

Mandates of the Special Rapporteur on extreme poverty and human rights

REFERENCE:
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Excellency,

I have the honour to address you in my capacities as Special Rapporteur on extreme poverty and human rights, pursuant to Human Rights Council resolutions 35/19.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning the **Social Services Legislation Amendment Act 2017 (Cth) (No. 33 of 2017)** and concerns that it may have a negative impact on the human rights of persons living in poverty, particularly single parents and their children. I have also been informed of an individual complaint on behalf of a single mother through the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* on the same matter.

This new legislation follows a series of welfare cuts implemented through the *Social Security Legislation Amendment (Fair Incentives to Work) Act 2012 (Cth)*. These social protection cuts were the subject of an earlier communication dated 19 October 2012 (Reference: UA Poverty (1998-11) AUS 2/2012, attached). I regret that a response was never received to that earlier letter.

In addition, I would like to express my concern about a series of proposed and actual legislative reforms following the demise of the *Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017* and concurrent enactment of the *Social Services Legislation Amendment Act 2017 (Cth)*. In particular, I refer to the *Social Services Legislation Amendment (Welfare Reform) Bill 2017*, the *Social Services Legislation Amendment (Better Targeting Student Payments) Bill 2017*, and the *Social Services Legislation Amendment (Payment Integrity) Bill 2017*.

I hope the present letter provides an opportunity to engage with your Excellency's Government on the issues mentioned above and to clarify Australia's obligations under international human rights law to fulfil the human rights of all persons, even in times of resource constraints.

According to the information received:

Brief overview of benefit cuts affecting single parent households since 2005

The social benefits of single parents in Australia have been subject to various cuts over the last two decades. In late 2005, the Federal Government introduced the *Employment and Workplace Relations Legislation Amendment (Welfare to Work and Other Measures) Act 2005 (Cth) (Welfare to Work Act)*. This statute introduced a range of welfare reforms, including to Parenting Payments for single

parents. From 1 July 2006, single parents were required to engage in paid work once their child turned six years of age. The Parenting Payments were also restricted to parents who had children under eight years of age. Parents of older children were only entitled to the general unemployment benefit plus some top-up payments as primary carers. “Grandfathering” provisions were included in the Welfare to Work Act to protect existing recipients of Parenting Payment. The grandfathering arrangement provided that those who were receiving the payment before 1 July 2006, and who remained eligible, would continue to receive it until their youngest child turned 16. However, those parents who had a youngest child aged seven years and over were required from 1 July 2007 to meet part-time participation requirements.¹

Historically, social security payments in Australia have been split between lower “allowance” and higher “pension” payments.² People are divided into two groups: “able to work” and “unable to work,” with the former receiving the lower allowances (e.g. Newstart Allowance) on the assumption that only short-term income support is required. Those who are deemed “unable to work” receive the higher ‘pension’ payments (e.g. Disability Support Pension or Carer Payment), with no job search and training requirements, but they also receive less help to transition to employment if that is their goal.

This division of payments into pensions and allowances has led to “sharp reductions” in income support for many single parents and people with disabilities.³ Ever more single parents are being shifted to the lower allowance payments under Newstart and Youth Allowance.⁴ Newstart is a lower allowance than the Parenting Payment and allegedly leaves a \$71.47 gap per week between the payment and the poverty line for a single parent family with two children.⁵ This has been said to have contributed to increased poverty and higher levels of mental health problems among single parent families.⁶

¹ Research Branch and Evaluation and Program Performance Branch Department of Education, Employment and Workplace Relations, *Welfare to Work Evaluation Report* (May 2008), 9 available at <http://www.a4.org.au/sites/default/files/welfaretoworkevaluationreport.pdf>.

² Information in this paragraph taken from Australian Council of Social Service of Social Service, *Submission to Review of Australia’s Welfare System* (August 2014), 7 available at http://www.acoss.org.au/images/uploads/ACOSS_welfare_review_submission_2014-FINAL.pdf.

³ Australian Council of Social Service of Social Service, *Submission to Review of Australia’s Welfare System* (August 2014), 7 available at http://www.acoss.org.au/images/uploads/ACOSS_welfare_review_submission_2014-FINAL.pdf.

⁴ Ibid, 46

⁵ Ibid, 27, 28

⁶ Kiely, K. M. & Butterworth P. *How has welfare to work reform affected the mental health of single parents in Australia?* (2014) 38.6 AUSTRALIAN AND NEW ZEALAND JOURNAL OF PUBLIC HEALTH 594-595, 2, 7 version accessed at <http://bit.ly/2pQGnj8> - original available at <http://doi.org/10.1111/1753-6405.12304>; Australian Council of Social Service of Social Service and Social Policy Research Centre, *Poverty in Australia 2016* (2016), 19 available at <http://www.acoss.org.au/wp-content/uploads/2016/10/Poverty-in-Australia-2016.pdf>.

In 2012, the *Social Security Legislation Amendment (Fair Incentives to Work) Act 2012* (Cth) (**Fair Incentives to Work Act**) removed, as from 1 January 2013, the grandfathering provisions that had been established in the 2006 Welfare to Work Act to protect existing recipients of the Parenting Payment. The effect of this was that single parents who could not obtain sufficient hours of paid work when their youngest child turned aged eight years old would have to apply for other income support payments, such as the Newstart Allowance. This meant that parents covered by the grandfathering provisions and receiving the Parenting Payment prior to the Welfare to Work Act could miss out on as much as nine years' worth of greater payment entitlements and security (depending on the age of the child as of 1 July 2006). In the communication of 19 October 2012 (Reference: UA Poverty (1998-11) AUS 2/2012) mentioned above, the Special Rapporteur on extreme poverty and human rights highlighted that all single parents, whether in casual or part-time employment stood to lose a portion of their income—in some circumstances as much as 12.8%, or \$223.23 per fortnight.

In addition to the former Special Rapporteur's letter, a number of submissions challenging the amendments were submitted by civil society to the Senate Standing Committee on Community Affairs.⁷ Further, the Parliamentary Joint Committee on Human Rights examined the Fair Incentives to Work Act and found that it risked violating international human rights law, and recommended that its enactment be delayed until the adequacy of the Newstart allowance for affected single parents had been examined.⁸ This recommendation was, however, overridden and the Fair Incentives to Work Act was passed in spite of the challenges presented.

It is alleged that the 2006 and 2012 social protection cuts may have contributed to a pattern of single parent household poverty.⁹ The Welfare to Work Act is said to have moved approximately 20,000 single parents from Parenting Payment to the lower Newstart Allowance. All remaining single parents whose youngest child had turned eight were then moved to the lower allowance in 2013 due to the Fair Incentives to Work Act. This is said to have affected another 80,000 single parents and resulted in a loss of income for the poorest single parent families of \$60 per week.¹⁰

Legislative process leading to Social Services Legislation Amendment Act 2017

⁷ The Senate Inquiry page shows some 62 submissions: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Completed_inquiries/2004-07/welfare_to_work/submissions/sublist.

⁸ Parliament of Australia, *Social Security Legislation Amendment (Fair Incentives to Work) Act 2012*, Parliamentary Joint Committee on Human Rights, [1.10] at http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2013/2013/52013/c01.

⁹ Australian Council of Social Service of Social Service and Social Policy Research Centre, *Poverty in Australia 2016*, above n 6, 19.

¹⁰ *Ibid.*

The 2014-2015 Federal Budget reportedly proposed a further cut to the benefits to families, including single parents, with children over the age of six years by limiting Family Tax Benefit Part B to families with children under six years of age.¹¹ While this measure was not passed at the time, on 8 February 2017, the Government originated in the House of Representatives an omnibus bill called the *Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017 (Omnibus Bill)* that, among other things, sought to lower the rate of benefits to certain groups of single parents and phased out certain supplements.¹²

On 9 February 2017, the Senate referred the Omnibus Bill to the Senate Community Affairs Legislation Committee for inquiry and report.¹³ A public hearing was held on 9 March 2017.¹⁴ Submissions were sought by 3 March 2017. The final report was tabled on 21 March 2017.

