 September 2012.

24 Report of the Senate Education, Employment and Workplace Relations Legislation Committee Inquiry into the Social Security Legislation Amendment (Fair Incentives to Work) Bill 2012, August 2012, paragraph 2.34-2.42.

government's evidence that the measures are fair and would promote workforce participation.²⁵

1.61 The committee recognises that these are not matters that can be conclusively proven upfront and considers that on balance the government has provided sufficient supporting evidence to suggest that these measures may go some way in achieving its stated objectives.

1.62 However, the lack of decisive evidence highlights the need for appropriate monitoring mechanisms to accompany changes like these. It is not apparent that the government has taken steps to establish post-legislative mechanisms to evaluate whether the measures are indeed achieving their objectives or to monitor their impact on individuals and groups, particularly with regard to the risks of hardship and discrimination. The committee notes that the bill contains no safeguards in this respect.

Proportionality

1.63 Proportionality requires that even if the objective of the limitation is of sufficient importance and the measures in question are rationally connected to the objective, it may still not be justified, because of the severity of the effects of the measure on individuals or groups.

1.64 While individuals who are transitioned from PP to Newstart will still have access to social security benefits, the adequacy of those benefits has been questioned by various community groups.²⁶

1.65 The Australian Human Rights Commission has also stated that it considers that Newstart is 'not adequate to provide a reasonable standard of living for jobseekers'. The Commission has recommended that Newstart and supplements should be increased 'so that they accurately reflect the costs of living, job-seeking and skill development activity'.²⁷

25 Report of the Senate Education, Employment and Workplace Relations Legislation Committee Inquiry into the Social Security Legislation Amendment (Fair Incentives to Work) Bill 2012, August 2012, paragraph 2.54.

26 See, for example, submissions to the Senate Education, Employment and Workplace Relations Legislation Committee Inquiry into the Social Security Legislation Amendment (Fair Incentives to Work) Bill 2012 and the Senate Education, Employment and Workplace Relations References Committee inquiry into the adequacy of Newstart by ACOSS, the Salvation Army, National Council of Single Mothers and their Children and the National Welfare Rights Network.

27 Australian Human Rights Commission, Submission to the Senate Education, Employment and Workplace Relations References Committee Inquiry, 'Adequacy of the allowance payment system for jobseekers', August 2012, paragraphs 23-34.

1.66 The government did not comment on the adequacy or otherwise of Newstart during the Senate Education, Employment and Workplace Relations Legislation Committee inquiry. However, the government noted in its submission to this committee that:

The level of social security welfare support is a matter for the Government however, the Government has been clear that it considers the breadth of financial assistance with employment and other service provides adequate support for recipients while also providing appropriate incentives to work.

...

People are supported through the income support safety net as well as family payments and a range of programs and other services provide by Commonwealth and State governments such as education and housing.²⁸

1.67 The committee understands that individuals transitioning to Newstart will have access to two additional services to support their participation in education and employment.²⁹ The committee however notes that all the financial benefits available to Newstart recipients are already received by parents on PP.

1.68 The committee considers that if Newstart combined with other benefits is not sufficient to provide an adequate standard of living for affected individuals, the measures to remove the grandfathered PP provisions risk being incompatible with the obligation in article 9 of ICESCR to ensure minimum essential levels of social security.

Committee view

1.69 The committee accepts that governments must be accorded a degree of discretion in public expenditure matters. However, there must be a reasonable basis and a relationship of proportionality between the legitimate aim pursued and the means used.

1.70 The committee is not convinced by the government's assertion that all affected individuals will maintain access to appropriate levels of social security support. These are questions of fact, which are currently the subject of an inquiry by the Senate Education, Employment and Workplace Relations References Committee into the adequacy of the allowance payment system for jobseekers, in particular Newstart. That committee will report by 29 November 2012.

28 Department of Education, Employment and Workplace Relations, Submission to the Parliamentary Joint Committee on Human Rights on the Social Security Legislation Amendment (Fair Incentives to Work) Bill 2012, 25 June 2012, pp. 1, 3.

29 Access to Training Places for Single Parents and Career Advice for Parents.

1.71 The question of whether individuals transitioning to Newstart could be deprived of minimum essential levels of social security goes directly to the issue of compatibility. The adequacy of Newstart is therefore central to an assessment of whether this bill is compatible with human rights.

1.72 The committee therefore considers that it would be premature for the government to introduce these measures before the Senate Education, Employment and Workplace Relations References Committee completes its inquiry.

Recommendation 1

1.73 The committee recommends that the government should defer these measures until the outcome of the Senate Education, Employment and Workplace Relations References Committee inquiry into the adequacy of Newstart is finalised.

1.74 The committee notes that a similar recommendation was made by the Senate Education, Employment and Workplace Relations Legislation Committee in its report on the bill.

Appendix 1

Additional Information

Correspondence Received

- Letter received from The Australian Council of Social Service (ACOSS), and a number of co-signatories, dated 15 June 2012;
- Information received from ACOSS on 21 June 2012:
 - A copy of the United Nations Council on Economic, Social and Cultural Rights General Comment No. 19, The right to social security (art. 9);
 - Senate Education, Employment and Workplace Relations Legislation Committee Budget Estimates Hearing, Tuesday, 29 May 2012, pp. 61-62, Hansard transcript extract;
 - Attachment 1, Financial impacts of moving parents to Newstart Allowance (Sourced: Senate Education, Employment and Workplace Relations Legislation Committee Additional Budget Estimates, Question on Notice, No. EW1039_12);
 - ACOSS Briefing notes on cuts to payments for sole parents;
 - ACOSS case studies –personal stories from single parents;
- Answers to questions taken on notice by ACOSS at the public hearing held on 21 June 2012, received 25 June 2012;
- Answers to questions taken on notice by the Department of Education, Employment and Workplace Relations (DEEWR) at the public hearing held on 21 June 2012, received 25 June 2012;
- Answers to questions taken on notice by ACOSS at the public hearing held on 21 June 2012, received 28 June 2012;
- Letter from the Chair of the committee to the Minister for Employment and Workplace Relations, dated 11 September 2012;
- Letter from the Minister for Employment and Workplace Relations in response to the Chairs letter, dated 18 September 2012.

Public Hearing and Witnesses

Thursday, 21 June 2012, Canberra, ACT

- BELJIC, Miss Emilija, Research Officer, National Council, St Vincent de Paul Society
- EDWARDS, Ms Terese, Chief Executive Officer, National Council for Single Mothers and their Children
- GOLDBLATT, Ms Beth, Visiting Fellow, Australian Human Rights Centre, Faculty of Law, University of New South Wales
- GOLDIE, Dr Cassandra, Chief Executive Officer, Australian Council of Social Service
- MILLIKEN, Ms Marsha, Group Manager, Income Support and Remote Service Implementation Group, Department of Education, Employment and Workplace Relations
- TAYLOR, Ms Jennifer, Deputy Secretary, Department of Education, Employment and Workplace Relations
- THOMAS, Mr Gerard, Policy and Media Officer, National Welfare Rights Network
- WHITEFORD, Professor Peter, Acting Director, Social Policy Research Centre, University of New South Wales