According to the inquiry's webpage, 68 written submissions were received.¹⁵ One organisation recommended that the Government consider education and child care reforms separately, rather than linking their passage with welfare reforms and cuts to paid parental leave.¹⁶ They argued that assistance for affordable quality education and child care must not come at the expense of income cuts to others who are in need.¹⁷ Another social welfare organisation explained that the Newstart Allowance has not been increased in real terms for over two decades, and is currently only \$38 per day.¹⁸ They allege that “[a]chieving budget savings through

¹¹ Australian Government, *Budget 2014-15 – PART 2: EXPENSE MEASURES (continued) Social Services*, http://www.budget.gov.au/2014-15/content/bp2/html/bp2_expense-21.htm.

¹² See e.g. description of effects in Community Affairs Legislation Committee, *Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017 [Provisions]* (March 2017), 9-12 available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/OmnibusSavingsReform/Report.

¹³ Information on the inquiry available at Parliament of Australia, *Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017* at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/OmnibusSavingsReform.

¹⁴ Parliament of Australia, *Public Hearings: Past public hearings and transcripts*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/OmnibusSavingsReform/Public_Hearings.

¹⁵ Parliament of Australia, *Submissions: Submissions received by the Committee*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/OmnibusSavingsReform/Submissions.

¹⁶ Community Child Care Association, *Submission on Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017 to Senate Community Affairs Legislation Committee Inquiry* (3 March 2017), 1.

¹⁷ *Ibid.*

¹⁸ St Vincent De Paul Society National Council, *Submission to the Senate Community Affairs Legislation Committee on the Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017* (March 2017), 17.

the ad-hoc freezing of indexation for such payments is unfair, inequitable and bad policy.”¹⁹

The Omnibus Bill passed the House of Representatives on 1 March 2017, but stalled in the Senate. The Second Reading was moved in the Senate on 20 March 2017, but was discharged from the Senate Notice Paper on 23 March 2017—the day after the *Social Services Legislation Amendment Bill 2017 (Amendment Bill)* was introduced and passed in the Senate.²⁰

The summary of the Amendment Bill provided on the Parliament of Australia website explains the nature of the amendments to the *Social Security Act 1991 (Cth)* to:²¹

... pause for three years the indexation of various income thresholds that apply to certain social security benefits and allowances and the income test free area for parenting payment single; extend the ordinary waiting period to youth allowance (other) and parenting payment; include additional evidentiary requirements for the ‘severe financial hardship’ exemption from the ordinary waiting period; and remove the ability for claimants to serve the ordinary waiting period concurrently with other waiting periods
...

It describes amendments to the *Social Security (Administration) Act 1999 (Cth)* as being to “enable automation of the regular income stream review process” and amendments to *A New Tax System (Family Assistance) Act 1999 (Cth)* to “maintain the standard family tax benefit (FTB) child rates for two years, from 1 July 2017, in the maximum and base rate of FTB Part A and the maximum rate of FTB Part B.”

The social protection cuts imposed by the current Act originated in the Omnibus Bill. The schedules on automation, indexation and ordinary waiting periods were extracted directly from the Omnibus Bill. The schedule on family benefits tax was, however, changed completely – it now freezes indexation for two years.

The Amendment Bill was introduced by the Coalition Government in the Senate by the Attorney-General George Brandis. The very first reason given for the introduction of the Amendment Bill by the Attorney-General was cost-saving.²²

¹⁹ Ibid.

²⁰ Details available at Parliament of Australia, *Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017* at http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r5798, PermaLink: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fs1064%22>.

²¹ Ibid.

The Social Services Legislation Amendment Bill 2017 seeks to secure the next instalment of remaining unlegislated savings from previous budgets.

This bill secures further savings of \$2.4 billion over the 2017-18 forward estimates period building to a \$6.8 billion dollar saving over the medium term.

No further justification for the social security amendments are offered in the introduction to the Amendment Bill in its second reading beyond “budget improvements,” though the Attorney-General did state that the reform package, consisting of the Amendment Bill and the child care bill, would “make a real and positive difference to nearly one million Australian families.”²³

There does not seem to be any consideration by the Attorney-General in the second reading speech of the effect that the cuts will have on those living in poverty in Australia, in spite of the fact that the Amendment Bill (now Act) poses a number of issues of potentially great concern from a poverty and human rights perspective.

Based on claims made in the second reading speech, it also appears that the consultation and debate on the content of the Amendment Bill was perfunctory. Some Senators alleged that the Bill was not presented to them or made available to them ahead of its second reading in the Senate, and that there was no meaningful discussion about it.²⁴ The Amendment Bill was passed by a narrow margin, with 34 Senators in favour and 31 Senators opposing.²⁵ Some Senators reportedly shifted their vote from opposing the Omnibus Bill to supporting the Amendment Bill on the ground that it was a compromise solution to support the \$1.6 billion package of childcare reforms, and tax cuts worth \$4.5 billion for those earning over \$80,000 a year.²⁶

The Amendment Bill received Royal Assent on 12 April 2017 and is now the *Social Services Legislation Amendment Act 2017* (Cth) (No. 33 of 2017) (**Amendment Act**).

Relevant Changes in the Amendment Act

The Amendment Act addresses three substantive issues with significant impact on human rights that will be briefly described further below, namely:

²² Commonwealth of Australia Parliamentary Debates, Senate Official Hansard No. 3, 2017 FORTY-FIFTH PARLIAMENT FIRST SESSION—SECOND PERIOD (Wednesday, 22 March 2017) (**Second Reading Speech**), 1765.

²³ Ibid, 1766.

²⁴ Ibid, see e.g. 1767, 1779.

²⁵ Ibid, 1961.

²⁶ Ibid, 1774.

1. Indexation of the ordinary income free area.
2. Extension of the ordinary waiting period to youth allowance (other) and the parenting payment.
3. Amendment of family tax benefits.

Indexation of Ordinary Income Free Area

The Amendment Act freezes the ordinary income free area for single parenting payments for three years. A person's "ordinary income free area" is "the amount of ordinary income that the person can have without any deduction being made from the person's maximum payment rate."²⁷ In relation to single parents, Schedule 1 section 2 relevantly provides:

(5AAA) The amount under item 14 of the CPI Indexation Table in subsection 1191(1), to the extent to which that item relates to the amount in column 2 of Table E in point 1068A-E14 of the Pension PP (Single) Rate Calculator, is not to be indexed on 1 July of the first financial year beginning on or after the day this subsection commences and on 1 July of the next 2 financial years.

Extension of Ordinary Waiting Period

The ordinary waiting period is a one week waiting period which a person must serve when making certain kinds of social security claims. Schedule 3 of the Amendment Act extends ordinary waiting periods to youth allowance (other) and the parenting payment. It also removes the ability for claimants to serve the ordinary waiting period concurrently with other waiting periods, such as those attached to the liquid assets test, income maintenance, seasonal work preclusion and newly arrived resident.

The ordinary waiting period may be waived if the claimant is experiencing "severe financial hardship." The Amendment Act imposes additional evidentiary requirements for the severe financial hardship exemption from the ordinary waiting period. People who are unable to endure the ordinary waiting period now have to demonstrate both:

- a) that they are in "severe financial hardship" (that the value of the person's liquid assets is less than the fortnightly amount at the maximum payment rate of the relevant social security pension or benefit);²⁸

and that they are in a "personal financial crisis" in the form of either:

²⁷ *Social Security Act 1991* (Cth) sub-Note within Step 2 of section 1068A-E1 Method statement.

²⁸ Per *Social Security Act 1991* (Cth), s 19C(2).

- b) domestic violence; or
- c) unavoidable or reasonable expenditure.

To establish domestic violence or unavoidable or reasonable expenditure, a person must produce “evidence that demonstrates a reasonable possibility that it applies to the person.”²⁹

Amendment to Family Tax Benefit

The Family Tax Benefit is a means-tested payment to eligible families to assist with costs of raising children. It comprises Part A, which is a payment per child that is based on the family’s circumstances, and Part B, which is paid per family to single parents and families with only one main income.³⁰

The family tax benefit amendments in the Amendment Act are entirely different from those that were proposed in the Omnibus Bill. The Amendment Act freezes indexation for two years for the following payments:

- Family tax benefit child rate (Part A—Method 1).
- Family tax benefit child rate (Part A—Method 2).
- Standard rate of family tax benefit (Part B).
- Standard rate of family tax benefit payable to an approved care organisation.

The effect of this amendment is that benefits for the above will be frozen at their current amounts on both 1 July 2017 and 2018. An answer from the Department of Social Services to a question on notice during the Committee Inquiry of the Omnibus Bill reveals that “as at September 2016, there were around 280,000 single parent families receiving the maximum rate of Family Tax Benefit (FTB) Part A via fortnightly instalments, while there were around 307,000 couple families receiving the maximum rate of FTB Part A via fortnightly instalments.”³¹ Those who will lose the most from this cut will be families who receive the full family tax benefit, that is, low income earners. One civil society organisation has observed that the indexation freeze on the Family Tax Benefit will cause a drop “by hundreds of dollars over two years,” with the biggest impact being felt by single parents. This is in a context where 40% of children living in one parent households live in poverty.³² Nevertheless, the freeze on the family tax benefit

²⁹ *Social Services Legislation Amendment Act 2017* (Cth), Schedule 3, s 5 – amendment s 19DA(6).

³⁰ See Australian Government Department of Social Services, *Families and Children: Family Tax Benefit* (Last updated 12 July 2016) at <https://www.dss.gov.au/families-and-children/benefits-payments/family-tax-benefit>.

³¹ The answers to the questions on notice are available online at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Omnibus_SavingsReform/Additional_Documents.

³² Australian Council of Social Service of Social Service and Social Policy Research Centre, *Poverty in Australia 2016*, above n 6.

was described by one of the Senators who moved from opposing the Omnibus Bill to supporting the Amendment Bill as the “least worst” option,³³ compared to what was originally proposed in the Omnibus Bill.

Poverty among Single Parent Households in Australia

Growing global wealth and income inequality represents a global problem and Australia is not immune from this trend. In Australia, the top 1% possess more than 22% of total Australian wealth. Even if the wealth of the bottom 70% of Australians is combined, the top 1% still own more.³⁴ The average Australian household annually earns just over \$107,000. The top 20% earns over \$260,000 – 49% of all earnings. The bottom 20% earns barely over \$22,000 – merely 4% of all income.³⁵ The gap between those at the top and those at the bottom is growing. As explained in one non-governmental organisation report, incomes of the poorest 10% rose between 1988 and 2011 equivalent to only 3% of the total income growth in Australia, as compared to the richest 10% who enjoyed over 28% income growth.³⁶ The Gini coefficient – a measure of income spread – is currently at a record high of 0.446 compared to a less-unequal 0.417 in the mid-1990s.³⁷

One organisation demonstrates the difference between the Henderson poverty line and the amount of government assistance going to an unemployed family of four (comprising two adults and two children) by way of a graph that shows how the family has fared relative to the poverty line since 1975.³⁸ The relevant portion of a graph contained in a submission on the Omnibus Bill by that organisation (excluding the estimates of the proposed cuts from the Omnibus Bills) is as follows:

The poverty line calculation used by one prominent poverty-focused organisation is 50% of the median Australian household income—the same method as used by the Organization for Economic Co-operation and Development (OECD). The most recent figures, from 2014, set the amount at less than \$400 a week for a

³³ Second Reading Speech, above n **Error! Bookmark not defined.**, 1775.

³⁴ Oxfam, *Australia Fact Sheet January 2017* available at <https://www.oxfam.org.au/wp-content/uploads/2017/01/2017-PA-002-Inequality-Report-V3a.pdf>.

³⁵ The McCrindle Blog, *Australia's Household Income and Wealth Distribution* (21 June 2016) at <http://mccrindle.com.au/the-mccrindle-blog/australias-household-income-and-wealth-distribution>.

³⁶ Oxfam, *Australia Fact Sheet January 2017*, above n 34.

³⁷ The McCrindle Blog, *Australia's Household Income and Wealth Distribution*, above n 35.

³⁸ David Richardson & Matt Grudnoff, *Information and graphic from Australia Institute, Inequality & poverty in Australia: Still no case for the removal of the clean energy supplement* (February 2017) The Australia Institute, 2 footnote 1 explaining: “The Henderson Poverty Line is a standard reference in Australia on the level of income required to avoid a situation of poverty for various family types. It was defined in the 1973 Commonwealth Commission of Inquiry into Poverty. See: <https://melbourneinstitute.com/miaesr/publications/indicators/poverty-lines-australia.html>.”

single adult.³⁹ Using this approach, it reports that children of single parents in Australia are over three times more likely to be living in poverty (40.6%) than children who come from couple families (12.5%).⁴⁰ Poverty among children of single parents is apparently on the rise, with an increase from 36.8 to 40.6% since 2012.⁴¹ Key reasons that have been cited for the higher incidence of poverty among single parents are lower levels of employment due to the burden of parenting responsibilities, the 2006 Work to Welfare Act reforms, and the 2012 Fair Work Incentives Act social security amendments which saw 80,000 single parents moved from parenting payments pension to the lower Newstart allowance.⁴² A 2015 source cites 120,000 parents as being worse off as a result of these amendments.⁴³

The statistics also show a gender bias in single parent poverty, with women far more likely to be the single parent. According to 2012 Australian Bureau of Statistics data, 81% of single parent families were headed by women, with some 780,000 single mother families.⁴⁴ Australian Bureau of Statistics data from 2013-14 showed that 65% of single parent families with dependent children received government pensions and allowances that comprise over 20% of their income.⁴⁵ A 2017 OECD report revealed that “[t]he employment rate of single mothers was 50.8% in 2014, the third-lowest in the OECD, after Ireland and Turkey.”⁴⁶

The amount provided under the Newstart Allowance has been questioned and investigated in the past, including by a 2012 Government inquiry. The Inquiry – called “The adequacy of the allowance payment system for jobseekers and others,

³⁹ Australian Council of Social Service, *Poverty* at <http://www.acoss.org.au/poverty/>.

⁴⁰ Australian Council of Social Service, *Child poverty on the rise: 730,000 children in poverty* (October 16, 2016) http://www.acoss.org.au/media_release/child-poverty-on-the-rise-730000-children-in-poverty/; Australian Council of Social Service of Social Service and Social Policy Research Centre, *Poverty in Australia 2016*, above n 6.

⁴¹ Australian Council of Social Service of Social Service and Social Policy Research Centre, *Poverty in Australia 2016*, above n 6, 7.

⁴² Ibid. November 2016; The Centre for Social Research and Methods, Australian National University report known as *Income Trends for Selected Single Parent Families* considered found that for a family with no private income and two children over the age of 8 policy changes since 2005 have left them around \$5,750 a year worse off or about 17.2 per cent by 2018.

⁴³ The Conversation, *Ideas for Australia: Welfare reform needs to be about improving well-being, not punishing the poor* (April 21, 2016) available at <https://theconversation.com/ideas-for-australia-welfare-reform-needs-to-be-about-improving-well-being-not-punishing-the-poor-56355> referencing Department of Social Services statistics.

⁴⁴ Australian Bureau of Statistics, *One Parent Families* (page last updated 26 August 2016) available at <http://www.abs.gov.au/ausstats/abs@.nsf/Products/6224.0.55.001~Jun%202012~Chapter~one%20Parent%20Families>.

⁴⁵ Australian Bureau of Statistics, *One Parent Families with Dependants* (page last updated 28 July 2016) available at <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/6523.0~2013-14~Main%20Features~One%20parent%20families%20with%20dependants~15>.

⁴⁶ <http://www.oecd.org/newsroom/australia-should-help-more-women-and-other-underemployed-groups-into-work.htm>

the appropriateness of the allowance payment system as a support into work and the impact of the changing nature of the labour market” – recognised that:⁴⁷

Single parents also receive less on Newstart Allowance than on the Parenting Payment Single (PPS). This last point is of particular concern given the government's introduction of the Social Security Legislation Amendment (Fair Incentives to Work) Bill 2012 in June of this year. This legislation changed eligibility requirements for Parenting Payment (PP) from 1 January 2013, with parents who no longer qualify for PP to be moved onto Newstart Allowance instead. For parents coming to Newstart Allowance from PPS, this will mean a lower rate of payment.

One study revealed that the lack of additional support for single mother families of children over eight years who are affected by domestic violence caused 22% of respondents to return to their place of abuse because they lacked adequate financial support.⁴⁸ According to Homelessness Australia, domestic violence is the leading cause of homelessness for women and children in Australia.⁴⁹

In this context, it is of concern that the Amendment Act introduces a number of changes that may further increase the financial hardships borne by single parent households —namely, indexation, ordinary waiting period, and family tax benefit amendments discussed above.

Further Legislative Action in the Wake of the Omnibus Bill

Following the rapid enactment of the Amendment Act, a series of further bills that amend social protection in Australia have been introduced and, in some cases, adopted by the Australian Parliament. These include:

- *Social Services Legislation Amendment (Welfare Reform) Bill 2017 (Welfare Reform Bill).*
- *Social Services Legislation Amendment (Better Targeting Student Payments) Bill 2017 (Targeting Student Bill).*
- *Social Services Legislation Amendment (Payment Integrity) Bill 2017 (Payment Integrity Bill).*
- *Social Services Legislation Amendment (Ending Carbon Tax Compensation) Bill 2017 (Carbon Tax Bill).*
- *Social Services Legislation Amendment (Seasonal Worker Incentives for Jobseekers) Act 2017 (Cth) (Seasonal Worker Act).*

⁴⁷ [3.16]. The report can be downloaded at <http://bit.ly/2woAFoD> http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_Employment_and_Workplace_Relations/Completed_inquiries/2010-13/newstartallowance/report/index.

⁴⁸ NCSMC (see also Family Violence: The Hidden Cost, Economic Security for Women in Retirement) This engagement included a survey known as Domestic Violence and Economic Security.

⁴⁹ Homelessness Australia 2016.

Each of the Welfare Reform, Targeting Student, Payment Integrity, and Carbon Tax Bills was sent to the Senate Community Affairs Legislation Committee for inquiry and report. These Committee reports have all been issued. In each instance, the majority of the Senate Committee recommended the passage of the legislation.

The Third Reading of the **Welfare Reform Bill** was agreed to in the House of Representatives on 11 September 2017. On 12 September 2017, the Second Reading was agreed to in the Senate, but the debate was adjourned to the next sitting week of **16 October 2017**. The 250-page Welfare Reform Bill proposes a raft of social security amendments, including:

- creating a new “Jobseeker” payment for “working age Australians” which replaces the Newstart Allowance;⁵⁰
- ceasing widow B pension, wife pension, bereavement allowance, sickness allowance, widow allowance and partner allowance payments;⁵¹
- removing the ability of certain 55 to 59 year old payment recipients to satisfy the activity test by engaging only in unpaid voluntary work, and requiring them to instead engage in at least 15 out of 30 hours of “suitable” paid work;⁵²
- delaying certain payment start dates;⁵³
- initiating a mandatory drug testing trial to be undertaken over two years from 1 January 2018 in three locations for 5 000 new recipients of Newstart Allowance and Youth Allowance;⁵⁴
- establishing delegating legislation and the delegation of legislative and administrative powers in respect of the drug trial to the Secretary and Minister;
- removing exemptions relating to drug or alcohol misuse and abuse from the activity test for recipients of certain payments;⁵⁵ and
- introducing a new “job seeker compliance framework” “designed to change the behaviour of non-genuine job seekers.”⁵⁶

Two of the Parliamentary Scrutiny Committees are currently reviewing the Welfare Bill. The Senate Standing Committee for the Scrutiny of Bills is considering the delegated legislation and powers, while the Joint Committee on Human Rights (HRs) is reviewing the compatibility of the Welfare Reform Bill with Australia’s international human rights law obligations. As of the time of drafting of this letter, neither report has been released.

⁵⁰ Schedule 1.

⁵¹ Schedules 2-7.

⁵² Schedule 9.

⁵³ Schedules 10-11.

⁵⁴ Schedule 12.

⁵⁵ Schedule 13

⁵⁶ Schedule 15.

The Second Reading of the **Targeting Student Bill** was moved in the House of Representatives on 21 June 2017. This bill seeks to:

- Restrict access to the relocation scholarship to students relocating within Australia and students studying in Australia.
- Align pensioner education supplement fortnightly rates with the amount of study undertaken by eligible students.
- Cease payments of the pensioner education supplement during semester breaks and holiday periods.
- Align education entry payment rates with the amount of study undertaken by eligible students.

The Second Reading of the **Payment Integrity Bill** was also moved in House of Representatives on 21 June 2017. This bill seeks to:

- Amend the residency requirements for the age pension and the disability support pension by changing certain timeframes which need to be met before claims will be deemed payable to eligible recipients.
- Increase the maximum liquid assets waiting period for Youth Allowance, Austudy, Newstart Allowance and Sick Allowance from 13 weeks to 26 weeks.
- Cease payment of the pension supplement after six weeks temporary absence overseas and immediately for permanent departures.
- Align the income test taper rates so that all income above the higher income free area is treated equally when calculating an individual's rate of family tax benefit Part A.

The **Carbon Tax Bill** prevents new recipients of welfare payments or concession cards from being paid the energy supplement from 20 September 2017. The Second Reading was moved in House of Reps on 31 May 2017. The **Seasonal Worker Act** was enacted to “trial a social security income test incentive aimed at increasing the number of job seekers who undertake specified seasonal horticultural work, such as fruit picking” and received assent on 22 June 2017.⁵⁷

I understand there is further amendment to the Australian social security support network afoot. A separate initiative to the Omnibus Bill, the *Social Services Legislation Amendment (Cashless Debit Card) Bill 2017 (Cashless Bill)* seeks to expand a current cashless debit card trial to further sites. The Second Reading of the Cashless Bill was moved in the House of Representatives on 17 Aug 2017. On

⁵⁷ http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5837.

the same day, it was referred to the Senate Community Affairs Legislation Committee, with that report due on 13 November 2017.⁵⁸

In this letter, I focus on the substance-related measures as one issue that is demonstrative of the ostensibly broader punitive and stigmatising approach of the Australian Government to social support.

Drug Testing

Schedule 12 of the Welfare Reform Bill provides that from 1 January 2018, a two year drug testing trial will commence for 5,000 recipients of Newstart Allowance and Youth Allowance in three locations. If a person does not attend an appointment for a drug test, their payment will be suspended until they attend a rescheduled appointment. Refusal to undertake the drug test will result in cancellation of their social assistance. If a person tests positive to the initial drug test, they will become subject to income management for 24 months. Under income management, the majority portion of a person's income support is quarantined, with only the remainder available for cash use.⁵⁹ The quarantined funds can only be used to purchase items at approved merchants and to pay rent and bills. The idea behind income management is that the recipient is not able to use their quarantined funds to withdraw cash, purportedly to prevent recipients from using that cash for gambling or drinking alcohol.⁶⁰

Currently, those social assistance recipients who are subject to an activity test or participation requirement may be granted an exemption in circumstances that are directly attributable to drug misuse. Schedule 13 of the Welfare Reform Bill removes these exemptions.⁶¹ Schedule 14 empowers the Secretary to make a legislative instrument excluding drug or alcohol dependency as a reasonable excuse for a variety of "failures," including a no show.

The drug testing trial, removal of exemptions for drug or alcohol dependence and changes to reasonable excuses (together "substance-related measures") were strongly opposed by civil society in their submissions to the Committee.⁶² Pertinent reasons for rejection by civil society organizations included:

⁵⁸ http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5939.

⁵⁹ Explanatory Memorandum to the Welfare Bill, 153.

⁶⁰ Ibid.

⁶¹ Schedule 13.

⁶² Of the selection reviewed, each of the following health-related organisations rejected the measure: Royal Australian and New Zealand College of Psychiatrists; Aboriginal Peak Organisations Northern Territory; South Australian Network of Drug & Alcohol Services; Australian Injecting & Illicit Drug Users League; Western Australian Network of Alcohol and other Drug Agencies; the National Drug Research Institute of Curtin University; Victorian Alcohol and Drug Association; Royal Australasian College of Physicians; the National Drug & Alcohol Research Centre of the University of New South Wales; the Centre for Social Research in Health / Social Policy Research Centre of the University of New South Wales; Australian Medical Association;

- Drug testing as a condition of receiving income support is a coercive and punitive measure that lacks any evidence of achieving lower rates of income support, increased income support compliance or decreased community harms related to drug use. Involuntary treatment for alcohol and other drug addictions is not effective.
- There is evidence indicating that denying benefits to people who are drug dependent could result in increases in poverty, homelessness and crime, and also lead to higher health and social costs. Poverty is a major issue for people with alcohol and other drug use issues. There is no evidence that keeping people in poverty decreases consumption of substances, or improves health. The removal of welfare payments for affected people would only increase poverty, thereby exacerbating rather than reducing harms related to alcohol and other drug use.
- The substance-related measures do not address the broader structural factors that contribute to unemployment. Such structural factors that contribute to inequality and broader exclusion from the job market include numeracy, internet access, post-schooling qualifications, disability, experience of domestic violence and prison convictions, broader economic issues that affect roles often filled by younger people, geographic availability of work, a chaotic childhood or home, parent's drug and/or alcohol use and attitudes, and peer and commercial influence.
- Nor do they recognise or help with the complex personal problems that lead to substance abuse, including physical and psychological comorbidity, housing issues, relational and family issues, comorbid mental disorders and intergenerational issues with employment and deprivation, and other types of trauma, including childhood trauma. Alcohol and other drugs are often used as a coping mechanism for dealing with unresolved trauma and its resulting psychological distress.
- The substance-related measures actively work against the Australian government's directions as part of the new National Drug Strategy 2017-2026 and contrary to government advice. For example, in 2013 the government's advisory body, the Australian National Council on Drugs, advised in a Position Paper on Drug Testing not to proceed with random drug testing policies due to there being no evidence that drug testing welfare beneficiaries will have any positive effects for those individuals or for society. In fact, some evidence indicates that it could have high social and economic costs.
- Drug tests risk false negative and false positive test results, including from secondary inhalation.

- A drug tests is limited in its utility. It provides clinical information about usage of a particular drug but no information about a person's diagnosis, or the frequency or range of drugs they may take. It also does not provide any information about an individual's life circumstances, including in relation to any potential mental health and/or addiction issues.
- The drug testing raises serious privacy concerns about how such information will be kept.
- Drug and alcohol treatment services are already extremely overburdened and underfunded, with long waiting lists for people who are voluntarily seeking support from addiction services let alone those who are required to attend services as a result of random drug testing. Many regions of Australia do not even offer any addiction treatment services.
- Experience in other countries like New Zealand and the United States suggest that only 1% or fewer would be expected to return positive tests.
- The cost of collecting and testing drug samples is apparently significant, at approximately \$500-900 per test.
- The substance-related measures will further alienate the most disadvantaged.
- Over 50 years of psychological research shows that positive reinforcement strategies are more effective than punitive strategies in terms of behaviour change.
- Reasonable alternatives are available, such as the NSW Debt Recovery model, which allows clients to use participation in treatment as a way to reduce debt from fines (a model that rewards engagement and participation rather than punishing people for inappropriate behaviour).
- Many individuals experiencing substance dependence, who already experience stigma from mental illness and/or prior involvement with the justice system, will have that experience compounded by these policies. Drug testing stigmatises all welfare recipients, and stigma is one of the most significant barriers to attending treatment.
- No consideration has been given to relapse, which is common during treatment.
- Drug testing cannot distinguish between those who have significant drug problems and the potential to benefit from treatment, and those who do not.

- The existing arrangement of an exemption in circumstances that are directly attributable to drug or alcohol misuse adequately recognises and responds to addiction as a chronic remitting and relapsing health condition, and should be preserved.
- The amendments appear to put in place an approach that will, in effect, dismiss a treating medical practitioner's diagnosis and advice.

By contrast, the Department of Social Services, the Department of Employment and the Department of Human Services in a joint submission recited the content of the Schedule and touted the purported benefits in the same tone as other Government documents such as the Explanatory Memorandum. Indeed, sentiments such as the following were reiterated:⁶³

It is not in line with community expectations that someone on welfare payments is exempt from their mutual obligation requirements primarily due to alcohol or drug misuse without any expectation that they will address their substance misuse. Allowing people to be exempt from their mutual obligations due to drug or alcohol issues supports a disengagement from the employment services support process and may impede a person's return to work.

In terms of the rules, and relevant to the following, the submission explained that:⁶⁴

A legislative instrument setting out Drug Test Rules is allowed for in the Bill and will include the protocols for conducting the drug tests, including safeguards to ensure that the testing is conducted appropriately and in accordance with relevant standards. The Drug Test Rules are currently being drafted by the Department of Social Services. An exposure draft of these Rules will be made available to the Committee for consideration.

The Department is also undertaking consultation with key stakeholders. The expert advice of the contracted testing provider and the drug and alcohol sector will be taken into account in developing these protocols and safeguards. The exposure draft of the Drug Testing Rules may therefore be subject to change based on these considerations.

In recommending that the Bill be passed, the Senate Committee's majority response to these points was, relevantly:⁶⁵

⁶³ Joint Departmental Submission, 25 – regarding Schedule 13.

⁶⁴ Joint Departmental Submission, 20.

⁶⁵ Paragraphs [2.64]-[2.67]. The Australian Labor Party and the Greens Party Senators wrote dissenting reports.

The committee acknowledges that, in evidence, the Departments of Social Services, Employment and Human Services have indicated that many of the concerns raised will be addressed in the consultations currently under way, in particular in relation to the drug testing trial. The release of the exposure draft of the drug testing rules for consultation during this inquiry is a measure of the departments' intention to engage with stakeholders to address issues raised through this inquiry.

The committee further notes the undertaking by the Minister to amend certain aspects of the Bill in relation to protecting the wellbeing of participants in the drug testing trial.

While acknowledging the concerns raised by submitters and witnesses, the committee considers that both the Minister and the responsible departments have indicated a willingness to review aspects of the reforms, where issues have been identified during stakeholder consultations.

The committee considers the proposed reforms will create a simpler, more efficient and better targeted welfare system. The changes will provide an opportunity to trial and evaluate a new way to assist people who are facing specific challenges in entering or re-entering the workforce.

While I do not wish to prejudge the accuracy of these allegations, I express my serious concern, first, (I) about the potential impact of the Amendment Act on the human rights of single parents and their children living in poverty. I further express serious concern about (II) Australia's increasingly austere and conditional approach to social security, as evidenced by the current bills being considered in Parliament and in particular the provisions on drug testing in the Welfare Bill.

I. The Amendment Act and International Human Rights Law

In relation to the Amendment Act, the Government prepared Statements of Compatibility with Human Rights (compatibility statements) in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) and included them in the Explanatory Memorandum to the Amendment Act. The compatibility statements declare each of the Amendment Act's schedules – on indexation, automation of income stream review process, ordinary waiting periods and family tax benefit – compatible with the human rights and freedoms recognised or declared in the ICESCR, the *International Convention on the Elimination of all Forms of Racial Discrimination*, the *International Covenant on Civil and Political Rights* (ICCPR), the *Convention on the Elimination of All Forms of Discrimination Against Women*, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, the *Convention on the Rights of the Child*, and the *Convention on the Rights of Persons with Disabilities*.

Below follows an analysis of the human rights impact of the indexation, ordinary waiting period, and family tax benefit amendments of the Amendment Act, taking into account the Government's compatibility statements.

Indexation of Ordinary Income Free Area

In relation to indexation, it was recognised in the compatibility statement that the schedule engaged the right to social security (article 9 ICESCR) but ultimately found that it had “no effect” on the right to social security. The effect of the indexation schedule was described as follows:

The changes to the value of income test free areas and thresholds for certain Australian Government payments assist in targeting payments according to need. Payments will not be reduced unless customers’ circumstances change, such as their income increasing in value.

The compatibility statement concluded by stating that “[t]he amendments in the Schedule are compatible with human rights because they do not limit *access* to social security.” (Emphasis added.)

Article 9 of the ICESCR, to which Australia is a State 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 of the 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 CESCR 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 themselves and their family, including adequate food, clothing and housing, and to the continuous improvement of living conditions (article 11 ICESCR).

It seems that the compatibility statement fails to recognise the *adequacy* element of the right to social security, and focuses instead on the *accessibility* element. The effect of this indexation freezing for single parents is that they will be permitted to earn

progressively less (relative to CPI and other increases) before it affects the amount of social support they receive through their parenting payment. This has been described as a “welfare cut by stealth.”⁶⁶

One submission on the relevant indexation schedule in the Omnibus Bill explained that single parents with three children who receive the Parenting Payment Single can earn and retain \$118 per week without their payments being affected. Once their youngest child turns eight years of age and they are required to move to Newstart, they can only earn \$52 per week before payments are affected.⁶⁷ This is only around three hours’ work per week at minimum wage before they are over the threshold.⁶⁸ Freezing indexation will further reduce this very low threshold and further disincentives work, thus undermining vulnerable families’ financial resilience.⁶⁹ Experience from one organisation shows that increasing the taper rates rather than freezing income letters is a more effective approach.⁷⁰ One organisation described the indexation schedule as “a cost-cutting measure that provides no added benefit in terms of supporting the goals of either the safety net or the workforce participation agenda.”⁷¹

From the information I have received, there seems to be a lack of evidence of a careful consideration of the adequacy of the payments that single parents are receiving—both as a result of being moved to Newstart (the Welfare to Work Act and Fair Incentives to Work Act amendments) and in terms of the prospective effect of freezing their income free allowance.

Indexation amendments aside, there appears to be a lack of evidence proving that single parent entitlements throughout the course of their child’s life up until 18 years of age are adequate in amount and duration for all family members to realize their rights to family protection and assistance, an adequate standard of living, and adequate access to health care to begin with. Upon a review of the materials provided in support of the Omnibus Bill and the Amendment Act, a lack of monitoring provisions relating to the adequacy of benefits to ensure that beneficiaries are able to afford the goods and services they require to realize their rights stands out as a glaring omission. This adds great weight to the concern that tens of thousands of people, including children, in Australia are not

⁶⁶ Australian Council of Trade Unions, *ACTU Submission: Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017* (3 March 2017), 8.

⁶⁷ The National Council of Single Mothers & their Children Inc., *Child Poverty & Families in Distress: Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017* (March 2017), 6.

⁶⁸ Refugee Council of Australia, *Senate Community Affairs Legislation Committee – Submission on the social services legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017* (March 2017), 3, 6; St Vincent De Paul Society Submission, above n 18, 17.

⁶⁹ See e.g. Sole Parents Alliance, *Submission to Community Affairs Legislation Committee on the Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017*, (3 March 2017), 2.

⁷⁰ Council of Single Mothers & their Children Victoria, *Submission to the Inquiry into the Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017* (27 February 2017), 5.

⁷¹ St Vincent De Paul Society Submission, above n 18, 17.

enjoying at least minimum essential levels of adequate food, clothing and housing, and continuously improving living conditions.

Extension of Ordinary Waiting Period

The compatibility statement explained the rationale behind the ordinary waiting period was that it reflects the “general principle that people should support themselves before seeking Government assistance”—a notion that is said to have “existed since the first iteration of these payments commenced in 1945.”⁷² The amendments are said to “better promote self-support and discourage a culture of automatic entitlement to income support.”⁷³ The extension of the ordinary waiting period to youth allowance (other) and parenting payments was justified as “reasonable” as it “ensures more consistent access to similar working age payments while maintaining the longstanding principle of self-support.”⁷⁴ Those claimants who cannot support themselves will allegedly “have access to exemptions and waivers.”⁷⁵ The additional evidentiary requirements for demonstrating “severe financial hardship” criterion were said to act as “discouragement for people to spend their resources on non-essential items in order to obtain income support payments.”⁷⁶ The measure is described as “reasonable” as it “ensure[s] claimants use their own resources first, while still enabling those who are in hardship due to extenuating circumstances to access payments immediately.”⁷⁷

The effect of the removal of the ability to serve the ordinary waiting period concurrently with other waiting periods – such as “the liquid assets test waiting period, income maintenance period, seasonal work preclusion period and newly arrived resident’s waiting period” – is deemed by the compatibility statement to be compatible with the right to social security because it only affects *when* a person starts receiving their entitlements, as compared to their *eligibility*. In relation to the right to an adequate standard of living, including food, water and housing, the compatibility statement found it compatible for the following reason:

To the extent that there is an impact on a person’s right to an adequate standard of living, including food, water and housing, by virtue of this Schedule, the impact is limited. The ordinary waiting period is a period of one week only during which those claimants with the means to support themselves are expected to do so. Those who are unable to accommodate their own living costs for that one week period because they are in severe financial hardship and have experienced a personal financial crisis will be able to have the waiting period waived.

⁷² The Parliament of the Commonwealth of Australia, *Social Services Legislation Amendment Bill 2017 Explanatory Memorandum*, Senate (2016-2017), 24.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*, 25.

⁷⁷ *Ibid.*

Therefore, this Schedule is compatible with the right to an adequate standard of living as the potential limitations on this right are proportionate to the policy objective of encouraging self-support while providing a safety net as eligible people can be exempted from serving the ordinary waiting period or can have the ordinary waiting period waived.

The compatibility statement further considered the equality and non-discrimination clauses in the ICCPR (arts. 2, 26). It claims that there will be “no differential impact” on any of the recognised categories of discrimination as it (formally) applies equally to all. While it recognises that “more than 90 per cent of parenting payment recipients are women” and therefore “the changes may more significantly impact on women,” it states that “the changes are reasonable and proportionate to achieving the legitimate objective of providing consistency across similar working age payments by ensuring that all new claimants meet their own living costs for a short period before receiving Government assistance, where they are able.”

There are two key issues that arise from the compatibility statement when considering the extension of the ordinary waiting period: (1) the assessment that its impact on the right to an adequate standard of living is limited due to the existence of the waiver and the alleged satisfaction of a proportionality test, and (2) the consideration of the discriminatory impacts of this schedule.

Adequate Standard of Living and Proportionality

The Compatibility Statement argues that the limitations posed by the new ordinary waiting period on the right to an adequate standard of living are proportionate to the legitimate aim of encouraging self-support. This argument, however, falls short of demonstrating the proportionality of the waiting period. According to the CESCR, the proportionality of a measure limiting the Covenant rights needs to be assessed against other available measures, so that it is demonstrated as “the least restrictive alternative” among all possible alternatives.⁷⁸

The schedule in the Amendment Act that expands the ordinary waiting period will allegedly “force Australians who often desperately need government support to wait longer for that support than is administratively necessary.”⁷⁹ Indeed, if a person requires government support, the likelihood is that they are already struggling to make ends meet and to make them arbitrarily wait even longer for support could be considered inhumane.

One civil society organisation has warned that the element of the new waiver test that requires proof of hardship results from “unavoidable or reasonable expenditure” could prove practically impossible to satisfy. Apparently, the “unavoidable or reasonable expenditure” test is the same test applied for waiver of income maintenance periods

⁷⁸ Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), para. 29.

⁷⁹ Australian Council of Trade Unions Submission, above n 66, 7.

which are imposed following a lump sum termination or redundancy payment.⁸⁰ The difficulties associated with this test in practice is that “reasonable” expenditure is capped at the fortnightly rate of Newstart Allowance, irrespective of a person’s normal reasonable expenses. The fortnightly rate of Newstart Allowance is below the minimum wage. As a result, rental amounts often exceed this cap, leaving a person unable to demonstrate that their expenditure was “reasonable.”

From the evidence I have received, it is unclear what data is being relied upon in making the assertion that claimants will be able to survive the mandatory extra week without pay. This is especially dubious in the light of the above submission that the waiver is extremely unlikely to, in practice, prove an adequate safety net. As another organisation has observed, those without access to income and support networks can suffer serious financial distress through waiting periods. Without a credible justification, the measure is unreasonable, and arguably a punitive cost-cutting measure that “represents a fundamental departure from the principle of need, which is the basic principle that is meant to underlie the social security system.”⁸¹ There is a great risk that the narrow definition of “personal financial crisis” will force people to wait an extra week without money for food, utilities and shelter, imposing severe and undue emotional and physical stress on poor households.

Non-Discrimination

When reading article 9 of the 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 (ICESCR, article 2, paragraph 2), and that the right is enjoyed equally between men and women (article 3). As noted by the CESCR “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 CESCR: “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

⁸⁰ National Social Security Rights Network, *Submission in relation to the Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017* (3 March 2017), 8.

⁸¹ St Vincent De Paul Society Submission, above n 18, 17-18.

(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.)

Under human rights law, a discriminatory intent is not a necessary element of discrimination (CESCR, 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 has also been a party since 1983.

Finally, “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).

As can be seen from the above, proportionality does not justify differential impact as any restriction on the enjoyment of human rights must not only be legally established, but also non-discriminatory and compatible with the nature of the right. The compatibility statement recognises that over 90% of parenting payment recipients are women and that the changes “may more significantly impact on women.” The discrimination through differential impact on the basis of sex – as well as socio-economic status of those male single parents – is patent. Pursuant to international human rights law, there is no justification for discrimination. Even if something is said to be “reasonable and proportionate,” it may in fact be unreasonable as a result of its very disparate impact.

Amendment to Family Tax Benefit

In relation to the family tax benefit, the compatibility statement considers the right to social security, as well as the right of every child to benefit from social security pursuant to article 26 of the *Convention on the Rights of the Child*. Referring again to principles of reasonableness, proportionality and transparency, the Statement contends:

To the extent that maintaining the family tax benefit standard payment rates limits the right to social security, this is reasonable and proportionate. The standard rates are not being reduced, and families will continue to receive assistance at current rates for another two years. Certain elements of family tax benefit, namely rent assistance, newborn supplement, large family supplement and multiple birth allowance, will continue to be indexed.

Allegedly, “[t]his reform will help ensure the sustainability of the family payments system.” In that sense the amendment is justified as reasonable and proportionate.

In this context, I would 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, reducing in real terms 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 CESCR “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). 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 assessing whether the measures are compatible with the ICESCR, the CESCR would specifically look 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”.⁸²

On the basis of the above information, there are doubts that these criteria have been met. While the two-year freeze was described by one Senator as the “least worst” option, it is unclear whether the Government has comprehensively considered a variety of alternative measures, apart from the original proposals contained in the Omnibus Bill. As indicated above, it appears that this part of the Amendment Act was rushed through Parliament and it is questionable whether there have been meaningful discussions and consultations within Parliament, as well as with affected groups and other stakeholders, on the proposed measures and alternatives. The indirectly discriminatory impact of the freeze is evident, having regard to the fact that it disproportionately affects single parents, the majority of whom are women. Finally, it does not appear that an independent review of the impact of the freeze has been carried out at the national level.

⁸² Committee on Economic, Social and Cultural Rights, General Comment No. 19, para. 42.

Furthermore, any restriction on the enjoyment of the Covenant's rights must comply with the safeguards enumerated in article 4 of the ICESCR. This means that any restriction on the enjoyment of the Covenant's rights, including those imposed by article 9 of the 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.

Taking into consideration the impact of the measures on children, I would also like to draw your Excellency's Government attention to the requirement in article 3 paragraph 1 of the *Convention on the Rights of the Child*, to which Australia is also a State Party (since 1990), that "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 (*Convention on the Rights of the Child*, article 27).

II. Drug Testing and International Human Rights Law

The approach of the committee, combined with the justifications for the Welfare Bill in the compatibility statement, are indicative of shortcomings in the Government's analysis of its obligations under international human rights law.

The statement justified the drug testing trial on the basis that the two key objectives are to "maintain the integrity of, and public confidence in, the social security system by ensuring that tax-payer funded welfare payments are not being used to purchase drugs or support substance abuse" and to "provide new pathways for identifying recipients with drug abuse issues and facilitating their referral to appropriate treatment where required."⁸³ The statement found Schedule 12 to be a permissible limitation on rights under the ICESCR.⁸⁴ Schedule 13 was also found to be "compatible with human rights because, to the extent that it may impact human rights, the impact is for a legitimate objective, and is reasonable, necessary and proportionate."⁸⁵ It was recognised that Schedule 14 "may limit the rights of individuals, but only to achieve the legitimate objective of encouraging job seekers to do all they can to support themselves through work, where they are able."⁸⁶ At any rate, "to the extent that this Schedule would restrict

⁸³ Explanatory Memorandum to the Welfare Bill, 151.

⁸⁴ Explanatory Memorandum to the Welfare Bill, 151.

⁸⁵ Explanatory Memorandum to the Welfare Bill, 163.

⁸⁶ Explanatory Memorandum to the Welfare Bill, 169.

the right to social security and an adequate standard of living, it would affect a very small minority of income support recipients.⁸⁷

The objectives relied upon in the compatibility statement appear to be based on a series of underlying assumptions by the Government, namely that:

- Those people who receive social assistance (who are unemployed, marginalised and facing other personal and intergenerational trauma and challenges) will be able to overcome barriers to employment if their drug misuse issues are addressed.
- People with drug or alcohol dependency do not currently have other incentives to address their underlying issues.
- The substance-related measures, including financial penalties, will incentivise treatment.
- The possibility of identifying a small percentage of people with drug misuse issues so that they can be “assisted” in the ways envisaged justifies affecting the human rights of a large majority of recipients with no drug misuse issues.
- The burden to address substance abuse falls almost exclusively on the individual to redress their addiction, and the state has a very limited obligation to address the many interacting structural causes that may be contributing to this dependency.
- Drug and alcohol dependency should be dealt with by the welfare system and welfare-related activities tied to job searching, rather than through more broad-ranging interventions based on public health.⁸⁸
- Aboriginal and Torres Strait Islander peoples (“who statistically experience higher levels of alcohol or drug dependency compared with the Australian population generally”)⁸⁹ should be subjected to indirect, differential treatment that is narrowly targeted and restrictive, rather than empowering and self-determining.
- The existing treatment services are adequately equipped to serve an additional number of people in a holistic and rehabilitative manner.
- Parents or guardians who are penalised under the substance-related measures will not dip into the funds provided for their children in order to support the rest of the household.

The evidence-based medical submissions summarised above clearly refute each of these assumptions. In this regard, I note that in its Concluding Observations on Australia, the Committee on Economic, Social and Cultural Rights has recently expressed concern that the conditioning of welfare benefits based on the results of drug testing lacks a

⁸⁷ Explanatory Memorandum to the Welfare Bill, 165.

⁸⁸ Explanatory Memorandum to the Welfare Bill, 159-160.

⁸⁹ Explanatory Memorandum to the Welfare Bill, 162.

credible evidence base, may deepen stigma and drive drug users away from treatment”.⁹⁰ Drug misuse is the result of complex, interconnected structural and personal factors – all of which the state has a pivotal role in addressing. People who suffer from dependency have multiple barriers to breaking the vicious cycles involved. It is demeaning to assume that they are simply choosing to stay addicted. Negative incentives have been proven not to help and even to exacerbate the problem, whereas positive incentives are supported by the evidence. Drug dependency is a public health concern and not something to be primarily addressed by the social protection system. The measure is not narrowly targeted and affects many people who are living in poverty in Australia. Aboriginal and Torres Strait Islander peoples should be offered to engage in solutions to substance dependency that are community-led and empowering, rather than subjected to further disempowering, patriarchal laws that inflame stigma and shame.

These factors were not adequately reflected in the conclusion endorsed by the committee’s majority to pass the Welfare Bill as it stood. By human rights standards, however, it is difficult to conclude that any of the objectives, based as they are on flawed assumptions, can be considered legitimate. Even if they could be, the submissions outlined above make a compelling case that the drug-related measures are neither reasonable nor proportionate, and that they are not the only viable option for dealing with substance abuse among the poor in Australia.

Beyond the flawed initial reasoning, from an international human rights law perspective, the requirement to successfully pass a drug test in order to receive social assistance is an unacceptable form of conditionality. Of the various human rights norms considered by the compatibility statement, the right to social security in article 9 of the ICESCR is the most relevant in this context. The statement found:⁹¹

To the extent that this trial may limit a job seeker’s rights under article 9 and article 11, this limitation is reasonable and proportionate to the objective of the trial as outlined above. There are appropriate safeguards in place to ensure that job seekers participating in the trial are still provided with the means to meet their basic needs and those of their families.

In light of General Comment 19 of the CESCR, the case of drug testing raises an issue concerning the *accessibility* to the human right to social security. It is true that conditions are allowed to be imposed on social security, however they must be reasonable and proportionate. The General Comment explains:⁹²

Qualifying conditions for benefits must be reasonable, proportionate and transparent. The withdrawal, reduction or suspension of benefits should be circumscribed, based on grounds that are reasonable, subject to due process, and provided for in national law.

⁹⁰ Committee on Economic, Social and Cultural Rights, Concluding observations on the fifth periodic report of Australia, E/C.12/AUS/CO/5 (2017), para. 43.

⁹¹ Explanatory Memorandum to the Welfare Reform Bill, 154.

⁹² [24].

(Footnote omitted.)

Notwithstanding the arguments used in the compatibility statement to the contrary, the drug testing trial is neither reasonable nor proportionate. In respect of what is reasonable, there is no evidence to prove that drug testing has any positive effects on rehabilitation. To the contrary, the measure is more likely to push affected individuals further into poverty, which will inevitably cause heightened risk of negative behaviour. Moreover, these measures do not appear reasonable in light of the purported objective of the Welfare Bill to protect taxpayer money spent on social welfare. Drug testing is believed to cost between \$500 and \$900 per tested individual, which means that significant amounts of taxpayer money (especially when set against the monthly amount of benefits received) are spent to test all beneficiaries in order to weed out the few who may use drugs. Spending a lot of taxpayer money to save a bit of taxpayer money does not appear reasonable.

In respect of proportionality, a proposed measure that diminishes existing levels of protection of a right recognized in the ICESCR needs to be assessed against other available measures, so that it is demonstrated to be “the least restrictive alternative” among all possible alternatives. In the submissions to the Senate Committee, civil society explicitly provided alternatives to drug testing that have been proven to be more effective at reducing substance abuse.⁹³ There is no evidence of such alternatives having been considered. In addition, the measures proposed seem by definition disproportionate, because they expose all benefit recipients to intrusive drug testing, even though the majority of those tested will not have used any drugs. Making every recipient undergo demeaning tests and raising the suspicion that they may have engaged in illegal behavior as a condition for receiving benefits is clearly disproportionate.

Conclusion

I reiterate concerns from the October 2012 communication by my predecessor that further cutting social security payments will have significantly negative impacts on the human rights of tens of thousands of Australians, many of whom are currently living in poverty. The Amendment Act risks creating an additional obstacle to the full enjoyment of human rights for people living in poverty, and increasing discrimination against single parents, the majority of whom are women. The other proposed legislative reforms, especially the Welfare Reform and Cashless Bill and the introduction of drug testing and cashless cards, risk undermining the human rights of social security recipients even further by their punitive and excessively conditional approach.

The Government apparently justifies the measures in the Amendment Act in terms of cost saving. However, the aim of budget savings in itself cannot justify retrogressive measures on the rights to social security and to an adequate standard of living. As a State Party to the ICESCR, the Government has the onus of demonstrating that it has given the most careful consideration to all alternatives and of duly justifying the measures by

⁹³ See for example the NSW Debt Recovery model mentioned above.

reference to the totality of the rights provided for in the ICESCR, in the context of the full use of the maximum available resources. In the present situation, it does not appear that the Government has adequately justified the need for Federal budget cuts to come from social protection and, in particular, from some of the poorest members of society. It is not clear whether consideration has been given to budget savings or revenue raising in other areas that will not have such a directly negative impact on the poor. On the information received, there is a lack of evidence of careful considerations of alternatives and of a satisfactory justification in light of the totality of rights provided for in the ICESCR and other relevant human rights treaties. Further, cost saving in the context of reducing social protection for the poorest in society misconceives the nature of spending on poverty alleviation. It is widely recognised that spending on poverty alleviation brings future economic gains by allowing people to escape poverty thereby reducing future expenditure on crime and health care, improving productivity, and ultimately reducing the number of people reliant on welfare.⁹⁴ To cut social protection spending where it is desperately needed by poor individuals such as single mothers supporting children in difficult circumstances is not compatible with human rights standards.

In conclusion, it is important to acknowledge that the right to social security is a right to access and maintain cash or in-kind benefits, without discrimination, in order to secure basic social protection.⁹⁵ It is both a safety net for those who require temporary financial support and a means of living for people who are unable to earn their own livelihood on a long-term basis. It is not a charitable concession whose recipients should be demonised and subjected to further social exclusion. Societies can choose to address the structural causes of poverty and commit to providing all of their members with a decent rights-affirming existence. Or they can blame the poor for their own plight, take steps to further marginalise and stigmatize them, and make it ever more difficult for them to enjoy their right to social security. Australia appears to be in the process of opting for the second of these alternatives, as reflected in:

- The systematic ratcheting up of conditionalities for receiving social security.⁹⁶

⁹⁴ In relation to inequality, the Parliament of Australia website notes: There are a number of reasons why inequality may harm a country's economic performance. At a microeconomic level, inequality increases ill health and health spending and reduces the educational performance of the poor. These two factors lead to a reduction in the productive potential of the work force. At a macroeconomic level, inequality can be a brake on growth and can lead to instability. Dr Anne Holmes, Economics, *Some economic effects of inequality*, The Parliament of Australia http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook44p/EconEffects. For an example of the negative economic effects of poverty see e.g. Harry J. Holzer et al, *The economic costs of childhood poverty in the United States* (2008) 14:1 JOURNAL OF CHILDREN AND POVERTY 41-61.

⁹⁵ ICESCR, article 9; Committee on the Economic, Social and Cultural Rights, General Comment 19, see description <http://www.ohchr.org/EN/Issues/RightSocialSecurity/Pages/SocialSecurity.aspx>.

⁹⁶ "Compliance action such as this is a standard feature under the social security law, and the placing of qualifying conditions on social security benefits (and the enforcement of those conditions) is permissible under article 9 where they are reasonable and proportionate to the objective of the policy." Explanatory Memorandum to the Welfare Bill, 154.

- The extent to which the design of the social security system proceeds not from a commitment to upholding human dignity or ensuring comprehensive social protection for all, but from the assumption that most social security beneficiaries have the capacity “to work and become self-sufficient” if they would only make the necessary effort.⁹⁷
- The prejudicial use of language such as “job seekers” to refer to social security recipients, as if to imply that the complex situations in which they find themselves can be resolved by the simple solution of finding a job.
- An underlying belief that it is a person’s individual choice as to whether they are poor or not.
- Treating substance-abuse on the part of social security recipients as though it was a wholly unacceptable and disqualifying aberration rather than a challenge affecting society as a whole. As one organisation observed, “[s]ubstance abuse is a complex issue, not simply a personal choice.”⁹⁸

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify and further reflect on the impact of the Amendment Act in terms of the human rights of those living in poverty. I would therefore be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above allegations.
2. In determining the extent of the benefit reduction, has your Excellency’s Government given due consideration to the minimum essential levels of support that all persons in need may require in order to enjoy an adequate standard of living, taking into account their varying circumstances such as the family size, family composition, gender, disability, health conditions and housing costs in different regions? Please provide evidence of any such analysis, if available.
3. What monitoring mechanisms have been put in place to assess the implementation of the Amendment Act and monitor its impact on the rights of those affected? What processes or mechanisms for redress will be included?
4. Could you please provide information on all alternative measures considered by the Government in lieu of the abovementioned provisions introduced by the Amendment Act and on how the Government assessed that they were the least restrictive measures in relation to the rights to social security and to an adequate standard of living?

⁹⁷ Explanatory Memorandum to the Welfare Bill, 152.

⁹⁸ Royal Australasian College of Physicians Submission, 3.

5. Was an impact assessment conducted with regard to the impact of the Amendment Act on the level of enjoyment of the right to an adequate standard of living by the individuals and families affected by the Amendment Act, including children?
6. Were those affected by the measures consulted in relation to the Amendment Act prior to its introduction and passing through Parliament? If so, please provide details.
7. What measures have been put in place to ensure that the implementation of the Amendment Act would not indirectly discriminate against women?
8. Has there been an independent review of the impact of the Amendment Act? If so, please provide the outcomes of the review.
9. What evidence is the Government relying on to justify drug testing as the best option for addressing substance abuse among the poor in Australia? What independent, medical advice has the Government relied upon in reaching this conclusion?
10. To what extent has the Government assessed the drug-related measures as being the least-restrictive means to achieve the objectives of reducing substance abuse among the poor?

I would appreciate receiving a response within 60 days.

I would like to inform your Excellency's Government that this communication will be made available to the public and posted on the website page for the mandate of the Special Rapporteur on extreme poverty and human rights (<http://www.ohchr.org/EN/Issues/Poverty/Pages/SRExtremePovertyIndex.aspx>).

I may publicly express my concerns in the near future as, in my view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. I also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that I have been in contact with your Excellency's Government's to clarify the issues in question.

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

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

Philip Alston
Special Rapporteur on extreme poverty and human rights